TAMING THE SEXY BAD BOY OF OPTIONAL PRECEDENT: TOWARD A THEORY OF CITING DISSENTS

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ABSTRACT

Dissenting opinions have long generated both scholarly and practical debate and provoked both passionate defenders and steadfast opponents. But what role do dissenting opinions actually play as cited authority in judicial opinions? To what extent does our nation's jurisprudence rely on this "opposite law"—opinions liberated from the obligation to curry consensus and the burden of binding future courts—and…well, should we be worried?

This Article is the first to address the gap in the scholarly literature regarding how courts cite dissenting opinions and to propose and defend a theoretical framework for analyzing how judges use this "counter precedent." After surveying key literature on dissenting opinions and citation to precedent, this Article locates the uncomfortable position dissenting opinions have long held in the universe of citable authority and specifically within the nebulous category of "optional" authority. The Article then systematically outlines the purposes for which dissents might legitimately—or illegitimately—be used to support a court opinion.

The Article then goes on to test the theoretical framework by applying it to the opinions generated by the Supreme Court of the United States in its October 2021 term. The results of this empirical analysis not only disclose provocative patterns in the frequency with which—and purpose for which—the Justices cite dissents but also provide a roadmap for further scholarly inquiry into both the significance of judicial citations to dissents and how law students, lawyers, and judges can and should use dissenting opinions in their own work.

I. INTRODUCTION

Dissenting opinions are having a moment. With the conservative-leaning supermajority on the United States Supreme Court, liberal-leaning Justices like Justice Sotomayor and Justice Jackson have authored pointed dissents peppered with meme-worthy quotations.[1] And, of course, just in the last decade the late Justice Ruth Bader Ginsburg ascended to the level of cultural icon as a famed dissenter, earning the moniker "Notorious RBG" and inspiring the first-ever Supreme Court Justice-related merch boom; the simple outline of the bejeweled-velvet Banana Republic bib necklace Justice Ginsburg dubbed her "dissent collar" became an instantly recognizable visual shorthand for the Justice herself and adorned a staggering variety of "RBG" swag items from t-shirts to jewelry to infant onesies.[2] At the same time,

1. *See, e.g.*, Sherri Lee Keene, *Teaching Dissents*, 107 MINN. L. REV. 2619, 2619 (2023) (discussing the attention that Justice Sotomayor's dissent in *Utah v. Strieff*, 579 U.S. 232, 243 (2016) (Sotomayor, J., dissenting), has received); Lindsey Whitehurst, *Sotomayor's Dissent: A President Should Not Be a 'King Above the Law'*, AP: POL. (July 1, 2024, at 16:05 ET), https://apnews.com/article/supreme-court-immunity-trump-president-jan-6-2350bee785c85282a97af9485b94b982 [https://perma.cc/9FBN-P659] (discussing Justice Sotomayor's dissent in *Trump v. United States*, 602 U.S. 593, 686 (2024) (Sotomayor, J., dissenting), where she stated that the majority had "allowed the president to become a 'king above the law'"); Adam Liptak, *In Her First Term, Justice Ketanji Brown Jackson 'Came to Play'*, N.Y. TIMES: SUP. CT. (July 7, 2023), https://www.nytimes.com/2023/07/07/us/supreme-court-ketanji-brown-jackson.html [https://perma.cc/98XK-NB9U] (noting that Justice Ketanji Brown Jackson authored three pointed solo dissents in her first term, writing "for the public and for a future where she may not always be in the dissent" (quoting N.Y. Univ. L. Prof. Melissa Murray)); Mark Walsh, *Justice Ketanji Brown Jackson Makes Her Mark During First Term on the Supreme Court*, ABA J.: SUP. CT. REP. (June 29, 2023, at 10:12 CT), https://www.abajournal.com/web/article/justice-ketanji-brown-jackson-makes-her-mark-during-first-term-on-the-supreme-court (discussing how Justice Brown Jackson made her mark during her first term on the bench through her dissents). The merchandise game is strong, too: for example, one can purchase an array of products—shirts, infant onesies, yard signs, tote bags, bumper stickers, zipper pulls, and mugs—emblazoned with "With fear for our democracy, I dissent," the final line from Justice Sotomayor's dissent in *Trump v. United States*, 602 U.S. 593, 686 (2024) (Sotomayor, J., dissenting). *See*, *e.g.*, *With Fear I Dissent T-Shirt*, CROOKED: STORE, https://store.crooked.com/products/with-fear-i-dissent-tshirt?srsltid=AfmBOoqWpWhre5eZmBHsxJceKDvhqKZTFwo0AwOFGWXX0_pOkTFC9704 [https://perma.cc/R66X-74QX] (last visited Aug. 5, 2025).

2. *See* Deborah Nicholls-Lee, *'How She Communicated Without Words': Ruth Bader Ginsburg's Collars - in Pictures*, THE GUARDIAN (Nov. 15, 2023, at 16:00 ET), https://www.theguardian.com/fashion/gallery/2023/nov/15/how-she-communicated-without-words-ruth-bader-ginsburgs-collars-in-pictures [https://perma.cc/55H6-XJBP] (giving a visual of the iconic Banana Republic neckpiece dubbed Justice Ginsburg's "dissent collar"); Zeke J. Miller, *Ruth Bader Ginsburg Says She Has Quite a Large Supply of Notorious RBG Shirts*, TIME (Oct. 19, 2014, at 23:05 ET), https://time.com/3523180/ruth-bader-ginsburg-rbg-shirts/ [https://perma.cc/5ULM-LVFW] (discussing how Justice Ginsburg embraced the commodification of her "Notorious RBG" moniker). *See generally* PBS NEWSHOUR: *How Ruth*

unprecedented public attention has focused on the Court, its Justices, and its opinions.[3] More Americans than ever before can identify at least one Justice by name,[4] and although that might seem at first blush to be a good development reflecting increased civic engagement, some blame the celebrity status conferred upon noted dissenters for the increased dysfunction of what one scholar dubbed "[o]ur Kardashian Court."[5]

Once those famed dissents are authored, with their soaring rhetoric and memorable turns of phrase, what role do they have as precedent to be cited? Any lawyer knows that dissents are not law. Indeed, dissents are a sort of counter-precedent or anti-precedent—diametrically opposed to the majority opinion that embodies the binding law. At the same time, lawyers also know that some dissents ultimately overtake their majority counterparts and the principles and positions captured therein become the law of the land.[6] Most dissents, however, have a more modest—but hardly insignificant—role in our jurisprudence.[7] Despite their counter-precedential nature, the conventional

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Bader Ginsburg Became the 'Notorious RBG' (PBS television broadcast, aired Sep. 23, 2020), *transcribed at* https://www.pbs.org/newshour/show/how-ruth-bader-ginsburg-became-the-notorious-rbg [https://perma.cc/2S7A-AFZP] (explaining how RBG got her nickname).

3. *See* Frank Newport, *Public Opinion and Recent Supreme Court Decisions*, GALLUP (July 7, 2023), https://news.gallup.com/opinion/polling-matters/508313/public-opinion-recent-supreme-court-decisions.aspx [https://perma.cc/7BG8-58M8]. Yet, the U.S. Supreme Court's approval rating remains at a near-record low as 43% of Americans saying they approve of the way the Court is handling its job and 52% disapproving. Megan Brenan, *Approval of U.S. Supreme Court Stalled Near Historical Low*, GALLUP: NEWS (July 30, 2024), https://news.gallup.com/poll/647834/approval-supreme-court-stalled-near-historical-low.aspx [https://perma.cc/GZ3E-SWZH] (discussing how recent landmark decisions like *Dobbs v. Jackson Women's Health Organization* have affected the Supreme Court approval rating). Since 2023, "half of Americans believe the Supreme Court has the right amount of power, while only 42% believe it has too much power." Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Aug. 8, 2024), https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low/ [https://perma.cc/B4KC-RPYQ] (discussing how 55% of Americans believe that the Supreme Court Justices are doing only a fair or poor job).

4. Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 187 (2020); *see also* Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 830–31 (2023) ("Today, the Justices are second-tier celebrities, sometimes complete with cult followings and multimillion-dollar book deals.").

5. *See* Sherry, *supra* note 4, at 182, 227–28. I, however, would not have had the restraint required to resist spelling Court with a "K" in that title.

6. *See* Christina M. Frohock, *Schrödinger's Dissent: The Hybrid Authority of a Dissenting Opinion*, 107 MARQ. L. REV. 963, 990 (2024) (discussing how a dissent rationale can become the majority); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 288 (1998) (describing how courts can revive a dissent and reuse its legal reasoning).

7. *See* Mark A. Hannah & Susie Salmon, *Against the Grain: The Secret Role of Dissents in Integrating Rhetoric Across the Curriculum*, 20 NEV. L.J. 935, 937 (2020).

wisdom is that dissents can be "persuasive authority"—or, as Frederick Schauer has styled it, "optional authority."[8]

Few, if any, texts provide any guidance on how to cite dissenting opinions effectively or appropriately.[9] In addition, although scholars have written extensively about dissents and about citations to precedent, no one has studied the extent to which lawyers and judges are citing dissents in their briefs and opinions or the purposes for which they are citing those dissents.[10] Further, no theoretical framework has been developed and articulated to inform our assessment of whether a citation of a dissenting opinion is appropriate or otherwise or to guide further study. Such an undertaking would represent a huge step toward identifying any unwritten norms. Moreover, should scholars or others wish to challenge the legitimacy of judicial decision-making based in any part on the extent to which it is grounded in citations of dissenting opinions, first developing a framework for assessing the appropriateness of that citation is essential.

This Article endeavors to set forth and justify a theoretical framework that can help us understand and assess dissent citations. In part, this framework describes what we would expect to see based on existing norms regarding use of authority and the general status of dissenting opinions in our jurisprudence and sets forth the theoretical basis for those expectations. The Article then describes the results of one "pilot test" on a narrowly circumscribed dataset: a review of how the Justices of the Supreme Court of the United States cited dissenting opinions in the opinions of its 2021 term—and details the extent to which that narrow examination suggested that the practice might prove the theory correct. Finally, the Article identifies specific questions for further investigation to improve our understanding of the actual and proper role of dissenting opinions in our legal system and provides informed guidance to those seeking to cite them.

Part II identifies the gap in the existing literature on the purpose of citing authority in legal argumentation and on dissenting opinions. Part III examines some general norms regarding citation of precedent and describes the awkward position dissenting opinions occupy in the universe of citable precedent. Part IV then seeks to set forth a framework for analyzing citations to dissenting opinions, which this paper characterizes as a sort of "counter-authority." Part V reports data about the Supreme Court of the United States's citation of dissenting opinions in the sixty-six opinions it issued in its 2021 term. Finally, Part VI posits some takeaways from this data and identifies areas for future research to build knowledge and insight about the day-to-day

8. Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1946–47 (2008).
9. *See infra* Part II.
10. *But see infra* Part II.

role dissenting opinions play in our jurisprudence and how lawyers and judges can and should be citing them.

II. DEFINING THE GAP

Although scholars have dedicated significant attention to citations to authority and to dissents in general, no one yet has focused on the question of the purposes for which judges are citing dissenting opinions.

To be sure, scholars across a variety of disciplines have examined dissenting opinions and the phenomenon of judicial dissent from a variety of angles.[11] Indeed, I have written on the topic of dissents more than once.[12] Legal historians have traced the origins of dissenting opinions and their changing prevalence in different legal systems.[13] Scholars have taxonomized them.[14] Judges and scholars have attacked or defended them.[15] Dissents have been examined through a variety of filters from the economic to the

11. *See, e.g.*, Hannah & Salmon, *supra* note 7, at 936; Frohock, *supra* note 6, at 965.

12. *See, e.g.*, Hannah & Salmon, *supra* note 7, at 964–65.

13. *See, e.g.*, M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 286 (discussing how dissents played a dynamic role from the Marshall Court to the Roberts Court); Alex Simpson, Jr., *Dissenting Opinions*, 71 U. PA. L. REV. 205, 207–10 (1923) (explaining how dissents were derived from British Parliament and later implemented by the Supreme Court); John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137, 140–42 (1999) (explaining the first time that an individual Justice wrote separately from the opinion of the Court); Mark A. Kadzielski & Robert C. Kunda, *The Origins of Modern Dissent: The Unmasking of Judicial Consensus in the 1930s*, 15 UWLA L. REV. 43, 43–45 (1983) (attributing the increase in judicial dissents to the national trend of divisiveness of the 1930s); Hunter Smith, *Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion*, 24 YALE J.L. & HUMANS. 507, 507–08 (2012) (discussing how dissents progressed from contended to commonplace in the judicial arena).

14. *See, e.g.*, Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1746 (2005) (giving examples of how scholars have characterized and named dissenters); Orit Gan, *I Dissent: Justice Ginsburg's Profound Dissents*, 74 RUTGERS U. L. REV. 1037, 1038 (2022) (introducing the taxonomy of the sliding scale on the spectrum of soft dissents to profound dissents); Duncan Hosie, Janus *and the Movement Dissent*, 65 B.C. L. REV. 371, 376 (2024) (identifying and explicating the categories of "demosprudential," "movement" or "mobilizing" dissents); Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment*, 22 FLA. STATE U. L. REV. 591, 649 (1995) (creating the term "relentless dissents"); Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 447 (2008) (defining "perpetual dissent").

15. *See, e.g.*, William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430–31 (1986) (defending the important and diverse roles dissents play in judicial opinion writing); Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3–4 (2010) (providing an example of the late Justice's first-hand endorsement of the role of dissents in the judiciary); Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 102 (2011) (discussing how a dissenting opinion increases the length of the majority opinion by approximately 20 percent).

rhetorical.[16] Some have highlighted the impact of famed individual dissenters.[17] Still others have theorized as to why judges choose to write separately in dissent.[18]

Similarly, when it comes to judicial citation of authority, and even judicial citation of optional authority, scholars have studied both in great detail.[19] Many legal academics have focused on the broad topic of the role of precedent and the reasons for which judges and lawyers cite authority.[20] Researchers have conducted close examinations of the general citation habits of particular judges or justices[21] or of particular courts over a particular time period.[22] Others have collected empirical evidence regarding judicial citation of

16. *See, e.g.*, Hannah & Salmon, *supra* note 7, at 964–65 (explaining how teaching dissents provides law students an understanding of the close relationship between rhetoric and law); Christine M. Venter, *Dissenting from the Bench: The Rhetorical and Performative Oral Jurisprudence of Ruth Bader Ginsburg and Antonin Scalia*, 56 WAKE FOREST L. REV. 321, 324–25 (2021) (discussing how Justice Ginsburg and Justice Scalia would read dissents aloud from the bench to attract public attention); Michael Frost, *Justice Scalia's Rhetoric of Dissent: A Greco-Roman Analysis of Scalia's Advocacy in the* VMI *Case*, 91 KY. L.J. 167, 170–71 (2002) (explaining how Justice Scalia used quotable phrases and rhetorical flair in his dissents to attracts public attention).

17. *See, e.g.*, Melvin I. Urofsky, *Mr. Justice Brandeis and the Art of Judicial Dissent*, 39 PEPP. L. REV. 919, 937 (2012) (discussing how Justice Brandeis's dissents shaped the Court's jurisprudence over time); J. Lyn Entrikin*, Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility,* 18 J. APP. PRAC. & PROCESS 201, 201–02 (2017) (discussing Justice Scalia's dissents role in modern civility in the public square); Gan, *supra* note 14 (explaining how Justice Ginsburg's different perspective on society and the law shaped her dissents).

18. *See, e.g.*, Epstein, Landes & Posner, *supra* note 15, at 104–05 (discussing the enhanced reputation a judge receives from a dissenting opinion); Frohock, *supra* note 6 (discussing how judges dissent to provide a framework for a future majority).

19. *See*, *e.g.*, Schauer, *supra* note 8, at 1945–46; William H. Manz, *Cardozo's Use of Authority: An Empirical Study*, 32 CAL. W. L. REV. 31, 32–33 (1995).

20. *See, e.g.*, Schauer, *supra* note 8, at 1946–49.

21. *See, e.g.*, Manz, *supra* note 19 (discussing how Justice Cardozo's legal research being largely unaffected by his law clerks resulted in unique practices of citing authority); Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?*, 37 J. LEGAL STUDS. 87, 96–97 (2008) (explaining how judges cite those with similar ideologies and backgrounds).

22. *See, e.g.*, John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 613–14 (1954); James Leonard, *An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990*, 86 LAW LIBR. J. 129, 129–30 (1994); William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 LAW LIBR. J. 267, 267–68 (2002) (surveying the use of authority by the Supreme Court of the United States during the 1996 term and comparing it to the authorities cited in the briefs submitted to the Court); Richard A. Mann, *The North Carolina Supreme Court 1977: A Statistical Analysis*, 15 WAKE FOREST L. REV. 39, 42–43 (1979); William H. Manz, *The Citation Practices of the New York Court of Appeals, 1850-1993*, 43 BUFF. L. REV. 121, 121–22 (1995); Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 773–74 (1981).

optional authority, including secondary sources such as law reviews[23] and treatises.[24] Scholars have even examined the extent to which citations in briefs lead to citations in judicial opinions.[25] None of these studies specifically examine citations to dissenting opinions, however. In fact, the vast majority even of those studies and theoretical pieces focusing on optional authority does not even explicitly discuss or consider dissenting opinions as items of optional authority a court might cite.[26]

When scholars do devote any attention to citations of dissenting opinions, they approach it with the purpose of measuring the impact that particular dissents have had on the development of the law.[27] As a result, they begin with the dissents themselves and then trace or analyze citations to those particular dissents in later cases.[28] No study or article begins with the briefs and opinions and examines those to discern how often and for what purposes lawyers or judges are citing dissents more generally. No scholar has attempted to set forth the universe of possible and permissible reasons for which lawyers and judges might cite dissents. Moreover, to the extent that scholars have devoted meaningful attention to the precedential value of dissents, that discussion has occurred almost exclusively in the context of determining the rule to be drawn

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23. *See, e.g.*, Louis J. Sirico, Jr. & Jeffrey Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 131–32 (1986); Louis J. Sirico, Jr., *The Citing of Law Reviews by the Supreme Court: 1971-1999*, 75 IND. L.J. 1009, 1009–10 (2000).

24. *See, e.g.*, Amy J. Griffin, *Treatise Tactics*, 100 DENV. L. REV. 347, 348 (2023).

25. *See, e.g.*, Kevin Bennardo & Alexa Z. Chew, *Citation Stickiness*, 20 J. APP. PRAC. & PROCESS 61, 64 (2019).

26. *See, e.g.*, Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 64 n.41 (2009) (omitting dissenting opinions from the proffered "hierarchy" of "persuasive" authority); Guyora Binder, *Dissenting Authority*, 35 YALE J.L. & HUMANS. 193, 208–09 (2024) (arguing dissents in legal writing can be claimed as authority that contributes to the rule of law). While I was writing the first draft of this article in the summer of 2024, Professor Christina Frohock published her poetic mediation on the "spectrum of authority," with a particular focus on dissenting opinions. *See* Frohock, *supra* note 6, at 978 (explaining how dissenting opinions are used in legal writing as both primary and secondary authority).

27. *See, e.g.*, Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 782 (2000).

28. *See, e.g.*, *id.* at 792–95 (discussing how both Justice Holmes and Justice Brandeis's dissents later shaped Court jurisprudence and New Deal era reform); LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 289–90 (2013) (examining the costs and benefits of dissenting by counting citations in majority and dissenting opinions to 266 Supreme Court opinions and dissents from the 1963, 1980, and 1990 terms); MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE 124–26 (2015) (discussing how Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 553–64 (1986) (Harlan, J., dissenting), is routinely cited in subsequent opinions by other Supreme Court Justices).

from a plurality decision and the extent to which any dissenting opinions contribute to that rule,[29] not to the role of dissents as precedent more generally.

The practical literature sheds no additional light on the issue. To the extent that written guidance for judges exists regarding citing optional authority to support their opinions, such guidance is sparse.[30] For example, the *Judicial Writing Manual*, published by the Federal Judicial Center,[31] offers two short paragraphs on citing to case authority, including one sentence advising judges that they may cite authority from another jurisdiction where no on-point authority is available in their own.[32] The manual also adds that judges may cite secondary sources sparingly, and "only to serve a purpose" to "refer to sound analysis that supports the reasoning of the opinion," noting that "some authors are so well respected in their fields that, absent a case on point, their word is persuasive."[33] Other resources on judicial opinion writing similarly provide no explicit guidance on citing dissents but implicitly advise against it by disfavoring citations to optional authority.[34] For example, the fifth edition of the *Judicial Opinion Writing Handbook* recommends that opinion writers "be selective and cite only cases that are controlling," and "[t]he most recent authoritative decision within the jurisdiction should be cited.[35] If there is none, then an out-of-state or secondary authority (encyclopedia, periodical, or treatise) may be used."[36] Similarly, a leading guide for judicial clerks does not address citing dissenting opinions; the closest it comes is when it advises clerks drafting opinions to "avoid citing dicta where possible" because it is "not controlling law."[37]

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29. *See, e.g.*, Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL'Y 285, 288–89 (2019); Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 799–800 (2017); Michael L. Eber, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 207–12 (2008).

30. *See* FED. JUD. CTR., JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES 17–18 (2013).

31. The Manual states that its authors expect its primary audience to be newly appointed judges and their law clerks but expresses the hope that it will also help experienced judges to "take a fresh look at their approaches to writing and their styles." *Id*. at 1.

32. *Id*. at 18.

33. *Id.*

34. *See, e.g.*, JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 31 (5th ed. 2007).

35. *Id.*

36. *Id.*

37. ABIGAIL L. PERDUE, THE ALL-INCLUSIVE GUIDE TO JUDICIAL CLERKING 220 (2017); *see* Thomas R. Newman & Steven J. Ahmuty Jr., *Creative Use of Dissenting Opinions*, N.Y.L.J. (Jan. 5, 2021), *reprinted at* https://www.duanemorris.com/articles/creative_use_diessenting_opinions_0121.html [https://perma.cc/NV2D-ACPS] (explaining that appellate court composition and judicial stances frequently change to where a dissent can turn

Four key pieces—all approaching the intersection between the literature studying citation to authority and the literature about dissenting opinions from different directions, but never quite entering it—get close enough to the question to help define the gap more sharply and create a starting point for thinking about what one might expect to see when judges cite dissents.

First, to date, only one scholar has focused on the question of "how lawyers and judges use cases in their arguments."[38] In the study that formed the basis for his 2021 article, *Precedent as Rational Persuasion*, Professor Brian Larson examined fifty-five reported federal district court opinions resolving dispositive motions relating to the fair-use doctrine in copyright cases, along with 144 of the party briefs that led to those opinions.[39] In a pilot study, Larson first identified four different "rational uses of cases" in the opinions and briefs: (1) citing a case to support a statement that a particular legal rule exists "in the form the authors assert," (2) citing a case for what Larson calls a "case example"—what others might call a "case illustration" or the foundation for an argument driven by analogical reasoning—"where the author describes a previous case, including facts about it and its outcome, then argues that the instant case should come out the same (opposite) way because the cases were (dis)similar," (3) citing a case to set forth the basis for a policy argument, and (4) citing a case as part of a cumulative argument that many courts have decided a similar issue in a similar fashion and thus the instant case should be decided in the same fashion.[40] Larson then coded the selected dataset for those four case uses, as well as two others: (5) "citing a case to support a quotation from the case in a section of the argument," and (6) citing

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into a majority). Legal writing texts provide little more guidance or insight. *See, e.g.*, CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN & SANDY PATRICK, A LAWYER WRITES 55 (4th ed. 2024) (explaining that dissenting opinions are not part of the law and should be relied upon only as persuasive authority); MARY BETH BEASLEY & MONTE SMITH, BRIEFS AND BEYOND: PERSUASIVE LEGAL WRITING 157–59 (2021) (recommending that authors citing persuasive authority, such as dissenting opinions, include qualifying language that puts a reader on notice that a legal rule or principle is based on a nonauthoritative source). Advice for practitioners tends to be more direct but even more superficial. For example, short, practical pieces on how lawyers might incorporate dissenting opinions into their briefs and oral arguments generally focus on using the dissent in two main ways: (1) to attack the majority opinion, either advocating that it be overturned or that the rule from it be abrogated, and (2) to tailor a related appeal to the judge or justice who authored that dissent. *See, e.g.*, Xan Ingram Flowers, *Making Use of Dissenting Opinions*, JD SUPRA (Nov. 11, 2020), https://www.jdsupra.com/legalnews/making-use-of-dissenting-opinions-33186/ [https://perma.cc/F2EK-WVGF] (discussing how lawyers use dissenting opinions to persuade a court that the majority's decision incorrectly applied the relevant law or facts).

38. Brian N. Larson, *Precedent as Rational Persuasion*, 25 J. LEGAL WRITING INST. 135, 199 (2021).

39. *Id.* at 161.

