To: Jurisprudence Discussion Group Readers.
From: Fred Schauer
Re: The attached

What follows is a draft, more preliminary than it may appear, of Chapter 4 of a book on legal reasoning to be published by the Harvard University Press under the title of *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*. Like Karl Llewellyn's *The Bramble Bush*, Oliver Wendell Holmes's *The Path of the Law*, and indeed like Hart's *The Concept of Law*, the book has as one of its audiences beginning law students, and tries to introduce those students to basic but important themes about legal reasoning and legal argument while at the same time attempting to make a genuine academic contribution to how we understand law. Thus, although some of the material, especially in the early pages of this chapter, will appear elementary to JDG members, much of it is less elementary, and perhaps even wrong. I look forward to your comments, and hope that our discussion can focus on the philosophical and jurisprudential dimensions of the relationship between the idea of a legal source and the practice by which lawyers and judges use the things they frequently refer to as "authorities."

1/30/2008

CHAPTER FOUR

AUTHORITY AND AUTHORITIES

4.1 *The Idea of Authority*

We have discussed rules and precedents in separate chapters because they differ in significant respects. Yet rule-governed and precedent-following decisions also share important features in common. One is that both are *backward-looking*.[1] To follow a rule is to do something because someone in past – including a legislature – has told us what to do, which is different from making the decision that now appears to have the best

[1] On the backward-looking aspect of legal reasoning, see Richard Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification (1961).

consequences. So too with following a precedent, which is about duplicating an earlier decision rather than deciding what will be best for the future.

The backward-looking aspect of these characteristic modes of legal thinking is related to the idea of *authority* in that rules and precedents not only pull us backwards, but also force us away from our own best judgment. When a court *follows* a rule it is not assessing whether the rule is a good or a bad one. Nor is it deciding whether it would be wise on this occasion to obey the rule. Indeed, rules function as rules just because they exclude or pre-empt from consideration what would otherwise be good reasons for doing one thing or another.[2] Judges making decisions according to legal rules look to the rule *instead of* looking to the intrinsic merits of the case. When a judge – or anyone else – judges by reference to a rule, therefore, she deliberately blinds herself to at least some of the considerations that would otherwise bear on making the correct decision. A police officer enforcing a speed limit rule is expected to focus on determining whether a driver was exceeding the speed limit and not on whether the driver was operating the vehicle unsafely. The Bureau of Land Management official who first rejected Mr. Locke's filing because it was a day late did not take it upon himself to evaluate whether it would be

[2] On the intrinsically *exclusionary* or *pre-emptive* aspect of rules, see especially Joseph Raz, The Authority of Law: Essays on Law and Morality (1979); Joseph Raz, Practical Reason and Norms (1975). *See also* Patrick Atiyah, *Form and Substance in Legal Reasoning: the Case of Contract, in* The Legal Mind: Essays for Tony Honoré 19 (Neil MacCormick & Peter Birks, eds., 1986); Robert S. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common Law Justification,* 63 Cornell L. Rev. 707 (1978).

good, all things considered, to accept this petition from this claimant at this time. He simply found that Locke had not filed prior to December 31.[3]

Just as rules operate to exclude at least some of what would otherwise be the factors to be considered in making a decision, so do precedents function in the same way. A lower or subsequent court bound by *MacPherson v. Buick Motor Company*[4] is not expected to decide whether it is wise policy to impose liability on a manufacturer when there is no privity between manufacturer and consumer. And the judge who understands that *Roe v. Wade*[5] is a binding precedent knows that her function is not to determine whether a complete restriction on abortion is morally permissible, or morally mandatory, or even whether it is constitutional. In these situations, it is sufficient that the precedent exists, for the very existence of a (binding) precedent precludes re-evaluation of the precedent's wisdom just as it forecloses deciding whether following the precedent will produce the best result in the instant case. Following a precedent, like following a rule, exemplifies a central and possibly even defining characteristic of law in denying to judges the power to determine whether a rule or a precedent is a good one and whether it will yield the best outcome on this occasion.

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[3] United States v. Locke, 471 U.S. 84 (1985), discussed in Chapter One. Recall that the statute required that filing be "*prior* to December 31" of the relevant year, even though it is almost certain that Congress meant to say "*on or* prior to December 31."

[4] 110 N.E. 1050 (N.Y. 1916) (Cardozo, J.), discussed at length in Chapter Three.

[5] 410 U.S. 13 (1973).

With respect to both rules and precedents, therefore, the key idea is that they are *authoritative*. Their force derives not from their soundness, but from their status, which is why philosophers of law refer to this feature of authority as *content-independence.*[6] When a rule or other directive (such as a command, order, or instruction) is authoritative, its subjects are expected to obey regardless of their own opinions of its wisdom. In other words, what the rule says does not matter; where it comes from makes all the difference. When an exasperated parent yells, "Because I said so!" to a child, for example, the parent may well have first tried to explain to the child *why* she should do her homework, or clean up her room. Only after such attempts at content-based persuasion have been unavailing does the parent resort to the because-I-said-so argument. And she does so precisely to make clear that the child should do as told whether the child agrees with the reasons for doing it or not. So too in law, where the legal system expects judges to follow even those rules and precedents they think mistaken. They are expected to obey the rules and the precedents because of their source and status, and not necessarily because they are persuaded by the content of their reasoning, and even if they are *not* persuaded by the content of their reasoning.

It is worth pausing to reflect on the unusual nature of content-independent authority. In most aspects of our lives, we base our decisions on the content of the

[6] The classic discussion of authority as content-independent is in H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in Essays on Bentham: Jurisprudence and Political Theory 243, 261-66 (1982). *See also* R.A. Duff, *Inclusion and Exclusion*, 51 Current Legal Probs. 247 (1998); Kenneth Eimar Himma, *H.L.A. Hart and the Practical Difference Thesis*, 6 Legal Theory 1, 26-27 (2000); Frederick Schauer, *The Questions of Authority*, 81 Geo. L.J. 95 (1992). For a skeptical view of the idea of content-independence, see P. Markwick, *Independent of Content*, 9 Legal Theory 43 (2003).

reasons we have, and not on where those reasons come from. The reason I eat spinach is that it is good for me. The reason that Judge Cardozo decided the way he did in *MacPherson v. Buick* is that he thought the *MacPherson* outcome fairer and more efficient than what had previously been the law. These reasons – that spinach is good for me, that not requiring privity as a condition of liability for certain consumer transactions is fair -- are *substantive reasons*. Sometimes they are called "first-order reasons."[7] They go directly to the content of the reason. If I did not think spinach good for me, I would not eat it. And Judge Cardozo would not have reached the result he did in *MacPherson* had he thought it unfair or bad policy. Normally, someone considering what to do or what to decide will take a reason as a good substantive reason only if she believes in what the reason actually *says*. C*ontent-independent reasons*, however, are different.[8] They are unusual precisely because what the reason says does not matter. It is the reason's source – "because I said so" – that gives it its power.

