

2019

## Reporting Certainty

James Macleod

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## Reporting Certainty

James A. Macleod\*

*Legal theorists, judges, and legal writing instructors persistently decry the assertions of certainty – “obviously X,” “undoubtedly Y,” etc. – that litter judicial opinions. According to the conventional view, the rhetoric of certainty that these assertions epitomize is disingenuous. It also reflects, and even encourages, poor judicial decision-making. And as if that were not enough, it is so unpersuasive that it is counter-persuasive: it signals uncertainty, nonobviousness, etc. – the exact opposite of what its author intends. Judges, for these and other reasons, should abstain from needless assertions of certainty and the myopic thinking they evince. That much is certain.*

*Yet the rhetoric of certainty persists. Why? To what effect? And how concerned should we be? The typical answers’ logic and empirical assumptions have largely escaped serious scrutiny. This Article begins to fill the gap. It identifies five conventional accounts of the causes, effects, and (uniformly negative) normative implications of judicial certainty rhetoric. After highlighting some intuitive implausibilities in each account, the Article reports new empirical evidence, drawing on an original dataset concerning assertions of certainty and uncertainty in nearly 500 federal appellate opinions and 350 corresponding briefs. These new data cast further doubt on the conventional accounts and suggest an alternative account of judicial certainty rhetoric – one with very different normative implications.*

*According to this Article’s new “efficient management” account, judges, constrained by individual reputation concerns, credibly and sincerely report certainty relative to a rhetorical baseline that their primary audiences readily presume. Judges thereby provide useful information to other judges, lawyers, and litigants, efficiently managing the judicial system in an era of expanding caseloads, without straying from their proper role. The Article draws from recent philosophical work*

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*in the field of “social epistemology” to argue that the practice of reporting relative certainty is not merely efficient, but also epistemically valuable, facilitating the judiciary’s truth-discovery goals. The overall implication is that judges should report their attendant degree of certainty more often, not less. Finally, the Article argues that, while it may well be desirable to shift the rhetorical baseline toward greater levels of expressed uncertainty, doing so may carry unintended consequences, such as (perhaps paradoxically) decreasing judicial deliberation and reducing a particular type of judicial minimalism. In the end, wherever the ideal rhetorical baseline might be, the case against reporting certainty is less certain than is typically suggested.*

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## INTRODUCTION

Legal theorists, judges, and legal writing instructors all cringe when judicial opinions (or, for that matter, litigants' briefs) claim that their assertions are not merely true, but "obviously" true, "clearly" correct, "undoubtedly" right, and so on. Commentators strongly and uniformly disparage the "rhetoric of certainty" that such assertions epitomize.<sup>1</sup> Judicial opinions routinely "overclaim[] certainty."<sup>2</sup> They are "notoriously—even comically—unequivocal,"<sup>3</sup> "dress[ing] up" uncertain contentions<sup>4</sup> in a "vocabulary of apodictic certainty,"<sup>5</sup> "inevitability,"<sup>6</sup> and "claimed objectivity" that disingenuously "denies the complexity of the problem."<sup>7</sup>

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1. Paul Gewirtz, *On "I Know It When I See It"*, 105 YALE L.J. 1023, 1042 (1996) ("The typical . . . opinion is marked by a rhetoric of certainty."); see also Elizabeth Fajans & Mary R. Falk, *Shooting from the Lip: United States v. Dickerson, Role (Im)morality, and the Ethics of Legal Rhetoric*, 23 U. HAW. L. REV. 1, 1 n.3 (2000) (lamenting "the over-certainty on complex issues that characterizes too much legal rhetoric").

2. Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1590 (1990); see also Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1 (1998) [hereinafter Simon, *Psychological Model*]; Dan Simon & Nicholas Scurich, *Judicial Overstating*, 88 CHI.-KENT L. REV. 411 (2013).

3. Dan M. Kahan, *The Supreme Court, 2010 Term: Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 59 (2011).

4. KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 73 (Paul Gewirtz ed., Michael Ansaldi trans., The Univ. of Chi. Press 1989) (1933); see also JEROME FRANK, *LAW AND THE MODERN MIND* 5-12 (1930) (arguing that certainty is not attainable in law); KENT GREENAWALT, *STATUTORY AND COMMON LAW INTERPRETATION* 186 (2013) (observing that while a judicial opinion "may be the result of a very modest degree of conviction, it is usually written in terms of ultimate certainty" (quoting Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 9 (1966))).

5. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 30 (1990); see also Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 865 (1988) ("Most judicial opinions . . . imply that even the very toughest case has a right and a wrong answer and only a fool would doubt that the author of the opinion had hit on the right one.").

6. Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 213-16 (1990) ("The monologic voice, the interrogative mode, and the declarative tone build together in what might be called a rhetoric of inevitability."); accord LLEWELLYN, *supra* note 4, at 8 (judicial opinions are typically "presented as simply inevitable, whatever doubts the panel may have had in arriving at it").

7. Gewirtz, *supra* note 1; cf. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897) ("[C]ertainty generally is illusion . . ."); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1242 (1931) (asserting that legal certainty is "an illusion"); Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2010 (2002) ("Opinions are written to make results seem determinate and value-free . . ."); *id.* at 2012 (noting that Supreme Court "opinions are written to make it seem that there is only one correct result and that it was derived in a

According to the conventional view, such rhetoric is not merely *disingenuous* but also *ineffective*: words like “clearly” and “obviously” convey “little” or “no extra meaning.”<sup>8</sup> Indeed, if they convey anything at all, it is that the proposition at issue is especially *unclear* or *nonobvious*—that is, “exactly [the] opposite [of] their original meaning.”<sup>9</sup> Thus Bryan Garner states, “when a judge . . .

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formalistic fashion”); Paul Gewirtz, *Narrative and Rhetoric in the Law*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 2, 11 (Peter Brooks & Paul Gewirtz eds., 1996) (“[T]he rhetoric of certainty seems to result from the perceived need of judges to preserve the institutional authority of the court.”); Alex Stein, *Law and the Epistemology of Disagreements*, 96 WASH. U. L. REV. 51, 96 (2018) (discussing judges’ “rhetoric of certainty”).

8. RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* 330 (5th ed. 2005) (“‘It is obvious’ and ‘clearly’ supply no extra meaning.”); MARY BARNARD RAY & JILL J. RAMSFIELD, *LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN* 205 (3d ed. 2000) (“[A]void modifiers that have little substantive meaning, such as . . . *obviously*.”); see also FED. JUDICIAL CTR., *JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES* 23 (2d ed. 2013) (instructing that judges “should . . . eliminate unnecessary adverbs such as ‘clearly[.]’ [and] ‘plainly[.]’”); see also, e.g., BRADLEY G. CLARY & PAMELA LYSAGHT, *SUCCESSFUL LEGAL ANALYSIS AND WRITING: THE FUNDAMENTALS* 102 (2d ed. 2006) (“Particularly avoid exaggeration through conclusory modifiers such as ‘clearly,’ ‘plainly,’ . . . and the like.”); Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 ME. L. REV. 47, 53 (2002) (“To persuade its various audiences, including these most resistant ones, the court must convince them that it has considered all points of view, ‘that opposing evaluations of the case have been understood and seriously weighed.’ To make the losing party even more accepting of the result, the judge might grant the losing side a point or two. Regarding this approach, Professor Gibson comments, ‘When this suggestion is proposed to appellate judges, they nod in polite agreement. Is it not astonishing, then, how many opinions are written as if there were only one, very obvious, and utterly inescapable position, and that the position of the writer himself?’” (quoting Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915, 922 (1961)) (footnotes omitted)).

9. LINDA H. EDWARDS, *LEGAL WRITING AND ANALYSIS* 289 (4th ed. 2015) (attributing the phenomenon to “generations” of “overuse” of such terms in legal writing); see also MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 291 (5th ed. 2019) (“*Clearly*, *obviously*, *of course*, and *it is evident* that have been so overused that they go beyond having no meaning to having a negative meaning.”); Neil Daniel, *Writing Tips*, in 1 *PERSPECTIVES: TEACHING LEGAL RESEARCH & WRITING* 87 (1993) (“Avoid clearly. The word is almost always the writer’s last resort when an argument is murky.”); LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 186–87 (7th ed. 2018); BRYAN A. GARNER, *THE WINNING BRIEF* 520–21 (3d ed. 2014) (“*Obviously*, like other dogmatic words (*clearly*, *undoubtedly*, *undeniably*), is one that “lawyers tend to use when they are dealing with exceptionally obscure matters.” . . . The words *clearly* and *obviously* . . . signal weakness. It’s paradoxical but true. (quoting BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 627 (3d ed. 2011) (quoting GRANT GILMORE, *THE DEATH OF CONTRACT* 116 n.63 (1974)))); RICHARDSON R. LYNN, *APPELLATE LITIGATION* § 9.7, at 247 (2d ed. 1993) (“Argument by adverbs, such as ‘clearly’ and ‘obviously,’ indicates that the argument is not being fully developed.”); RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* § 25.3, at 320 (6th ed. 2009) (“Judges assume that expressions like these are used to cover up a lack of logical proof.”); Daniel M. Friedman, *Winning on Appeal*, in *APPELLATE PRACTICE MANUAL* 129, 133–34 (Priscilla Anne Schwab ed.,