40. *Id.* at 166–67.

a case for some use not clearly captured by one of the other five categories.[41] Next, Larson assessed the findings from that study to develop answers to the initial question—how lawyers and judges use cases in their arguments—as well as a second question regarding the relative frequency with which lawyers and judges used cases in each way.[42] Larson did not look specifically at any traits of the cases cited or whether the portion of the case cited was a majority, concurring, or dissenting opinion, however.[43]

Second, one of the studies that looked at citations to a defined population of dissents—counting the number of times dissents from a particular population of cases had been cited by other courts—identified some patterns useful to the inquiry at the heart of this paper.[44] The results of that study, part of a larger empirical and theoretical inquiry into legal decision-making, suggested that (1) the average Supreme Court dissent is not heavily cited, and (2) that, to the extent that Supreme Court dissents are cited, they are significantly more likely to be cited by the Supreme Court itself than by a federal court of appeals, and (3) dissents from courts of appeals are almost never cited.[45] That study, however, did not examine the purposes for which the dissents were cited or gather any additional data about those citations, it did not collect data on which judges or Justices wrote the opinions citing those cases, nor did it examine whether the opinions they reviewed cited dissents from cases outside the narrowly defined population of cases that were the focus of the study.[46]

Third, one of the few studies of citations to optional authorities—Professor Amy Griffin's study of the Tenth Circuit's citation to optional authorities in its 2017 term—briefly identified some reasons why a court might cite to non-binding portions of otherwise binding authority.[47] Although Professor Griffin did not look specifically at citations to dissenting opinions or quantify those citations separately in any of the many data charts in her paper, she did note that in eight percent of the cases she examined, the opinion cited to a "non-binding" portion of a Supreme Court opinion, concurrence, or dissent.[48] Professor Griffin also observed that those citations to non-binding portions of the opinion appeared to serve a handful of purposes: "to explain the majority opinion, and in particular the extent (limited or expansive) of the

41. *Id.* at 169–70.
42. *Id.* at 170.
43. *See id.*
44. *See* EPSTEIN, LANDES & POSNER, *supra* note 28, at 288–91.
45. *Id*.
46. *See id.*
47. *See* Amy J. Griffin, *Problems with Authority*, 97 ST. JOHN'S L. REV. 113, 144–57 (2023).
48. *Id.* at 147.

majority opinion; for policy support; or to support a particular interpretation of a statute or rule of procedure."[49]

Finally, Professor Christina Frohock recently waded into the theoretical space, ultimately arguing that dissenting opinions defy categorization within the traditional binary of primary and secondary authority.[50] Calling dissents the "Schrödinger's cat of authorities: both the law and not the law simultaneously," Frohock concludes that dissents are a hybrid authority with traits of both primary and secondary authority, enjoying the "rhetorical leeway" of a judicial opinion while unconstrained by the responsibility of making law.[51] Although the piece provides examples of the opportunity the unique traits of the genre offer the dissent's author, it leaves aside the question of whether, when, and how citing a dissent would be appropriate.[52]

The remaining gap—the lack of a narrowly focused theoretical or empirical project examining how judges should and do cite dissenting opinions—leaves us with only a scattershot understanding of the practical role dissenting opinions play. To the extent that any norms exist, they remain unarticulated. Absent a description of norms regarding when citing a dissenting opinion is appropriate, how do we identify when a judge has breached those norms or when citation of a dissenting opinion is notable, aberrant, or even alarming? This Article takes some initial steps toward closing that gap and sharpening our understanding of dissent citations.

III. DISSENTS IN THE UNIVERSE OF CITABLE AUTHORITY

A. Why Cite Authority at All?

In thinking about reasons for which judges might cite a dissenting opinion, it useful to begin by considering why lawyers and judges cite cases at all. Although we currently take citation to precedent as a given, scholars who have traced the history of the use of legal precedent in the courts of the United States and in the English courts that preceded them have made it clear that, although "[t]he impulse to look to the past while shaping the present has always been powerful," the idea that some cases constitute binding precedent was hardly a given during the first years of the United States courts and instead has evolved over many centuries.[53] During the Post-Revolutionary War Era

49. *Id.*
50. *See* Frohock, *supra* note 6, at 992.
51. *Id.* at 965.
52. *See id.* at 1004.
53. Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 54 (2001) (tracing the history of the use of legal precedent in England beginning in the 13th century and in the United States from colonial times through the post-Revolutionary period); *see*

in the United States, even judges and legal scholars who agreed that precedents represented evidence of the common law and thus should be respected did not express the view that judges must—or even should—automatically follow the principles set forth in decided cases.[54] In fact, the idea that some cases, or at least particular parts of those cases, might be "binding precedent" from the moment they were decided is a relatively recent one, dating to the early nineteenth century.[55]

Nonetheless, current norms of legal argumentation provide that "no U.S. judge should write an opinion to justify a decision . . . without using previous court opinions . . . to support the argumentation in them."[56] In the literature about why judges cite cases, variations on the words "legitimate" and "justify" dominate.[57] Opinions draw their legitimacy, at least in part, from the citations to precedent; judges justify outcomes, at least in part, by pointing to precedent that they assert unavoidably compels those outcomes.[58]

So-called "binding" precedent does the best job at this justifying and legitimizing function. By definition, binding precedent must be followed.[59]

Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 645, 659–61 (1999).

54. Healy, *supra* note 53, at 83–84.

55. *See* THEODORE F. T. PLUNKETT, A CONCISE HISTORY OF THE COMMON LAW 307–08 (1929) ("[I]t is only in the nineteenth century that the present system of case law with its hierarchy of authorities was established."); Healy, *supra* note 53, at 87–89 ("The American commitment to stare decisis gradually strengthened during the nineteenth century, due mainly to the emergence of reliable case reports and a positivist conception of law.").

56. Larson, *supra* note 38, at 147; *accord* Griffin, *supra* note 47, at 141 ("Citations are used as proof of judicial impartiality, guided by the foundational norm that something must be cited.").

57. *See, e.g.*, John Henry Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381, 418 (1978) ("The judge has an obligation to justify his decision in legal terms ('a government of laws'); by failing to cite authority, he has failed to inform and convince the parties, counsel, and the public of the legal basis of the decision. . . . the obligation to cite authority seems indisputable."); Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 512 (2010) ("Thus, more citations should translate into more legitimacy for decisions.").

58. *See* Schauer, *supra* note 8, at 1940.

59. A robust analysis of whether any precedent is, in fact, binding or whether stare decisis is a fairy tale falls outside the scope of this paper. *See generally* Russell A. Miller, *The Purpose and Practice of Precedent: What the Decade Long Debate Over Stare Decisis Teaches Us About the New Roberts Court*, 51 U.C. L. CONST. Q. 231 (2024) (expanding on the history of precedent in American Law and the United States Supreme Court). At any rate, most agree that lower courts remain bound by the precedent of higher courts in their jurisdictions. *See, e.g.*, Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 790 (2012) (defining vertical stare decisis as a practice of a lower court adhering to the decisions of higher courts in their jurisdictions); Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 227 (2014) ("Decisions of a federal court of appeals are binding on district courts within the

Judges delivering the news of unpleasant or unpopular outcomes arguably dictated by the facts and rules set forth in binding precedent may simply shrug and point to that precedent—their hands are tied by the decisions of previous judges, and the outcome is preordained, beyond their control. Legal scholars disagree on whether judicial citation to precedent is genuine or disingenuous or a little bit of both; precedent may be the reason for a decision, it may merely mask the true reason for a decision, or it may serve as guardrails beyond which a decision cannot careen.[60] But the ability to point to vertical or even horizontal precedent directly on point that seems to compel an outcome—or at least compel a step toward a particular outcome—at minimum provides cover for a decision in favor of that outcome.[61]

Norms regarding when judges cite precedent and what they cite, though they may be second nature or even "intuitive" to those in the profession, are informal, internal, and generally unwritten; most are simply "unarticulated background rules about what authority can be legitimately relied upon."[62] Indeed, even foundational principles of weight and hierarchy of authority—concepts like stare decisis, the very notion of "binding precedent," and the distinction between holding and dicta—developed not from codified law or the holding of a case but through the individual practices of judges over time.[63]

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relevant circuit."); Joseph A. Greenaway, Jr., *Reflections on Stare Decisis*, 83 MD. L. REV. 1, 2 (2023) (discussing how lower courts implement stare decisis principles outside of Supreme Court decisions).

60. *See* Thomas B. Nachbar, *Twenty-First Century Formalism*, 75 U. MIA. L. REV. 113, 115–20 (2020) (describing legal formalism as a judicial theory where judges apply the law as written); Brian Leiter, *Legal Realism and Legal Doctrine*, 163 U. PA. L. REV. 1975, 1975 (2015) (distinguishing legal realism from legal formalism as judges employing legal realism have significant discretion in interpreting and applying the law based on social and moral principles). *But see* Michael Baur, *Beyond Standard Legal Positivism and "Aggressive" Natural Law: Some Thoughts on Judge O'Scannlain's "Third Way*,*"* 79 FORDHAM L. REV. 1529, 1529–30 (2011) (defining legal positivism as social facts or conventions alone, not moral principles, that constitute the fundamental criteria for determining what may count as valid law).

61. Professor Richard Re labels this way of using case law as "precedent as shield." Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 910 (2021) ("A judge who bucks the wishes of her political allies, for example, might like to say not 'I am right, whereas you are wrong,' but rather 'I am following precedent, regardless of who is right.'").

62. Griffin, *supra* note 47, at 129.

63. *See* Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMPAR. L. 67, 68–69 (2006) ("The practice of precedent may differ slightly as applied to (1) the common law, (2) constitutions, and (3) legislation . . . but all depend ultimately on the culture of American Lawyers, as developed in the course of their separation from Britain, mostly in the eighteenth century, and perpetuated by the tenacity and conservativism of the Courts."); Healy, *supra* note 53, at 50 ("[S]tare decisis . . . did not result from deeply held beliefs about the nature of judicial power, but emerged out of a practice of following the past for the sake of convenience and stability."); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 572 (2001) ("Stare decisis . . . is a doctrine . . . rooted as much in unwritten norms of constitutional practice as in the written Constitution itself."); Griffin, *supra* note 47, at 129–30.

In the rare instance that what constitutes citable precedent is subject to formal prescriptive rules, such rules generally represent deviations from previously entrenched norms.[64] But most norms about what and how often judges should cite are largely memorialized only through the practices of individual judges as reflected in the opinions they write.[65] Thus, examination of actual judicial citation practices is essential to understanding these unwritten norms.

B. Next Level of Difficulty: Why Cite Optional Authority?

Even less information exists regarding the citation of optional authority[66] or why judges might cite or credit that authority. Norms certainly permit such citation; indeed, "citation to optional authority is a routine and integral part of judicial decision-making—not only acceptable but a widely practiced aspect of opinion writing."[67] Where binding authority on point exists, a court must follow it.[68] The prevailing wisdom holds that lawyers and courts should only be citing to optional authority when "mandatory authority leaves a 'gap' that must be filled."[69]

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64. For example, every federal circuit has local rules providing that unpublished cases are not binding precedent. *See* 1ST CIR. R. 32.1.0(a) ("The court will consider [unpublished opinions] for their persuasive value but not as binding precedent."); 2D CIR. R. 32.1.1(a); 3D CIR. R. 5.3; 4TH CIR. R. 32.1; 5TH CIR. R. 47.5.4; 6TH CIR. R. 32.1(b); 7TH CIR. R. 32.1(b); 8TH CIR. R. 32.1A; 9TH CIR. R. 36-3(a); 10TH CIR. R. 32.1(A); 11TH CIR. R. 36-2; D.C. CIR. R. 36(e)(2); FED. CIR. R. 32.1(d). And three federal circuits have enacted formal rules codifying horizontal stare decisis whereby each panel of the circuit is bound by the decisions of earlier panels in that same circuit. *See* 3D CIR. R. 9.1 ("Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so."); 6TH CIR. R. 32.1(b) ("Published panel opinions are binding on later panels. A published opinion is overruled only by the court en banc."); 11TH CIR. R. 36 IOP 2 ("Under the law of this circuit, published opinions are binding precedent."); 4TH CIR. R. 36(b).

65. *See* Griffin, *supra* note 47, at 127–28.

66. Because what makes certain types of non-binding authority persuasive—and thus citation-worthy—is central to this paper's inquiry, I have adopted Frederick Schauer's terminology here, describing authority as either "binding" or "optional" rather than "binding" or "persuasive." *See* Schauer, *supra* note 8, at 1946.

67. Griffin, *supra* note 24*,* at 350.

68. Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001) ("Binding authority . . . cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point is the law. If a court must decide on an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect."); *see* Amy J. Griffin, *Dethroning the Hierarchy of Authority*, 97 OR. L. REV. 51, 60 (2018) ("Only when mandatory authority fails to resolve an issue should legal analysts turn to persuasive authority, also referred to as nonbinding, nonmandatory, or optional authority.").

69. Griffin, *supra* note 68*,* at 60–61; *see* RICHARD K. NEUMANN, LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 86–88 (7th ed. 2005) ("If you have mandatory authority relevant to your issue, it should dominate your analysis. But where you

Optional authorities do not bind a court, but they may "have a power by virtue of what they say, if they say it persuasively."[70] To the extent that observers have endeavored to explain judicial selection of optional authority, such explanations focus on the persuasiveness of the authority's content and a few observations about traits—like the reputation of the author—that may make the authority more persuasive.[71] Scholars have attempted to test commonly held notions of the relative persuasive weight of different types of optional authority, like the conventional wisdom that courts are more likely to find authority from nearby jurisdictions more persuasive, with mixed results.[72]

Even with these loose notions of criteria that might help predict which optional authority might be most appropriate or effective to cite, any hierarchy of persuasiveness of optional authority is always mushy at best;[73] as Frederick Schauer observed, "[a] judge who is genuinely persuaded by an opinion from another jurisdiction is not taking the other jurisdiction's conclusion as

need to fill gaps in the law or want to provide additional support, you must choose which persuasive authority to rely on.").

70. Flanders, *supra* note 26, at 65.

71. *See, e.g.*, COUGHLIN, ROCKLIN & PATRICK, *supra* note 37, at 24 ("Although a court is not required to rely on or follow case law from another jurisdiction, a court may do so if it finds the reasoning expressed in that case law to be persuasive and consistent with the law from the court's jurisdiction."); Schauer, *supra* note 8, at 1947–49. Additionally, in the federal circuit courts, many opinions have explicitly articulated the norm that decisions of other circuits, although only optional authority, nonetheless should be accorded significant weight. *See e.g.*, United States v. Thomas, 27 F.4th 556, 559 (7th Cir. 2022) ("Respectful consideration of the differing views of other circuits is, without doubt, a continuing obligation of every circuit."); OSF Healthcare Sys. v. Insperity Grp. Health Plan, 82 F. Supp. 3d 860, 865 (C.D. Ill. 2015) ("[O]ut-of-circuit precedent . . . is of course not binding on the Court, but is entitled to 'respectful consideration.'" (quoting United States v. Glaser, 14 F.3d 1213, 1216 (7th Cir. 1994))); Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 31 (1st Cir. 2004) ("A court of appeals should always be reluctant to create a circuit split without a compelling reason . . . ."); United States v. Thomas, 939 F.3d 1121, 1130 (10th Cir. 2019) ("We should not create a circuit split merely because we think the contrary arguments are marginally better.").

72. *See, e.g.*, Kevin Bennardo, *Testing the Geographical Proximity Hypothesis: An Empirical Study of Citations to Nonbinding Precedents by Indiana Appellate Courts*, 90 NOTRE DAME L. REV. ONLINE 125, 126 (2015) https://scholarship.law.nd.edu/ndlr_online/vol90/iss3/3 [https://perma.cc/NJ34-HAB6] (using an empirical study of the citation practices of the Indiana Supreme Court to test the notion that courts are more likely to cite optional authority from geographically proximate courts and concluding that common regional identity is more significant than mere proximity); A. Michael Beaird, *Citations to Authority by the Arkansas Appellate Courts, 1950–2000*, 25 U. ARK. LITTLE ROCK L. REV. 301, 317 (2003) (demonstrating that when Arkansas courts cited out-of-state authority, those opinions most often came from more populous states like New York, California, Illinois, and Texas); Friedman et al., *supra* note 22, at 801–04.

73. *See* Griffin, *supra* note 68, at 106 ("Strategies for choosing optional authority are not well articulated anywhere."); NEUMANN, *supra* note 69 ("It would be easier if courts adopted uniform and well-defined rules for selecting persuasive authority, but any such rules would deprive judges of some of the flexibility and creativity so valuable to judicial decision-making."). Law students find this endlessly frustrating.

authoritative. Rather, she is learning from it, and in this sense she is treating it no differently in her decision-making process than she would treat a persuasive argument that she has heard from her brother-in-law or in the hardware store."[74] Thus, in some ways all optional authorities might be equally persuasive; perhaps if judges like what the optional authority says or how it says it, regardless of the source, they will cite it, or at minimum let it inform their reasoning.

Of course, in some instances, a judge or lawyer may simply be citing an optional authority because they need something to cite. Conventions dictate that assertions in a brief or an opinion be supported by citation to something, but those conventions do not necessarily dictate what that something must be.[75] As Schauer suggests, precedent-based reasoning may signify only that citing something is better than citing nothing because "a legal argument is often understood to be a better legal argument just because someone has made it before, and a legal conclusion is typically taken to be a better one if a court has either reached it or credited it on an earlier occasion," even if other courts have reached opposite conclusions.[76] Perhaps this proposition holds true even if the judge or judges who made or credited the argument did so in the context of a dissenting opinion. It may be that, as Schauer put it, such a citation operates as "the legal equivalent of the line commonly used by the humorist Dave Barry—'I am not making this up.'"[77]

C. One of These Things is Not Like the Other: Dissents as Counter Precedent

Where do dissenting opinions fit into this scheme? As an initial matter, many noted scholars of precedent have concluded that dissenting opinions are dicta.[78] Appellate courts in the United States follow the majoritarian principle: only a majority of a court's members can speak for the court as a whole, and only the court as a whole has the authority to make law that will bind other

74. Schauer, *supra* note 8, at 1943.

75. *See id.* at 1950 ("[C]onventions of legal citation do not appear to require only strong (authoritative) support.").

76. *Id.*

77. *Id.* (citing DAVE BARRY, DAVE BARRY IS NOT MAKING THIS UP (1994)).

78. To the extent that modern scholars have analyzed the role of dissents as precedent, most treat dissents as "stand[ing] in a position similar to dicta." Williams, *supra* note 29, at 819; *accord* Jonathan H. Adler, *Once More, with Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction*, *in* THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS 81, 94 (L. Kinvin Wroth ed., 2007) ("[A] dissent, like dicta from a majority opinion, . . . does not, indeed cannot, form part of the *holding* of the Court."); A.M. Honoré, *Ratio Decidendi: Judge and Court*, 71 LAW Q. REV. 196, 198 (1955) ("[O]pinions of [dissenting] judges cannot form part of the ratio decidendi of a case [because] they are not reasons for the order made by the court . . . .").

courts in future cases.[79] Under the traditional model of precedent, to become binding precedent, a statement of legal principle in an opinion from a multi-member court must meet two requirements: (1) it must be joined by a majority of judges or justices, and (2) it must form a necessary connection with the judgment of a majority of justices.[80] By definition, dissents fail both requirements: they represent the opinion of less than a majority of judges or justices, and they assert conclusions counter to the judgment of the majority.[81]

Even labeling statements in dissenting opinions as dicta does not clarify matters all that much, however. First, not all dicta are created equal. Dicta from the Supreme Court of the United States—even dicta from dissenting opinions—has often been stated to be binding on lower courts, particularly "clearly established" dicta that recurs in multiple opinions over time.[82] Thus, a statement from a dissenting opinion from the Supreme Court of the United States could conceivably hold significant weight in, say, a federal district court.[83]

Further, simply categorizing dissents as dicta and thus optional authority does not adequately capture their unique status as precedent. Unlike statements in a majority opinion, or the holding of an appellate or highest court in a different jurisdiction, a dissent by definition contradicts rather than supplements the law.[84] What makes dissents particularly tricky as authority is their role as a sort of counter-precedent; they exist to reject the rules and

79. *See* Varsava, *supra* note 29, at 306; Eber, *supra* note 29, at 216–17 (explaining the "command model" of precedent, under which "each statement of law must receive endorsement by a majority of Justices and form a necessary connection with the judgment of a majority of Justices").

80. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 17 (1994) (describing how a rule becomes binding precedent "only if it is endorsed by a majority of judges participating in a single case in support of a unitary disposition"); Eber, *supra* note 29, at 216–17.

81. Eber, *supra* note 29, at 223.

82. *See, e.g.*, Utah Republican Party v. Cox, 892 F.3d 1066, 1079 (10th Cir. 2018) (recognizing that lower courts are bound by Supreme Court dicta especially where "the dicta has been explicitly reaffirmed several times, across multiple different eras, by Justices both in support and in dissent"); Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements.").

83. *But see* Purcell v. BankAtlantic Fin. Corp., 85 F.3d 1508, 1513 (11th Cir. 1996) ("[A] dissenting Supreme Court opinion is not binding precedent."); Liberty/Sanibel II Ltd. P'ship v. Gettys Grp., Inc., No. 06-cv-16-FtM-29SPC, 2007 WL 1009274, at *1 (M.D. Fla. Apr. 12, 2007) (critiquing a party's reliance on a dissenting opinion from a federal circuit court, because "[a] district court cannot follow a dissenting opinion").

84. *See* Varsava, *supra* note 29, at 311 ("[B]y definition, dissenting judges reached a conclusion that opposes that of the court."); Eber, *supra* note 29, at 213 ("A dissent . . . is defined by its opposition to the majority judgment."); Frohock, *supra* note 6, at 985–86 ("A dissenting opinion inhabits its own land, not expressing the law but exposing its cracks. . . . Whatever the court says, the dissent says the opposite.").

rationales set forth in the binding precedent created by the majority opinions they oppose and critique.[85] If majority opinions embody what the law is, dissents embody the opposite, the path deliberately not chosen, a species of "opposite law."[86]

This counter-precedential nature can give dissents a destabilizing force as authority, muddying legal standards and arguably undermining the integrity of institutions and the credibility of precedent. It is no accident that many noted jurists—and especially Chief Justices—strongly discouraged dissents, and movements within the legal profession to abolish dissents gained traction at various times in the nation's history.[87] Indeed, for approximately three decades in the late nineteenth and early twentieth century, a significant faction led a crusade to ban dissenting opinions entirely in courts of last resort.[88] Although, obviously, the dissent abolitionists ultimately failed, the primary arguments they asserted illuminate legitimate and recurring anxieties regarding the role dissenting opinions can and should play as sources of authority. For example, opponents argued that dissenting opinions rendered

85. *See* Frohock, *supra* note 6, at 965 ("A dissenting judge opines on the case at hand for the inherent purpose of undercutting the law, providing a case law coda.").

86. *See* Krishnakumar, *supra* note 27, at 782 (stating dissents are "originally penned to record the losing, minority viewpoint").

87. From the beginning of the history of the courts in the United States, the very existence of dissenting opinions has consistently been the subject of controversy, with some arguing that dissents, particularly in courts of last resort, should be rare or even prohibited. *See, e.g.*, Sherry, *supra* note 4, at 197 (arguing that a law requiring the Court to issue one per curiam opinion per case, with "no attribution, no concurrences or dissents permitted" would cure much of the Court's current dysfunction); Smith, *supra* note 13, at 510–17 (recounting opposition to dissenting opinions within the legal profession and organized efforts to ban the publication of dissents in official reporters in the late 1800s and early 1900s). In the early days of the Supreme Court of the United States, dissenting opinions were rare; in its first decade, the Court mimicked the practice that prevailed in Great Britain for nearly all of its history, under which justices issued individual opinions seriatim and then announced a short summary of the issues on which all justices agreed. Venter, *supra* note 16, at 327. Marshall was largely successful in his efforts, and during thirty-five years as Chief Justice, there was "only one dissent in about every twenty-five cases." Henderson, *supra* note 13, at 318. Although the percentage of cases in which a dissent was published increased after Marshall's term—from four percent to ten percent—that relatively low percentage held constant for over a century. *See* Venter, *supra* note 16, at 327. State courts similarly saw relatively few dissents through the nineteenth and into the twentieth century; the Massachusetts Supreme Judicial Court had a long-standing tradition against dissent, for example, and the Pennsylvania legislature for some time even prohibited the publication of dissenting opinions in the state's official reporter. *See* Smith, *supra* note 13, at 510 n.8.

88. *See* Smith, *supra* note 13, at 510–15 (recounting opposition to dissenting opinions within the legal profession and organized efforts to ban the publication of dissents in official reporters in the late 1800s and early 1900s). The effort to ban dissenting opinions in courts of last resort did have some limited, short-term success, with Louisiana passing a constitutional amendment banning the publication of dissenting opinions in 1898 and several other jurisdictions considering similar actions. *Id.* at 510. Louisiana ultimately amended its constitution again in 1921 to lift the prohibition. *Id.* at 515 n.48.

the law indeterminate, creating uncertainty about the state of the law in the minds of members of the profession and the public.[89] Other opponents articulated the philosophy shared by many Chief Justices over the years:[90] that courts should speak as impersonal, "composite units," not as mere "collections of judges," and publishing dissenting opinions risked undermining the courts' "self-preservation as institutions."[91]

Nonetheless, the percentage of dissenting opinions rose sharply over the early twentieth century, and for the past seventy-five-plus years, at least fifty percent and usually closer to sixty-five percent of SCOTUS opinions have accompanying dissents.[92] At the same time, unease about dissents and their effect on the force and clarity of law as embodied in judicial decisions persists.[93]

And this unease is justified; dicta—even dicta from an opinion that otherwise states the agreed-upon law—is treated as non-binding for at least two considered reasons. First, as Chief Justice Marshall explained in *Cohens v. Virginia* in 1821, unlike the holding—which is "investigated with care, and considered in its full extent" because it will impact the outcome as to the

89. In fact, at least one author articulated the worry that "the dissenting opinion is at times fully as conclusive to the ordinary mind as the opinion which expressed the sentiment of the majority of judges." *From Bench and Bar*, N.Y. TRIB., Oct. 26, 1890, at 19, https://tile.loc.gov/storage-services/service/ndnp/dlc/batch_dlc_eagle_ver02/data/sn83030214/00175038425/1890102601/0779.pdf [https://perma.cc/2WXU-V8TA].