Like parents, those who are *in* authority often rely on their official or formal role to provide the content-independent reasons for subjects to follow their commands, orders, or instructions. Sergeants and teachers, for example, may initially try to induce their subordinates or students to understand and internalize – to take on as their own -- the substantive reasons for doing this or that. The essence of authority, however, exists not because of such internalization, but apart from it. Perhaps the sergeant would like me to

[7] *See* Raz, Practical Reason and Norms, *supra* note 2.

[8] In contrast to first-order reasons, content-independent reasons also have the character of *second-order reasons*. They are reasons about reasons. And in this context they serve, in part, to exclude from consideration some of what would otherwise be good first-order reasons.

understand *why* I should have a sharp crease in my uniform pants, and surely the teacher would like me to understand *why* I must memorize and recite a Shakespeare sonnet; but in these and myriad other cases the authorities wish it to be understood that I am expected to do what I am told just because of who told me to do it, even if I neither accept nor agree with the underlying substantive reasons for doing so.

It is controversial whether exercising or following authority is a good idea, and, if so, in what contexts. Over the years many have argued that it is irrational for someone to do something she would not otherwise have done just because a so-called authority says so.[9] If Barbara has decided after careful thought to spend her life as a lawyer rather than a physician, why should she act differently just because her father says so? When Sam has concluded that he would like to smoke marijuana because he believes it makes him feel good and has few side effects, is it rational for him to put aside his own best judgment in favor of the judgments of police officers and politicians? When the sign says "Don't Walk" and there is not a car in sight, does it make sense for me to stand obediently at the curb? And when a judge has determined what she believes would be the best result for the case before her, can it be rational for her to make a contrary ruling solely because a bare majority of judges of a higher court have happened to come to a different conclusion in a similar case? Authority may be ubiquitous in our lives, but for

[9] *See, e.g.*, Heidi M. Hurd, Moral Combat (1999); A. John Simmons, Moral Principles and Political Obligations (1979); Robert Paul Wolff, In Defense of Anarchism (1970); Heidi M. Hurd, *Challenging Authority*, 100 Yale L.J. 1611 (1991). *See generally* Scott J. Shapiro, *Authority*, in The Oxford Handbook on Jurisprudence and Philosophy of Law 382 (Jules Coleman & Scott Shapiro eds., 2002).

generations the basic soundness of the idea of authority has been an object of persistent challenge.

Yet although authority has long been criticized, it has for just as long been accepted and defended. Socrates refused to escape from Athens on the eve of being put to death precisely because he accepted the authority of a state that had unjustly, even in his own mind, condemned him. President Eisenhower sent federal troops to Little Rock, Arkansas, in 1958,[10] to enforce a Supreme Court decision – *Brown v. Board of Education*[11] – with whose outcome he disagreed,[12] and he did so because he accepted the authority of the Supreme Court, just as he expected the state of Arkansas to accept the authority of the federal government. Questioning the idea of authority may have a long history, but there is an equally long history of people both following authority and seeking to explain why it can be rational to defer to the views of others even when we disagree with the judgments to which we are deferring.[13]

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[10] *See* Cooper v. Aaron, 358 U.S. 1 (1958).

[11] 347 U.S. 483 (1954).

[12] *See* Richard Kluger, Simple Justice 753-54 (1976); Kenneth O'Reilly, Nixon's Piano: Presidents and Racial Politics from Washington to Clinton 170-75 (1995).

[13] *See, e.g.*, Joseph Raz, The Morality of Freedom (1986); Joseph Raz, The Authority of Law: Essays on Law and Morality (1979); Robert P. George, *Natural Law and Positive Law*, in The Autonomy of Law: Essays on Legal Positivism 321, 327-28 (Robert P. George ed., 1996); Scott J. Shapiro, *The Difference That Rules Make*, in Analyzing Law: New Essays in Legal Theory (Brian Bix ed., 1998). A considerably more qualified defense of official authority can be found in Leslie Green, The Authority of the State (1988).

The ultimate rationality of the idea of authority is not our principal concern here, nor is the question of the legitimacy of official or state authority in general. Knowing that authority is controversial, however, is important precisely because so many legal debates, both in court and out, are about the extent of law's authoritativeness. The debates among commentators about whether *United States v. Locke* was correctly decided,[14] and indeed the debates among the Justices in the case itself, are about the extent to which, if at all, a likely mis-drafted Act of Congress should be taken as authoritative, mistakes and all, just because Congress enacted it in that form. Likewise, the question that we explored in Chapter Three of when a court should overrule its own previous decisions is a question about the authority of past decisions. And the debate about when judges and other legal officials should refuse to enforce laws they perceive to be immoral is a question that has for generations infused the discussion of judicial and legal responsibility with respect to, for example, the Fugitive Slave Laws,[15] the laws of Nazi Germany,[16] and the racial laws of apartheid South Africa.[17] So although explicitly philosophical questions about authority may surface only rarely in legal argument, the

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[14] *Compare* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case West. Res. L. Rev. 179 (1986), and Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 Va. L. Rev. 1295, 1314-16 (1990), *with* Frederick Schauer, *The Practice and Problems of Plain Meaning*, 45 Vand. L. Rev. 715 (1992).

[15] *See* Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (1975).

[16] *See* Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958); Stanley L. Paulson, *Lon L. Fuller, Gustav Radbruch, and the "Positivist" Theses*, 13 L. & Phil. 313 (1994).

[17] *See* David Dyzenhaus, Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy (1991).

fact that authority itself is deeply contested is a looming presence in the operation of the law. And the controversial nature of authority looms especially large in law precisely because content-independent authority, embodied principally in legal rules and precedents, lies at the heart of legal thinking, reasoning, and argument. Lawyers do try to convince judges that their client is substantively right. But the language they use is typically the language of authority. The lawyer will often urge the judge to see the first-order or substantive justice of her client's position, but she relies on the authority of rules and precedents as a way of saying to the judge that the judge should rule in her client's favor regardless of whether the judge agrees that such an outcome is just.

