ESSAY

A COMMON LAW FOR THE AGE OF AMICI: HOW THE PARTY-PRESENTATION PRINCIPLE CAN HELP IDENTIFY BINDING PRECEDENT

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INTRODUCTION 1
I. DICTA AND HOLDING 2
II. THE PARTY-PRESENTATION PRINCIPLE 4
III. DICTA, PARTY PRESENTATION, AND AMICI 6
CONCLUSION 11

INTRODUCTION

Two recent Supreme Court cases suggest an additional dimension for the traditional test that distinguishes dicta from holding.

In the first, *United States v. Sineneng-Smith*,[1] the Ninth Circuit reversed a criminal conviction based on arguments made by amici appointed by that court. The Supreme Court then reversed 9-0, holding that the Ninth Circuit's handling of the case violated the party-presentation principle—the concept that courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."[2]

In the second, *Dobbs v. Jackson Women's Health*, one reason given by the Supreme Court for overruling *Roe v. Wade*[3] was that *Roe*'s trimester framework "was never raised by any party" in briefing that case.[4]

This Essay examines the connection between those two statements. It concludes that the party-presentation principle can provide useful insight for the process of distinguishing

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1 140 S. Ct. 1575 (2020).

2 *Id.* at 1579.

3 410 U.S. 113 (1973).

4 142 S. Ct. 2228, 2266 (2022).

dicta from holding.

Specifically, the accepted test for distinguishing dicta and holding asks whether a statement is necessary to an opinion's outcome. That test is motivated by concerns about accuracy and legitimacy.[5] Similarly, the party-presentation principle also seeks to advance accurate and legitimate decision making, based on the assumption that parties will identify and advocate the best available arguments.[6]

Because these two concepts share similar goals, this Essay suggests that the party-presentation principle can help clarify the precedential effect of earlier opinions.[7] Put another way, the analysis of *what* issues that opinion addressed can be informed by also examining *who* framed and presented those issues. That perspective can be particularly valuable in high-profile matters involving extensive amicus participation, where the party's presentations can become obscured by extensive discussion of other matters.

I
DICTA AND HOLDING

A holding has precedential effect, while dicta—generally defined as statements unnecessary to resolution of the case[8]—are not binding precedent.[9] In between is "judicial dicta," comprised of statements that a court may choose to follow if it finds them sufficiently persuasive.[10]

Courts justify the distinction between holding and dicta, and the "necessity" test for distinguishing them, by concerns about accurate and legitimate decision making.[11] In an

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5 *See infra* Part I. Dicta and Holding.

6 *See infra* Part II. The Party Presentation Principle.

7 *See infra* Part III. Dicta, Party Presentation, and Amici.

8 *See, e.g.*, Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

9 *Compare* Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend . . . ."); *with* Humphrey's Ex'r v. United States, 295 U.S. 602, 626-67 (1935) ("In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis.").

10 *See, e.g.*, Kappos v. Hyatt, 566 U.S. 431, 443 (2012) ("Although that discussion was not strictly necessary to *Butterworth*'s holding it was also not the kind of ill-considered dicta that we are inclined to ignore." (citation omitted)); Hawks v. Hamill, 288 U.S. 52, 58 (1933) (describing another court's statement as "something less than a decision," but nevertheless having "capacity . . . to tilt the balanced mind toward submission and agreement" because "it is a considered dictum, and not comment merely obiter").

11 *See, e.g.*, Judith M. Stinson, *Why Dicta Becomes Holding and Why It*

explanation still quoted widely today, Chief Justice Marshall described the concern about accuracy in the 1821 opinion of *Cohens v. Virginia*:

> The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.[12]

Issues that are necessary for decision presumably receive a court's full attention and ability.[13]

As for legitimacy, dicta risks usurping other branches of government by exceeding the courts' traditional role of resolving cases and controversies.[14] The necessity test checks judicial overreach by limiting the binding effect of opinions to that dispute-resolution function.