90. *See* Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 772 (2015) (explaining how Chief Justice Marshall played a crucial role in the norm of establishing consensus on the Supreme Court); Meghan Dalton, Note, *Calling Balls and Strikes? Chief Justice Roberts in October Term 2019*, 97 NOTRE DAME L. REV. 1327, 1343–44 (2022) (discussing Chief Justice Roberts's emphasis on consensus, judicial restraint, and unanimity by the Supreme Court).

91. *See* C. A. Hereschoff Bartlett, *Dissenting Opinions*, 31 L. MAG. & REV. 54, 55 (1906) (describing how dissenting opinions tended to create unrest in the public and spread confusion), https://dn790009.ca.archive.org/0/items/in.ernet.dli.2015.92723/2015.92723.The-Law-Magazine-And-Review--Vol-31_text.pdf [https://perma.cc/L74T-ARWV]. The Albany Law Journal, one of the nation's leading legal periodicals at the time and a driving force behind the anti-dissent movement, advanced this "corporate notion of courts," and opined that "there is no theoretical or practical good in disclosing the fact that in a particular case [a court] is made up of discordant fractions." Smith, *supra* note 13, at 511, 519 (quoting *Reporting Dissenting Opinions*, 18 ALB. L. J. 284, 285 (1878)).

92. *See* Epstein, Landes & Posner *supra* note 15, at 103.

93. Although the tide against dissents turned somewhat in the early twentieth century and dissenting opinions steadily increased in frequency between 1910 and 1945, *see* C. Herman Pritchett, *Politics and Value Systems: The Supreme Court, 1945-1946*, 8 J. POL. 499, 504 (1946), norms against dissents remained strong, and even surfaced in the American Bar Association's Canons of Judicial Ethics: "It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision," A.B.A., CANNONS OF JUDICIAL ETHICS 5 (1924), https://americanbar.org/content/dam/aba/administrative/professional_responsibility/pic_migrated/1924_canons.pdf [https://perma.cc/378F-LPFH].

parties and create a rule that binds future courts and future parties—dicta has different stakes, and thus might be less precise, less careful, and less well-considered.[94] This reasoning would seem to apply with even more force to dissenting opinions; dissenting judges, unfettered by the need to obtain agreement from any of their colleagues, and animated by disagreement, frustration, or even anger, may be more even brash or reckless in their statements.[95] Second, limiting the force of dicta bounds the power of judges and limits the risk of judicial overreach.[96] The case-or-controversy requirement of the U.S. Constitution authorizes courts to create binding rules when those rules are necessary to resolve the matters immediately before them; federal courts cannot give advisory opinions.[97] Statements of rule not necessary to the resolution of the immediate controversy thus cannot be binding sources of law.[98] Although this rationale may not apply directly to every statement in a dissent—indeed, many statements in a dissent would dictate a different outcome in the case or controversy before the court and thus bear directly upon it—the notion of cabining judicial power, and particularly the power of a lone dissenting judge, does.

IV. TOWARD A THEORY OF CITING DISSENTS

With all this in mind, then, we return to the questions I posed at the outset. When should a judge or advocate cite a dissenting opinion over other existing authority? For what purposes might it be most effective to cite a dissenting opinion? And when does citing a dissenting opinion breach norms in a way that implicates the reasons we do not treat dicta as binding—and the concerns anti-dissent crusaders have identified—and thereby disregard, disrespect, or even dismantle our precedent-based system?

That a judge or attorney might be tempted to cite a dissenting opinion is not particularly surprising. Indeed, the dissent is the sexy bad boy of

94. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399–400 (1821).

95. *See* Eber, *supra* note 29, at 226 (citing Benjamin N. Cardozo, *Law and Literature*, 14 YALE L. REV. 699, 703 (1925), *reprinted in* LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 34 (1986)); Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 42 (stating that the dissenter can "write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less differing views of one's colleagues," and can "address precisely the points of law that one considers important and no others").

96. *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1063 (2005) (explaining that "a central concern of the definition of dicta is to minimize judicial overreaching and to ensure legitimacy in the construction of actual holdings").

97. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000–01 (1994); A.W.B. Simpson, *The Ratio Decidendi of a Case and the Doctrine of Binding Precedent*, in OXFORD ESSAYS IN JURISPRUDENCE 148, 160–61 (A.G. Guest ed., 1961).

98. *See* Dorf, *supra* note 97 ("[C]ourts have legitimate authority only to decide cases, not to make law in the abstract.").

precedent, its allure deriving from the same source as its danger. It occupies its own genre, one shaped by a freedom the authors of majority opinions do not enjoy and characterized by more vivid language, impassioned phrasing, and at times a captivatingly naked self-indulgence.[99] Majority opinions generally must be restrained, careful, and precise; they are consciously making law and must maintain consensus to remain the majority.[100] As a result, a majority opinion is less likely to coin a memorable turn of phrase; "the spokesman of the court is cautious, timid, fearful of the vivid word, the heightened phrase."[101] On the other hand, "[a] judge authoring a dissenting opinion has more of a license to tell a story and depart from the conventions of 'traditional' legal writing than a judge authoring a majority opinion."[102] This license in many cases means that "[e]xuberant (or excess) prose is unconstrained."[103] Indeed, in celebrating the "unparalleled pleasure" of dissenting, Justice Scalia admitted that the dissenter, and particularly the solo dissenter, is able to, "express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority's opinion should engender."[104]

Liberated from the compulsion to curry consensus and the burden of binding future courts, dissenters may shatter the stuffy rhetorical conventions of the judicial opinion and speak more authentically or poetically, generating eminently quotable sound bites. Indeed, "when pressed, most appellate judges will admit that 'one discovers in [dissents] after all, a place for the genuine.'"[105] As a result, "[d]issents contain some of the most creative variations of legal writing,"[106] and "often exude an infused passion, an expressive potency, and even a telltale hint or two of not-so-latent literary leanings—together with other dynamic and imaginative qualities—that are typically lacking in more homogenized majority opinions."[107] Thus, judges may find themselves helpless to resist the siren song of the dissent, enticed to

99. *See* Scalia, *supra* note 95.

100. *See* UROFSKY, *supra* note 28, at 15 (describing how majority opinions must be carefully crafted to precisely reflect the collective opinion of all judges in the majority).

101. *Id.* (quoting ROBERT H. JACKSON, THE SUPREME COURT AND THE AMERICAN SYSTEM OF GOVERNMENT 17 (1955)).

102. *See* Iman Zekri, *Respectfully Dissenting: How Dissenting Opinions Shape the Law and Impact Collegiality Among Judges*, FLA. BAR J., Sep./Oct. 2020, at 8, 14.

103. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric*, 62 U. CHI. L. REV. 1371, 1413 (1995).

104. Scalia, *supra* note 95.

105. Robert G. Flanders, Jr., *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401, 402 (1999) (quoting Marianne Moore, *Poetry*, *in* COLLECTED POEMS 40, 40 (1951)).

106. Zekri, *supra* note 102.

107. Flanders, *supra* note 105, at 410.

quote a pithy phrase or vivid exhortation from a dissenting opinion over the comparably pallid prose of binding precedent.

But even if we understand why citing a dissenting opinion might be attractive, some dissent citations are more justifiable—and less troubling—than others. It helps to think of dissent citations as falling on a continuum. At one end of that continuum are citations that, instead of occurring *despite* the dissent's role as counter-precedent, occur precisely *because* the dissenting opinion contradicts the prevailing legal standard or, more narrowly, the particular majority opinion to which it responds.[108] The paradigmatic example would be a dissent citation in support of an argument to overturn precedent and flip the law in favor of the position set forth in the dissent.[109] Less extreme but also toward that end of the continuum would be those citations that support critiques of the majority opinion to which the dissent responds or seek to cabin or otherwise define the impact of that opinion.[110] Similarly, a judge might deploy citations to dissents to illustrate disagreement and thus lack of clarity in the law.[111] Such citations use dissents frankly and transparently as what they are—perhaps what the law should be, but not currently the law. The judge is simply citing the dissent to show that someone else agrees with the proposition being asserted or shares the concern being voiced, or to illustrate disagreement or confusion.[112] At the other end of the continuum are those citations that most implicate the concerns about dicta as precedent: citations that treat the dissent as law, pointing to dissents as a source for a rule that compels a particular outcome, and treating the dissent as a source of—or at least on the same level as—binding precedent. [113]

Probably the least surprising dissent citation would be one that honors the dissenting judge's core purpose: that "appeal . . . to the intelligence of a future day," to seek or justify a "decision [that] may possibly correct the error in which the dissenting judge believes the court to have been betrayed." [114] Indeed, such citations are the ones that have received the lion's share of the

108. *See* discussion *infra* Section III.C.

109. *See infra* notes 114–16 and accompanying text.

110. *See* cases cited *infra* note 208.

111. *See infra* notes 122–124 and accompanying text.

112. *See infra* notes 122–124 and accompanying text.

113. *See infra* notes 133–135 and accompanying text.

114. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928); *see also* Ginsburg, *supra* note 15, at 3–7 (noting the power of dissents as warnings against the rule of the majority, considerations for the future, and attractions for public attention); Brennan, *supra* note 15, at 430 (explaining how a dissent is "offered as a corrective—in the hope that the Court will mend the error of its ways in a later case"; indeed, the best dissents "seek to sow seeds for future harvest").

scholarly attention.[115] We would expect those to occur when social mores—or the ideological composition of the relevant court—have changed such that the arguments advanced by the dissent become more likely to find majority support. Thus, we would particularly expect to see dissents cited in ideologically charged cases, where the cynical might say predicting an outcome requires only the ability to "count to five."[116] By that same reasoning, we would also be unsurprised to see an appellate judge citing the dissent from the opinion under review.

In addition, the dissenting opinion's unique role as counter-precedent, positioned in opposition to the majority's reasoning and outcome, makes it particularly suitable to cite as precedent for three other specific purposes: (1) to characterize or cabin the rule created by the majority opinion, (2) to critique the rule created by the majority opinion, and (3) to advocate that precedent be overturned. Some of the existing research on dissent citation supports this.[117] For example, in her study of "canonical dissents," Professor Anita Krishnakumar observed that one of two reasons courts seemed to cite those dissents was as "warnings."[118] Such judges cited the famous dissents to provide examples of doctrines that led to unworkable or "morally repugnant" results—and to support an argument that the path the judge was choosing to reject would lead to similar catastrophe.[119] For example, Professor Krishnakumar observed that Justice Harlan's dissent in *Plessy v. Ferguson* is often cited for its "symbolic power as a voice of caution against a doctrine that later experience has proven to be anathema" and that the dissent in *Korematsu* is frequently cited for similar reasons.[120] Similarly, citations to Holmes's *Lochner* dissent in the New Deal era tended to reflect a "judicial reaction to the country's lived experience under the *Lochner* doctrine" and a repudiation of the economic rights jurisprudence that *Lochner* represented.[121]

115. *See, e.g.*, UROFSKY, *supra* note 28, at 340 (discussing how certain Supreme Court dissents throughout history hinged on a unique historical hindsight and courage to shape societal perception, the rule of law, and public policy in later decisions).

116. *See* Epstein, Landes & Posner, *supra* note 15, at 108–09, 129–30, 132–34 (examining the reasons that cause a judge to refrain from dissenting). Professor Krishnakumar anticipated that "the dissents written in cases involving morally-charged political issues—such as *Bowers v. Hardwick* (homosexuality), *Roe v. Wade* (abortion), *Furman v. Georgia* (death penalty)—are the most likely candidates for future canonization, since morally-charged cases are the most susceptible to popular repudiation." Krishnakumar, *supra* note 27, at 825 (citations omitted).

117. *See, e.g.*, Ginsburg, *supra* note 15, at 4; Brennan, *supra* note 15, at 430.

118. Krishnakumar, *supra* note 27, at 819–22.

119. *Id.* at 824.

120. *Id.* at 800–01, 803–04.

121. *Id.* at 789–90 (characterizing Court citations of *Lochner* Era dissents as "an admonition against repeating the egregious mistakes of the *Lochner* era").

By definition, dissents evidence disagreement among judges as to what the law is or should be.[122] As a result, one would anticipate that another reason for which a judge might cite dissents would be to illustrate such disagreement. Judges might have several reasons for wishing to demonstrate disagreement among courts, including as evidence that the law is unclear, that a decision creates an unworkable standard, or that a principle might not be as widely accepted as some might assert.[123]

All these examples fall neatly into the category of citing dissents as counter-precedent. The citer is not pointing to the dissents as a source of rule but as evidence that not everyone agrees with the status quo, and some of those disagreeing have done so with particular force, stature, or eloquence. But those are not the only expected or even appropriate reasons that an advocate or judge might cite to a dissenting opinion.[124] Other citations acknowledge or even leverage the dissenting opinion's opposite-law nature and perhaps even its author's lone-wolf, outsider role.[125]

One such reason we might anticipate a judge to cite a dissent—or a lawyer to cite a dissent in a brief to that judge—is a strategic one: when that judge authored or joined the cited dissent.[126] I have thought of this as an "as I've been saying . . ." citation, but Professor Richard Re has coined a more sophisticated term to describe this phenomenon: personal precedent.[127] Personal precedent refers to "judges' presumptive adherence to their own previously expressed legal views, as contrasted with the institutional precedent issued by court majorities."[128] Judges have many reasons to seek to be and appear consistent with their own past views—maybe even more so now, in the age of the celebrity Justices—and some likely care more about that personal consistency than they do about institutional consistency.[129] This circumstance may motivate dissent citations in a few different situations. A judge may cite another judge's dissent to nudge that judge to vote in a manner consistent with those views in a new case.[130] Or a judge who fears that their

122. *See, e.g.*, Frohock, *supra* note 6, at 965.

123. *See infra* notes 208–209 and accompanying text.

124. *See* Zekri, *supra* note 102, at 9.

125. *See* Krishnakumar, *supra* note 27, at 782.

126. *See* Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 845–46 (2023).

127. *See generally id.* (defining "personal precedent" and illustrating the concept in practice).

128. *Id.* at 826.

129. *Id.* at 830–31.

130. One famous example of this strategy is the "Kennedy Brief" that became prevalent in the early 2000s when Justice Kennedy was perceived to be a swing vote on many issues. These briefs were "so common that [they'd] become an inside joke within the Supreme Court bar." *Id.* at 845. Another example arises from the very term I analyze later in this paper: in *New York*

colleague may—for institutional, political, ideological, or other reasons—vote in a manner arguably inconsistent with the judge's previously stated views will nudge that judge toward consistency with a citation of the judge's own words. Similarly, in the "as I've been saying…" vein, a judge whose opinion defies precedent may cite their own dissent to justify that action, demonstrating consistent disagreement with a wrong-headed line of reasoning or outcome.[131] Or a judge may "shame cite" a dissent authored by a judge joining an opposing opinion, calling that judge out for inconsistency with personal precedent. [132]

On the other hand, the nature of dissents as counter-precedent would make it particularly surprising—or even somewhat of a red flag—if a lawyer or court cited a dissenting opinion in a way that assumes that the precedent at issue sets forth a rule. Here, I use the word "rule" in the way legal philosopher Ronald Dworkin has done in distinguishing between legal "rules" and legal "principles": legal "rules" are standards that must be applied when a case presents a certain set of circumstances.[133] They apply "in an all-or-nothing fashion," and if the facts contemplated by a rule are presented by a case, that rule compels a particular outcome.[134] In looking at the coding categories Professor Larson used in his study, for example, at least three of his "rational uses of cases" contemplate citing a case in a way that invokes a legal rule: (1) citing a case to support a statement that a particular legal rule exists "in the form that the authors assert," (2) citing a case for a "case example," "where the author describes a previous case, including facts about it and its outcome, then argues that the instant case should come out the same (opposite) way because the cases were (dis)similar," and (3) citing a case as part of a cumulative argument that many courts have decided a similar issue in a similar fashion, and thus the instant case should be decided in the same fashion.[135]

Citing a dissenting opinion for any of these three purposes would seem irrational for a few reasons. First, because a dissenting opinion is not binding precedent, it cannot set forth a rule that compels an outcome in any future case.[136] Second, in many instances, any "rule" the dissent purports to propose directly contradicts the "rule" set forth in the corresponding majority opinion;

State Rifle & Pistol Association v. Bruen, the parties' briefs and many amicus briefs cited a circuit court dissent authored by then-Judge Kavanaugh, who, of course, was on the Court deciding *Bruen*. *See id*. at 845–46. The majority opinion itself cited the Kavanaugh circuit court dissent four times. *See id.* at 846 (citing *Bruen*, 597 U.S. 1, 23 n.5, 31, 36 (2022)).

131. *Id.* at 839–40.

132. *See id.* at 852.

133. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 24 (1977).

134. *Id.*

135. Larson, *supra* note 38, at 140.

136. COUGHLIN, ROCKLIN & PATRICK, *supra* note 37.

the law compels the opposite outcome.[137] In that circumstance, it would make no sense for a judge to cite a dissent for the proposition that a legal rule exists or to analogize to the dissent's application of a rule to a particular set of facts, and it would make little more sense to cite the dissent as cumulative support. To the extent that the dissent agrees with the majority's statement of the rule and simply argues that the majority misapplied that rule to the facts, (1) that argument about how the rule should apply contravenes binding law, and (2) it makes more sense to cite the majority opinion itself for the rule statement.[138] Third, even to the extent that, in the process of responding to a majority opinion, a dissent happens to state a legal rule that is good law and supported by binding precedent, it would make no strategic sense to cite the dissent for that proposition. In fact, citing an optional authority to support what one asserts to be a rule might even suggest that the statement was not, in fact, a binding rule because it has no visible support in mandatory authority.[139] At minimum, citing an optional authority to support a rule statement would undercut the legitimacy and persuasiveness of that rule statement. Indeed, for a judge to cite a dissent to support a rule statement—particularly if binding precedent exists to support that rule—arguably either signals sloppiness or communicates some level of disregard for the role of precedent.

On the other hand, citing a dissenting opinion to support an assertion of what Dworkin would characterize as legal "principle" makes more sense. Unlike legal rules, principles do not set forth legal consequences that follow automatically when the conditions provided are met.[140] Rather, a principle is a consideration that may be implicated by the facts of the case, and, if it is, it merely tips the balance in one direction or another.[141] In particular, methodological principles, such as an opinion's endorsement or rejection of using textualism, or legislative history, or other interpretive methods, are generally not considered to bind future judges or justices.[142] Because legal principles do not compel outcomes, citing authority that need not be followed—and even counter-precedent that disagrees with the authority setting forth a governing rule—would be more appropriate, or at least not jarringly inappropriate. Further, dissents frequently turn on and develop broad legal principles and thus might be good sources for powerful, resonant expressions of those principles, making citation to them particularly

137. *See* Varsava, *supra* note 29, at 311.

138. *See* Flowers, *supra* note 37.

139. *See* sources cited *supra* note 68.

140. DWORKIN, *supra* note 133, at 25.

141. *See id.* at 26.

142. *See* Re, *supra* note 126, at 847; Kisor v. Wilkie, 588 U.S. 558, 624 (2019) (Gorsuch, J., concurring) ("[W]e do not regard statements in our opinions about such generally applicable interpretive methods . . . as binding future Justices with the full force of horizontal stare decisis.").

tempting.[143] In much the same vein, statements of public policy in an opinion would almost certainly be dicta, and dissenting opinions often assert public policy that the majority opinion would contravene.[144] Thus, for similar reasons, citing a dissent as evidence of public policy would not be overly problematic.

In fact, the limited research tracing the citation of particular dissenting opinions seems to support this hypothesis.[145] In her study of so-called "canonical dissents"—a small group of dissents that "not only have shaken off the stigma of the losing position but have come to command a constitutional stature far superior to that accorded most majority opinions in other cases"—Professor Anita Krishnakumar concluded that one of two key reasons judges cite to those dissents is to support assertions of broad principles.[146] For example, judges cite to the dissents in the "free speech cases" and in *Olmstead* to support broad Constitutional principles rather than to reject the rules embodied by the holdings of the majorities in those cases.[147] Similarly, Justice Harlan's dissent in *Poe v. Ullman*[148] is often cited because it "rested on an expansive construction of the word 'liberty' in the Fourteenth Amendment's due process clause"—again, a citation to support the assertion of broad Constitutional principles rather than narrow rule statements.[149]

V. INFORMING THEORY WITH DATA: CITATIONS OF DISSENTING OPINIONS IN THE 2021 TERM

With this framework for dissent citation in mind, we turn to applying that framework to one real-world example. This Part reports data based on a

143. *See* Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445, 1465–69 (2012) (identifying "principle-based dissents" as one of three categories of dissents that the author had written in her career on the U.S. Court of Appeals for the Seventh Circuit). Judge Wood described principle-based dissents as those that "raise a broad question of law or principle." *Id*. at 1465. In reflecting on her own jurisprudence on the Court of Appeals for the Seventh Circuit, Judge Wood gave several illustrative examples of her own "principle-based dissents," including one in which she asserted a concern that the majority's decision violated a well-established Constitutional principle against discriminating against children born outside marriage, and another in which she wrote to object to the majority's failure to apply strict scrutiny to legislation that would place "a significant burden on the right to vote of specific and identifiable groups of voters." *Id.* at 1466–69.

144. *See* Vanessa Baird & Tonja Jacobi, *How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court*, 59 DUKE L.J. 183, 201–03 (2009).

145. *See, e.g.*, *id.* at 192–96.

146. Krishnakumar, *supra* note 27, at 782.

147. *Id.* at 798–800.

148. 367 U.S. 497, 523–56 (1961) (Harlan, J., dissenting).

149. Krishnakumar, *supra* note 27, at 802–03.

quantitative and qualitative analysis of the sixty-six opinions issued by the Supreme Court of the United States during the 2021 term. Section A explains why looking first at how SCOTUS cites dissents makes sense. In a similar vein, Section B discusses the reasons behind using all the opinions issued during the 2021 term as the dataset for this pilot test. Section C describes the methodology used to identify, describe, and code the citations to dissenting opinions in those opinions. Section D presents the resulting data.

A. Why the Supreme Court of the United States?

Although, for many reasons, the Supreme Court of the United States is not the most representative of the practices of everyday judges, it makes a good subject for a pilot study for several key reasons. First, because the Court is the highest authority in our court system, no vertical precedent binds it, and it can reverse its own horizontal precedent if it so chooses.[150] As a result, the Court has more flexibility to cite and rely on optional or even counter-precedential sources in its opinions. Thus, if any court is citing dissents with any regularity, the Supreme Court of the United States is the most likely court in which to observe this practice.

Second, the Court generally accepts for review only the most difficult cases.[151] Cases in which the Court grants certiorari often present issues on which the federal circuit courts of appeal have reached conflicting conclusions, or issues of nationwide importance or significance.[152] The fact that lower courts disagree suggests that the cases turn less on clear, dispositive rules and more on the interpretation and application of broad principles. Thus, if it is true that a court is more likely to cite dissents to support assertions of principle rather than assertions of rule, such an opportunity would present itself with more frequency in cases before the Supreme Court of the United States.

Further, in light of the Court's position atop the United States court system and its role in setting rules and norms for courts and attorneys,[153] it makes some sense to look to the Justices of the Court for clues as to norms,

150. Some have phrased this point even more strongly: "[T]he political nature of so many of the Court's cases and the fact that no higher court can discipline the Supreme Court's decision making—the Justices are likely to chafe at having to follow precedents created by their predecessors." Epstein, Landes & Posner, *supra* note 15, at 105.

151. *See* Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 925 (2022).

152. SUP. CT. R. 10(a)–(c); *see, e.g.*, STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE ch. 4, §§ 4.3–4.4 (11th ed. 2019) ("A well-established ground for granting certiorari, reflected in Rule 10(a), is the existence of a conflict between the decision as to which review is sought and one rendered by the Supreme Court or some lower court whose judgment is final in the absence of Supreme Court review.").

153. *See* Miller, *supra* note 59, at 235–38.

including when it comes to citing precedent. Of course, unlike judges on intermediate courts of appeal or trial courts, Justices on the Court are not subject to any vertical precedent.[154] And, of late, they seem less inclined to see themselves as constrained by stare decisis.[155] As a result, they have unique flexibility in selecting authority to justify their decisions. Nonetheless, because of its role and position, looking to the Court's dissent-citation practices as an initial step can help inform a broader inquiry in the future.

Looking to the Court is also useful because we just generally have more knowledge about the views, practices, philosophies, and personalities of the Justices on the Supreme Court of the United States than we do about other judges.[156] For example, we know that Chief Justice Roberts shares former Chief Justice Marshall's strong preference that the Court as an institution speak with a unified voice and, as a result, also shares Marshall's general aversion to dissents.[157] Thus, examining how often Roberts cites to dissenting opinions in a single term is, at minimum, interesting. Similarly, Justice Thomas has been open about his disdain for stare decisis; he has "made it clear that he does not follow precedent."[158] If it is true that citing more dissenting opinions correlates with a lesser regard for precedent, then we would expect to see Justice Thomas cite notably more dissenting opinions than his fellow Justices do. The 2021 Term was Justice Barrett's first with the Court; whether and how she cites dissents as a new Justice might give an indication of her own judicial philosophy.[159]

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154. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 824 (1994).

155. *See* Miller, *supra* note 59, at 238–40 (discussing the trend of modern Supreme Court to overturned settled precedent).