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In law, even if less so elsewhere, the concept of authority is typically associated with legal *sources*. Indeed, legal sources -- such as constitutions, statutes, regulations, and reported cases -- are often referred to as *authorities*, whether they are actually authoritative or not. For example, what American lawyers call a "brief," a written argument on a matter of law, is sometimes referred to as a "memorandum of points and authorities." In this broader sense of the word, a legal authority – not only a constitution, a statute, a regulation, or a case, but also at times a learned treatise or an article in a law review – may sometimes be used not because it is authoritative, but because it is a repository of genuine wisdom, experience, or information. A citation in a judicial opinion to a pithy phrase from Holmes or Cardozo, for example, may differ little from a speech in which a member of Congress quotes Abraham Lincoln or Winston Churchill.

But although legal arguments and judicial opinions often use sources in this non-authoritative way, law is also pervaded – indeed characterized – by the use of genuinely authoritative sources. Such sources, unlike quotations from famous judges or (possibly[18]) references to the law of other jurisdictions, themselves provide reasons for making a decision in a certain way by virtue of their very existence and not by virtue of their content. And so although these source-based and content-independent reasons will often be consistent with what a judge would have done even without them, sometimes they will not. Reliance on genuinely authoritative sources may frequently dictate that a judge make a decision other than the one she would have made herself, even after taking into account all the knowledge, wisdom, and information she can obtain from her own knowledge or that of others. And in this way legal reasoning differs, in degree even if not in kind, from the reasoning in other decision-making environments. In most other decision-making environments, authority may play some role, but basic or first-order substantive considerations typically dominate. In law, however, authority is dominant, and rarely do judges engage in the kind of all-things-considered decision-making that is so pervasive outside of the legal system.

Thus, we should not be seduced by labels into thinking that everything called an "authority" in legal argument is being offered or used for reasons of its authority. Just as there is an important difference between *learning* how to do something from a book and taking something in that same book as correct just because it is in the book, so too is

[18] *See* the discussion below, at pages 23-28.

there an important difference between law's typically content-independent authority-based reasoning and the various other uses to which legal decision-makers, like decision-makers in other environments, may use a host of published materials. The characteristically legal mode of argument is one in which published materials have content-independent authority, but the legal system does not only operate in characteristically legal mode, and not all of its uses of published materials, as we will explore in the following section, are based on the authoritative status of those materials.

4.2 *On Binding and So-Called Persuasive Authority*

Once we understand that genuine authority is content-independent, we can see that persuasion, on the one hand, and the acceptance (whether voluntarily or not[19]) of authority, on the other, are fundamentally opposed notions. To be *persuaded* that global warming is a problem, or that freedom of speech encompasses the right to encourage racial hatred, is to agree that there are sound substantive reasons supporting those conclusions. And when we are genuinely persuaded by substantive reasons we have no need for authoritative pronouncements. When a scientist concludes that global warming is a problem, she does so not because seven Nobel Prize winners have said it is so, but because her own investigation justifies the conclusion. But when *I* conclude that global warming is a problem, it is not because I genuinely know it to be correct, for I have no

[19] One reason for my accepting the authority of some source or of someone *in* authority is my own belief that it is, for one reason or another, the right thing to do. But another reason is that something bad will happen to me if I do not. Authority and *legitimate* authority are two different things, and the concentration camp prisoner who does what the Nazi guard tells him to do solely for fear of being sent to the gas chamber is still treating the guard's orders as authoritative – it is the source of the order and not its content that leads the prisoner to comply.

authority-independent way of knowing. Rather, I reach that conclusion because it is consistent with what various authorities whose authority I accept have said so. It is not that I am persuaded that global warming is a problem. It is that I am persuaded that people whose judgment I trust are persuaded that global warming is a problem.

We see the same distinction in law.[20] It is one thing for a public official or a lower court judge to believe that the best understanding of the principle of freedom of speech permits the advocacy of racial hatred. It is quite another to conclude that advocacy of racial hatred is to be permitted in the United States because the Supreme Court on the basis of its interpretation of the First Amendment said so in *Brandenburg v. Ohio*.[21] In the former the substantive reasons are doing the work, while in the latter it is authority pure and simple. A lower court judge must follow *Brandenburg* even if she thinks it mistaken and even if her own legal analysis leads her to conclude that advocacy of racial hatred is not constitutionally protected. The precedent being authoritative, the judge is obliged to obey it regardless of her view of its soundness.[22]

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[20] "[A]uthority and hierarchy play a role in law that would be inimical to scientific inquiry." Richard A. Posner, The Problems of Jurisprudence 62 (1990). Judge Posner exaggerates, because genuine authority does exist in science. *See* C.A.J. Coady, *Mathematical Knowledge and Reliable Authority*, 90 Mind 542 (1981); John Hardwig, *The Role of Trust in Knowledge*, 88 J. Phil. 693 (1991). But Posner's basic point that authority is far more important in law than in science seems sound.

[21] 395 U.S. 444 (1969) (per curiam).

[22] *See* Larry Alexander, *Constrained By Precedent*, 63 S. Cal. L. Rev. 1 (1989); Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817 (1994); Michael Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo. Wash. L. Rev. 68 (1991); Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571 (1987).

Precedents like *Brandenburg* are typically referred to as *binding*. A lower court judge is bound, or compelled, to follow them. Or, to be more precise, binding authorities are those that a lower court must follow or distinguish, just as a lower state court in New York must follow *MacPherson v. Buick* or explain why the current case is different. The court is not permitted to concede *MacPherson*'s applicability but refuse to apply it. Nor may it overrule *MacPherson*. It is bound to follow *MacPherson* just as it is bound to follow the Constitution of the United States, the Constitution of the State of New York, and any applicable federal or New York statute. And because the court has no choice about whether to follow these authorities, they are sometimes referred to not as "binding" authorities but as *mandatory* authorities. They are mandatory in the sense that they must be used, and mandatory in the sense that they must be followed.