In between holding and dicta is "judicial dicta," generally defined as "[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision."[15] While such statements are "dicta" because they are not strictly necessary to the outcome, they appear sufficiently thorough to allay any concerns about accuracy and legitimacy, and can be followed as a kind of precedent.[16]

Matters, 76 BROOK. L. REV. 219, 225 (2010) (identifying the "three most persuasive rationales for maintaining the distinction" between holding[s] and dicta" as accuracy, judicial authority, and legitimacy); *cf.* Comment, *Dictum Revisited*, 4 STAN. L. REV. 509, 516-18 (describing the term "dicta" as a label for the application of certain "policies in the law of precedent").

[12] 19 U.S. 264, 399-400 (1821); *see also* Cent. Va Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) ("For the reasons stated by Chief Justice Marshall . . . we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

[13] *See* Sarnoff v. Am. Home Prods. Corp., 798 F.2d 1075, 1084 (7th Cir. 1986) (defining dicta as "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it"); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994) ("Dicta are less carefully considered than holdings, and, therefore, less likely to be accurate statements of law.").

[14] *See, e.g.*, Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. Rev. 1249, 1260 (2006) ("Courts make law only as a consequence of the performance of their constitutional duty to decide cases. They have no constitutional authority to establish law otherwise."); Dorf, *supra* note 13, at 2069 (arguing that "sensitivity to the concerns underlying Article III" should affect the definitions of dicta and holding).

[15] *Judicial dictum*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[16] *See* Sheet Metal Workers v. EEOC, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring) ("Although technically dicta . . . an important part of the Court's rationale for the result [that] it reache[s] . . . is entitled to greater weight . . . .").

While lines defined by concepts such as "full consideration" are hard to draw with great precision,[17] the "necessity" test for distinguishing between holding and dicta is widely accepted and routinely applied.[18] At the very least, the labels of dictum and holding serve as a convenient shorthand for "policies in the law of precedent."[19]

II
THE PARTY-PRESENTATION PRINCIPLE

While the concept of an "adversary system" is as old as the United States,[20] the party-presentation principle—as a standalone concept, by that name—is a relative newcomer. But in 2020, it became a staple phrase in civil procedure when the Supreme Court reaffirmed, reviewed, and applied the party-presentation principle in *United States v. Sineneng-Smith*.[21]

Evelyn Sineneng-Smith was convicted of encouraging an alien to unlawfully enter the United States. On appeal, after receiving the parties' briefs, the Ninth Circuit appointed amici to brief another issue not raised by her or the prosecution—whether the statute's breadth violated the First Amendment.[22] After receiving that briefing, the court then reversed her conviction on that basis.[23]

The Supreme Court reversed 9-0, holding that the Ninth Circuit's handling of the case violated the party-presentation

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17 *See* Dorf, *supra* note 13, at 2003 ("[N]o universal agreement exists as to how to measure the scope of judicial holdings. Consequently, neither is there agreement as to how to distinguish between holdings and dicta.").

18 *See* Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. LEGAL EDUC. 431, 433 (1989) ("[M]ost judges take with some seriousness the idea that they should follow precedents, and the effort to determine the scope of precedents is important for them."); *see generally* United States Nat'l Bank of Or. v. Indep. Ins. Agents of America, Inc., 508 U.S. 439, 463 n.11 (1993) (noting that various past statements on an issue "contain a valuable reminder about the need to distinguish an opinion's holding from its dicta").

19 *See* Dictum Revisited, *supra* note 11, at 516-18; *see generally* David Coale & Wendy Couture, *Loud Rules*, 34 PEPP. L. REV. 715, 725–28 (2007) (describing situations when courts may deliberately bend the holding-dicta distinction for case-management reasons).

20 *See, e.g.*, Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323, 323 (2009) ("America did not simply adopt England's adversary system, but moved to an adversary system independently and in advance of England . . . [T]he American adversary system was operating widely in America at the end of the eighteenth century.").

21 140 S. Ct. 1575 (2020).

22 *Id.* at 1578 (citing United States v. Sineneng-Smith, 910 F.3d 461, 485 (9th Cir. 2018)).

23 *Id.*

principle.[24] The Court described that principle as—like the holding-dicta distinction—advancing two related goals.