156. Re, *supra* note 126, at 833 (stating that at least eighty-seven law review articles have been published just covering the members of the current Court).

157. Henderson, *supra* note 13, at 283 (explaining how Chief Justice Marshall and Chief Justice Roberts preferred the Court to speak with one unified voice in opinions); Dalton, *supra* note 90 (discussing Chief Justice Roberts's emphasis on consensus, judicial restraint, and unanimity by the Supreme Court).

158. EPSTEIN, LANDES, & POSNER, *supra* note 28, at 263; *see* Gregory Maggs, *Justice Thomas and Stare Decisis*, 2 HARV. J.L. & PUB. POL'Y PER CURIAM 1, 1 (2021) (citing author's experience as Justice Thomas's law clerk during the 1991 term); Gamble v. United States, 587 U.S. 678, 720 (2019) (Thomas, J., concurring).

159. *See* Daniel L. Kaplan, *Amy Coney Barrett: A Mellower Scalia*, A.B.A: CRIM. JUST. (Oct. 1, 2023), https://www.americanbar.org/groups/criminal_justice/resources/magazine/2023-fall/amy-coney-barrett-mellower-scalia/ [https://perma.cc/Q4M7-JGSG]; Ann E. Marimow, *Justice Amy Coney Barrett is Charting Her Own Path on the Bench*, WASH. POST (July 4, 2024) https://www.washingtonpost.com/politics/2024/07/04/amy-coney-barrett-supreme-court-dissents/ [https://perma.cc/XL94-U6FP] (describing Justice Barrett as independent on the bench and willing to publicly disagree with her colleagues).

B. Why the 2021 Term?

In large part, I chose the 2021 term as the subject for my pilot test because I thought that if Supreme Court Justices were citing dissenting opinions with any regularity, they almost certainly would be citing dissents during a term in which the Court decided a number of momentous and politically charged cases and overturned or abrogated longstanding precedent. The 2021 term fit that description, of course; that term not only saw the Court overrule *Roe* and *Casey* in *Dobbs v. Jackson Women's Health Organization,*[160] but also saw the Court confirm in *Kennedy v. Bremerton School District*[161] that it had abandoned the fifty-year-old *Lemon* test in Establishment Clause cases.[162] The Court also issued polarizing opinions in controversial Second Amendment,[163] Free Exercise,[164] and ineffective assistance of counsel[165] cases, among others. If my hypotheses were correct that courts are more likely to cite dissents when overruling or abrogating precedent or in controversial cases where the court was divided along ideological lines, then I would expect to see a number of dissents cited in this term.

I also suspected that the 2021 term could be an interesting subject because it was the first full term with the 6-3 ideological split and conservative supermajority created when Justice Barrett was confirmed to replace the late Justice Ginsburg on the Court in October of 2020.[166] If Justices would be more likely to cite dissenting opinions in cases presenting particularly controversial, polarizing issues—with one symptom of a "polarizing" issue being an opinion reflecting a Court split along ideological lines—then that phenomenon should be particularly visible in this term.

Beginning with this term also sets up the opportunity for some interesting and illuminating contrasts. For example, the 2023 term shaped up to be one that rivaled the 2021 term in terms of reversing and eroding precedent and

160. 97 U.S. 215, 302 (2022).

161. 597 U.S. 507 (2022).

162. *Id.* at 510.

163. *See* New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 70–71 (2022).

164. *See* Carson v. Makin, 596 U.S. 767, 789 (2022) (holding that Maine's "nonsectarian" requirement for its otherwise generally available tuition assistance payments violated the Free Exercise clause of the First Amendment); Shurtleff v. City of Boston 596 U.S. 243, 259 (2022) (holding that City's display of a religious flag was permissible due to the First Amendment's guarantee of freedom of religious expression).

165. *See* Shinn v. Ramirez, 596 U.S. 366, 382–84 (2022) (holding federal habeas court may not consider additional evidence beyond the state-court record solely because of ineffective assistance of state postconviction counsel).

166. *See* Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR: NEWS (Oct. 26, 2020 at 20:07 ET), https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court [https://perma.cc/RM66-HRXT].

cases fraught with public controversy.[167] Comparing the data on dissent citations in the 2023 term with that of the 2021 term, and then contrasting that with data on dissent citations in a less "noisy" term—perhaps the 2005 term, one of the only terms since the 1940s in which over fifty percent of the Court's opinions were issued without dissenting opinions[168]—could further support the hypothesis that the Justices are more likely to cite dissents in terms in which it is more divided.

C. Methodology

I, and at least one of my research assistants, examined every opinion issued by the Supreme Court of the United States during the 2021 term[169] to determine whether it cited any dissenting opinions.[170] We only counted citations to "pure" dissenting opinions, not to opinions concurring in part and dissenting in part; that process made the analysis cleaner, and we did not have to scrutinize the opinion to determine whether the portion cited was true counter-authority, as characterized in this paper, or whether it supported the outcome determined by the majority opinion. On the other hand, omitting citations to opinions concurring in part and dissenting in part eliminated many citations to notable text critiquing precedent, including many citations in the *Dobbs* majority to opinions concurring in part and dissenting in part in *Planned Parenthood v. Casey*.[171]

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167. *See* Karen M. Tani, Foreword: *Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 2 (2024) (describing cases on the 2023 Supreme Court term that eroded previous precedent and implicated controversial public figures).

168. *See* Ginsburg, *supra* note 15, at 1 (indicating that fifty-five percent of cases in the Supreme Court's 2005 term were unanimous in the bottom-line judgment).

169. We worked from the list of "Opinions of the Court" for the 2021 term. *Opinions of the Court - 2021*, SUP. CT. U.S.: OPS., https://www.supremecourt.gov/opinions/slipopinion/21 [https://perma.cc/RM66-HRXT].

170. To determine whether an opinion cited any dissenting opinions, I, and at least one of my research assistants, pulled up the case on Westlaw and used the search function to search for the word "dissenting," under the theory that the proper citation format to the dissenting opinion in a case includes that word in an explanatory parenthetical. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.6.1(a), at 113 (Columbia L. Rev. Ass'n et al. eds., 22d ed. 2025). Once we located a citation to a dissenting opinion through this method, we also scrutinized the next few citations in the case and counted any "*id.*" or "*ibid.*" citations immediately following that first citation to the dissenting opinion as additional citations to that dissent. Unfortunately, a few citations may have escaped our notice through this method; if the Justice drafting the opinion referred to the name of the dissenting Justice and the dissent in the text of the sentence preceding the citation, they often did not include the word "dissenting" in the citation itself. *See id.* (giving language that seems to be mandatory, but the Bluebook is silent on in-text references to judicial dissents). We caught many of these, but we may not have caught them all.

171. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 281 (2022) ("As Justice Scalia noted in his *Casey* partial dissent, determining whether a burden is 'due' or 'undue' is 'inherently standardless.' 505 U.S. at 992.").

We counted each dissent citation, including "*id.*" and "*ibid.*" citations. If an opinion cited to a dissent several times in one paragraph, for example, we counted each of those citations as one citation to a dissent. If an opinion cited to a dissent to that same opinion, however, we did not include that citation in the count; an attorney appearing before the Court in a particular case would not have been able to cite the dissenting opinion in that same case in their own briefs, so citations to those "internal" dissents would not provide particularly instructive insights for attorneys. Further, such citations would almost always be for the purposes of response or refutation rather than any reliance on the cited dissent for some form of authority. That said, we did count any citations to the dissent in the lower court opinions in the case under review because I anticipated that it would be fairly common practice for an attorney to cite the dissent from the opinion below in asking the court to reverse that opinion.

We also included citations to dissents in other cases decided in the 2021 term in our count. Although the parties likely did not have access to those dissenting opinions at the time they wrote their briefs—although depending on the briefing schedule, it is possible that they could have—including those citations in our analysis still provided instructive information because we did not think that whether a dissent was issued in the immediately previous term or the current term meaningfully changed what we could learn from a citation to it. Further, we believed it would be more likely that the Justice citing that dissent would be relying on it as some form of authority rather than responding to or refuting assertions made in it.

For each citation to a dissenting opinion, we then recorded the following information in a spreadsheet:

- The name and citation of the case in which the dissent was cited;
- The number of Justices who joined the majority and the number who dissented in the case;
- The name of the Justice who wrote the majority opinion;
- The names of any Justices who wrote concurring or dissenting opinions in the case and the names of the justices who joined in those respective opinions;
- The full citation to the dissenting opinion cited, including the "pinpoint" citation to the page or pages at issue;
- The name of the judge or Justice authoring the dissenting opinion cited, as well as the names of any judges or Justices sitting on the Court during the 2020-21 term who also joined in that dissenting opinion;
- The name of the Justice who wrote the opinion citing that dissent;

- Whether the opinion in which the dissent was cited was a majority opinion, a concurring opinion, a dissenting opinion, or an opinion concurring in part and dissenting in part;
- Whether the citation to the dissent appeared in a footnote;
- Whether the citation to the dissent was preceded by *see*, *see also*, *see, e.g.*, or another introductory signal;
- Whether that citation represented a "sticky" citation—that is, whether the dissent was cited in one of the party briefs.[172]

I and at least one of my research assistants also examined the text surrounding the dissent citation to discern the purpose for which the Justice seemed to be citing the dissenting opinion. Based on the framework set forth in Part IV of this paper, we coded each citation as serving one or more of the following purposes:

- Critiquing or advocating to overturn precedent;
- Cabining or characterizing precedent;
- Issuing a "warning" regarding the potential impact of the majority opinion;
- Illustrating disagreement among courts;
- Supporting a statement of public policy;
- Supporting a statement of legal principle;
- Invoking "personal precedent" of the author or another Justice on the Court;
- Supporting a statement of legal rule;
- Supporting a "case illustration" for purposes of analogy;
- Identifying the source of a direct quotation, whether that quotation appeared in the body text of the opinion or in an accompanying parenthetical;
- Adopting a characterization of fact from a lower court opinion in the same matter; or
- Some other purpose.[173]

For each of the sixty-six cases before the Supreme Court of the United States in the 2021 term that resulted in an opinion, we also reviewed the party briefs[174] for dissent citations. Although we collected and logged in a

172. *See infra* Appendix C (providing a chart identifying "sticky" citations).

173. *See infra* Appendix A (providing a general chart indicating the purpose for which each dissent was cited).

174. To keep the universe of documents manageable, we did not include amicus briefs in our review. Looking at how amicus briefs cite dissents, and the extent to which any of those

spreadsheet various types of data about the briefs,[175] for the purposes of this paper, I only reviewed whether any of the dissent citations in the briefs were "sticky," that is, whether any of the dissent citations in the briefs seemed to cause matching citations in the resulting opinion.[176] In looking at "sticky" citations, I was more interested in whether the portion of the dissent cited in the opinion was also cited on one of the party briefs, largely because I was interested in whether it seemed like the Court was citing to the dissent *sua sponte* or because it was influenced by some source other than the party briefs.[177] Attempting to discern the traits of dissent citations that "stick" in the resulting opinion, although a worthy subject of further study, is beyond the scope of this paper.

D. The Data

First, the Court is definitely citing dissenting opinions, or at least it did in its 2021 term.[178] In fact, the Court cited to a dissenting opinion at least once in forty of its sixty-six opinions in that term.[179] In the term overall, the Court cited to a dissenting opinion a total of 201 times.[180] Seventy-five of those dissent citations were in majority opinions, forty-six in concurrences, four in opinions concurring in part and dissenting in part, and seventy-seven in dissenting opinions.[181] Of the seventy-five citations to dissents in majority opinions, twenty-five came in footnotes.[182] In counting only pure dissenting

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citations "stick" in the resulting opinion, is certainly a worthy focus of further study. In *Dobbs* alone, over 140 amicus briefs were filed. Ellena Erskine, *We Read All the Amicus Briefs in* Dobbs *so You Don't Have To*, SCOTUSBLOG (Nov. 30, 2021) https://www.scotusblog.com/2021/11/we-read-all-the-amicus-briefs-in-dobbs-so-you-dont-have-to/ [https://perma.cc/L4RY-S799]; *see also* Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 YALE L.J.F. 141, 144–46 (2021), https://yalelawjournal.org/pdf/F7.WhitehouseFinalDraftWeb_v4zwakx5.pdf [https://perma.cc/6W7G-JP2Q] (discussing the increased volume and influence of amicus briefs in Supreme Court decisions).

175. For each "sticky" citation, we collected the following information: the document's title and the author of the source brief, the dissenting opinion that was cited, the purpose for which the source brief cited the dissenting opinion, and the purpose for which the authoring Justice cited the dissenting opinion.

176. *See* Bennardo & Chew, *Citation Stickiness*, *supra* note 25 (explaining that a citation is "sticky" when it is cited in one of the parties' briefs and then subsequently cited again in the court's opinion).

177. Of course, examining how lawyers are using dissenting opinions in their briefs and which types of use seem most likely to "stick" in the resulting opinion is also a rich area for inquiry.

178. *See infra* Appendix A.

179. *Compare infra* Appendix A (identifying dissent citations), *with Opinions of the Court – 2021*, *supra* note 169 (listing the full list of opinions in the 2021 term).

180. *See infra* Appendix A.

181. *See infra* Appendix A.

182. *See infra* Appendix A.

opinions—rather than opinions concurring in part and dissenting in part—this number of citations to majority opinions arguably undercounts citations to dissenting principles; in his majority opinion in *Dobbs* and the footnotes thereto, Justice Alito cited to a dissenting opinion twenty-five times,[183] but he also cited frequently to opinions concurring in part and dissenting in part, particularly those from *Planned Parenthood v. Casey*.[184]

Second, some Justices cite dissents significantly more than others do.[185] Justice Thomas has the most citations to dissents with sixty-six.[186] Justice Alito is next, with thirty-five,[187] but again *Dobbs* skews those numbers; without *Dobbs*, Alito cited dissenting opinions only ten times, which drops him to seventh.[188] Justice Gorsuch is next with twenty-nine.[189] Justice Breyer barely edges out Justice Sotomayor: he cited to dissenting opinions twenty-five times to her twenty-two;[190] both of those totals include nine dissent citations in the jointly authored dissent in *Dobbs*.[191] Justice Kagan cited dissents eighteen times,[192] with half of those citations coming in the jointly authored dissent in Dobbs, and Justice Kavanaugh follows with eleven dissent citations.[193] Finally, and perhaps unsurprisingly, Chief Justice Roberts and Justice Barrett cited dissents rarely; Roberts cited dissents only times, and Justice Barrett only twice.[194]

Third, the majority of the dissents cited came from opinions of the Supreme Court of the United States.[195] Thirty-three of the citations were to dissents from lower courts (primarily federal courts of appeal).[196] Of those,

183. *See infra* Appendix A.

184. *E.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022) (citing Planned Parenthood v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in judgment in part and dissenting in part)); *id.* at 249 (citing *Casey*, 505 U.S. at 952 (Rehnquist, C.J., concurring in judgment in part and dissenting in part)); *id.* at 249 (citing *Casey*, 505 U.S. at 952 (Rehnquist, C.J., concurring in judgment in part and dissenting in part)); *id.* at 283 (citing *Casey*, 505 U.S. at 964–66 (Rehnquist, C.J., concurring in judgment in part and dissenting in part)); *id.* at 284 (citing *Casey*, 505 U.S. at 965 (Rehnquist, C.J., concurring in judgment in part and dissenting in part)); *id.* at 286 (citing Lehnert v. Ferris Fac. Ass'n, 500 U.S. 507, 551 (1991) (Scalia, J., concurring in judgment in part and dissenting in part)); *id.* at 291 (citing *Casey*, 505 U.S. at 963 (Rehnquist, C.J., concurring in judgment in part and dissenting in part)).

185. *See infra* Appendix B (providing chart of citations by Justice).

186. *See infra* Appendix B.

187. *See infra* Appendix B.

188. *See infra* Appendix B.

189. *See infra* Appendix B.

190. *See infra* Appendix B.

191. *See infra* Appendix B.

192. *See infra* Appendix B.

193. *See infra* Appendix B.

194. *See infra* Appendix B.

195. *See infra* Appendix A.

196. *See infra* Appendix A.

twenty were citations to the dissent in the opinion under review; the others were citations to dissents in other lower court opinions.[197]

Fourth, of the 201 dissent citations, only thirty represented "sticky" citations, where the Court's citation of a dissenting opinion appeared to echo a similar citation in one of the party briefs.[198] The remaining 171 dissent citations may have been prompted by a citation in an amicus brief or come from the citing Justice *sua sponte*.

It does seem that, at least in the 2021 term, Justices were substantially more likely to cite to dissents in their opinions in cases where the Court was split along ideological lines.[199] Because the Court in the 2021 term had six Justices appointed by Republican presidents and three Justices appointed by Democratic presidents, a 6-3 decision frequently reflects such a divide.[200] In the 2021 term, sixteen opinions were decided 9-0, and five of those opinions cited dissents; twelve opinions were decided 8-1, and nine of those cited dissents; five cases were decided 7-2 and four of those cited dissents; nineteen cases were decided 6-3, and seventeen—almost all—of those majority opinions cited dissents; ten cases were decided 5-4, and five of those cited dissents.[201] Of the 201 dissent citations in opinions issued in the 2021 term, 130 were cited in majority 6-3 decisions.[202] Another eight were cited in majority 5-4 decisions.[203]

In terms of the purposes for which Justices cited dissents, the most common purpose was to identify the source of a quotation; 121 of the dissent citations supported quoted language, whether that language appeared in the

197. *See infra* Appendix A. This finding is consistent with Epstein, Landes, and Posner's observation that dissents from the Supreme Court of the United States were cited significantly more frequently than those from the Federal Courts of Appeal. *See* EPSTEIN, LANDES & POSNER, *supra* note 28, at 288–90.

198. *See infra* Appendix C.

199. *See* ANGIE GOU, ELLENA ERSKINE & JAMES ROMOSER, STAT PACK FOR THE SUPREME COURT'S 2021-22 TERM 3 (2022), https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf [https://perma.cc/4YWR-K933] (noting that fourteen of the nineteen 6-3 decisions in the 2021 term were "polarized" decisions with all six Republican-appointed Justices in the majority and all three Democrat-appointed Justices in dissent); *infra* Appendix D (providing chart of citations by split).

200. *See* GOU, ERSKINE & ROMOSER, *supra* note 199; Jaclyn Alston, Comment, *The Future of* Roe v. Wade *with a Conservative Super Majority Supreme Court*, 22 RUTGERS J.L. & RELIGION 446, 452–53 (2021) (describing how the three Justices that President Donald J. Trump appointed in his first term, culminating in the appointment of Justice Barrett in late 2020, wrought a "change in the ideological composition of the Court [that] has raised legitimate questions about the future of the progressive reforms and rights that the Court has protected for years").

201. *See infra* Appendix D; GOU, ERSKINE & ROMOSER, *supra* note 200, at 4 (listing aggregate votes for each case that resulted in a published opinion during the 2021 term).

202. *See infra* Appendix D.

203. *See infra* Appendix D.

body of the opinion citing the dissent or in a parenthetical to the citation.[204] Aside from some notable exceptions,[205] much of the quoted language was not particularly poetic or magical, however, suggesting that the unfettered rhetorical flair of some dissents might not be the primary appeal of citing dissents, at least for United States Supreme Court Justices.[206]

By far the most common substantive purpose for citing a dissenting opinion was to critique precedent or advocate that precedent be overturned: eighty-four of the 201 citations to dissents used those dissents as primary or supplemental support for a statement criticizing the reasoning of a case, criticizing the development of a line of precedent, or bluntly advocating that a case be overruled.[207] A number of other dissent citations similarly used a dissenting opinion in a way consistent with its role as counter-precedent: thirteen cited a dissent to cabin or characterize rules or principles drawn from the majority opinion to which the dissent responded,[208] fourteen cited a dissent

204. *See infra* Appendix E.

205. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 739 (2022) (Gorsuch, J., concurring) (quoting famous language referring to States as "laborator[ies]" for "novel social and economic experiments" (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 228–29, 261, 268–69, 292 (2022) (invoking, repeatedly, Justice White's characterization of the opinions finding a constitutional right to abortion as an exercise of "raw judicial power" (quoting Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting)); *id.* at 342 (Kavanaugh, J., concurring) (referencing Justice White's characterization of *Roe v. Wade* as "an improvident and extravagant exercise of the power of judicial review" (quoting Doe v. Bolton, 410 U.S. 179, 221–22 (1973) (White, J., dissenting)); *id.* at 383 (Breyer, Sotomayor, & Kagan, JJ., dissenting) ("[T]he majority depicts today's decision as 'a restricted railroad ticket, good for this day and train only.'" (quoting Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting))); *id.* at 414 ("Power, not reason, is the new currency of this Court's decisionmaking." (quoting Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting))); *see also infra* Appendix A (detailing all dissents of the 2021 term).

206. *See infra* Appendix A.

207. *See infra* Appendices A, E.

208. *See, e.g.*, Shurtleff v. City of Boston, 596 U.S. 243, 281 (2022) (Gorsuch, J., concurring) (stating that, although the dissent in *Shurtleff* "disagreed with some of the majority's conclusions about what qualifies as an establishment of religion, it readily agreed that '[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment'" (quoting Everson v. Board of Ed. of Ewing, 330 U.S. 1, 33–49 (1947) (Rutledge, J., dissenting))); Shinn v. Ramirez, 596 U.S. 366, 405 (2022) (Sotomayor, J., dissenting) (citing Martinez v. Ryan, 566 U.S. 1, 19 (2012) (Scalia, J., dissenting)) (critiquing the *Martinez* dissent's characterization of the *Martinez* holding—a characterization implicitly adopted by the majority in *Shinn*); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 350–51 (2022) (Roberts, C.J., concurring) (citing Gonzales v. Carhart, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting)) (discussing the *Gonzales* dissent's assertion that the majority in *Gonzales* "blurred the line, firmly drawn in *Casey*, between previability and postviability abortions" to support the assertion that the Court in *Casey* was, at least in part, "drawing a bright line that clearly distinguishes abortion and infanticide"); Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 600 (2022) (Kagan, J., concurring) (citing PennEast Pipeline Co.

to support an argument that judges or courts disagreed,[209] and eight provided cautionary tales that supported a "warning" regarding the likely impact of an opposing opinion.[210]

A significant number of the dissent citations represented some deployment of what Professor Richard Re has dubbed "personal precedent," whether that be the "personal precedent" of the author citing the dissent, or

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v. New Jersey, 594 U.S. 482, 517–18 (2021) (Barrett, J., dissenting)) (adopting, albeit implicitly, the characterization of the majority's decision by the dissent—in which Justice Kagan joined—in concluding that the majority opinion there compels her now to reach a result with which she would not otherwise agree); *see also infra* Appendix A (detailing all dissents of the 2021 term).

209. *See, e.g.*, Badgerow v. Walters, 596 U.S. 1, 6-7 (2022) (citing Quezada v. Bechtel OG&C Constr. Servs., Inc., 946 F.3d 837, 845–46 (5th Cir. 2020) (Ho, J., dissenting)) (illustrating disagreement among judges regarding whether to apply a "principle of uniformity" and use the same approach in determining jurisdiction under each section of the Federal Arbitration Act); Egbert v. Boule, 596 U.S. 482, 490 (2022) (citing Boule v. Egbert, 998 F. 3d 370, 373 (9th Cir. 2021) (Bumatay, J., dissenting); *id.* at 384 (Owens, J., dissenting); *id.* (Bress, J., dissenting)) (illustrating that twelve Ninth Circuit judges disagreed with the denial of rehearing en banc and the opinion below); Vega v. Tekoh, 597 U.S. 134, 149 n.5 (2022) (citing Dickerson v. United States, 530 U.S. 428, 445–46, 457–61 (2000) (Scalia, J., dissenting)) (illustrating debate regarding whether the Supreme Court "has the authority to create prophylactic rules that bind both federal and state courts"); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 537 (2022) (citing Lee v. Weisman, 505 U.S. 577, 640–41 (1992) (Scalia, J., dissenting)) (illustrating disagreement among Justices regarding "what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause"); West Virginia v. EPA, 597 U.S. 697, 737 (2022) (Gorsuch, J., concurring) (citing Gundy v. United States, 588 U.S. 128, 169 (2019) (Gorsuch, J., dissenting)) (illustrating that "what qualifies as an important subject" and thus one that must be regulated by Congress, "and what constitutes a detail" that the Executive can clarify, "may be debated"); *see also infra* Appendix A (detailing all dissents of the 2021 term).

210. *See* City of Austin v. Reagan Nat'l Advert. of Aus., LLC, 596 U.S. 61, 104 (2022) (Thomas, J., dissenting) (citing Hill v. Colorado, 530 U.S. 703, 742–43 (2000) (Scalia, J., dissenting)) (warning that the majority's conception of content neutrality increased the danger of favoring speech based on the ideology of the speaker); Carson v. Makin, 596 U.S. 767, 810 (2022) (Sotomayor, J., dissenting) (warning that the Court had moved beyond "'a place where separation of church and state is a constitutional slogan, not a constitutional commitment'" "to a place where separation of church and state becomes a constitutional violation" (quoting Trinity Lutheran Church of Columbia v. Cromer, 582 U.S 449, 496 (2017) (Sotomayor, J., dissenting))); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 385–86 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (echoing Justice Scalia's skepticism that the right to "same-sex intimacy did 'not involve' same-sex marriage" in warning that, despite the majority's avowals to the contrary, the reasoning of the majority opinion would undermine related precedent and lead to the erosion of other rights (quoting Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting))); United States v. Zubaydah, 595 U.S. 195, 250 (2022) (Gorsuch, J., dissenting) (citing Korematsu v. United States, 323 U.S. 214, 235–36 (1944) (Murphy, J., dissenting)) (discussing the President's reliance on military reports, insisting that the Japanese internment was "imperative to national security" in warning that "[m]ore recent history reveals that executive officials can sometimes be tempted to misuse claims of national security to shroud major abuses and even ordinary negligence from public view"); *see also infra* Appendix A (detailing all dissents of the 2021 term).