The briefest glance at almost any judicial opinion, however, will show that courts often support their arguments by references to various decisions and other sources that they are bound neither to use nor to follow. A New York state court may cite to a case decided in Vermont, just as the United States Court of Appeals for the Third Circuit may refer to cases from other circuits or from the district courts of its own circuit. The courts are not required to cite to these "authorities," and they are certainly not required to follow or defer to them. Not only is the Third Circuit not required to follow a similar case in the United States District Court for the Western District of Virginia, it is not even required to acknowledge its existence. But nevertheless such citation to non-binding sources is ubiquituous. And so too with the citation of legal treatises or law review articles. Such

secondary sources are, like decisions of other jurisdictions, commonly found in judicial opinions, but no judge is required to use or refer to them, and the judge who supports a conclusion with reference to a treatise or law review article is referring to a source whose use is entirely at the discretion of the opinion-writing judge.

Sometimes cases from other jurisdictions, cases from lower courts, treatises, law review articles, and references to non-legal sources (like dictionaries, newspaper articles, and journals from non-law disciplines) are referred to as *persuasive* authorities, the implicit idea being that a court will use such sources only if it is persuaded by the reasoning of the cited court, book, or article.[23] But if the court using or citing such material is genuinely persuaded, then, as we have seen, it is at least slightly misleading to think of the sources as authoritative at all, for persuasion and authority are fundamentally opposed notions. Because the idea of persuasive authority is oxymoronic in just this way, therefore, it is better to describe these non-binding sources as non-mandatory, or, more felicitously, *optional*. They are optional because the citing court is not required to cite or follow them, their use being entirely at the discretion of the citing court.

As we will see in the next section, referring to mandatory authorities as "binding" is somewhat misleading as well. A better and more accurate distinction than the one between binding and persuasive authority, therefore, is one between optional and mandatory authorities, for the real difference is whether the decision-maker has a choice

[23] *See, e.g.*, Morris L. Cohen, Robert C. Berring, & Kent C. Olson, How to Find the Law 3 (9th ed., 1989); Robin Wellford Slocum, Legal Reasoning, Writing, and Persuasive Argument 13-24 (2nd ed., 2006).

about using the authority. In a products liability case in the Minnesota state courts, a law review article about Minnesota products liability law is obviously applicable, but its use is still optional, just as an Arizona products liability case dealing with very similar facts is optional in the Minnesota courts. By contrast, a Minnesota products liability *statute* is also applicable, but now the court has no choice but to use it. The Minnesota statute cannot legitimately be ignored, even though the Minnesota article and the Arizona case plainly can be.

In distinguishing mandatory from optional authorities, we capture the way in which a judge in the Southern District of New York is *required* to follow Second Circuit and Supreme Court decisions, but not required to follow the conclusions of the Eastern District of New York, the New York Court of Appeals, the Third Circuit, *Wigmore on Evidence*, the *Harvard Law Review*, the High Court of Australia, or the European Court of Human Rights. The sources in this latter set are permissible,[24] even if not mandatory, but what makes them optional rather than *im*permissible is that their use is acceptable in ways that judicial references to astrology, private conversations with the judge's brother, and articles in the *National Enquirer* are not.

But now we need to address an important question. It is true that optional authorities are ones that a court is not required to use. But if a court is not required to use an optional authority – if it need not cite or take account of a secondary source or a decision from another jurisdiction -- then how or why does a court select an optional

[24] *See* John Gardner, *Permissive Sources and Gaps*, . . .

source, and is such a source really no different in status than a felicitous or even persuasive quote from Abraham Lincoln or Woody Allen?

The most straightforward answer to this question is that the judge might select the authority because she is persuaded by the substantive reasons the source provides in support of the source's conclusion. But in this case the source – the authority -- is not being used *as* an authority, and little differentiates the genuinely persuasive opinion of a court in a different jurisdiction from the genuinely persuasive opinion of the judge's father-in-law. Thus, when a judge is persuaded by the decision of another jurisdiction, we would expect the judge not merely to cite to that decision, but to describe its reasoning and explain why it seems persuasive. Good manners and the desire to give research direction to others will typically counsel the judge to acknowledge the source of what she has now taken on as *her* ideas and conclusions, but the citation of the decision of another jurisdiction will not be a citation to authority as we now understand the idea of authority. It will instead be the judicial equivalent of an academic paper that gives credit to the origins of the author's own thinking.

If an optional source of guidance is selected because of the selector's belief in the substantive soundness of the source's reasoning, therefore, the source, even if by tradition and convention we often label it as an "authority," is not being used *as* an authority. But although this makes the idea of an optional authority just as self-contradictory as that of a persuasive authority, there remains another interpretation. Optional authorities are indeed sometimes selected because they are persuasive, but more often optional authorities are

selected *as authorities* because the selector trusts the authority as an authority even if the selector does not agree with the conclusion; or, more likely, believes herself unreliable in reaching a conclusion as to which a commentator or another court is thought to be more reliable. So although a Tenth Circuit judge is under no obligation to rely in securities cases on conclusions reached by the Second Circuit or found in Loss and Seligman's treatise on securities regulation,[25] the judge might think her own judgments about securities matters sufficiently unreliable that she would prefer to rely on a court or commentator she believes to be more expert on such a technical and rarely-encountered (for her) topic. The Tenth Circuit judge who looks to the Second Circuit for guidance in securities cases is like a trial court relying on expert testimony or an amateur at car repair relying on the advice of an expert mechanic. In such cases the judge is not so much persuaded by the expert's reasons as by the (judge's inexpert evaluation of the[26]) expert's expertise, an expertise that operates in a genuinely authoritative manner.

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[25] Louis Loss & Joel Seligman, Securities Regulation (3d ed., 2004).

[26] Non-expert evaluation of expertise is a serious problem, albeit one typically discussed more in the context of the law of evidence than with respect to sources of law. But whether it be members of a jury (or a judge acting as trier of fact) trying to determine which of two opposing expert witnesses is correct (where all too often the decision is made on the basis of things like whether the expert looks like college professor), or a judge on an appellate court deciding between the opposing interpretations of two different scholars of a statute dealing with a topic about which the judge herself knows little, inexpert evaluation of expertise is a recurring dilemma. Sometimes the answer lies in the ability of some people on some occasions to expertly evaluate credentials even if they do not have the ability to evaluate the conclusions reached by the people who have those credentials. A judge of the Sixth Circuit, for example, might be expert at knowing that the place to look for guidance is the Second Circuit on securities matters and the Tenth Circuit on questions of federal Indian law even if he knows little about either securities or Indian law. Whether there can be expert evaluation of expertise without an evaluation of the substance of the expertise is itself a problem, but when such an evaluation is unavailable the quandary is even larger.