The first is quality decision-making based on good advocacy. The court summarized: "[A]s a general rule, our system 'is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.'"[25]

The second goal is appropriate use of judicial power. The court again summarized: "Courts are essentially passive instruments of government . . . They 'do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties.'"[26] Instead, courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."[27]

Sineneng-Smith reminded that this principle is "supple, not ironclad."[28] As an example, the court noted that in cases involving pro se litigants, it may be appropriate for a court to be more assertive about argument development.[29] Other

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24 *Id.* at 1579 ("In our adversarial system of adjudication, we follow the principle of party presentation."). This opinion was one of the last by Justice Ruth Bader Ginsburg; the party-presentation principle was a theme connecting several of her opinions. *See* Jeffrey M. Anderson, *The Principle of Party Presentation*, 70 BUFF. L. REV. 1029, 1059-75. (2022) (citing, *inter alia*, Albright v. Oliver, 510 U.S. 266 (1994), and Wood v. Milyard, 566 U.S. 463 (2012)).

25 140 S. Ct. at 1578 (citing Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring); *see also* Greenlaw v. United States, 554 U.S. 237, 244 (2008) (noting that "parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief," and that as a result, "[c[ounsel almost always know a great deal more about their cases than we do . . . ."); United States v. Oliver, 878 F.3d 120, 126 (4th Cir. 2017) ("[O]ur adversarial system of justice is premised on "the well-tested principle that party presentation is the most effective method for reaching the best outcome in each case."); *see generally* Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."); Georgia Firefighters' Pension Fund v. Andarko Petroleum Corp., No. 23-20424, 2024 WL 1787927, at *1 (5th Cir. 2024) ("Our adversarial system of justice requires that we give both sides full and fair opportunity to present their strongest possible arguments to the court.").

26 140 S. Ct. at 1579 (quoting United States v. Samuels, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of rehearing en banc);

27 *Id.* (quoting 554 U.S. at 243).

28 *Id.*

29 *Id.* (citing 540 U.S. at 381-383); *see also* United States v. Campbell, 26 F.4th 860, 871-75 (11th Cir. 2022) (en banc) (rejecting a waiver argument about a significant Fourth Amendment issue). *See generally* Anderson, *supra* note 24, at 1059 (noting Justice Ginsburg's distinctions between waiver and forfeiture in

commentators note that a court may—and indeed, must—make its own examination of subject-matter jurisdiction, regardless what the parties may say.[30]

And as with the holding-dicta distinction, reasonable judges may simply disagree about when this principle applies. In a 2023 labor-law case from the Fifth Circuit, *United Natural Foods v. NLRB*,[31] a vigorous dissent argued that the case should have been resolved on a waiver issue,[32] while the majority rejected that approach as inconsistent with the party-presentation principle.[33] As with the dicta-holding distinction, the boundary between the parties' presentation and judicial creativity is not defined by objective markers, but by judgments about competing policies during the judging process.[34]

III
DICTA, PARTY PRESENTATION, AND AMICI

Over time, amicus brief submissions have consistently expanded in substance and number into what has now been called the "amicus machine."[35] Major Supreme Court cases

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her party-presentation opinions).

30 *See* Zachary B. Pohlman, *The* Sineneng-Smith *Doctrine*, 14 FED. COURTS L. REV. 106, 112-13 (2022) (citing, *inter alia*, Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) ("Jurisdiction is power to declare the law . . . ."); *see also* Matthew J. Slovin, *Stipulating to Overturn* Klaxon, 97 NYU L. REV. 127 (2022) (criticizing excessive deference to party stipulations about choice-of-law issues).

31 66 F.4th 536 (5th Cir. 2023).

32 *Id.* at 555–56 (Oldham, J., dissenting).

33 *Id.* at 546; *see also* Elmen Holdings, LLC v. Martin Marietta Materials, Inc., 86 F.4th 667, 674 (5th Cir. 2023) ("[T]he magistrate judge did not violate the party presentation principle by interpreting the Gravel Lease to terminate automatically upon a missed royalty payment, even if that interpretation was contrary to the parties' reading of their contract."); *but cf. Georgia Firefighters*, 2024 WL 178927, at *1 (reversing when the presentation of a new argument in a reply brief denied the opponent "fair opportunity to address that new evidence" absent a sur-reply).