begins a sentence with a term of utter conviction (*Clearly, Undeniably, It is plain that . . .*), the sentence that follows is likely to be dubious, unreasonable, and fraught with difficulties."<sup>10</sup> And in addition to being disingenuous and ineffective, certainty rhetoric in judicial opinions may evince, and even encourage, superficial

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1992) ("The claim that a particular statutory provision covers the case does not gain strength by stating that it 'clearly,' 'plainly,' or 'patently' does so. . . . Indeed, words like 'patently' or 'obviously' suggest that what follows is the *ipse dixit* of the writer, rather than a necessary conclusion."); Sarah E. Ricks & Jane L. Istvan, *Effective Brief Writing Despite High Volume Practice: Ten Misconceptions That Result in Bad Briefs*, 38 U. TOL. L. REV. 1113, 1118 n.17 (2007) (finding adverbs "such as 'clearly' or 'obviously,' do not strengthen legal writing and, in fact, often are considered red flags for logical leaps in the argument"); CLARY & LYSAGHT, *supra* note 8 ("[A]void exaggeration through conclusory modifiers such as 'clearly,' 'plainly,' 'very,' 'obviously,' 'outrageous,' 'unconscionable,' and the like."); Robert Barnes, *Chief Justice Counsels Humility: Roberts Says Lawyers Must Put Themselves in Judges' Shoes*, WASH. POST, Feb. 6, 2007, at A15 ("We get hundreds and hundreds of briefs, and they're all the same," [Chief Justice John] Roberts told a crowd . . . "Somebody says, 'My client clearly deserves to win, the cases clearly do this, the language clearly reads this,' blah, blah, blah. And you pick up the other side and, lo and behold, they think they clearly deserve to win.' How about a little recognition that it's a tough job? . . . 'I mean, if it was an easy case, we wouldn't have it.'"); see also ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 13 (2008) ("You'll harm your credibility — you'll be written off as a blowhard — if you characterize the case as a lead-pipe cinch . . ."). This advice is not confined to the Supreme Court, where cases may be expected to be least clear as a matter of law. Circuit court judges express the same sentiment. See, e.g., *Bennett v. State Farm Mut. Auto. Ins. Co.*, 731 F.3d 584, 584–85 (6th Cir. 2013) (Kethledge, J.) (listing "good reasons not to call an opponent's argument 'ridiculous,' including 'civility' and 'the near-certainty that overstatement will only push the reader away'"); CALIFORNIA APPELLATE PRACTICE HANDBOOK 237 (7th ed. 2001) (reporting that in a 2001 survey of California appellate court judges, seventy-three percent of the respondents agreed with this statement: "'I notice, and it bothers me, when a brief uses adverbs like 'clearly' and 'obviously' to support arguments'"); Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1351 (2018) ("Many judges mentioned that lawyers' efforts at zealous advocacy . . . often backfire and make them less helpful to the courts, with . . . both sides insisting their reading of the text is the only clear reading."); Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 J. LEGAL WRITING INST. 257 (2002).

10. GARNER, *supra* note 9, at 520 (quoting Gibson, *supra* note 8, at 925).

reasoning and decision-making,<sup>11</sup> inadequate respect for litigants,<sup>12</sup> and other horrors paraded below in greater detail.<sup>13</sup>

Yet despite its disparagement from all corners, the rhetoric seems, at least anecdotally, to continue unabated.<sup>14</sup> The very same lawyers taught to avoid the rhetoric, and the very same judges advocating its abolition, continue to claim that their assertions are “obviously” correct, “beyond dispute,” and the like.<sup>15</sup> This is puzzling, and raises several important questions. First, exactly how pervasive is this rhetoric of certainty? Second, when, by whom, and ultimately *why*, is it used—in short, what are its *causes*? Third, what *effects*, if any, does certainty rhetoric have on its audiences? And finally, in light of its causes and effects, what are its *normative* implications—would individual judges (and/or litigants) themselves be better off avoiding it, and, more importantly, would the judicial system as a whole be better without it?