We can now understand that a typical use of an optional authority is not one in which the selector and user of the authority is persuaded by what some optional source says, but is one in which the selector is persuaded that the optional source is more likely reliable than the selector. So although a judge of the Southern District of New York is required to follow Second Circuit rulings he thinks wrong even if he thinks that all of the judges of the Second Circuit are idiots, in other circumstances a judge defers to an authority because he is persuaded that the authority is an authority. Relying on such an authority is still optional and not mandatory, but because it is based on the source and not on the content it is nevertheless a genuine reliance on authority. There is a difference between relying on an authority because the system demands it, as when a lower court obeys a higher one, and relying on an authority because the authority is perceived to be more expert, but both are examples of real authority in operation.

Optional authorities are often used in just this genuinely authoritative way, but even more frequently they are employed in a manner that hovers precariously on the edge of true authoritativeness. Thus, when a lawyer in a brief, a judge in an opinion, or a scholar in a law review article makes reference to an authority, it is often done to provide so-called "support" for some proposition. Judges will ask lawyers what support they have for an argument, and student law review editors incessantly ask authors to provide support for what they say. But the idea of "support" here is odd. The authority alleged to provide support is typically not necessarily one that supports some proposition more than

another authority negates it.[27] So "support" is a peculiar sense of authority, because the balance of all the authorities might not point in one direction or another, or might even point against the very proposition allegedly being supported. Nevertheless, the conventions of legal citation require only that a proposition be supported by a reference to some court (or other source) that has previously reached that conclusion, even when other courts or other sources have reached different conclusions, and even when there are more of the latter than the former. Often, therefore, to support a legal proposition with a citation is to say no more than that at least one person or court has said the same thing on at least one previous occasion.

This kind of support may seem close to pointless, and if often is, but on closer inspection it can be seen to serve a purpose. Especially in a brief or judicial opinion, it reflects not only law's intrinsically authoritative nature, but also law's related inherent conservatism, in the non-political sense of that word. Perhaps surprisingly to some, a legal argument is a better legal argument just because someone has made it before, and a legal conclusion is a better legal conclusion just because another court has reached the same conclusion on an earlier occasion. The use of an authority that is not necessarily more persuasive or more authoritative than one that could be marshaled for the opposite proposition is at least the minimal assurance that the one using the authority is not simply making up the argument out of whole cloth.

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[27] There is a an ethical obligation for lawyers to cite to directly contrary controlling authority, *see* Model Rules of Professional Responsibility, Rule 3.3, but even apart from the significant qualifications provided by "directly" and "controlling," the obligation is one that is (unfortunately) hardly universally followed. *See* Roger J. Miner, *Professional Responsibility in Appellate Practice: A View from the Bench*, 19 Pace L. Rev. 323 (1999).

So what conclusions can the reader of an opinion or brief or article draw from the fact that the author has provided assurance of minimal non-originality? One conclusion would be based on the premise that that there are not, proportionally, that many legal propositions whose affirmation and denial are both supportable. That is certainly the case in some fields, and we might suspect that in some of the sciences most of the basic principles find virtually unanimous support. Were that the case with law, then the fact that some conclusion of law had been reached previously would be some indication of its soundness, and would thus provides genuine decision-guiding force.

American judges often use the phrase "It won't write,"[28] to refer to a conclusion they would prefer to reach but for which they cannot find sufficient support in the available authorities to justify the outcome. The question, and one we will take up at length in the discussion of Legal Realism in Chapter Seven, is the frequency with which one or another possible outcome in a case, especially an outcome that seems desirable on non-legal grounds, "will not write." If it turns out that there is usually or almost always some citation to a case or a rule or a principle available to support virtually any legal conclusion, as Realists such as Karl Llewellyn often insisted, then the requirement of support will not serve as very much of a constraint. But if, on the other hand, the existing stock of authorities, even optional and not mandatory authorities, is entirely or almost

[28] *See* Patricia M. Wald, *The Rhetoric of Result and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371 (1995). *See also* Paul A. Freund, *An Analysis of Judicial Reasoning*, in Law and Philosophy 282, 284 (Sidney Hook, ed., 1984); Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 Fordham L. Rev. 23, 50 (2005).

entirely on one side of the question, then a requirement that legal conclusions be supported by legal authorities will genuinely constrain a judge's decisional freedom.

But although the requirement of some support may often not be very constraining, it is worth noting that this variety of citation is a species, albeit a weak one, of genuine authority. The author of a brief or opinion who uses support to deny genuine novelty is asking the reader to take the supported proposition as being at least slightly more plausible because it has been said before than had it not been. And this is being done, typically, on the basis of the very existence of the source itself rather than the substantive reasoning contained in it. One could well ask why the legal system is so concerned about the existence of one supporting "authority" even when the weight of authority might go in the other direction. But although the practice is questionable, the point is only that even this weaker and arguably more common form of citation to authority is a variant on genuine authority, and consistent with the authoritative character of the law itself. The lawyer who points to an authority is in effect claiming an endorsement for her argument, and in law, as in life, having one endorser is at least better than having none at all.

4.3. *Why Real Authority Need Not Be "Binding"*

Authority, as we have just seen, can be at the same time both optional and authoritative, at least insofar as an optional authority is selected for reasons other than the intrinsic persuasiveness of the authority's conclusion. But what of mandatory authorities? Are they as "binding" as the traditional terminology suggests? The answer

depends on what is meant by "binding," and it turns out that speaking of "binding" authority can be just as misleading as speaking of "persuasive" authority.

Typically, when we imagine a rule or constraint as binding, we think of it as unavoidable, as leaving no choice. Binding constraints are those we suppose to be absolute, and thus not capable of being overridden by other considerations. The image of a binding authority is most commonly an image of an authoritative constraint from which the decision-maker cannot escape.