34 *See* Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L.J. 477, 477 (1958) (comparing the claim of "render[ing] automatons of judges" with the concept that "[a]n appellate court decides only the issues presented by the parties." (first quoting Rentways, Inc. v. O'Neill Milk & Cream, Co., 126 N.E.2d 271, 274 (N.Y. 1955); and then quoting Hampton v. Super. Ct., 242 P.2d 1, 3 (Cal. 1952)); *see also* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 448 (2009) ("[J]udicial power to raise issues sua sponte is compatible with adversary theory as long as judges are careful to avoid slipping into the role of advocate, and make sure to preserve an opportunity for a dialectical exchange between the parties on new questions raised by the court.").

35 Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1901 (2016); *see also* Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361 (2015) (describing trends in amicus submissions over time).

routinely attract dozens of amicus submissions from academics and advocacy groups,[36] and even trial courts attract significant amicus briefing in notable matters.[37] Studies document the influence that these submissions from non-parties can have on decision making.[38]

As a leading scholar succinctly summarizes: "The widespread participation of amicus curiae at all stages of litigation is . . . in tension with the party presentation principle."[39] Indeed, in the federal system, strict application of the relevant rule *requires* tension with party presentation, as stated by that rule's advisory-committee notes:

> [A]n amicus brief is supplemental. It need not address all issues or all facets of a case. It should treat only matter not adequately addressed by the party.[40]

Applicable rules in some large states, such as New York, are similar.[41] In practice, though, many courts use more nuanced tests to decide whether an amicus submission is appropriate, and consistency with the party-presentation

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36 *See, e.g.*, Ellena Erskine, Angie Gou & Elisabeth Snyder, *A Guide to the Amicus Briefs in the Affirmative-Action Cases*, SCOTUSBLOG (Oct. 29, 2022), https://www.scotusblog.com/2022/10/a-guide-to-the-amicus-briefs-in-the-affirmative-action-cases/ [https://perma.cc/3BXV-RXAB]; 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/9QB9-BZYB].

37 *See* Troy A. Price, *Amicus Curiae in Federal Trial Courts*, 58 ARK. LAW. 20, 20 (Summer 2023) (describing one judicial district's experiences with, and policies about, amicus filings).

38 *See* Adam Feldman, *Amicus Policy Success in Impactful Supreme Court Decisions*, EMPRICALSCOTUS (Feb. 19, 2018) https://empiricalscotus.com/2018/02/19/policy-success/ [https://perma.cc/CWT5-M9MH]; Maria E. Doerfler, *Bishops and Friends: History and Legal Interpretation in Recent Amicus Curiae Briefs Before the Supreme Court*, 38 J. L. RELIGION 55, 59–60 (2023) (reviewing numbers of amicus filings in significant cases); Timothy B. Dyk, *The Role of Non-Adjudicative Facts in Judicial Decisonmaking*, 76 STAN. L. REV. ONLINE 10, 23 (2023).

39 Frost, *supra* note 34, at 465.

40 FED. R. APP. P. 29 Advisory committee's note to 1998 amendment; *cf.* Prairie Rivers Network v. Dynegy Midwest Generation LLC, 976 F.3d 761, 763 (7th Cir. 2020) (noting that "[t]he point, of course, is that an *amicus curiae* brief should be additive—it should strive to offer something different, new, and important.") (Scudder, J., in chambers) (citation omitted).