Although the literature is rife with cursory claims about the causes, effects, and normative undesirability of judicial and litigant

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11. Simon & Scurich, *supra* note 2, at 419 (arguing that conclusory judicial certainty statements “blunt[] the thoroughness that befits the judicial practice”); cf. Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 810 (1961) (“[T]he necessity for preparing a formal opinion assures some measure of thoughtful review of the facts in a case and of the law’s bearing upon them.”); Jeffery S. Sutton, *A Review of Richard A. Posner, How Judges Think* (2008), 108 MICH. L. REV. 859, 874 (2010) (book review) (noting that judges explaining their decisions in writing “not only improves the decision-making process, but it also disciplines judges to ensure that their votes amount to more than intuition and impulse”).

12. See EMILY M. CALHOUN, *LOSING TWICE: HARMS OF INDIFFERENCE IN THE SUPREME COURT* (2011); Timothy P. O’Neill, *Law and “The Argumentative Theory”*, 90 OR. L. REV. 837, 848 (2012) (“When a judicial opinion . . . is couched in completely unequivocal language, its message to the other side is: ‘You’re wrong. And, by the way, you are stupid and perhaps dishonest, too.’”); Simon & Scurich, *supra* note 2, at 421 (“Rather than emphasizing commonalities and broadening social consensus, the judicial one-sidedness pushes the opposing parties further apart. The judicial opinion, then, entrenches the boundaries that separate people; it solidifies parochialism and perpetuates pre-existing power arrangements.”); Wanderer, *supra* note 8, at 54 (“The reader must be treated as an equal, with respect.”); cf. Gibson, *supra* note 8, at 923.

13. See *infra* Section I.A.

14. See Simon, *Psychological Model*, *supra* note 2, at 8–11 (noting the Legal Realist attacks on certainty in judicial opinions and the persistence of certainty despite the attacks); sources cited *supra* notes 2–7 and accompanying text.

15. Justice Scalia’s writings offer a particularly stark example. Compare, e.g., Scalia & Garner, *supra* note 9 (“You’ll harm your credibility—you’ll be written off as a blowhard—if you characterize the case as a lead-pipe cinch . . .”), with, e.g., King v. Burwell, 135 S. Ct. 2480, 2496 (2015) (Scalia, J., dissenting) (characterizing the correct resolution of the case as “obvious—so obvious there would hardly be a need for the Supreme Court to hear a case about it,” and lamenting that the majority’s “of course quite absurd” decision comes out the other way).

certainty rhetoric, those claims rest on theoretical and empirical assumptions that have received little attention. Like the content of judicial opinions more generally – a subject some judicial behavior scholars consider “woefully understudied”<sup>16</sup> – the actual causes and effects of legal certainty rhetoric have received little systematic attention, leaving the normative case against certainty rhetoric surprisingly unsupported. This Article begins to address the gap in the literature.

First, the Article identifies five theories of the causes and effects of certainty rhetoric that, in one form or another, undergird the prevailing disdain for judicial certainty rhetoric. These theories can be labeled and summarized as follows: (1) “misguided persuasion” (authors use certainty rhetoric in an ill-advised attempt to convince their readers); (2) “reactive escalation” (certainty rhetoric is an impulsive response to somebody else’s rhetorical provocation); (3) “extralegal communication style” (certainty rhetoric is bleed over from the author’s speaking and/or writing style in other contexts); (4) “power-grabbing” (judges use certainty rhetoric as a form of dicta to push the law in their favored direction); and (5) “legitimacy bolstering” (judges use certainty rhetoric in an effort to enhance perceptions of judicial legitimacy).

After laying out the conventional theories, their normative implications, and the empirical predictions each generates, the

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16. Frank B. Cross & James W. Pennebaker, *The Language of the Roberts Court*, 2014 MICH. ST. L. REV. 853, 857 (2014) (claiming that the content of judicial opinions has been “woefully understudied” in the context of judicial behavior literature) (quoting Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine?*, 100 NW. U. L. REV. 517, 517 (2006)); see also Keith Carlson et al., *A Quantitative Analysis of Writing Style on the U.S. Supreme Court*, 93 WASH. U. L. REV. 1461, 1462 (2016) (“While judicial writing style often serves as fodder for commentary, it has rarely been subject to systematic study.”); Frank B. Cross, *The Ideology of Supreme Court Opinions and Citations*, 97 IOWA L. REV. 693, 738 (2012) (“The influence of a precedent . . . depends on the language of the opinion.”); Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017, 2072 (2016) (asserting that scholars studying judicial behavior “have long ignored the most obvious feature of what we study: the actual texts that judges produce”); Barry Friedman, *Taking Law Seriously*, 4 PERSP. POL. 261, 266 (2006); Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CALIF. L. REV. 813, 862 (2010); Jack Knight, *Are Empiricists Asking the Right Questions About Judicial Decisionmaking?*, 58 DUKE L.J. 1531, 1533 (2009) (stressing the need to study “aspects of the opinions accompanying the votes”); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1908–09 (2009); Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 1990 (1996); Kate O’Neill, *Rhetoric Counts: What We Should Teach When We Teach Posner*, 39 SETON HALL L. REV. 507, 509 (2009).