"personal precedent" of another Justice on the Court.[211] At least forty-six times, a Justice cited a dissent either to illustrate their own consistency as to what the law is or should be, or to call out another Justice for being inconsistent with what that Justice has written or held in the past.[212] On at least a couple of occasions, a Justice cited a previous dissent of a Justice joining in the current opinion; for example, in his majority opinion in Bruen, Justice Thomas favorably cited Justice Kavanaugh's dissent from the D.C. Circuit's opinion in *Heller* three times.[213] In general, some of the Justices do not shy away from citing themselves: when citing dissents, Thomas, Breyer, Alito, and Sotomayor cited their own dissents most frequently.[214] And the Justices often seem to cite each other strategically, whether citing dissents authored or

211. *See* Re, *supra* note 126, *passim*.

212. *See, e.g.*, Whole Women's Health v. Jackson, 595 U.S. 30, 52 n.1 (2021) (Thomas, J., concurring in part and dissenting in part) (citing June Med. Servs. L.L.C. v. Russo, 591 U.S. 299, 366 (2020) (Thomas, J., dissenting)) ("As I have explained elsewhere, abortion providers lack standing to assert the putative constitutional rights of their clients."); Shinn v. Ramirez, 596 U.S. 366, 390 (2022) (citing Cullen v. Pinholster, 563 U.S. 170, 208–09 (2011) (Sotomayor, J., dissenting)) (discussing Justice Sotomayor's dissent in *Cullen* to suggest that the principles she invokes there compel the outcome of the majority in the instant case, where she dissents from that outcome); Johnson v. Arteaga-Martinez, 596 U.S. 573, 585 (2022) (Thomas, J., concurring) ("[A]s I have explained elsewhere, there is considerable historical evidence that the Due Process Clause does not 'apply to laws governing the removal of aliens.'" (quoting Sessions v. Dimaya, 584 U.S. 148, 211 (2018) (Thomas, J., dissenting))); Denezpi v. United States, 596 U.S. 591, 606 (2022) (Gorsuch, J., dissenting) (citing Gamble v. United States, 587 U.S. 678, 737–38 (2019) (Gorsuch, J., dissenting)) (discussing how his consistent view that the dual-sovereignty doctrine "is at odds with the text and original meaning of the Constitution"); Carson v. Makin, 596 U.S. 767, 793 (2022) (Breyer, J., dissenting) (citing Zelman v. Simmons-Harris, 536 U.S. 639, 717–29 (2002) (Breyer, J., dissenting)) ("I have previous discussed my views of the relationship between the Religion Clauses and how I believe these Clauses should be interpreted to advance their goal of avoiding religious strife."); United States v. Taylor, 596 U.S. 845, 878 (2022) (Alito, J., dissenting) (citing Descamps v. United States, 570 U.S. 254, 281–96 (2013) (Alito, J., dissenting)) ("As I have previously explained, the modified categorical approach is difficult to apply, and I would not apply it here."); Berger v. N.C. State Conf. of the NAACP, 597 U.S. 179, 209–10 (2022) (Sotomayor, J., dissenting) (citing Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 272 (2011) (Roberts, C.J., dissenting)) (referencing language from a Justice Roberts dissent to support her criticism of the majority's holding in the current case, in which Justice Roberts joined); *see also infra* Appendix A (detailing all dissents of the 2021 term).

213. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 23 n.5, 31, 36 (2022) (citing Heller v. District of Columbia, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

214. *See infra* Appendix B. Chief Justice Roberts and Justices Kagan, Kavanaugh, and Barrett were more self-effacing, never or rarely citing their own dissents. *See infra* Appendix B. Justice Gorsuch cited Justice Scalia's dissents only slightly less often than he cited his own. *See infra* Appendix B.

joined by others who join them in their current opinion, or citing dissents authored by Justices on the Court who oppose them.[215]

Fifty-two of the dissent citations supported an assertion of a broad legal principle.[216] Only eleven dissent citations supported what could arguably be characterized as coming close to being a statement of a legal rule.[217] Nine of those dissent citations were from Justice Thomas.[218] In four of those instances, Thomas cited his own past dissents: once, he cited his consistent stance that due process does not apply in certain circumstances,[219] twice, he cited his consistent stance that the Federal Arbitration Act does not apply in certain circumstances,[220] and once he cited his consistent stance that abortion providers lack standing to assert the rights of their potential patients.[221] Twice, he cited Scalia dissents: once asserting that due process did not apply to a certain circumstance,[222] and once asserting that the Court was required to deny habeas relief.[223] And three of the rule citations involved Justice Thomas citing a dissent wherein Chief Justice Roberts characterized a rule from a majority opinion in a third case very narrowly, and Thomas adopted that

215. *See, e.g.*, Berger v. N.C. State Conf. of the NAACP, 597 U.S. 179, 209–10 (2022) (Sotomayor, J., dissenting) (citing Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 272 (2011) (Roberts, C.J., dissenting)) (supporting criticism of the majority's holding in the current case, in which Chief Justice Roberts joined); Shinn v. Ramirez, 596 U.S. 366, 390 (2022) (citing Cullen v. Pinholster, 563 U.S. 170, 208–09 (2011) (Sotomayor, J., dissenting)).

216. *See infra* Appendix E.

217. *See infra* Appendix E.

218. *See infra* Appendix A.

219. *See* Johnson v. Arteaga-Martinez, 596 U.S. 573, 585 (2022) (Thomas, J., concurring) ("[A]s I have explained elsewhere, there is considerable historical evidence that the Due Process Clause does not 'apply to laws governing the removal of aliens.'" (quoting Sessions v. Dimaya, 584 U.S. 148, 210 (2018) (Thomas, J., dissenting))); *infra* Appendix A.

220. *See* Viking River Cruises, Inc. v. Moriana, 596 U.S. 639, 665 (2022) (Thomas, J., dissenting) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 285–97 (1995) (Thomas, J., dissenting); Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246, 257 (2017) (Thomas, J., dissenting) ("I continue to adhere to the view that the Federal Arbitration Act . . . does not apply to proceedings in state courts.").

221. *See* Whole Woman's Health v. Jackson, 595 U.S. 30, 52 n.1 (2021) (Thomas, J., concurring in part and dissenting in part) (citing June Med. Servs. L.L.C. v. Russo, 591 U.S. 299, 366 (2020) (Thomas, J., dissenting)) ("As I have explained elsewhere, abortion providers lack standing to assert the putative constitutional rights of their potential clients.").

222. *See Johnson*, 596 U.S. at 585 (Thomas, J., concurring) ("[E]ven assuming the Due Process Clause extends to some aliens contesting their removability, it does not protect from detention an alien who, like Arteaga-Martinez, does not challenge his final removal order. Illegal aliens deemed removable have no 'right of release into this country.'" (quoting Zadvydas v. Davis, 533 U.S. 678, 703 (2001) (Scalia, J., dissenting))).

223. *See* Shinn v. Ramirez, 596 U.S. 366, 385 (2022) ("Where Congress has erected a constitutionally valid barrier to habeas relief, a court *cannot* decline to give it effect." (quoting McQuiggin v. Perkins, 569 U.S. 383, 402 (2013) (Scalia, J., dissenting))).

characterization.[224] One dissent citation to support a rule came from Justice Breyer, who cited an Alito dissent to support the standard of review.[225] The final dissent citation was from Justice Gorsuch, who asserted that "courts have consistently held" something and cited the dissent from a 1793 opinion as initial support for that assertion.[226]

Only fifteen dissent citations fell completely outside of the categories I had identified.[227] Of those, half involved adopting a dissenting opinion's statement or characterization of facts involved in or related to the litigation.[228] Others, unsurprisingly, involved agreeing with the reasoning of the dissent in the lower court in a case in which the Court would reverse.[229] In one instance, Chief Justice Roberts cited a dissenting opinion as a "*see also*" citation

224. *See id.* at 387 (interpreting the holding of *Martinez v. Ryan*, 566 U.S. 1 (2012), narrowly such that it "cut[] against respondents' proposed result" (citing Trevino v. Thaler, 569 U.S. 413, 431 (2013) (Roberts, C.J., dissenting))); *id.* (citing *Trevino*, 569 U.S. at 432 (Roberts, C.J., dissenting)) (emphasizing the centrality of the limiting language to the *Martinez* holding, thus underlining the narrowness of that holding); *id.* (recognizing that the Court in *Martinez* was "unusually explicit about the narrowness of [its] decision" (quoting *Trevino*, 569 U.S. at 432 (Roberts, C.J., dissenting))).

225. *See* United States v. Tsarnaev, 595 U.S. 302, 332 (2022) ("[A]buse-of-discretion review is not toothless; and it is entirely proper for a reviewing court to find an abuse of discretion when important factors . . . are 'slighted.'" (quoting Gall v. United States 552, U.S. 38,72 (2007) (Alito, J., dissenting))).

226. *See* West Virginia v. EPA, 597 U.S. 697, 736 (2022) (Gorsuch, J., concurring) ("[C]ourts have consistently held that 'nothing but express words, or an insurmountable implication' would justify the conclusion that lawmakers intended to abrogate the States' sovereign immunity." (quoting Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 450 (1793) (Iredell, J., dissenting))).

227. *See infra* Appendix A. Thirty-six dissent citations had at least one purpose other than the ones I had identified, but twenty-one of those arguably supported at least one of the purposes I identified as well. *See infra* Appendix A. Only fifteen were solely for "other" purposes. *See infra* Appendix A.

228. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 118 (2022) (agreeing with the dissent below that "[a] vaccination, after all 'cannot be undone at the end of the workday'" (quoting MCP No. 165 v. U.S. Dep't of Lab., 20 F.4th 264, 274 (6th Cir. 2021) (Sutton, J., dissenting))); Arizona v. San Francisco, 596 U.S. 763, 766 (2022) (Roberts, C.J., concurring) (quoting the lower court dissent's characterization of the federal government's actions as "rulemaking-by-collective-acquiescence" (quoting San Francisco v. U.S. Citizenship & Immigr. Servs., 992 F.3d 742, 744 (9th Cir. 2021) (VanDyke, J., dissenting))); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 38 n.9 (2022) (citing Drake v. Filko, 724 F.3d 426, 442 (3d Cir. 2013) (Hardiman, J., dissenting)) (discussing what a statute in a "shall-issue" licensing regime requires); Oklahoma v. Castro-Huerta, 597 U.S. 629, 647 (2022) (citing McGirt v. Oklahoma, 591 U.S. 894, 968 (2020) (Roberts, C.J., dissenting)) (adopting the *McGirt* dissent's characterization that people in Oklahoma were previously unaware that the state included any "Indian country").

229. *See, e.g.*, Berger v. N.C. State Conf. of the NAACP, 597 U.S. 179, 196 (2022) (citing N.C. State Conf. of the NAACP v. Berger, 999 F.3d 915, 951 (4th Cir. 2021) (Quattlebaum, J., dissenting)) (using Judge Quattlebaum's reasoning to support reversal of the Fourth Circuit's holding in *Berger*).

accompanying a citation to the majority opinion in the same case, using both to support an illustrative example of how one state court rejected a rule from the Restatement.[230]

VI. TAKEAWAYS, LIMITATIONS, AND AREAS FOR FURTHER RESEARCH

Although of course this examination of citations from a single term, a single court, and a court uniquely situated to be flexible in its use of precedent obviously has its limitations, it does offer some intriguing insights into at least one court's receptivity to citing dissenting opinions and how the willingness to cite dissenting opinions as precedent reflects other aspects of judicial philosophy. Further, this study suggests several more narrowly focused research inquiries that should prove even more illuminating. And, at minimum, the fact that the highest court in the nation cites dissenting opinions consistently and for a variety of purposes suggests that the Court sees dissenting opinions as acceptable sources to cite under certain circumstances. Additional studies can test the theoretical framework set forth in this paper on different datasets and from different angles and further illuminate the role dissenting opinions play in judging and lawyering.

Replicating this study on representative datasets of opinions from intermediate appellate and trial courts in both the state and federal system could provide deeper insights into how frequently and for what purposes courts are citing dissenting opinions and further test the theoretical framework set forth in Part IV. For example, this paper asserts that dissent citations are more appropriate and defensible to support broad principles.[231] Since cases before the Supreme Court of the United States largely implicate the Constitution and thus likely involve sweeping principles,[232] it seems probable that the Court would be more likely to cite dissenting opinions than would courts at the intermediate appellate or trial level. Replicating this study on a representative dataset of opinions from a federal appellate court could confirm or refute this hypothesis and shed a brighter light on the influence dissenting opinions have on the law at various levels of our court system.

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230. *See* Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 227–28 (2022) (citing Johnson v. Jam. Hosp., 62 N.Y.2d 523, 528–29 (1984) (Meyer, J., dissenting)).

231. *See supra* Part V.

232. *See Supreme Court Procedures*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-court-procedures [https://perma.cc/8T62-TXFZ] (last visited Aug. 6, 2025) (stating that the Court usually only hears cases that "have national significance, might harmonize conflicting decisions of the federal circuit courts, and/or could have precedential value," and the Supreme Court only takes state cases that raise federal Constitutional issues); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (establishing the principle of judicial review and that the Supreme Court has the ability to declare legislation passed by Congress unconstitutional).

Although a close analysis of each Justice's individual citations to dissenting opinions is beyond the scope of this article, the extent to which the number of dissent citations varied by Justice supports an argument that a willingness to cite dissenting opinions says something about a Justice's judicial philosophy and attitude toward precedent. Indeed, perhaps a propensity to cite dissents—particularly where binding precedent is available to support a proposition—may serve as a sort of "canary in the coal mine," signaling the erosion of traditional notions of precedent and hierarchy of authority that those who sought to ban dissenting opinions feared. For example, it is perhaps unsurprising that Justice Thomas cited to dissents the most frequently and even occasionally cited to dissents as primary or supplemental support for legal rules. In his concurrence in *Gamble v. United States*,[233] Thomas clearly articulated his views on stare decisis, which arguably boiled down to "we only have to follow precedent if we agree with it."[234] Additionally, Thomas largely cited his own dissents—precedent with which he presumably agrees—signaling repeatedly that he often found his own version of the law more compelling than that enshrined in precedent.[235] A closer and more thorough examination of Justice Thomas's citations to dissenting opinions over his now almost thirty-five years on the Court could supplement existing scholarly work on his jurisprudence, his judicial philosophy, and his impact on the Court and the rule of law.[236]

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233. 587 U.S. 678, 710–26 (2019) (Thomas, J., concurring).

234. *See id.* at 717–18 ("In my view, if the Court encounters a decision that is demonstrably erroneous—i.e., one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling the precedent. Federal courts may (but need not) adhere to an incorrect decision as precedent, but only when traditional tools of legal interpretation show that the earlier decision adopted a textually permissible interpretation of the law."); Maggs *supra* note 158, at 2; Morgan Johnson, Note, *Conservative Stare Decisis on the Roberts Court: A Jurisprudence of Doubt*, 55 U.C. DAVIS L. REV. 1953, 1963–64 (2022).

235. *See infra* Appendix B; *supra* note 186 and accompanying text.

236. Leaving aside the countless news articles about him, Justice Thomas has been the subject of countless articles, books, and symposia discussing everything from his biography to his unique sociopolitical views to his jurisprudence and impact on the Court and the law, to his ethics, to his cultural significance, all from a variety of perspectives. *See, e.g.*, Maggs, *supra* note 158 (examining Justice Thomas's judicial philosophy and approach to precedent); Rachel Guy, *The Man Behind the Curtain: Discovering Clarence Thomas and the Role of Judicial Biographies*, 22 GEO. J. GENDER & L. (2020) (examining Justice Thomas's jurisprudence and judicial philosophy); COREY ROBIN, THE ENIGMA OF CLARENCE THOMAS (2019); JOHN L. COOPER, THE PRINCE AND THE PAUPER: THE CASE AGAINST CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT (2001); ANDREW PEYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY (2001); KEVIN MERIDA & MICHAEL FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS (2008); MICHAEL PACK & MARK PAOLETTA, CREATED EQUAL: CLARENCE THOMAS IN HIS OWN WORDS (2022); Timothy Sandefur, *Clarence Thomas's Jurisprudence Unexplained*, 4 N.Y.U. J.L. & LIBERTY 535, 535–

By contrast, Chief Justice Roberts seldom cited to dissenting opinions, only citing a dissent six times during the 2021 term.[237] Roberts also tended to cite dissents in ways that acknowledged and even leveraged their status as counter-precedent.[238] For example, one Roberts dissent citation acknowledged, and implicitly disagreed with the reasoning behind, a dissenting opinion's characterization of the majority opinion.[239] Another used a dissent as one of several examples to show that Justices agreed on a core principle, even across an ideological divide.[240] Still, another served as an illustrative example of how one jurisdiction approached a particular legal issue.[241] This sparing, selective use of dissenting opinions seems consistent with Roberts's emphasis on consensus and judicial restraint and his avowed commitment to safeguarding the institutional integrity of the Court.[242] Corroborating that pattern by looking at Roberts's citations to dissents in other terms could further support this connection between a particular judicial philosophy and a propensity to cite—or avoid citing—dissents.

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56 (2008) (analyzing Thomas's originalism, comparing and contrasting his approach with Scalia's, and highlighting his willingness to rely on natural rights tradition and "fearlessness with regard to the various fetishes of modern law"); William Pryor Jr., *Justice Thomas, Criminal Justice, and Originalism's Legitimacy*, 127 YALE L.J. F. 173, 173–81 (2017) (explaining Justice Thomas's contributions to originalism); Jonathan L. Entin*, Justice Thomas, Race, and the Constitution Through the Lens of Booker T. Washington and W.E.B. Du* Bois, 88 U. DET. MERCY L. REV. 755, 755–68 (2011).

237. *See infra* Appendix B.

238. *See infra* notes 239–44 and accompanying text.

239. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 350–51 (2022) (Roberts, C.J., concurring) (using Justice Ginsburg's statement that Gonzales "blurr[ed] the line, firmly drawn in Casey, between previability and postviability abortions" to support his assertion that "the viability line has nothing to do with advancing" the interests, recognized in *Gonzalez*, of "'establishing a bright line that clearly distinguishes abortion from infanticide,' maintaining societal ethics, and preserving the integrity of the medical profession" (citing Gonzales v. Carhart, 550 U.S. 124, 171–72 (2007) (Ginsburg, J., dissenting))).

240. Biden v. Texas, 597 U.S. 785, 800 (2022) (citing Nielsen v. Preap, 586 U.S. 392, 403 (2019); Jennings v. Rodriguez, 583 U.S. 281, 355 (2018) (Breyer, J., dissenting)) (showing Justice Barrett citing two opinions, one joined by conservative Justices and another joined by liberal Justices, in support of the assertion that a particular statute did not prevent the Court from entertaining a petition for declaratory relief).

241. *See* Cummings v. Premier Rehab. Keller, P.L.L.C., 596 U.S. 212, 228 (2022) (citing Johnson v. Jam. Hosp., 62 N.Y.2d 523, 536–37 (1984) (Meyer, J. dissenting)) (using New York as "a good example" of a state that declined to apply a particular exception set forth in the Restatement and describing the alternative approach a New York court adopted in a particular case).

242. *See, e.g.*, Dalton, *supra* note 90, at 1343–44 (asserting that Chief Justice Roberts's emphasis on consensus, judicial restraint, and unanimity is shaped by a desire to preserve bipartisan confidence in the Court); Joel K. Goldstein, *Leading the Court: Studies in Influence as Chief Justice*, 40 STETSON L. REV. 717, 754 (2011) ("Some of Roberts'[s] actions suggest that institutional concerns may guide his conduct to a greater degree than that of most of his colleagues.").

Similarly, Justice Barrett, new to the Court in the 2021 term, cited to dissenting opinions only twice, both times in ways that acknowledged the dissents as counter-precedent—once to illustrate disagreement among courts,[243] and once to support a critique of precedent.[244] Her reluctance to cite dissents could reflect the cautiousness of a new member to the Court, or it could suggest something about her judicial philosophy; watching her pattern of dissent citations in later terms could be interesting.

If a propensity to cite dissenting opinions suggests an erosion of stare decisis or a general disregard for the role of precedent, tracking the Court's citation to dissents over time and tracking trends could be illuminating. Replicating this study with different terms of the Supreme Court would give us an idea of, for example, whether citations to dissents tend to increase in connection with an increased willingness to overturn established precedent or judicial statements expressing such a willingness.

The fact that very few citations to dissenting opinions even came close to purporting to support legal rules is perhaps reassuring for those who fear a precipitous erosion in the rule of law;[245] perhaps the dissent doomsayers of yore were more Chicken Little than Cassandra. That said, this study did not closely examine whether Justices were citing dissents to support legal rules or principles where a majority opinion on point was available. Law students and lawyers are told to cite optional authority only as a gap-filler, when no binding authority on point exists.[246] If Justices on the United States Supreme Court favor precedent based on who authored it, for example, rather than hierarchy of authority, at minimum that undermines traditional notions of precedent. A broader examination of citations to dissents to support rule statements over multiple terms, in connection with research into the other precedent available on point, could support a more pointed critique.

Although this study did note whether dissent citations in Supreme Court opinions corresponded with a matching "sticky" citation in a party brief, it did not examine whether the opinion cited the dissent in the same way or for the same purpose. A closer examination of how the top advocates before the United States Supreme Court cite dissenting opinions, including the purposes for which they cite dissents, how they introduce and frame that discussion in the brief, and what strategies seem to correlate most with a corresponding

243. *See* Biden v. Texas, 597 U.S. 785, 839 (2022) (Barrett, J. dissenting) (citing Alli v. Decker, 650 F.3d 1007, 1019–21 (3rd Cir. 2011) (Fuentes, J., dissenting)) (illustrating disagreement among judges regarding whether a particular statute bars declaratory relief).

244. *See* Wooden v. United States, 595 U.S. 360, 381 (2022) (Barrett, J., concurring) (citing American Broadcasting Cos. v. Aereo, Inc., 573 U.S. 431, 458 (2014) (Scalia, J., dissenting)) ("The only thread connecting the occasions clause to *Petty* is legislative history, and the problems with legislative history are well rehearsed.").

245. Or at least one led by the Court.

246. *See supra* notes 61–62 and accompanying text.

citation in the Court's opinion could inform advice to lawyers and law students about effective practices.

To further develop actionable guidance for everyday lawyers, judges, and law students regarding how to cite dissenting opinions effectively and appropriately, researchers could replicate this study on datasets of briefs and opinions from trial and intermediate courts, both at the state and federal level.

The role amicus briefs play in inserting dissenting opinions into the jurisprudential dialogue similarly warrants focused examination. Much has been written of late about the extent to which amicus briefs influence the modern Court;[247] examining the extent to which and the purposes for which amicus briefs cite dissenting opinions, and how often those citations seem to correspond with a matching citation in the resulting opinion could provide further evidence of the nature and extent of that influence.

Finally, in terms of concrete, defensible takeaways for judges, lawyers, and law students regarding the purposes for which they might permissibly and effectively cite dissents, the data from this term of the Court tentatively supports a few norms, particularly for those writing to a court with more latitude to overturn or deviate from precedent. The Court's willingness to cite dissents as counter-authority to critique precedent, justify overturning precedent, illustrate disagreement among courts and judges, and characterize the scope or nature of the rules or principles articulated by the majority opinion suggests that advocates might do the same. Unsurprisingly, citing strong analysis from the dissenting opinion in the case under review makes sense for the party seeking reversal. And invoking a jurist's own "personal precedent" by citing to that jurist's dissents seems a safe bet as well.

VII. CONCLUSION

Although conversations about dissenting opinions have raged for centuries, this paper opens a new and important thread. After elucidating the uncomfortable and sometimes ominous space dissenting opinions long have occupied in the universe of citable precedent, this paper then sets forth and

247. *See, e.g.*, Whitehouse, *supra* note 174 (discussing the increased volume and influence of amicus briefs in Supreme Court decisions); Mary Christine Sungaila, *What Makes an Amicus Brief Matter*, A.B.A.: LITIG. J. (Nov. 5, 2024), https://www.americanbar.org/groups/litigation/resources/litigation-journal/2024-fall/what-makes-amicus-brief-matter/ [https://perma.cc/G3SW-4BBT] (noting that "[a]micus briefs are regularly filed in more than 90 percent of civil cases before the U.S. Supreme Court" and that "their prevalence demonstrates their influence"); Jess Bravin, *Amicus Briefs Inundate Supreme Court,* WALL STREET J. (Mar. 6, 2021, at 09:00 ET), https://www.wsj.com/politics/policy/amicus-briefs-inundate-supreme-court-11615039201 [https://perma.cc/U3DU-EL28]; Huchen Liu & Jonathan P. Kastellec, *The Revolving Door in Judicial Politics: Former Clerks and Agenda Setting on the U.S. Supreme Court*, 51 AM. POL. RSCH. 1, 1 (2022).

justifies the first theoretical framework for analyzing citations to dissenting opinions. Considering what this paper identifies as the dissenting opinion's nature as "counter precedent," the paper identifies and categorizes the purposes for which courts might appropriately cite dissenting opinions. On the flipside, the paper also isolates categories of dissent citations that might serve as red flags for something more sinister. This framework can serve as a tool for future scholars seeking to examine and critique the role citations to dissenting opinions play in our jurisprudence more generally or in the jurisprudence of particular jurists. Indeed, this paper tests that theoretical framework through an empirical examination of citations to dissenting opinions by the Supreme Court of the United States in its 2021 term and thereby sheds light on the extent to which at least one court is citing dissenting opinions, the purposes for which that court is citing dissenting opinions, and any potentially problematic patterns those citations disclose.