41 *See* 22 N.Y.C.R. § 500.23[a][4][i] (requiring a showing "that the parties are not capable of a full and adequate presentation and that movant could remedy this deficiency; movant could identify law or arguments that might otherwise escape the court's consideration; or the proposed *amicus curiae* brief otherwise would be of assistance to the court"); *But see* TEX. R. APP. P. 11 (only setting disclosure requirements for amicus briefs in the Texas appellate system); Cal. Rules of Court, rules 8.520(f) & 8.200(c) (same).

principle is part of such a test in the Court of Federal Claims,[42] the Ninth Circuit (after *Sinenung-Smith*, of course),[43] and the Tenth Circuit.[44]

Assuming that amicus briefs, by their nature, present at least some tension with the party-presentation principle, what does it matter? Plainly, there is not one answer to that question, as the role and impact of an amicus brief varies with the kind of issues in dispute, the motives of the amicus, and the thoroughness of its work.

Amicus briefs can provide valuable technical and industry information to a court,[45] especially as to the intense historical analysis required by modern Second Amendment jurisprudence.[46] At the same time, many amicus briefs are

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42 *See* Advanced Sys. Tech., Inc. v. United States, 69 Fed. Cl. 355, 357 (Ct. Cl. 2006) ("In exercising its discretion to accept an amicus curiae brief, the Court of Federal Claims considers such factors as 'whether the parties oppose the motion, the strength of information and argument presented by the potential amicus curiae's interests, the partisanship of the moving entity, the adequacy of the current representation, the timeliness of the motion, and, perhaps most importantly, the usefulness of information and argument presented by the potential amicus curiae to the court.'" (quoting Wolfchild v. United States, 62 Fed. Cl. 521, 536 (Ct. Cl. 2004)).

43 *See* United States v. Nunez, No. 21-50131, 2022 WL 17883604, at *4 n.2 (9th Cir. Dec. 23, 2022) ("[T]he brief seeks to introduce new facts outside of the record and advance arguments not raised by the parties. Because we do not entertain legal issues raised for the first time in an appeal by a party appearing as an amicus . . . we decline to consider these arguments.") (citing Pres. Coal., Inc. v. Pierce, 667 F.2d 851, 862 (9th Cir. 1982)), *cert. denied*, 144 S. Ct. 326 (2023).

44 *See* Genova v. Banner Health, 734 F.3d 1095, 1102–03 (10th Cir. 2013) ("Though we have the discretion to address an argument developed only by an *amicus* rather than a party, we will typically exercise that discretion only when (1) a party has done something to incorporate the argument 'by reference' in its own brief, or (2) 'the issue involves a jurisdictional question or touches upon an issue of federalism or comity that could be considered sua sponte.'" (Gorsuch, J.) (quoting Tyler v. City of Manhattan, 118 F.3d 1400, 1404 (10th Cir. 1997) (citing Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1422 (10th Cir. 1990)), *cert. denied*, 571 U.S. 1204 (2014).

45 *See* Larsen & Devins, *supra* note 35, at 1901, 1945–46 (arguing that "when it comes to amicus briefs—the benefits of specialization outweigh the costs").

46 *See, e.g.*, Andrew Willinger, *Thoughts on Judge Carlton Reeves' Critique of Text, History, and Tradition*, DUKE CTR. FOR FIREARMS L. (July 19, 2023), https://firearmslaw.duke.edu/2023/07/thoughts-on-judge-carlton-reeves-critique-of-text-history-and-tradition [perma.cc/H3DC-XM7Y]; *see generally* Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797, 825 (2023) (arguing that courts now must "parse through the one-sided collections of evidence and citations that the parties muster and reach an accurate historical conclusion."); Allison Orr Larsen, *The Supreme Court Decisions on Guns and Abortion Relief Heavily on History. But Whose History?*, POLITICO (July 22, 2022) https://www.politico.com/news/magazine/2022/07/26/scotus-history-is-from-motivated-advocacy-groups-00047249 [https://perma.cc/HQ6F-KQW6].

fairly criticized as a kind of lobbying[47] that can involve biased presentation of facts that goes beyond the evidentiary record.[48]

This Essay cannot offer an all-encompassing framework for review of all cases involving amicus submission. But it can offer one insight, based on the similar policy goals that motivate the party-presentation principle and the standard definition of a holding: the role of amici in shaping the opinion can be a relevant consideration in determining the precedential value of a prior opinion. If the reasoning of an opinion is wholly separate from what the parties argued, that variance is a "yellow light" that the court may have strayed into territory that implicates concerns about accuracy and legitimacy.[49]