There is no reason, however, why even a binding authority should be understood in this way. Although a binding authority does create an obligation on the part of the bound court to use that authority, such an obligation, like any other obligation, need not be absolute in order to oblige. As we see in life as much as in law, genuine obligations can be overridden by even stronger ones without losing their force as obligations. I am obliged to keep my promises, so it is said and so I believe, and thus I must keep my lunch date with you even if I no longer find you interesting or have subsequently received a better offer. But if a close relative has fallen ill, it is understood that my obligation to keep my lunch date is overridden by the even stronger obligation to attend to ailing relatives. And when the police officer refrains from giving a speeding ticket to the man who is rushing his pregnant wife to the hospital, the officer properly understands that the obligation to obey (and to enforce) the speed limit can be outweighed by an even stronger one. Indeed, rights operate in the same way. It is not that the government may never under to the equal protection clause of the Fourteenth Amendment draw a distinction

based on race. Rather, the government may draw such a distinction only if it has a *compelling interest* in doing so,[29] and the fact that the interest must be compelling (rather than simply substantial, legitimate, or rational) shows exactly how a right, like a rule and like an obligation, can make a genuine difference without being absolute. What there is a reason to do is different from what should be done all things considered, just as what there is a right to do is different from what the right-holder actually gets to do, all things considered.

Just as obligations can be obligatory without being absolutely so, so too can authorities be authoritative without being absolutely authoritative. The existence of an authoritative reason is not inconsistent with there being other outweighing authoritative reasons, or outweighing reasons of other kinds. Most authorities are therefore not binding or controlling in the absolute sense, and treating a source as authoritative or even mandatory does not entail following it come what may. A judge of the United States District Court for the District of Maryland is bound by the pertinent decisions of the Court of Appeals for the Fourth Circuit, but she is also bound by the decisions of the Supreme Court, and if in some case the relevant Fourth Circuit precedent turns out to dictate one outcome while the relevant Supreme Court case indicates just the opposite, the obligation to follow the Supreme Court will override the obligation to follow the Fourth Circuit. Similarly, the best understanding of stare decisis is that a subsequent court is bound to follow the earlier decisions of the same court, but this too is not an absolute obligation. When the Supreme Court says that it will only overturn its own

[29] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Loving v. Virginia, 388 U.S. 1 (1967).

previous precedents when there is a "special justification" for doing so,[30] it is emphasizing that it is not sufficient for the Court now to believe that the Court on an earlier occasion was mistaken. Something more is required, something "special," but there is no indication that this higher burden of justification cannot on occasion be satisfied. In this respect, the Supreme Court's approach is consistent with that of appellate courts generally, which typically retain the power to overrule their own earlier decisions, but which emphasize that overruling is exceptional, and that it will occur only when the reasons for doing so are especially weighty. The earlier case is thus a binding precedent, but here, unlike in the situation involving vertical precedent, where we understand binding to mean non-overridable by any other consideration, the binding force of stare decisis is real but decidedly non-absolute.

4.4 *Can There Be Prohibited Authorities?*

We have distinguished mandatory from optional authorities, but there is another category that needs to be considered: the possibility of a *prohibited* authority. Are there sources that simply may not be used at all? It turns out that the answer to this question is "yes," although the issues are complex. Consider, for example, the practice of some American courts, especially federal courts of appeals, of issuing "no citation" or "no precedential effect" rules encompassing many of the cases the court decides.[31] Under

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[30] Arizona v. Rumsey, 467 U.S.203 (1984).

[31] *See* Jessie Allen, *Just Words? The Effects of No-Citation Rules in the Federal Courts of Appeals*, 29 Vt. L. Rev. 555 (2005); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent – Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167 (1978); Lauren Robel, *The Practice of Precedent:* Anastasoff, *Noncitation Rules, and the Meaning of Prcedent in an*

these rules, the court issues with its judgment a (typically brief) opinion for the benefit of the parties, but by the court's rules that opinion, even if publicly available, can neither be cited nor relied upon as authority in subsequent cases. The practice generated some controversy,[32] and in the federal courts Rule 32.1 of the Federal Rules of Appellate Procedure now prohibits the individual circuits from issuing no-citation rules, even though Rule 32.1 says nothing about the ability of a court to declare that one of its decisions will not have precedential effect, just as the Supreme Court has declared that its denials of certiorari will not have precedential effect. But although no-citation rules have been eliminated in the federal courts, some of them still exist in the state courts,[33] and they have the effect of creating a class of prohibited citations, prohibited sources, and prohibited precedents. Moreover, the still-permitted practice of designating some opinions having no precedential effect verges on treating such opinions as prohibited authorities. Even with the recent change in the rules, therefore, much of the basic issue persists. Does a court get to control what will count as precedent before it, and can it say that some of what it decides cannot subsequently be used?

If we view precedents simply as predictions, it seems odd to prohibit their use. But it seems even odder, as we will see in Chapter Seven, for someone arguing before a

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Interpretive Community, 35 Ind. L. Rev. 399 (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 (2004).

[32] *Compare* Hart v. Massanari, 266 F.3d 1155, 1170-74 (9th Cir. 2001) (Kozinski, J.), *with* Anastasoff v. United States, 223 F.3d 898, 899-905 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (2000) (en banc).

[33] *E.g.*, Texas Rule of Appellate Procedure 90(i). Tex. R. App. Proc. 90(i).

court to be predicting what that court will do, as opposed to urging the court what it *should* do. If we persist in the strange belief that courts do not make law, then perhaps a judicial decision can be thought of as evidence of what the pre-existing law was, and under this premise it might seem questionable to prohibit a lawyer from providing to a court now any available evidence of what the law is. But a judicial decision is not evidence of what the law is. It is the law. And if it is the law, then there is no more reason why a court any less than a legislature should not have the ability to decide when it will make law and when it will not. In treating some sources as, in effect, not authoritative at all, courts adopting no-citation or no-precedential-effect rules appear to be worried that what the court may have said entirely for the benefit of the parties, and with little consideration of the implications for other cases, will be used as any kind of reason in subsequent cases.[34] These rules deny the authority, and not only the absolute authority, of a court's casual, rushed, or simply overly party-focused statements. And there seems no good justification for not allowing courts the power to do just that.

[34]A court giving reasons for its decision in one case is announcing reasons that will apply in subsequent cases. Because reasons are always more general than the outcomes that they are reasons for, courts will often try to assess whether the reasons they give for a good result in the first case will have the effect of producing less than good result in subsequent cases. And courts will sometimes consider reaching the wrong outcome in the case before it in order to avoid laying down a rule that will produce poor outcomes in future cases. See M.P. Golding, *Principled Decision-Making and the Supreme Court*, 63 Colum. L. Rev. 35 (1963); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 Colum. L. Rev. 982 (1978). If a court wishes to avoid both a poor outcome in the case before it and poor outcomes in future cases because of what it said in the first case, it can reach the right outcome in the case before it while restricting its use in future cases. *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. Chi. L. Rev. 883 (2006); Frederick Schauer, *Giving Reasons*, 47 Stan. L. Rev. 633 (1995).