This paper also serves as a further entry in support of the argument that the precedent cited to justify a legal argument matters. I hope that future scholars will pick up some of the empirical threads left unpursued by this paper and further build our understanding of the authority that underpins the legal opinions that shape—and at times arguably erode—our nation's law. This inquiry is particularly urgent now, as we enter an era when the rule of law is under assault as never before, and members of the profession and the academy find themselves called upon to defend principles and institutions we previously took for granted. I also hope that continued empirical study will inform advice that can guide judges, lawyers, and law students to most effectively and ethically leverage the power of dissents to right past wrongs and steer our legal system and our nation on a course toward greater justice for all.

VIII. APPENDICES

A. Appendix A: 2021–2022 Opinions that Cite Dissents

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
Whole Woman's Health v. Jackson, 595 U.S. 30, 52 (2021).	Concurring in part and dissenting in part	Thomas	*MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 142, (2007) (Thomas, J., dissenting). No current Justices join.	Legal principle	Yes
Whole Woman's Health v. Jackson, 595 U.S. 30, 53 (2021).	Concurring in part and dissenting in part	Thomas	*Douglas v. Independent Living Center of Southern Cal., Inc.*, 565 U.S. 606, 620 (2012) (Roberts, C.J., dissenting). Joined by Justices Thomas & Alito.	Legal principle: supplemental support	No
Whole Woman's Health v. Jackson, 595 U.S. 30, 56 (2021).	Concurring in part and dissenting in part	Thomas	*Yellen v. Confederated Tribes of Chehalis Reservation*, 594 U.S. 338, 380 (2021) (Gorsuch, J., dissenting). Joined by Justices Thomas & Kagan.	Legal principle: supplemental support	Yes (in parenthetical)
Whole Woman's Health v. Jackson, 595 U.S. 30, 52 n.1 (2021).	Concurring in part and dissenting in part	Thomas	*June Medical Services L. L. C. v. Russo*, 591 U.S. 299, 369–71 (2020) (Thomas, J., dissenting). No current Justices join.	Rule; Personal precedent	No
Whole Woman's Health v. Jackson, 595 U.S. 30, 63 n.1 (2021).	Concurring in part and dissenting in part	Sotomayor	*Whole Woman's Health v. Jackson*, 141 S.Ct. 2494, 2498–99 (2021) (Sotomayor, J., dissenting). Joined by Justice Kagan.	Other: support factual assertion; Policy	No
Biden v. Missouri, 595 U.S. 87, 99 (2022).	Dissenting	Thomas	*In re MCP No. 165*, 20 F.4th 264, 268 (6th Cir. 2021) (Sutton, C.J., dissenting fro m denial of initial hearing en banc). No current Justices join.	Other: support factual assertion; Policy	Yes

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
National Federation of Independent Businesses v. OSHA, 595 U.S. 109, 117 (2022).	Per curiam opinion	Per curiam	*In re MCP No. 165*, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting). No current Justices join.	Other: adopting characterization of fact by lower court opinion in same case	Yes
National Federation of Independent Businesses v. OSHA, 595 U.S. 109, 118 (2022).	Per curiam opinion	Per curiam	*In re MCP No. 165*, 20 F.4th 264, 274 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc). No current Justices join.	Other: adopting characterization of fact	Yes
National Federation of Independent Businesses v. OSHA, 595 U.S. 109, 122 (2022).	Concurring	Gorsuch	*Gundy v. United States*, 588 U.S. 128, 167 (2019) (Gorsuch, J., dissenting). Joined by Justices Roberts & Thomas.	Other: adopting name of particular doctrine being discussed; Personal precedent	No
National Federation of Independent Businesses v. OSHA, 595 U.S. 109, 123 (2022).	Concurring	Gorsuch	*In re: MCP No. 165*, 20 F.4th 264, 276 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc). No current Justices join.	Other: adopting factual statement (opinion being reviewed)	No
National Federation of Independent Businesses v. OSHA, 595 U.S. 109, 124–25 (2022).	Concurring	Gorsuch	*Gundy*, 588 U.S. 128, 149 (Gorsuch, J., dissenting). Joined by Justices Roberts & Thomas.	Legal principle	No
National Federation of Independent Businesses v. OSHA, 595 U.S. 109, 125 (2022).	Concurring	Gorsuch	*United States Telecom Ass'n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc). No current Justices join.	Legal principle	Yes

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
Hemphill v. New York, 595 U.S. 140, 167 (2022).	Dissenting	Thomas	*Vachon v. New Hampshire*, 414 U.S. 478, 483 (1974) (Rehnquist, J., dissenting). No current Justices join.	Critiquing precedent	No
Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 595 U.S. 178, 192 (2022).	Dissenting	Thomas	*Manuel v. Joliet*, 580 U.S. 357, 375 n.1 (2017) (Alito, J., dissenting). Joined by Justice Thomas.	Legal principle	No
Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 595 U.S. 178, 192–93 (2022).	Dissenting	Thomas	*Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 472 (2017) (Thomas, J., dissenting). Joined by Justice Alito.	Warning	Yes
Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 595 U.S. 178 (2022).	Dissenting	Thomas	*Ratzlaf v. United States*, 510 U.S. 135, 162 (1994) (Blackmun, J., dissenting). Joined by Justice Thomas.	Reasoning – why a rule makes sense	Yes
Cameron v. EMW Women's Surgical Center, 595 U.S. 267, 284–85 (2022).	Concurring	Thomas	*Devlin v. Scardelletti*, 536 U.S. 1, 15 (2002) (Scalia, J., dissenting) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 34 cmt. a, reporter's note, at 347 (A.L.I. 1980)). Joined by Justice Thomas.	Legal principle	Yes
United States v. Tsarnaev, 595 U.S. 302, 332 (2022).	Dissenting	Breyer	*Gall v. United States*, 552 U.S. 38, 72 (2007) (Alito, J., dissenting). No current Justices join.	Rule	Yes
United States v. Tsarnaev, 595 U.S. 302, (2022).	Dissenting	Breyer	*Glossip v. Gross*, 576 U.S. 863, 937 (2015) (Breyer, J., dissenting). No current Justices join.	Legal principle; Personal precedent	Yes (in parenthetical)

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
United States v. Tsarnaev, 595 U.S. 302, 341–42 (2022).	Majority (in footnote)	Thomas	*Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 273 (1953) (Jackson, J., dissenting). No current Justices join.	Illustrating disagreement	Yes (in parenthetical)
United States v. Tsarnaev, 595 U.S. 302, 319 (2022).	Majority (in footnote)	Thomas	*Miller v. Alabama*, 567 U.S. 460, 505–06, and n.3 (2012) (Thomas, J., dissenting). No current Justices join.	Critiquing precedent; Personal precedent	No
United States v. Tsarnaev, 595 U.S. 302, 319 (2022).	Majority (in footnote)	Thomas	*Gardner v. Florida*, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting). No current Justices join.	Critiquing precedent	Yes
Wooden v. United States, 595 U.S. 360, 381 (2022).	Concurring	Barrett	*American Broadcasting Cos. v. Aereo, Inc.*, 573 U.S. 431, 458 (2014) (Scalia, J., dissenting). Joined by Justices Thomas & Alito.	Critiquing precedent	Yes (in parenthetical)
Wooden v. United States, 595 U.S. 360, 397 n.7 (2022).	Concurring	Gorsuch	*United States v. Thompson*, 421 F.3d 278, 287–95 (4th Cir. 2005) (Wilkins, C.J., dissenting). No current Justices join.	Legal principle	No
Ramirez v. Collier, 595 U.S. 411, 455–56 (2022).	Dissenting	Thomas	*Wainwright v. Spenkelink*, 442 U.S. 901, 903–04 (1979) (Rehnquist, J., dissenting from a denial of a motion to vacate). No current Justices join.	Policy	Yes

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
Ramirez v. Collier, 595 U.S. 411, 457 (2022).	Dissenting	Thomas	*Murphy v. Collier*, 587 U.S. 901, 907 (2019) (Alito, J., dissenting from grant of application for stay). Joined by Justices Thomas & Gorsuch.	Policy	Yes
Ramirez v. Collier, 595 U.S. 411, 419 (2022).	Majority	Roberts	*Dunn v. Smith*, 141 S. Ct. 725, 726–27 (Kavanaugh, J., dissenting). Joined by Chief Justice Roberts.	Legal principle	Yes
Badgerow v. Walters, 596 U.S. 1, 7 (2022).	Majority	Kagan	*Quezada v. Bechtel OG&C Construction Services, Inc.*, 946 F.3d 837, 846 (5th Cir. 2020) (Ho, J., dissenting). No current Justices join.	Showing disagreement	Yes (in parenthetical)
Badgerow v. Walters, 596 U.S. 1, 25 (2022).	Dissenting	Breyer	*DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 59 (2015) (Thomas, J., dissenting). No current Justices join.	Showing disagreement	No
Thompson v. Clark, 596 U.S. 36, 51 (2022).	Dissenting	Alito	*Manuel v. Joliet*, 580 U.S. 357, 378 (2017) (Alito, J., dissenting). Joined by Justice Thomas.	Rule: supplemental support	No
City of Austin v. Reagan National Advertising of Austin, LLC, 596 U.S. 61, 77–78 (2022).	Concurring	Breyer	*Sorrell v. IMS Health Inc.*, 564 U.S. 552, 582 (2011) (Breyer, J., dissenting). Joined by Justice Kagan.	Legal principle; Personal precedent	No
City of Austin v. Reagan National Advertising of Austin, LLC, 596 U.S. 61, 78 (2022).	Concurring	Breyer	*Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). No current Justices join.	Other: quoting original coining of a phrase	No

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
City of Austin v. Reagan National Advertising of Austin, LLC, 596 U.S. 61, 80 (2022).	Concurring	Breyer	*Sorrell v. IMS Health Inc.*, 564 U.S. 552, 603 (Breyer, J., dissenting). Joined by Justice Kagan.	Policy; Negative ramifications of decision; Critiquing precedent; Personal precedent	Yes
City of Austin v. Reagan National Advertising of Austin, LLC, 596 U.S. 61, 103 (2022).	Dissenting	Thomas	*Hill v. Colorado*, 530 U.S. 703, 772 (2000) (Kennedy, J., dissenting). No current Justices join.	Critiquing precedent	Yes
City of Austin v. Reagan National Advertising of Austin, LLC, 596 U.S. 61, 103 (2022).	Dissenting	Thomas	*Hill v. Colorado*, 530 U.S. 703, 742–43 (2000) (Scalia, J., dissenting). Joined by Justice Thomas.	Critiquing precedent	Yes
City of Austin v. Reagan National Advertising of Austin, LLC, 596 U.S. 61, 104 (2022).	Dissenting	Thomas	*Tennessee v. Lane*, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting). No current justices join.	Critiquing precedent	Yes
City of Austin v. Reagan National Advertising of Austin, LLC, 596 U.S. 61, 104 (2022).	Dissenting	Thomas	*Hill v. Colorado*, 530 U.S. 703, 742 (2000) (Scalia, J., dissenting). Joined by Justice Thomas.	Warning; Critiquing precedent	Yes (in parenthetical)
City of Austin v. Reagan National Advertising of Austin, LLC, 596 U.S. 61, 105 (2022).	Dissenting	Thomas	*Hill v. Colorado*, 530 U.S. 703, 742 (2000) (Scalia, J., dissenting). Joined by Justice Thomas.	Supplemental support for critique of precedent; Warning	Yes (in parenthetical)
City of Austin v. Reagan National Advertising of Austin, LLC, 596 U.S. 61, 98 n.4 (2022).	Dissenting (in footnote)	Thomas	*Hill v. Colorado*, 530 U.S. 703, 766 (2000) (Kennedy, J., dissenting). No current Justices join.	Supplemental support for critique of precedent	Yes (in parenthetical)

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
Brown v. Davenport, 596 U.S. 118, 128 (2022).	Majority	Gorsuch	*Hamdi v. Rumsfeld*, 542 U.S. 507, 555 (2004) (Scalia, J., dissenting). No current Justices join.	Legal principle	Yes
Brown v. Davenport, 596 U.S. 118, 147 (2022).	Dissenting	Kagan	*Ex parte Wells*, 59 U.S. 307, 330 (1856) (Curtis, J., dissenting). No current Justices join.	Characterizing precedent using the dissent; Opposite of rule (showing that only dissent thought the rule operated in a certain way)	Yes (in parenthetical)
Brown v. Davenport, 596 U.S. 118, 155 n.5 (2022).	Dissenting (in footnote)	Kagan	*Davis v. Ayala*, 576 U.S. 257, 291 (2015) (Sotomayor, J., dissenting) Joined by Justice Kagan.	Characterizing majority opinion/strength of rule Even the dissent agreed regarding what the applicable rule was, just not how the rule was applied	Yes
United States v. Vaello Madero, 596 U.S. 159, 168 (2022).	Concurring	Thomas	*In re Winship*, 397 U.S. 358, 378–82 (1970) (Black, J., dissenting). No current Justices join.	Critiquing precedent; Legal principle; Supplemental support for alternate interpretation of legal standard/historical support	No
United States v. Vaello Madero, 596 U.S. 159, 169–70 (2022).	Concurring	Thomas	*Obergefell v. Hodges*, 576 U.S. 644, 725 (2015) (Thomas, J., dissenting). No current Justices join.	Critiquing precedent; Personal precedent; Legal principle (reasoning to support alternate interpretation of legal standard)	Yes
United States v. Vaello Madero, 596 U.S. 159, 185 (2022).	Concurring	Gorsuch	*Downes v. Bidwell*, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting). No current Justices join.	Critiquing precedent; Arguing to overturn precedent	Yes
United States v. Vaello Madero, 596 U.S. 159, 173 n.1 (2022).	Concurring (in footnote)	Thomas	*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 583 (1857) (Curtis, J., dissenting). No current Justices join.	Illustrating disagreement	Yes

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 227–28 (2022).	Majority	Roberts	*Johnson v. Jamaica Hospital*, 467 N.E.2d 502, 509 (1984) (Meyer, J., dissenting). No current Justices join.	Other: illustrative example of how one jurisdiction handles issue	No
Shurtleff v. City of Boston, 596 U.S. 243, 279 (2022).	Concurring	Gorsuch	*American Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1108–10 (10th Cir. 2010) (Gorsuch, J., dissenting from denial of rehearing en banc). No current Justices join.	Critique of precedent; Personal precedent	No
Shurtleff v. City of Boston, 596 U.S. 243, 281 (2022).	Concurring	Gorsuch	*Everson v. Board of Education of Ewing*, 330 U.S. 1, 33–49 (1947) (Rutledge, J., dissenting). No current Justices join.	Characterizing majority opinion (demonstrating agreement between dissent and majority to bolster strength of rule)	Yes
Shurtleff v. City of Boston, 596 U.S. 243, 284–85 (2022).	Concurring	Gorsuch	*Feldman v. United States*, 322 U.S. 487, 501 (1944) (Black, J., dissenting). No current Justices join.	Critiquing precedent; Supplemental authority supporting policy argument	No
Shurtleff v. City of Boston, 596 U.S. 243, 286 (2022).	Concurring	Gorsuch	*Lee v. Weisman*, 505 U.S. 577, 640 (Scalia, J., dissenting). Joined by Justice Thomas.	Characterizing precedent (bolstering principle from majority opinion by showing agreement between majority and dissent)	No
Shurtleff v. City of Boston, 596 U.S. 243, 271 n.3 (2022).	Concurring	Alito	*Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 222 (2015) (Alito, J., dissenting). No current Justices join.	Criticism of scope of precedent; Cabining precedent	Yes

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
Shurtleff v. City of Boston, 596 U.S. 243, 282 (2022).	Concurring (in footnote)	Gorsuch	*McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting). Joined by Justice Thomas.	Criticizing precedent; Illustrating disagreement; Advocating to overturn precedent	Yes
Shurtleff v. City of Boston, 596 U.S. 243, 282 n.9 (2022).	Concurring (in footnote)	Gorsuch	*Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting). No current Justices join.	Criticizing precedent; Advocating to overturn precedent	Yes
Shinn v. Ramirez, 596 U.S. 366, 385 (2022).	Majority	Thomas	*McQuiggin v. Perkins*, 569 U.S. 383, 402 (2013) (Scalia, J., dissenting). Joined by Chief Justice Roberts & Justice Thomas. Also joined in part by Justice Alito.	Rule statement (also supported by very old majority opinion)	Yes
Shinn v. Ramirez, 596 U.S. 366, 387 (2022).	Majority	Thomas	*Trevino v. Thaler*, 569 U.S. 413, 431 (2013) (Roberts, C.J., dissenting). Joined by Justice Alito.	Characterizing precedent; Supporting rule statement	Yes
Shinn v. Ramirez, 596 U.S. 366, 387 (2022).	Majority	Thomas	*Trevino v. Thaler*, 569 U.S. 413, 432 (2013) (Roberts, C.J., dissenting). Joined by Justice Alito.	Characterizing precedent; Supporting rule statement	Yes
Shinn v. Ramirez, 596 U.S. 366, 387 (2022).	Majority	Thomas	*Trevino v. Thaler*, 569 U.S. 413, 432 (2013) (Roberts, C.J., dissenting). Joined by Justice Alito.	Characterizing precedent; Supporting rule statement	Yes

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
Shinn v. Ramirez, 596 U.S. 366, 390 (2022).	Majority	Thomas	*Cullen v. Pinholster*, 563 U.S. 170, 208–09 (2010) (Sotomayor, J., dissenting). Joined by Justice Kagan.	Personal precedent; Warning/practical impact of holding	Yes
Shinn v. Ramirez, 596 U.S. 366, 390 (2022).	Majority	Thomas	*Cullen v. Pinholster*, 563 U.S. 170, 209 (Sotomayor, J., dissenting). Joined by Justice Kagan.	Personal precedent; Warning/practical impact of holding	Yes
Shinn v. Ramirez, 596 U.S. 366, 405 (2022).	Dissenting	Sotomayor	*Martinez v. Ryan*, 566 U.S. 1, 19 (Scalia, J., dissenting). Joined by Justice Thomas.	Characterizing authority (pointing out that argument majority follows was from a dissent)	Yes (in parenthetical)
Gallardo v. Marstiller, 596 U.S. 420, 449 (2022).	Dissenting	Sotomayor	*Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (Cardozo, J., dissenting). No current Justices join.	Legal principle (re: statutory interpretation)	Yes
Egbert v. Boule, 596 U.S. 482, 490 (2022).	Majority	Thomas	*Boule v. Egbert*, 998 F.3d 370, 373 (9th Cir. 2021) (Bumatay, J., dissenting from the denial of rehearing en banc). No current Justices join.	Illustrating disagreement	No
Egbert v. Boule, 596 U.S. 482, 490 (2022).	Majority	Thomas	*Boule v. Egbert*, 998 F.3d 370, 384 (9th Cir. 2021) (Owens, J., dissenting from the denial of rehearing en banc). No current Justices join.	Illustrating disagreement	No
Egbert v. Boule, 596 U.S. 482, 490 (2022).	Majority	Thomas	*Boule v. Egbert*, 998 F.3d 370, 384 (9th Cir. 2021) (Bress, J., dissenting from the denial of rehearing en banc). No current Justices join.	Illustrating disagreement	No

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
Egbert v. Boule, 596 U.S. 482, 501 (2022).	Majority	Thomas	*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting). No current Justices join.	Criticism of precedent	No
Egbert v. Boule, 596 U.S. 482, 501 (2022).	Majority	Thomas	*Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 427 (1971) (Black, J., dissenting). No current Justices join.	Criticism of precedent	No
Egbert v. Boule, 596 U.S. 482, 501–02 (2022).	Majority	Thomas	*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 430 (1971) (Blackmun, J., dissenting). No current Justices join.	Criticism of precedent	No
Egbert v. Boule, 596 U.S. 482, 501–02 (2022).	Majority	Thomas	*Carlson v. Green*, 446 U.S. 14, 31 (1980) (Rehnquist, J., dissenting). No current Justices join.	Criticism of precedent	No
Garland v. Aleman Gonzalez, 596 U.S. 543, 547 (2022).	Majority	Alito	*Aleman Gonzalez v. Barr*, 955 F.3d 762, 790 (2020) (Fernandez, J., dissenting). No current Justices join.	Illustrating disagreement	No
Johnson v. Arteaga-Martinez, 596 U.S. 573, 585 (2022).	Concurring	Thomas	*Sessions v. Dimaya*, 584 U.S. 148, 210 (2018) (Thomas, J., dissenting). Joined in part by Justice Alito.	Rule statement – historical evidence that Due Process Clause does not apply; Personal precedent	Yes
Johnson v. Arteaga-Martinez, 596 U.S. 573, 585 (2022).	Concurring	Thomas	*Zadvydas v. Davis*, 533 U.S. 678, 703 (2001) (Scalia, J., dissenting). Joined by Justice Thomas.	Rule statement; Sort of personal precedent	Yes

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
Johnson v. Arteaga-Martinez, 596 U.S. 573, 586 (2022).	Concurring	Thomas	*Clark v. Martinez*, 543 U.S. 371, 401 (2005) (Thomas, J., dissenting). No current Justices join.	Criticism of precedent/Advocating for overturning precedent; Personal precedent	Yes
Denezpi v. United States, 596 U.S. 591, 606 (2022).	Dissenting	Gorsuch	*Gamble v. United States*, 587 U.S. 678, 737 (2019) (Gorsuch, J., dissenting). No current Justices join.	Criticism of precedent; Legal principle; Personal precedent	No
Viking River Cruises, Inc. v. Moriana, 596 U.S. 639, 665 (2022).	Dissenting	Thomas	*Kindred Nursing Centers L.P. v. Clark*, 581 U.S. 246, 257 (2017) (Thomas, J., dissenting). No current Justices join.	Criticism of precedent; Rule statement; Personal precedent	No
Viking River Cruises, Inc. v. Moriana, 596 U.S. 639, 665 (2022).	Dissenting	Thomas	*Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285–97 (1995) (Thomas, J., dissenting). No current Justices join.	Criticism of precedent; Rule statement; Personal precedent	No
American Hospital Ass'n v. Becerra, 596 U.S. 724, 735 (2022).	Majority	Kavanaugh	*American Hospital Ass'n v. Azar*, 967 F.3d 818, 837 (D.C. Cir. 2020) (Pillard, J., dissenting). No current Justices join.	Citation of dissent in lower court; Endorsing rule statement	Yes
American Hospital Ass'n v. Becerra, 596 U.S. 724, 738–39 (2022).	Majority	Kavanaugh	*American Hospital Ass'n v. Azar*, 967 F.3d 818, 840 (D.C. Cir. 2020) (Pillard, J., dissenting). No current Justices join.	Citation of dissent in lower court; Policy argument	Yes

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
Arizona v. City and County of San Francisco, 596 U.S. 763, 766 (2022).	Concurring	Roberts	*City and County of San Francisco v. United States Citizenship and Immigration Servs.*, 992 F.3d 742, 744 (9th Cir. 2021) (VanDyke, J., dissenting from the denial of intervention). No current Justices join.	Other: adopting characterization of facts	Yes
Carson v. Makin, 596 U.S. 767, 793 (2022).	Dissenting	Breyer	*Zelman v. Simmons-Harris*, 536 U.S. 639, 717–29 (2002) (Breyer, J., dissenting). No current Justices join.	Personal precedent; Legal principle	No
Carson v. Makin, 596 U.S. 767, 793 (2022).	Dissenting	Breyer	*Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 531–38 (2020) (Breyer, J., dissenting). Joined in part by Justice Kagan.	Personal precedent; Legal principle	No
Carson v. Makin, 596 U.S. 767, 793–94 (2022).	Dissenting	Breyer	*Everson v. Board of Education*, 330 U.S. 1, 68–69 (1947) (appendix to dissenting opinion of Rutledge, J.). No current Justices join.	Legal principle	No(quoting appendix to dissent)
Carson v. Makin, 596 U.S. 767, 794 (2022).	Dissenting	Breyer	*Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 536 (2020) (Breyer, J., dissenting). Joined in part by Justice Kagan.	Legal principle; Personal precedent	Yes
Carson v. Makin, 596 U.S. 767, 794 (2022).	Dissenting	Breyer	*Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 534 (2020) (Breyer, J., dissenting). Joined in part by Justice Kagan.	Legal principle; Personal precedent	Yes