The Supreme Court's blockbuster constitutional opinion of 2022, *Dobbs v. Jackson Women's Health Organization*,[50] shows how that can be done. The court identified five factors relevant to the question whether to overrule *Roe v. Wade* and *Planned Parenthood v.* Casey, one of which was "the quality of their reasoning."[51] In reviewing that factor, *Dobbs* noted that the trimester framework established by *Roe* was not advocated by any party or amicus in that case.[52]

Similarly, in criticizing Chief Justice Roberts's concurrence, the *Dobbs* majority observed: "[I]t is revealing

47 *See, e.g.*, Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 YALE L.J. F. 141 (2021).

48 Ari Ezra Waldman, *Manufacturing Uncertainty in Constitutional Law*, 91 FORDHAM L. REV. 2249 (2023) (arguing that amicus briefs have encouraged the acceptance of untrue statements about abortion as fact); James G. Dwyer, *Faux Advocacy in Amicus Practice*, 50 PEPP. L. REV. 633 (2023) (levying similar criticisms about other areas of law).

49 *See* Leval, *supra* note 14, at 1261 (noting how the "absence of briefing and adversity" can negatively affect the quality of legal analysis presented in dicta); *see generally* Vestal, *supra* note 34, at 477 (noting that the topic of appellate courts addressing an issue waived by a party "should be distinguished from the situation wherein a court as a matter of dicta articulates a principle of law not urged or argued by the litigants").

50 142 S. Ct. 2228 (2022).

51 *Id.* at 2265 (identifying "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance").

52 *See id.* at 2266 ("[*Roe*] was more than just wrong. It stood on exceptionally weak grounds. . . . [I]ts most important rule (that States cannot protect fetal life prior to 'viability') was never raised by any party and has never been plausibly explained."); *see also id.* ("This elaborate scheme was the Court's own brainchild. Neither party advocated the trimester framework; nor did either party or any *amicus* argue that "viability" should mark the point at which the scope of the abortion right and a State's regulatory authority should be substantially transformed."); *id.* at 2311 (Roberts, C.J., concurring) ("No party or *amicus* [in *Roe*] asked the Court to adopt a bright line viability rule. And as for *Casey*, arguments for or against the viability rule played only a *de minimis* role in the parties' briefing and in the oral argument.")

that nothing like it was recommended by either party."[53] In both instances, the court considered the lack of party support as a relevant factor in determining whether to follow a proposed rule of law.

And—consciously or not—the dialogue between majority and dissenting opinions since *Sineneng-Smith* invites consideration of the party-presentation principle by future courts. When Supreme Court Justices have cited that case on that principle, it's generally by a dissenter,[54] writing to give perspective for a later court considering how to apply the other Justices' analysis to a new case. Dissenting circuit judges do the same with some frequency.[55] These references to *Sineneng-Smith* lay the foundation for use of the party-presentation principle in determining how precedent applies over time.

Two practical concerns about this use of the party-presentation principle are readily addressed. One is whether it's feasible to examine the parties' presentations, outside of unusually high-profile matters such as *Dobbs*. That could have been a reasonable objection many years ago. But in

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53 *Id.* at 2281; *see also id.* ("[W]hen the specific approach advanced by the concurrence was broached at oral argument, both respondents and the Solicitor General emphatically rejected it. . . . What is more, the concurrence has not identified any of the more than 130 *amicus* briefs filed in this case that advocated its approach. The concurrence would do exactly what it criticizes *Roe* for doing: pulling 'out of thin air' a test that '[n]o party or amicus asked the Court to adopt.'").

54 *See* Students For Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181, 342 n.21 (2023) (Sotomayor, J., dissenting) (explaining why Justice Gorsuch's analysis was rejected by all other Justices); Mallory v. Norfolk Southern Railway Co., 600 U.S. 122, 180 n.9 (2023) (Barrett, J., dissenting) ("[T]he plurality finds its own facts and develops its own argument. That is not how we usually do things."); Edwards v. Vannoy, 141 S.Ct. 1547, 1580 (2021) (Kagan, J., dissenting) ("To begin with, no one here asked us to overrule *Teague*.").