There is a parallel here to the 2006 decision by the Middlebury College Department of History to prohibit students from citing to *Wikipedia* in their class papers. The department's worry was not primarily that Middlebury students would take whatever is in *Wikipedia* as absolute and unchallengeable gospel. Rather, the concern was that Middlebury students would take *Wikipedia* entries as serious sources of information, and serious sources of authoritative guidance. Indeed, Middlebury's prohibition on *Wikipedia* is similar to the strong warnings against citation to *Corpus Juris Secumdum* or *American Jurisprudence* routinely included in legal writing instruction for law students.[35] And perhaps the prohibition on *Wikipedia* is also analogous to the Supreme Court's boilerplate statement in every one of its decisions on the merits that the syllabus of the decision is prepared by the Reporter of Decisions and not by the Court itself, and accordingly is not to be treated as authoritative.[36]

Many of the same considerations that influenced the Middlebury History Department also apply to the hotly-debated question whether American courts should cite to or rely on foreign law, a debate that surfaced in Supreme Court opinions on capital punishment[37] and homosexual sodomy[38] and that has been widely discussed in the law

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[35] *See* William H. Manz, *The Citation Practices of the New York Court of Appeals*, 49 Buff. L. Rev. 1273, 1287 (2001).

[36] Detroit Timber & Lumber Co. v. United States,

[37] *See* Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002).

[38] Lawrence v. Texas, 539 U.S. 558 (2003).

reviews.[39] For Justice Scalia and other opponents of the citation of foreign law, the concern is not that foreign law would be considered absolutely binding, because no one has urged such a position. Rather, the opponents worry that the typical reference to foreign or international law, even if optional, treats foreign law as a source, albeit not a binding one, and thus as genuinely authoritative. For Justice Kennedy in *Lawrence v. Texas*, for example, the practices of the countries whose decriminalization of homosexual sodomy he cites are reasons for the United States to come to the same conclusion, even if those reasons are far from conclusive. Like other optional references to authoritative sources – the Tenth Circuit's reliance on the Second Circuit, and the Second Circuit's reliance on *Loss and Seligman*, for example – neither the optionality nor the non-absoluteness of the use of an authority is inconsistent with that authority's authoritativeness. To cite something is typically to imply that it is to be taken seriously, and those who would treat the citation of foreign law as at least questionable, just like the appellate courts that prohibit the citation to some of their less-carefully-considered opinions, wish to establish that there are certain things that simply should not be taken seriously. The debate on this issue is likely to continue for some time, but it is worth bearing in mind that these debates are about the question of which authorities should be

[39]*See, e.g.*, Roger P. Alford, *In Search of a Theory for Constitutional Comparitivism*, 52 UCLA L. Rev. 639 (2005); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 Harv. L. Rev. 109 (2005); David S. Law, *Generic Constitutional Law*, 89 Minn. L. Rev. 652 (2005); Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 Mich. L. Rev. 1555 (2004); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 Am. J. Int'l L. 69 (2004); Mark Tushnet, *Transnational/Domestic Constitutional* Law, 35 Loy. L.A.L. Rev. 239 (2003); Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 Harv. L. Rev. 129 (2005); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 Harv. L. Rev. 148 (2005).

taken seriously as genuine even if non-absolute authority. And this is a debate, as the ensuing section will make clear, that goes to the heart of the authoritative character of law itself.

4.5 *How Do Authorities Become Authoritative?*

Although we can identify a distinction between mandatory and optional authorities, the difference turns out to be one of degree rather than one of kind. In theory it would be possible for sources to become authoritative by virtue of a single discrete act, as with the provision in the West Virginia Constitution recognizing certain legislative decisions of Virginia (of which West Virginia had formerly been a part) courts as authority in West Virginia.[40] Far more commonly, however, the status of an authority *as* an authority is the product of an informal and evolving process by which some sources become progressively more and more authoritative as they are increasingly used and accepted. It was formerly the practice in English courts, for example, to treat as impermissible in a lawyer's argument or a judge's opinion a reference a secondary source written by a still-living author. If the author of a treatise or (rarely) an article were dead, then citation was permissible, but not otherwise. The reasons for this practice remain somewhat obscure, although apparently it developed out of a concern that it was far easier for those who are still living than those who are dead to change their minds. What is important, however, is that the prohibition gradually withered, a withering that commenced more or less with the citation by the House of Lords in 1945 to a work by the

[40] West Virginia Constitution, §2-1-1.

then-still-living Arthur Goodhart.[41] Once the first citation to a living secondary author appeared, subsequent courts became slightly less hesitant to do the same thing, and then less hesitant yet, and over time the practice became substantially more acceptable.[42]

There is nothing unusual about the example of still-living authors of secondary sources. Rarely are there formal rules determining what is to be recognized as law. What the British legal philosopher H.L.A. Hart influentially called the "rule of recognition"[43] is far less a rule as such than it is a series of continuing changing practices or conventions, much like the fluid practices or conventions that constitute a language.[44] And so too are there rarely crisp rules that determine which authorities may or may not legitimately be cited in a legal brief or argument or opinion. Rather, what counts as legal authority, and thus what counts as a legitimate source of law, is the product of an evolving practice in which lawyers, judges, commentators, and other legal actors gradually and in diffuse and non-linear fashion determine what will count as a legitimate source and what will not, and thus will, in the same fashion, determine what will count as law and what will not. Justice Scalia, the Middlebury history department, and the guardians of the no-citation

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[41] *See* Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 Cornell L. Rev. 1080 (1997). [Alexandra Braun articles; Duxbury book]

[42] It is still less acceptable in Great Britain than it is in the United States, but the same can be said about the citation to secondary sources generally, whether their authors be dead or alive.

[43] H.L.A. Hart, The Concept of Law (Penelope A Bulloch & Joseph Raz, eds., 2d. ed., 1994).