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
Carson v. Makin, 596 U.S. 767, 794 (2022).	Dissenting	Breyer	*Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 534 (2020) (Breyer, J., dissenting). No current Justices join.	Legal principle; Personal precedent	Yes
Carson v. Makin, 596 U.S. 767, 805–06 (2022).	Dissenting	Breyer	*Zelman v. Simmons-Harris*, 536 U.S. 639, 725 (Breyer, J., dissenting). No current Justices join.	Criticism of precedent; Personal precedent	Yes
Carson v. Makin, 596 U.S. 767, 807 (2022).	Dissenting	Sotomayor	*Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 479–87 (Sotomayor, J., dissenting). No current Justices join.	Criticism of precedent; Personal precedent	Yes
Carson v. Makin, 596 U.S. 767, 808 (2022).	Dissenting	Sotomayor	*Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 495 n.14 (Sotomayor, J., dissenting). No current Justices join.	Warning; Criticism of precedent; Personal precedent	Yes
Carson v. Makin, 596 U.S. 767, 810 (2022).	Dissenting	Sotomayor	*Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 496 (Sotomayor, J., dissenting). No current Justices join.	Legal principle; Warning; Criticism of precedent; Personal precedent	Yes
Carson v. Makin, 596 U.S. 767, 807 (2022).	Dissenting	Sotomayor	*Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 875–76 (1995) (Souter, J., dissenting). No current Justices join.	Criticism of precedent; Other: string cite giving examples of earlier Court principles that have been eroded	No

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
United States. v. Taylor, 596 U.S. 845, 864 (2022).	Dissenting	Thomas	*Sessions v. Dimaya*, 584 U.S. 148, 225 (2018) (Thomas, J., dissenting). Joined in part by Justice Alito.	Criticism of precedent/development of doctrine; Personal precedent	Yes
United States v. Taylor, 596 U.S. 845, 866 (2022).	Dissenting	Thomas	*Johnson v. United States*, 576 U.S. 591, 632 (Alito, J., dissenting). No current Justices join.	Criticism of precedent/development of doctrine; Personal precedent	Yes
United States v. Taylor, 596 U.S. 845, 866 (2022).	Dissenting	Thomas	*United States v. Davis*, 588 U.S. 445, 460–61 (2019) (Kavanaugh, J., dissenting). Joined by Justices Thomas & Alito. Joined in part by Chief Justice Roberts.	Criticism of precedent/development of doctrine; Advocating to overrule precedent	No
United States v. Taylor, 596 U.S. 845, 866–67 (2022).	Dissenting	Thomas	*United States v. Davis*, 588 U.S. 445, 468–71 (2019) (Kavanaugh, J., dissenting). Joined by Justices Thomas & Alito. Joined in part by Chief Justice Roberts.	Criticism of precedent; Advocating to overrule precedent from which dissent is drawn	No
United States v. Taylor, 596 U.S. 845, 866–67 (2022).	Dissenting	Thomas	*United States v. Davis*, 588 U.S. 445, 468–71 (2019) (Kavanaugh, J., dissenting). Joined by Justices Thomas & Alito. Joined in part by Chief Justice Roberts.	Criticism of precedent; Advocating to overrule precedent from which dissent is drawn; Other: reasoning	Yes
United States v. Taylor, 596 U.S. 845, 867 (2022).	Dissenting	Thomas	*United States v. Davis*, 588 U.S. 445, 495 (2019) (Kavanaugh, J., dissenting). Joined by Justices Thomas & Alito. Joined in part by Chief Justice Roberts.	Criticism of precedent; Advocating to overrule precedent from which dissent is drawn; Other: reasoning	Yes

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United States v. Taylor, 596 U.S. 845, 867 (2022).	Dissenting	Thomas	*United States v. Davis*, 588 U.S. 445, 494 (2019) (Kavanaugh, J., dissenting). Joined by Justices Thomas & Alito.	Other: reasoning regarding what the rule should be, plus supporting quotation in parenthetical; Criticizing precedent; Advocating to overrule precedent from which dissent is drawn	Yes (in parenthetical)
United States v. Taylor, 596 U.S. 845, 867 (2022).	Dissenting	Thomas	*Sessions v. Dimaya*, 584 U.S. 148, 223 (Thomas, J., dissenting). Joined in part by Justice Alito.	Supplemental support for reasoning; Personal precedent	No
United States v. Taylor, 596 U.S. 845, 867 (2022).	Dissenting	Thomas	*United States v. Davis*, 588 U.S. 445, 476 (2019) (Kavanaugh, J., dissenting). Joined by Justices Thomas & Alito. Joined in part by Chief Justice Roberts.	Other: reasoning regarding what the rule should be; Criticizing precedent; Advocating to overrule precedent from which dissent is drawn	Yes
United States v. Taylor, 596 U.S. 845, 872 (2022).	Dissenting	Thomas	*United States v. Davis*, 588 U.S. 445, 471 (2019) (Kavanaugh, J., dissenting). Joined by Justices Thomas & Alito. Joined in part by Chief Justice Roberts.	Other: reasoning regarding what the rule should be; criticizing precedent; Advocating to overrule precedent	No
United States v. Taylor, 596 U.S. 845, 872 (2022).	Dissenting	Thomas	*Sessions v. Dimaya*, 584 U.S. 148, 228 (Thomas, J., dissenting). Joined in part by Justice Alito.	Personal precedent; Other: reasoning regarding what the rule should be; Criticizing precedent; Advocating to overrule precedent	Yes
United States v. Taylor, 596 U.S. 845, 878 (2022).	Dissenting	Alito	*Mathis v. United States*, 579 U.S. 500, 536–44 (Alito, J., dissenting). No current Justices join.	Critiquing precedent; Personal precedent	Yes

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United States v. Taylor, 596 U.S. 845, 878 (2022).	Dissenting	Alito	*Descamps v. United States*, 570 U.S. 254, 281–96 (Alito, J., dissenting). No current Justices join.	Critiquing precedent; Personal precedent	No
United States v. Taylor, 596 U.S. 845, 875 n.1 (2022).	Dissenting	Alito	*Alleyne v. United States*, 570 U.S. 99, 132–34 (2013) (Alito, J., dissenting). No current Justices join.	Criticizing precedent; Personal precedent	No
United States v. Taylor, 596 U.S. 845, 875 n.1 (2022).	Dissenting (in footnote)	Alito	*Cunningham v. California*, 549 U.S. 270, 298, n.1 (2007) (Alito, J., dissenting). No current Justices join.	Criticizing precedent; Personal precedent	No
United States v. Taylor, 596 U.S. 845, 875 n.1 (2022).	Dissenting (in footnote)	Alito	*United States v. Davis*, 588 U.S. 445, 485–86 (2019) (Kavanaugh, J., dissenting). Joined by Justices Thomas & Alito. Joined in part by Chief Justice Roberts.	Criticizing precedent	No
New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 23 (2022).	Majority	Thomas	*District of Columbia v. Heller*, 554 U.S. 570, 689–90 (Breyer, J., dissenting). No current Justices join.	Cabin/clarify majority holding; Critiquing dissent	Yes
New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 31 (2022).	Majority	Thomas	*Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). No current Justices join.	Legal principle; Other: agreeing with difficulty of analysis; Personal precedent	Yes
New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 34 (2022).	Majority	Thomas	*Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 311 (2008) (Roberts, C.J., dissenting). Joined by Justices Thomas & Alito.	Legal principle; Personal precedent	Yes

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New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 36 (2022).	Majority	Thomas	*Heller v. District of Columbia*, 670 F.3d 1244, 1274, n.6 (2011) (Kavanaugh, J., dissenting). No current Justices join.	Legal principle/reasoning; Personal precedent	Yes
New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 113 (2022).	Dissenting	Breyer	*District of Columbia v. Heller*, 554 U.S. 570, 721–22 (2011) (Breyer, J., dissenting). No current Justices join.	Legal principle/reasoning; Personal precedent	Yes
New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 129 (2022).	Dissenting	Breyer	*Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting). No current Justices join.	Clarifying precedent	Yes
New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 23 n.5 (2022).	Majority (in footnote)	Thomas	*Heller v. District of Columbia*, 670 F.3d 1244, 1277 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). No current Justices join.	Characterizing precedent	Yes
New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 38 n.9 (2022).	Majority (in footnote)	Thomas	*Drake v. Filko*, 724 F.3d 426, 442 (3d Cir. 2013) (Hardiman, J., dissenting). No current Justices join.	Other: factual statement	Yes
Vega v. Tekoh, 597 U.S. 134, 149 n.5 (2022).	Majority (in footnote)	Alito	*Dickerson v. United States*, 530 U.S. 428, 445–46, 457–61 (2000) (Scalia, J., dissenting). Joined by Justice Thomas.	Illustrating disagreement	No

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Nance v. Ward, 597 U.S. 159, 164–65 (2022).	Majority	Kagan	*Arthur v. Dunn*, 580 U.S. 1141, 1148 (2017) (Sotomayor, J., dissenting from denial of certiorari). No current Justices join.	Legal principle	No
Berger v. North Carolina State Conference of the NAACP, 597 U.S. 179, 196 (2022).	Majority	Gorsuch	*North Carolina State Conf. of the NAACP v. Berger*, 999 F.3d 915, 951 (4th Cir. 2021) (Quattlebaum, J., dissenting). No current Justices join.	Other: agreeing with reasoning of dissent in lower court	No
Berger v. North Carolina State Conference of the NAACP, 597 U.S. 179, 198 (2022).	Majority	Gorsuch	*North Carolina State Conf. of the NAACP v. Berger*, 999 F.3d 915, 939–41 (Wilkinson, J., dissenting). No current Justices join.	Other: agreeing with reasoning of dissent in lower court	No
Berger v. North Carolina State Conference of the NAACP, 597 U.S. 179, 209–10 (2022).	Dissenting	Sotomayor	*Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 272 (2011) (Roberts, C.J., dissenting). Joined by Justice Alito.	Legal principle; Personal precedent	Yes (in parenthetical)
Berger v. North Carolina State Conference of the NAACP, 597 U.S. 179, 200 n.* (2022).	Majority (in footnote)	Gorsuch	*North Carolina State Conf. of the NAACP v. Berger*, 999 F.3d 915, 945 (4th Cir. 2021) (Quattlebaum, J., dissenting). No current Justices join.	Other: agreeing with reasoning of dissent in lower court	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 250 (2022).	Majority	Alito	*Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 793, (1986) (White, J., dissenting). No current Justices join.	Critiquing precedent	Yes

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Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 257 (2022).	Majority	Alito	*Compassion in Dying v. Washington*, 85 F.3d 1440, 1444 (9th Cir. 1996) (O'Scannlain, J., dissenting from denial of rehearing en banc). No current Justices join.	Critiquing precedent	No
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 261 (2022).	Majority	Alito	*Roe v. Wade*, 410 U.S. 113, 222 (1973) (White, J., dissenting to the majority's opinion in *Roe v. Wade* and *Doe v. Bolton*). No current Justices join.	Critiquing precedent	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 268 (2022).	Majority	Alito	*Plessy v. Ferguson*, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting). No current Justices join.	In support of overturning precedent; Legal principle	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 268–69 (2022).	Majority	Alito	*Roe v. Wade*, 410 U.S. 113, 222 (1973) (White, J., dissenting to the majority's opinion in *Roe v. Wade* and *Doe v. Bolton*). No current Justices join.	Broader principles; Criticism of precedent/arguing to overrule precedent	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 279 (2022).	Majority	Alito	*Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting). No current Justices join.	Arguing to overturn precedent/critiquing precedent	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 281 (2022).	Majority	Alito	*June Medical Services L.L.C. v. Russo*, 591 U.S. 299, 424 (2020) (Gorsuch, J., dissenting). No current Justices join.	Critiquing precedent/arguing to overturn precedent	Yes

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Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 286 (2022).	Majority	Alito	*Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). No current Justices join.	Criticizing precedent/ supporting overturning precedent	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 286 (2022).	Majority	Alito	*Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 631–33 (Thomas, J., dissenting). No current Justices join.	Supplemental authority critiquing/supporting overturning precedent	No
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 286 (2022).	Majority	Alito	*Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 645–66, 678–84 (Alito, J., dissenting). Joined by Chief Justice Roberts & Justice Thomas.	Supplemental authority critiquing/supporting overturning precedent	No
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 286 (2022).	Majority	Alito	*June Medical Services L.L.C. v. Russo*, 591 U.S. 299, 409–23 (Gorsuch, J., dissenting). No current Justices join.	Supplemental authority critiquing/supporting overturning precedent	No
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 287 (2022).	Majority	Alito	*June Medical Services L. L. C. v. Russo*, 591 U.S. 299, 376 (Thomas, J., dissenting). No current Justices join.	Critiquing precedent/supporting overturning precedent	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 292 (2022).	Majority	Alito	*Roe v. Wade*, 410 U.S. 113, 222 (1973) (White, J., dissenting to the majority's opinion in *Roe v. Wade* and *Doe v. Bolton*). No current Justices join.	Critiquing precedent/supporting justification for overturning precedent	Yes

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Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 331 (2022).	Concurring	Thomas	*June Medical Services L.L.C. v. Russo*, 591 U.S. 299, 374 (2020) (Thomas, J., dissenting). No current Justices join.	Critiquing precedent/supporting justification for overturning precedent; Personal precedent	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 333 (2022).	Concurring	Thomas	*Obergefell v. Hodges*, 576 U.S. 644, 722 (2015) (Thomas, J., dissenting). No current Justices join.	Criticizing precedent/ rationale/advocating overturning precedent; Personal precedent	No
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 334 (2022).	Concurring	Thomas	*Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 794, (1986) (White, J., dissenting). No current Justices join.	Criticizing precedent/ rationale/advocating overturning precedent	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 335 (2022).	Concurring	Thomas	*Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 640–42 (2016) (Thomas, J., dissenting). No current Justices join.	Criticizing precedent/advocating overturning precedent; Personal precedent	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 336 (2022).	Concurring	Thomas	*Obergefell v. Hodges*, 576 U.S. 644, 696 (Roberts, C.J., dissenting). Joined by Justice Thomas.	Advocating overturning precedent	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 340 (2022).	Concurring	Kavanaugh	*Furman v. Georgia*, 408 U.S. 238, 467 (1972) (Rehnquist, J., dissenting). No current Justices join.	Legal principle	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 341 (2022).	Concurring	Kavanaugh	*Roe v. Wade*, 410 U.S. 113, 177 (1973) (Rehnquist, J., dissenting). No current Justices join.	Legal principle; Critiquing precedent	No

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Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 341 (2022).	Concurring	Kavanaugh	*Roe v. Wade*, 410 U.S. 113, 222 (1973) (White, J., dissenting to the majority's opinion in *Roe v. Wade* and *Doe v. Bolton*). No current Justices join.	Legal principle	No
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 341–42 (2022).	Concurring	Kavanaugh	*Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). No current Justices join.	Justifying overturning precedent	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 342 (2022).	Concurring	Kavanaugh	*Roe v. Wade*, 410 U.S. 113, 222 (1973) (White, J., dissenting to the majority's opinion in *Roe v. Wade* and *Doe v. Bolton*). No current Justices join.	Critiquing precedent/advocating to overturn precedent	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 350–51 (2022).	Concurring	Roberts	*Gonzales v. Carhart*, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting). No current Justices join.	Characterizing majority opinion	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 359 (2022).	Dissenting	Breyer, Kagan & Sotomayor	*Gonzales v. Carhart*, 550 U.S. 124, 171–72 (2007) (Ginsburg, J., dissenting). No current Justices join.	Legal principle	No
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 376 (2022).	Dissenting	Breyer, Kagan & Sotomayor	*Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). No current Justices join.	Legal principle	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 376 (2022).	Dissenting	Breyer, Kagan & Sotomayor	*Poe v. Ullman*, 367 U.S. 497, 542, (1961) (Harlan, J., dissenting). No current Justices join.	Legal principle	Yes

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Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 383 (2022).	Dissenting	Breyer, Kagan & Sotomayor	*Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). No current Justices join.	Warning; quote	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 385 (2022).	Dissenting	Breyer, Kagan & Sotomayor	*Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting). Joined by Justice Thomas.	Warning; quote	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 385 (2022).	Dissenting	Breyer, Kagan & Sotomayor	*Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting). Joined by Justice Thomas.	Warning; quote	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 408–09 (2022).	Dissenting	Breyer, Kagan & Sotomayor	*Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting). No current Justices join.	Legal principle; Policy	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 414 (2022).	Dissenting	Breyer, Kagan & Sotomayor	*Payne v. Tennessee*, 501 U.S. 808, 844 (Marshall, J., dissenting). No current Justices join.	Warning; quote	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 415 (2022).	Dissenting	Breyer, Kagan & Sotomayor	*Whole Woman's Health v. Jackson*, 141 S.Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting). Joined by Justice Kagan.	Other: adopting characterization of fact	Yes
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 252 n.40 (2022).	Majority (in footnote)	Alito	*Voinovich v. Women's Medical Professional Corp.*, 523 U.S. 1036, 1039 (1998) (Thomas, J., dissenting from denial of certiorari). No current justices join.	Critiquing precedent; Illustrating disagreement	No

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 285 n.58 (2022).	Majority (in footnote)	Alito	*A Woman's Choice–East Side Women's Clinic v. Newman*, 305 F.3d 684, 708 (7th Cir. 2002) (Wood, J., dissenting). No current Justices join.	Examples supporting critique of precedent/advocating overruling	No
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 285 n.59 (2022).	Majority (in footnote)	Alito	*Planned Parenthood of Rocky Mountains Servs. Corp. v. Owens*, 287 F.3d 910, 931 (10th Cir. 2002) (Baldock, J., dissenting). No current Justices join.	Examples supporting critique of precedent/advocating overruling	No
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 287 n.61 (2022).	Majority (in footnote)	Alito	*June Medical Services L.L.C. v. Russo*, 591 U.S. 299, 403–04 (Alito, J., dissenting). Joined by Justice Gorsuch. Joined in part by Justices Thomas & Kavanaugh.	Examples supporting critique of precedent/overruling precedent;	No
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 287 n.61 (2022).	Majority (in footnote)	Alito	*June Medical Services L.L.C. v. Russo*, 591 U.S. 299, 413 (Gorsuch, J., dissenting). No current Justices join.	Examples supporting critique of precedent/overruling precedent	No
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 287 n.61 (2022).	Majority (in footnote)	Alito	*Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 632 n.1 (Thomas, J., dissenting). No current Justices join.	Examples supporting critique of precedent/overruling precedent	No
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 287 n.62 (2022).	Majority (in footnote)	Alito	*Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 645–66, (Alito, J., dissenting). Joined by Chief Justice Roberts and Justice Thomas.	Examples supporting critique of precedent/overruling precedent	No

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Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 287 n.63 (2022).	Majority (in footnote)	Alito	*Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 644–45 (Alito, J., dissenting). Joined by Chief Justice Roberts and Justice Thomas.	Examples supporting critique of precedent/overruling precedent	No
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 287 n.64 (2022).	Majority (in footnote)	Alito	*Stenberg v. Carhart*, 530 U.S. 914, 977–78 (2000) (Kennedy, J., dissenting). No current Justices join.	Examples supporting critique of precedent/overruling precedent	No
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 287 n.64 (2022).	Majority (in footnote)	Alito	*Stenberg v. Carhart*, 530 U.S. 914, 996–97 (2000) (Thomas, J., dissenting). No current Justices join.	Examples supporting critique of precedent/overruling precedent	No
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 287 n.65 (2022).	Majority (in footnote)	Alito	*Hill v. Colorado*, 530 U.S. 703, 741–42, (2000) (Scalia, J., dissenting). Joined by Justice Thomas.	Examples supporting critique of precedent/overruling precedent	No
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 287 n.65 (2022).	Majority (in footnote)	Alito	*Hill v. Colorado*, 530 U.S. 703, 765 (2000) (Kennedy, J., dissenting). No current Justices join.	Examples supporting critique of precedent/overruling precedent	No
Ruan v. United States, 597 U.S. 450, 467 (2022).	Majority	Breyer	*Gonzales v. Oregon*, 546 U.S. 243, 285 (Scalia, J., dissenting). Joined by Chief Justice Roberts and Justice Thomas.	Statutory interpretation	Yes (in parenthetical)
Ruan v. United States, 597 U.S. 450, 472 n.* (2022).	Concurring (in footnote)	Alito	*United States v. X–Citement Video*, 513 U.S. 64, 80–82 (Scalia, J., dissenting). Joined by Justice Thomas.	Legal principle; Other: showing rule they state is the moderate rule by showing Scalia rule	Yes (in parenthetical)

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Kennedy v. Bremerton School District, 597 U.S. 507, 537 (2022).	Majority	Gorsuch	*Lee v. Weisman*, 505 U.S. 577, 640–41 (Scalia, J., dissenting). Joined by Justice Thomas.	Illustrating disagreement	No
Kennedy v. Bremerton School District, 597 U.S. 507, 564 (2022).	Dissenting	Sotomayor	*Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 369–70, (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting). No other current Justices join.	Legal principle	Yes (in parenthetical)
Kennedy v. Bremerton School District, 597 U.S. 507, 573 (2022).	Dissenting	Sotomayor	*Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 374 (Breyer, Sotomayor, & Kagan, JJ., dissenting). No other current Justices join.	Legal principle	Yes (in parenthetical)
Kennedy v. Bremerton School District, 597 U.S. 507, 573 (2022).	Dissenting	Sotomayor	*New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 103 (2022) (Breyer, J., dissenting). Joined by Justices Sotomayor & Kagan.	Legal principle	Yes (in parenthetical)
Kennedy v. Bremerton School District, 597 U.S. 507, 573 (2022).	Dissenting	Sotomayor	*Brown v. Davenport*, 596 U.S. 118, 152 (2022) (Kagan, J., dissenting). Joined by Justice Sotomayor.	Legal principle	Yes (in parenthetical)
Kennedy v. Bremerton School District, 597 U.S. 507, 578 (2022).	Dissenting	Sotomayor	*Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 496 (2017) (Sotomayor, J., dissenting). No current Justices join.	Legal principle; Personal precedent	Yes (in parenthetical)

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
Kennedy v. Bremerton School District, 597 U.S. 507, 535 n.4 (2022).	Majority (in footnote)	Gorsuch	*Kennedy v. Bremerton School District*, 4 F.4th 910, 945 (9th Cir. 2021) (R. Nelson, J., dissenting from denial of rehearing en banc). No current Justices join.	Criticizing precedent/arguing for overturning precedent	No
Kennedy v. Bremerton School District, 597 U.S. 507, 535 n.4 (2022).	Majority (in footnote)	Gorsuch	*Kennedy v. Bremerton School District*, 4 F.4th 910, 947 n.3 (9th Cir. 2021) (R. Nelson, J., dissenting from denial of rehearing en banc). No current Justices join.	Criticizing precedent/arguing to overturn precedent	Yes (in parenthetical)
Kennedy v. Bremerton School District, 597 U.S. 507, 537 n.5 (2022).	Majority (in footnote)	Gorsuch	*Lee v. Weisman*, 505 U.S. 577, 640–42 (1992) (Scalia, J. dissenting). Joined by Justice Thomas	Legal principle; Other: purpose	No
Torres v. Texas Department of Public Safety, 597 U.S. 580, 599 (2022).	Concurring	Kagan	*PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 512–15 (2021) (Barrett, J., dissenting). Joined by Justices Thomas, Kagan, & Gorsuch.	Characterizing holding of majority; Critiquing precedent; Personal precedent	No
Oklahoma v. Castro-Huerta, 597 U.S. 629, 647 (2022).	Majority	Kavanaugh	*McGirt v. Oklahoma*, 590 U.S. 894, 938 (2020) (Roberts, C.J., dissenting). Joined by Justices Alito, Kavanaugh, & Thomas	Other: adopting characterization of fact	No

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
Oklahoma v. Castro-Huerta, 597 U.S. 629, 695 (2022).	Dissenting	Gorsuch	*Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting). No current Justices join.	Seems to just be appropriating the quote; legal principle (loosely)	Yes
Oklahoma v. Castro-Huerta, 597 U.S. 629, 651 (2022).	Majority (in footnote)	Kavanaugh	*McGirt v. Oklahoma*, 591 U.S. 894, 940–41 (2020) (Roberts, C.J., dissenting). Joined by Justices Alito, Kavanaugh, & Thomas	Other: adopting characterization of fact	No
West Virginia v. EPA, 597 U.S. 697, 723 (2022).	Majority	Roberts	*United States Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc). No current Justices join.	Legal principle	Yes
West Virginia v. EPA, 597 U.S. 697, 736 (2022).	Concurring	Gorsuch	*Chisholm v. Georgia*, 2 U.S. 419, 450 (1793) (Iredell, J., dissenting). No current Justices join.	Rule (to illustrate that "courts have consistently held" – first of two examples)	Yes
West Virginia v. EPA, 597 U.S. 697, 737 (2022).	Concurring	Gorsuch	*Gundy v. United States*, 588 U.S. 128, 156–60 (2019) (Gorsuch, J., dissenting). Joined by Chief Justice Roberts, & Justice Thomas.	Illustrating disagreement (among justices to highlight areas of agreement)	No
West Virginia v. EPA, 597 U.S. 697, 739 (2022).	Concurring	Gorsuch	*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). No current Justices join.	Legal principle	Yes

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
West Virginia v. EPA, 597 U.S. 697, 740 (2022).	Concurring	Gorsuch	*Gundy v. United States*, 588 U.S. 128, 167 (Gorsuch, J., dissenting). Joined by Chief Justice Roberts, & Justice Thomas.	Personal precedent; Legal principle	No
West Virginia v. EPA, 597 U.S. 697,745 (2022).	Concurring	Gorsuch	*United States Telecom Ass'n v. FCC*, 855 F.3d 381, 423–24 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc). No current Justices join.	Legal principle; Other: reasoning	Yes
West Virginia v. EPA, 597 U.S. 697, 750 (2022).	Concurring	Gorsuch	*Rucho v. Common Cause*, 588 U.S. 684, 727 (2019) (Kagan, J., dissenting). Joined by Justice Sotomayor.	Legal principle	Yes (in parenthetical)
West Virginia v. EPA, 597 U.S. 697, 782 (2022).	Dissenting	Kagan	*National Federation of Independent Business v. OSHA*, 595 U.S. 109, 134 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting). No current Justices join.	Legal principle; Other: reasoning	Yes (in parenthetical)
West Virginia v. EPA, 597 U.S. 697, 782 (2022).	Dissenting	Kagan	*Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting). No current Justices join.	Legal principle	No
West Virginia v. EPA, 597 U.S. 697, 782 (2022).	Dissenting	Kagan	*Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). No current Justices join.	Legal principle	Yes