55 From 2023 alone, *see, e.g.*, Hess v. Garcia, 72 F.4th 753, 768 (7th Cir. 2023) (Easterbrook J., concurring) ("Given the principle of party presentation . . . I would stop there. My colleagues continue, however, with language favorable to those holdings." (citation omitted); Arizmendi v. Garland, 69 F.4th 1043, 1059 (9th Cir. 2023) (Forrest, J., dissenting) ("By sua sponte raising and considering Arizmendi-Medina's unexhausted and forfeited claim, the court ignores that our role is to decide claims, not make them."); Su v. Medical Staffing of Am., LLC, No. 22-1290, 2023 WL 3735221, at *3 (4th Cir. May 31, 2023) (Richardson, J., dissenting) ("Ordinarily we do not raise new claims for litigants. . . . The majority disregards this principle, deciding this case based on a theory raised for the first time by the panel at oral argument and, even then, affirmatively rejected by the parties."); Dooley v. United States, 83 F.4th 156, 171 (2d Cir. 2023) (Park, J., dissenting) (arguing that "the majority extracts . . . factual challenges" in violation of the party-presentation principle); *see also* United States v. Del. Dep't of Ins., 66 F.4th 114, 127-28 (3d Cir. 2023) (making the related point that an earlier opinion's handling of a threshold matter had been influenced by the substantive issues presented).

today's world, briefs are readily available online. And the parties' submissions are routinely reviewed in other contexts, such as collateral estoppel, to determine just what issues were "fully and fairly litigated" by parties in an earlier case.[56]

The second concern involves landmark cases such as *Erie* and *Brown,* where it is well known that the Supreme Court went beyond the matters presented by the parties in writing those important opinions.[57] (Ironically, there is even room to argue about whether party presentation was presented by the parties in *Sineneng-Smith*.[58])

Plainly, some common sense is required when applying this kind of well-established precedent. And here again, *Dobbs* provides an example, based on the other factors it noted about the continuing viability of precedent, such as the passage of time and reliance on that precedent.[59] Whatever issues that cases such as *Erie* may have had with party presentation, their longstanding acceptance effectively insulates them from criticism on that basis today.

To summarize: In 2022, the Supreme Court cautioned that the party-presentation principle keeps courts from "sally[ing] forth each day looking for wrongs to right."[60] And in 2023, the Supreme Court justified overruling precedent by explaining how it took a position not advocated by any party.[61] This Essay tries to connect the dots between those two statements. Courts do not give precedential effect to dicta because it is deemed unreliable and illegitimate. Because the party-presentation principle involves the same concerns, it can also play a role in determining whether an opinion creates binding precedent—particularly in cases that drew significant attention from amici.

CONCLUSION

Referring to *Sineneng-Smith*, a commentator recently observed: "[N]ever before had the Supreme Court or any federal appeals court vacated a lower court decision for violating that principle. Despite its novelty as a basis for vacatur and remand, the Court said precious little about its power to

56 *See, e.g.*, Eagle Oil & Gas Co. v. TRO-X, L.P., 619 S.W.3d 699, 703, 707-08 (Tex. 2021).

57 *See* Dyk, *supra* note 38, at 23.

58 *See* Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 901 n.374 (2022) "[I]n *Sineneng-Smith* itself, the party presentation issue was hardly briefed; the parties' focus was on the merits of the First Amendment question.").

59 *See Dobbs*, 142 S. Ct. at 2265.

60 *Sineneng-Smith*, 140 S. Ct. at 1579.

61 *See Dobbs*, 142 S. Ct. at 2266.

enforce the party presentation principle."[62]

This Essay suggests that one way to enforce that principle, in particular as to overreliance on amici, lies in the routine parsing of opinions to identify their holdings. The Supreme Court did something similar in *Dobbs* in 2022, and its analysis on that point transfers readily to other cases that question the precedential effect of earlier opinions.

62 Pohlman, *supra* note 30, at 108.