[44] *See* A.W.B. Simpson, *The Common Law and Legal Theory, in* Oxford Essays in Jurisprudence

rules thus have some genuine basis for worrying that legitimizing the use of this or that source will set in motion a considerably more expansive process. Indeed, a legal citation has an important double aspect. A citation to a particular source is not only a statement by the citer that this is a good source, but is also a statement by the citer (especially if a court) that sources *of this type* are legitimate.

Thus, we frequently see a progression in authoritativeness from prohibited to optional to mandatory, a common process by which sources become transformed from decidedly non-legal "stuff" into so-called binding authorities. Although the Tenth Circuit would be doing nothing wrong in the most technical sense in failing to cite to the Second Circuit in a securities case, the failure to cite to the most prominent court on securities matters would likely raise some eyebrows. And the higher the eyebrows are raised, the more that is in a hyper-technical sense optional is in a realistic sense mandatory.[45] The more there is an expectation of reliance on a certain kind of technically optional authority -- it is virtually impossible to argue or decide an evidence case in the Massachusetts Supreme Judicial Court, for example, without making reference to Liacos's *Handbook of Massachusetts Evidence*,[46] just as it has traditionally been difficult to argue a Charter of

[45] *See* J.M. Balkin & Sanford Levinson, *Legal Canons: An Introduction*, in Legal Canons 3 (J.M. Balkin & Sanford Levinson eds., 2000).

[46] Paul J. Liacos, Handbook of Massachusetts Evidence (6th ed., 1994). Given that the book, in all of its editions, has been cited 894 times by the Massachusetts Supreme Judicial Court and the Massachusetts Appeals Court, it would be a brave (or foolhardy) lawyer who attempted to argue a point of evidence before one of those courts without dealing with what Liacos had to say on the issue. To say that the source is not a binding (although, to repeat, not absolutely binding) authority thus appears to be a considerable oversimplification.

Rights and Freedoms case in the Supreme Court of Canada without nodding to American Supreme Court decisions[47] – the more an authority passes from optional to mandatory.

Thus, for Justice Scalia (and others) with reference to foreign and international law, for legal writing instructors counseling first year law students about which authorities are permissible citations and which are not, and for appellate courts wrestling with no-citation rules, what may appear to be minor questions about form are in fact fundamental questions about what is to count as law. When Justice Breyer, in *Parents Involved in Community Schools v. Seattle School District No. 1,*[48] provided three pages of sources, mostly historical and administrative sources not in the briefs or the record below, his citation practice not only speaks to what for him counts as law and what it is to *do* law, but also serves an authoritative (although it would have been more authoritative had the opinion not been a dissent) function in telling lawyers and judges what they can *use* to make a legal argument, and thus in telling lawyers and judges what law is.[49]

Because law is an authoritative practice, a great deal turns on what the authorities are. Why the Supreme Court and the Congress of the United States but not the editorial

[47] As Canada's internal constitutional culture and stock of precedents has grown (the Charter dates only from 1982), the obligatoriness of references to American decisions appears to be declining, a phenomenon magnified by the extent to which Canada's point of external constitutional reference is shifting away from the United States and in the direction of Europe and the European Convention on Human Rights.

[48] 127 S. Ct. 2738, 2800 (2007) (Breyer, J., dissenting).

[49] And thus the debate at Middlebury College and elsewhere about *Wikipedia* is analogously not about citation, or footnoting, but about what it is to *do* history, and thus about what history (as a practice) simply is.

board of the *New York Times*? Why the Federal Trade Commission but not the board of directors of Wal-Mart? Why *Loss & Seligman* but not Marx and Engels? Why the *Harvard Law Review* but not the *Village Voice*? Why the writings of Thomas Jefferson but not of Jefferson Davis?

None of these seemingly rhetorical questions is strictly rhetorical. At least in American courts, citation practice is undergoing rapid change, and there has been a great increase not only in citations to non-American sources, but also to sources that not so many years ago would have been sneeringly dismissed as "non-legal." In *Kumho Tire Co. v. Carmichael*, we find Justice Breyer for the majority in a case dealing with the qualifications of expert witnesses referring to a book, not cited below, entitled *How to Buy and Care for Tires*, but Justice Breyer's increasing willingness to depart from traditionally legal sources is hardly unique to him. In *Martin v. PGA Tour, Inc.*, the Supreme Court had to decide whether allowing a professional golfer with a circulatory ailment to ride in a golf cart in violation of the rules of high-level professional golf was required by the Americans with Disabilities Act. That act does require employers to make special accommodations for the disabilities of their employees,[50] but not if the accommodation would interfere with the "fundamental nature" of the employer's enterprise. The Supreme Court was thus forced to decide whether walking was part of the fundamental nature of professional golf. In deciding that it was not, and thus deciding that Martin was entitled under the Act to demand the right to use a cart while

[50] The Court had determined that Casey Martin, the golfer in question, was an employee of the PGA Tour for purposes of the Act.

playing, the Court, with Justice Stevens writing for the majority, relied on and cited a number of books on golf and its history, none of which had been cited in the briefs of the parties or the record below.

Perhaps the most dramatic example of this phenomenon comes from the plurality opinion of Justice Kennedy in *Bush v. Gore*. For the plurality, it was an important link in the chain of reasoning to their conclusion that voters often cast invalid ballots, and thus that this was not a phenomenon unique to the Presidential election of 2000. But to reach this conclusion, Justice Kennedy relied on several newspaper articles, one from the *Omaha World-Herald*, for example, that had reported on just this historical phenomenon. And once again, this source was not be found in any of the briefs or records from below, it presumably having located by one of Justice Kennedy's law clerks.

These examples are hardly exceptional. With increasing frequency, certainly in the United States and to some extent in other common law jurisdictions, lawyers and judges have been citing to and sometimes relying on material contained in non-legal journals from economics, sociology, and political science, on books about subjects other than law, and on articles in newspapers and popular magazines. If seen as just a change in citation practice, this might be at best an interesting shift in the form of judicial opinions. But these changes do not merely reflect a transformation in citation practice. They embody a change in what counts as a *legal* argument; and what counts as a legal argument -- as opposed to a moral, religious, economic, or political one -- is the principal component in determining just what law is. The boundaries of law are set by the

boundaries of legal authority, and law speaks as law through its sources. When previously prohibited authorities become optional, and when previously optional authorities become mandatory, the nature of legal sources has changed, and with that change comes a transformation in the nature of law itself.