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
West Virginia v. EPA, 597 U.S. 697, 782–83 (2022).	Dissenting	Kagan	*Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting). No current Justices join.	Legal principle	Yes
West Virginia v. EPA, 597 U.S. 697, 731 n.4 (2022).	Majority (in footnote)	Roberts	*American Lung Ass'n. v. EPA*, 985 F.3d 914, 1000 (D.C. Cir. 2021) (Walker, J., dissenting). No current Justices join.	Other: adopting characterization of fact	Yes (in parenthetical)
Biden v. Texas, 597 U.S. 785, 800 (2022).	Majority	Roberts	*Jennings v. Rodriguez*, 583 U.S. 281, 355 (2018) (Breyer, J., dissenting). Joined by Justice Sotomayor.	Rule (cumulative support for rule – seems to be showing agreement on principle across ideological divide)	Yes (in parenthetical)
Biden v. Texas, 597 U.S. 785, 839 (2022).	Dissenting	Barrett	*Alli v. Decker*, 650 F.3d 1007, 1013 (3rd Cir. 2011) (Fuentes, J., dissenting). No current Justices join.	Illustrating disagreement	No
United States v. Zubaydah, 595 U.S. 195, 219 (2022).	Concurring	Thomas	*Husayn v. Mitchell*, 965 F.3d 775, 782 (9th Cir. 2020) (Bress, J., dissenting from denial of rehearing en banc). No current Justices join.	Other: adopting characterization of fact	No
United States v. Zubaydah, 595 U.S. 195, 221 (2022).	Concurring	Thomas	*Trump v. Vance*, 591 U.S. 786, 823–24 (2020) (Thomas, J., dissenting). No current Justices join.	Rule (supplemental support); personal precedent	No
United States v. Zubaydah, 595 U.S. 195, 223 (2022).	Concurring	Thomas	*Hamdi v. Rumsfeld*, 542 U.S. 507, 592 (2004) (Thomas, J., dissenting). No current Justices join.	Other: reasoning; personal precedent	Yes

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
United States v. Zubaydah, 595 U.S. 195, 250 (2022).	Dissenting	Gorsuch	*Korematsu v. United States*, 323 U.S. 214, 235–36 (1944) (Murphy, J., dissenting). No current Justices join.	Criticizing precedent; Other: example supporting characterization of fact; Warning	No
Wisconsin Legislature v. Wisconsin Elections Commission, 595 U.S. 398, 403 (2022).	Per curiam opinion	Per curiam	*Johnson v. Wisconsin Elections Commission*, 971 N.W.2d, 402, 427–28, 432–33 (2022) (Ziegler, C.J., dissenting). No current Justices join.	Other: adopting characterization of facts (from dissent from opinion under review)	No
Wisconsin Legislature v. Wisconsin Elections Commission, 595 U.S. 398, 405 (2022).	Per curiam opinion	Per curiam	*Johnson v. Wisconsin Elections Commission*, 971 N.W.2d, 402, 433–34 (2022) (Ziegler, C.J., dissenting). No current Justices join.	Other: adopting characterization of facts (from dissent from opinion under review)	No
Wisconsin Legislature v. Wisconsin Elections Commission, 595 U.S. 398, 400 n.1 (2022).	Per curiam opinion (in footnote)	Per curiam	*Johnson v. Wisconsin Elections Commission*, 2022 WI 14, ¶87 (Mar. 1, 2022) (Ziegler, C.J., dissenting). No current Justices join.	Other: adopting characterization of facts (from dissent from opinion under review)	No

B. Appendix B: Citations by Justice[248]

Alito	
Total citations to dissents	35[249]
In majority opinions	27
In concurring opinions	2
In opinions concurring in part/dissenting in part	0
In dissenting opinions	6
Total "sticky" citations	5
Dissenting justices most frequently cited:	
Alito	10
Thomas	5
White	5
Citations to dissent authored or joined by justice joining current opinion	7
Barrett	
Total citations to dissents	2
In majority opinions	0
In concurring opinions	1
In opinions concurring in part/dissenting in part	0
In dissenting opinions	1
Total "sticky" citations	0
Dissenting justices most frequently cited:	
Scalia	1
Citations to dissent authored or joined by justice joining current opinion	1
Breyer	
Total citations to dissents	25[250]
In majority opinions	1
In concurring opinions	3
In opinions concurring in part/dissenting in part	0
In dissenting opinions	21[251]
Total "sticky" citations	1
Dissenting justices most frequently cited:	

248. *See supra* Appendix A.
249. Includes 25 dissent citations in majority opinion in *Dobbs*.
250. Includes 9 in joint dissent in *Dobbs* with Justices Sotomayor and Kagan.
251. Includes 9 in joint dissent in *Dobbs* with Justices Sotomayor and Kagan.

Breyer	10
Scalia	3
Citations to dissent authored or joined by justice joining current opinion	5

Gorsuch

Total citations to dissents	29
In majority opinions	8
In concurring opinions	18
In opinions concurring in part/dissenting in part	0
In dissenting opinions	3
Total "sticky" citations	4
Dissenting justices most frequently cited:	
Gorsuch	6
Scalia	5
Citations to dissent authored or joined by justice joining current opinion	6

Kagan

Total citations to dissents	18[252]
In majority opinions	2
In concurring opinions	1
In opinions concurring in part/dissenting in part	0
In dissenting opinions	15[253]
Total "sticky" citations	4
Dissenting justices most frequently cited:	
Scalia	5[254]
Sotomayor	4[255]
Citations to dissent authored or joined by justice joining current opinion	3

Kavanaugh

Total citations to dissents	11
In majority opinions	6
In concurring opinions	5
In opinions concurring in part/dissenting in part	0
In dissenting opinions	0
Total "sticky" citations	3

252. Includes 9 dissent citation in joint dissent in *Dobbs* with Breyer and Sotomayor.
253. Includes 9 dissent citations in joint dissent in *Dobbs* with Breyer and Sotomayor.
254. Includes 2 in joint dissent in *Dobbs*.
255. Includes 1 in joint dissent in *Dobbs*.

Dissenting justices most frequently cited:	
Rehnquist	2
Roberts	2
White	2
Citations to dissent authored or joined by justice joining current opinion	2

Roberts

Total citations to dissents	7
In majority opinions	5
In concurring opinions	2
In opinions concurring in part/dissenting in part	0
In dissenting opinions	1
Total "sticky" citations	2
Dissenting justices most frequently cited:	
Kavanaugh	2
Citations to dissent authored or joined by justice joining current opinion	2

Sotomayor

Total citations to dissents	22[256]
In majority opinions	0
In concurring opinions	0
In opinions concurring in part/dissenting in part	0
In dissenting opinions	22[257]
Total "sticky" citations	1
Dissenting justices most frequently cited:	
Sotomayor	7
Breyer	3
Kagan	3
Scalia	3
Citations to dissent authored or joined by justice joining current opinion	7

256. Includes 9 citations to dissenting opinions in joint dissent in *Dobbs* with Breyer and Kagan.

257. Includes 9 citations to dissenting opinions in joint dissent in *Dobbs* with Breyer and Kagan.

Thomas

Total citations to dissents	66
In majority opinions	22
In concurring opinions	14
In opinions concurring in part/dissenting in part	4
In dissenting opinions	26
Total "sticky" citations	10
Dissenting justices most frequently cited:	
Thomas	17
Kavanaugh	10
Scalia	7
Roberts	6
Citations to dissent authored or joined by justice joining current opinion	10

Most Cited Justices

Scalia	24
Thomas	23
Breyer	16
Kavanaugh	15
Sotomayor	13
Roberts	10
Gorsuch	10

C. *Appendix C: "Sticky" Dissent Citations*

Opinion	Type of Opinion	Written By	"Sticky" Dissent Citation	Document Initially Citing Dissent
Whole Woman's Health v. Jackson, 595 U.S. 30, 63 n.1 (2021).	Dissenting	Sotomayor	*Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2498–99 (2021) (Sotomayor, J., dissenting). Joined by Justice Kagan.	Reply Brief for Respondent Penny Clarkston at 8, 9, Whole Woman's Health v. Jackson, 595 U.S. 30 (2021) (No. 21-463).
National Federation of Independent Businesses v. OSHA, 595 U.S. 109, 124–25 (2022).	Concurring	Gorsuch	*Gundy v. United States*, 588 U.S. 128, 149 (Gorsuch, J., dissenting). Joined by Justices Roberts & Thomas.	Emergency Application of Twenty-Six Business Associations for Immediate Stay of Agency Action Pending Disposition of Petition for Review at 23, NFIB v. OSHA, 595 U.S. 109 (2022) (No. 21A244).
Ramirez v. Collier, 595 U.S. 411, 457 (2022).	Dissenting	Thomas	*Murphy v. Collier*, 587 U.S. 901, 907 (2019) (Alito, J., dissenting from grant of application for stay). Joined by Justices Thomas & Gorsuch	Brief for Respondents *passim*, Ramirez v. Collier, 595 U.S. 411 (2022) (No. 21-5592).
Ramirez v. Collier, 595 U.S. 411, 419 (2022).	Majority	Roberts	*Dunn v. Smith*, 141 S. Ct. 725, 726–27 (Kavanaugh, J., dissenting). Joined by Chief Justice Roberts.	Brief for Respondents *passim*, Ramirez v. Collier, 595 U.S. 411 (2022) (No. 21-5592).

Opinion	Type of Opinion	Written By	"Sticky" Dissent Citation	Document Initially Citing Dissent
Badgerow v. Walters, 596 U.S. 1, 7 (2022).	Majority	Kagan	*Quezada v. Bechtel OG&C Construction Services., Inc.*, 946 F.3d 837, 846 (5th Cir. 2020) (Ho, J., dissenting). No current Justices join.	Petition for a Writ of Certiorari *passim*, Badgerow v. Walters, 596 U.S. 1 (2022) (No. 20-1143); Brief for the Petitioner *passim*, Badgerow v. Walters, 596 U.S. 1 (2022) (No. 20-1143).
Thompson v. Clark, 596 U.S. 36, 51 (2022).	Dissenting	Alito	*Manuel v. Joliet*, 580 U.S. 357, 378 (2017) (Alito, J., dissenting). Joined by Justice Thomas.	Brief in Opposition *passim*, Thompson v. Clark, 596 U.S. 36 (2022) (No. 20-659).
Brown v. Davenport, 596 U.S. 118, 155 n.5 (2022).	Dissenting (footnote)	Kagan	*Davis v. Ayala*, 576 U.S. 257, 291 (2015) (Sotomayor, J., dissenting). Joined by Justice Kagan.	Brief in Opposition at 12, Brown v. Davenport, 596 U.S. 118 (2022) (No. 20-826).
United States v. Vaello Madero, 596 U.S. 159, 185 (2022).	Concurring	Gorsuch	*Downes v. Bidwell*, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting). No current Justices join.	Brief for Respondent at 8, U.S. v. Vaello-Madero, 596 U.S. 159 (2022) (No. 20-303).
United States v. Vaello Madero, 596 U.S. 159, 173 n.1 (2022).	Majority (footnote)	Kavanaugh	*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 583 (1857) (Curtis, J., dissenting). No current Justices join.	Brief for Respondent, U.S. v. Vaello-Madero, 596 U.S. 159 (2022) (No. 20-303).

Opinion	Type of Opinion	Written By	Dissent Cited	Purpose of Citation	Quoted Dissent?
Hemphill v. New York, 595 U.S. 140, 167 (2022).	Dissenting	Thomas	*Vachon v. New Hampshire*, 414 U.S. 478, 483 (1974) (Rehnquist, J., dissenting). No current Justices join.	Critiquing precedent	No
Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 595 U.S. 178, 192 (2022).	Dissenting	Thomas	*Manuel v. Joliet*, 580 U.S. 357, 375 n.1 (2017) (Alito, J., dissenting). Joined by Justice Thomas.	Legal principle	No
Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 595 U.S. 178, 192–93 (2022).	Dissenting	Thomas	*Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 472 (2017) (Thomas, J., dissenting). Joined by Justice Alito.	Warning	Yes
Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 595 U.S. 178 (2022).	Dissenting	Thomas	*Ratzlaf v. United States*, 510 U.S. 135, 162 (1994) (Blackmun, J., dissenting). Joined by Justice Thomas.	Reasoning – why a rule makes sense	Yes
Cameron v. EMW Women's Surgical Center, 595 U.S. 267, 284–85 (2022).	Concurring	Thomas	*Devlin v. Scardelletti*, 536 U.S. 1, 15 (2002) (Scalia, J., dissenting) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 34 cmt. a, reporter's note, at 347 (A.L.I. 1980)). Joined by Justice Thomas.	Legal principle	Yes
United States v. Tsarnaev, 595 U.S. 302, 332 (2022).	Dissenting	Breyer	*Gall v. United States*, 552 U.S. 38, 72 (2007) (Alito, J., dissenting). No current Justices join.	Rule	Yes
United States v. Tsarnaev, 595 U.S. 302, (2022).	Dissenting	Breyer	*Glossip v. Gross*, 576 U.S. 863, 937 (2015) (Breyer, J., dissenting). No current Justices join.	Legal principle; Personal precedent	Yes (in parenthetical)

Opinion	Type of Opinion	Written By	"Sticky" Dissent Citation	Document Initially Citing Dissent
Egbert v. Boule, 596 U.S. 482, 501–02 (2022).	Majority	Thomas	*Carlson v. Green*, 446 U.S. 14, 31 (1980) (Rehnquist, J., dissenting). No current Justices join.	Petition for a Writ of Certiorari at 24, Egbert v. Boule, 596 U.S. 482 (2022) (No. 21-147).
Denezpi v. United States, 596 U.S. 591, 606 (2022).	Dissenting	Gorsuch dissent	*Gamble v. United States*, 587 U.S. 678, 737 (2019) (Gorsuch, J., dissenting). No current Justices join.	Reply Brief of Appellant Merle Denezpi *passim*, Denezpi v. U.S., 596 U.S. 591 (2022) (No. 20-7622).
Viking River Cruises, Inc. v. Moriana, 596 U.S. 639, 665 (2022).	Dissenting	Thomas	*Kindred Nursing Centers L.P. v. Clark*, 581 U.S. 246, 257 (2017) (Thomas, J., dissenting). No current Justices join.	Respondent's Brief in Opposition *passim*, Viking River Cruises v. Moriana, 596 U.S. 639 (2022) (No. 20-1573); Brief for Respondent at 21, Viking River Cruises v. Moriana, 596 U.S. 639 (2022) (No. 20-1573).
New York State Rifle & Pistol Ass'n, v. Bruen, 597 U.S. 1, 23 (2022).	Majority	Thomas	*District of Columbia v. Heller*, 554 U.S. 570, 689–90 (Breyer, J., dissenting). No current Justices join.	Brief for Respondents *passim*, N.Y. State Rifle Pistol Ass'n v. Bruen, 597 U.S.1 (2022) (No. 20-843).
New York State Rifle & Pistol Ass'n, v. Bruen, 597 U.S. 1, 31 (2022).	Majority	Thomas	*Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). No current Justices join.	Brief for Petitioners at 40, 45, N.Y. State Rifle Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (No. 20-843); Brief for Respondents at 20, N.Y. State Rifle Pistol Ass'n v. Bruen, 597 U.S.1 (2022) (No. 20-843).

Opinion	Type of Opinion	Written By	"Sticky" Dissent Citation	Document Initially Citing Dissent
New York State Rifle & Pistol Ass'n, v. Bruen, 597 U.S. 1, 129 (2022).	Dissenting	Breyer	*Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting). No current Justices join.	Brief for Petitioners at 40, N.Y. State Rifle Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (No. 20-843).
New York State Rifle & Pistol Ass'n, v. Bruen, 597 U.S. 1, 38 n.9 (2022).	Majority (footnote)	Thomas	*Drake v. Filko*, 724 F.3d 426, 442 (3d Cir. 2013) (Hardiman, J., dissenting). No current Justices join.	Petition for Writ of Certiorari at 26, N.Y. State Rifle Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (No. 20-843).
Vega v. Tekoh, 597 U.S. 134, 149 n.5 (2022).	Majority (footnote)	Alito	*Dickerson v. United States*, 530 U.S. 428, 445–46, 457–61 (2000) (Scalia, J., dissenting). Joined by Justice Thomas.	Petition for a Writ of Certiorari at 12a, Vega v. Tekoh, 597 U.S. 134 (2022) (No. 21-499); Brief for Petitioner *passim*, Vega v. Tekoh, 597 U.S. 134 (2022) (No. 21-499).
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 250 (2022).	Majority	Alito	*Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 793, (1986) (White, J., dissenting). No current Justices join.	Brief for Petitioners at 3, Dobbs v. Jackson Women Health Org., 17, 21, 33, 41, 597 U.S. 215 (2022) (No. 19-1392); Reply Brief for Petitioners at 8–9, Dobbs v. Jackson Women Health Org., 597 U.S. 215 (2022) (No. 19-1392).
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 281 (2022).	Majority	Alito	*June Medical Services L.L.C. v. Russo*, 591 U.S. 299, 424 (2020) (Gorsuch, J., dissenting). No current Justices join.	Brief for Petitioners at 25, Dobbs v. Jackson Women Health Org., 597 U.S. 215 (2022) (No. 19-1392).

Opinion	Type of Opinion	Written By	"Sticky" Dissent Citation	Document Initially Citing Dissent
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 341 (2022).	Concurring	Kavanaugh	*Roe v. Wade*, 410 U.S. 113, 177 (1973) (Rehnquist, J., dissenting). No current Justices join.	Brief for Petitioners *passim*, Dobbs v. Jackson Women Health Org., 597 U.S. 215 (2022) (No. 19-1392).
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 350–51 (2022).	Concurring	Roberts	*Gonzales v. Carhart*, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting). No current Justices join.	Brief for Petitioners at 17, Dobbs v. Jackson Women Health Org., 597 U.S. 215 (2022) (No. 19-1392).
Torres v. Texas Department of Public Safety, 597 U.S. 580, 599 (2022).	Concurring	Kagan	*PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 512–15 (2021) (Barrett, J., dissenting). Joined by Justices Thomas, Kagan, & Gorsuch.	Reply Brief for Petitioner *passim*, Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580 (2022) (No. 20-603).
Oklahoma v. Castro-Huerta, 597 U.S. 629, 647 (2022).	Majority	Kavanaugh	*McGirt v. Oklahoma*, 590 U.S. 894, 938 (2020) (Roberts, C.J., dissenting). Joined by Justices Alito, Kavanaugh, & Thomas.	Petition for A Writ of Certiorari *passim*, Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022) (No. 21-429); Brief for Respondent at 6, Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022) (No. 21-429); Reply Brief for the Petitioner *passim*, Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022) (No. 21-429).

Opinion	Type of Opinion	Written By	"Sticky" Dissent Citation	Document Initially Citing Dissent
West Virginia v. Environmental Protection Agency, 597 U.S. 697, 740 (2022).	Concurring	Gorsuch	*Gundy v. United States*, 588 U.S. 128, 167 (Gorsuch, J., dissenting). Joined by Chief Justice Roberts, & Justice Thomas.	Brief for Petitioners at 15, 44-45, W. Va. v. EPA, 597 U.S. 697 (2022) (No. 20-1530); Brief for Petitioner the North American Coal Corporation at 20, 22, 27, W. Va. v. EPA, 597 U.S. 697 (2022) (Nos. 20-1530, 20-1531, 20-1778, 20-178); Brief of Petitioner Westmoreland Mining Holdings LLC at 22, W. Va. v. EPA, 597 U.S. 697 (2022) (No. 20-1778); Brief of Respondent National Mining Association in Support of Petitioners *passim*, W. Va. v. EPA, 597 U.S. 697 (2022) (No. 20-1530); Brief of Respondent America's Power in Support of Petitioners at 8, W. Va. v. EPA, 597 U.S. 697 (2022) (Nos. 20-1530, 20-1531, 20-1778, 20-1780); Brief of Non-Governmental Organization and Trade Association Respondents at 48, W. Va. v. EPA, 597 U.S. 697 (2022) (Nos. 20-1530, 20-1531, 20-1778, 20-1780); Brief for the Power Company Respondents at 51, W. Va. v. EPA, 597 U.S. 697 (2022), (Nos. 20-1530, 20-1531, 20-1778, 20-1780); Reply Of Petitioner Westmoreland Mining Holding LLC at 19, W. Va. v. EPA, 597 U.S. 697 (2022) (No. 20-1778).
West Virginia v. Environmental Protection Agency, 597 U.S. 697, 782 (2022).	Dissenting	Kagan	*Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting). No current Justices join.	Brief of Respondent National Mining Association in Support of Petitioners at 22, W. Va. v. EPA, 597 U.S. 697 (2022) (No. 20-1530).

D. Appendix D: Opinions that Cite Dissents: By Split

Split	Total Cases	Cases Citing Dissents	# Dissent Citations
9-0	16	5	14
8-1	12	9	25
7-2	5	4	24
6-3	19	17	130
5-4	10	5	8

Opinion	Split	# of dissent citations
Wooden v. United States, 595 U.S. 360 (2022).	9-0	2
Shurtleff v. City of Boston, 596 U.S. 243 (2022).	9-0	7
American Hospital Ass'n v. Becerra, 596 U.S. 724 (2022).	9-0	2
Arizona v. City of San Francisco, 596 U.S. 763 (2022).	9-0	1
Ruan v. United States, 597 U.S. 450 (2022).	9-0	2
Whole Woman's Health v. Jackson, 595 U.S. 30 (2021).	8-1	5
Hemphill v. New York, 595 U.S. 140 (2022).	8-1	1
Cameron v. EMW Women's Surgical Center, 595 U.S. 267 (2022).	8-1	1
Ramirez v. Collier, 595 U.S. 411 (2022).	8-1	3
Badgerow v. Walters, 596 U.S. 1 (2022).	8-1	2
United States v. Vaello Madero, 596 U.S. 159 (2022).	8-1	4
Johnson v. Arteaga-Martinez, 596 U.S. 573 (2022).	8-1	3
Viking River Cruises, Inc. v. Moriana, 596 U.S. 639 (2022).	8-1	2
Berger v. North Carolina State Conference of the NAACP, 597 U.S. 179 (2022).	8-1	4
Gallardo ex rel. Vassalllo v. Marstiller, 596 U.S. 420 (2022).	7-2	1
United States v. Taylor, 596 U.S. 845 (2022).	7-2	16
United States v. Zubaydah, 595 U.S. 195 (2022).	7-2	4
Wisconsin Legislature v. Wisconsin Elections Commission, 595 U.S. 398 (2022).	7-2	3

Opinion	**Split**	**# of dissent citations**
National Federation of Independent Business v. OSHA, 595 U.S. 109 (2022).	6-3	6
Unicolors Inc. v. H&M Hennes & Mauritz, L.P., 595 U.S. 178 (2022).	6-3	3
United States v. Tsarnaev, 595 U.S. 302 (2022).	6-3	5
Thompson v. Clark, 596 U.S. 36 (2022).	6-3	1
City of Austin v. Reagan National Advertising of Austin, LLC, 596 U.S. 61 (2022).	6-3	9
Brown v. Davenport, 596 U.S. 118 (2022).	6-3	3
Cummings v. Premier Rehab Keller, P L.L.C., 596 U.S. 212 (2022).	6-3	1
Shinn v. Ramirez, 596 U.S. 366 (2022).	6-3	7
Egbert v. Boule, 596 U.S. 482 (2022).	6-3	7
Garland v. Aleman Gonzalez, 596 U.S. 543 (2022).	6-3	1
Denezpi v. United States, 596 U.S. 591 (2022).	6-3	1
Carson ex rel. O.C. v. Makin, 596 U.S. 767 (2022).	6-3	11
New York State Rifle & Pistol Ass'n, v. Bruen, 597 U.S. 1 (2022).	6-3	8
Vega v. Tekoh, 597 U.S. 134 (2022).	6-3	1
Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).	6-3	45
Kennedy v. Bremerton School District, 597 U.S. 507 (2022).	6-3	9
West Virginia v. EPA, 597 U.S. 697 (2022).	6-3	12
Biden v. Missouri, 595 U.S. 87 (2022).	5-4	1
Nance v. Ward, 597 U.S. 159 (2022).	5-4	1
Torres v. Texas Department of Public Safety, 597 U.S. 580 (2022).	5-4	1
Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022).	5-4	3
Biden v. Texas, 597 U.S. 785 (2022).	5-4	2

E. Appendix E: Citations by Purpose[258]

Purpose	Number of Dissent Citations
Critiquing or advocating to overturn precedent	85
Cabining or characterizing precedent	9
"Warning" regarding impact of majority opinion	12
Illustrating disagreement among courts	14
Supporting a statement of public policy	8
Supporting a statement of legal principle	55
Invoking "personal precedent" of the author or another justice on the Court	46
Supporting a statement of legal rule	17
Supporting a "case illustration" for purposes of analogy	0
To identify the source of a direct quotation	119
Adopting a characterization of fact from a lower court opinion in the same matter	6
Some other purpose	36

258. *See supra* Appendix A, Column 5.