Article introduces new empirical data and evaluates each theory in light of those data. The data come from an exploratory study of 483 published appellate court opinions and 344 corresponding briefs.<sup>17</sup> This study is the first to track assertions of certainty (ACs)—terms like “obviously” and “undoubtedly”<sup>18</sup>—and assertions of uncertainty (AUs)—terms like “uncertain,” “not obvious,” etc.<sup>19</sup>—along with various case, litigant, and judge attributes that help shed light on the causes, effects, and normative implications of certainty rhetoric in the courts.<sup>20</sup>

The data confirm and add precision to the view that, despite its being universally decried, certainty rhetoric is surprisingly pervasive in legal discourse.<sup>21</sup> But the data appear not to support prevailing theories about its causes and effects. For example, certainty assertions, despite their reputation as a sign of unpersuasive or poorly reasoned writing, appear frequently in the best lawyers’ and best judges’ briefs and opinions,<sup>22</sup> and they appear not to harm litigants’ chances of winning,<sup>23</sup> nor to affect the number of citations an opinion garners.<sup>24</sup> Dissenting opinions, notorious for over-claiming certainty precisely where it is least warranted,<sup>25</sup> do indeed employ increased levels of certainty rhetoric compared to majority opinions, but they are also accompanied by an equally large increase in uncertainty statements (in both the dissent and the majority opinion), contrary to

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17. See *infra* Part II.

18. See text accompanying *infra* notes 96–98.

19. See *infra* Section I.B.2.b. A few notes regarding terminology: As used throughout this Article, “ACs” and “AUs” are stand-in terms for, e.g., assertions of *obviousness* (or non-obviousness), assertions of *undoubtability* (or doubtability), etc. Also, ACs and AUs sometimes explicitly concern the author’s own subjective state of belief (e.g., “I am certain that X”), but in other instances, and perhaps more commonly in legal discourse, they do so only implicitly. That is, ACs and AUs often explicitly reference only a purported objective state of the world (e.g., “X is obvious”)—omitting any direct reference to the author’s subjective state—while nonetheless *implying* that the author feels certain about X, that the author believes others will or should feel certain about X, etc.

20. See Section II.B (describing the study). For comparison with previous empirical studies of legal discourse, see *infra* note 98.

21. See *infra* page 512.

22. See *infra* notes 105–106 and accompanying text.

23. See *infra* note 108 and accompanying text.

24. See *infra* note 107 and accompanying text. Collectively, these findings seem to go against the “misguided persuasion” account.

25. Lance N. Long & William F. Christensen, *When Justices (Subconsciously) Attack: The Theory of Argumentative Threat and the Supreme Court*, 91 OR. L. REV. 933, 933 (2013) [hereinafter Long & Christensen, *Justices (Sub-Consciously) Attack*].

conventional assumptions.<sup>26</sup> And while ideologically diverse panels appear to more often express uncertainty,<sup>27</sup> ideologically unified panels do not appear more likely to express certainty, further calling into question some of the more cynical accounts of certainty rhetoric.<sup>28</sup> (These and other findings are contextualized in section I.B, below.)

Part I of this Article therefore ultimately concludes that the five conventional theories' predictions are unsupported by the evidence. And while neither this Article's arguments nor its empirical findings actively disprove the prevailing explanations of certainty rhetoric's causes and effects, they help pave the way for a more realistic explanation of the continued persistence of certainty rhetoric—an explanation that not only better coheres with the data but also carries very different normative implications than the traditional accounts.<sup>29</sup>

Part II supplies that new descriptive account of certainty rhetoric's causes and effects—the “efficient management” account—and explores its normative implications. The “efficient management” account explains judicial certainty rhetoric as resulting primarily from two judicial preferences.<sup>30</sup> First, judges care about their own reputation.<sup>31</sup> This reputational concern constrains judges' use of certainty rhetoric, because judges know they will lose credibility if they routinely overclaim (relative to the relevant rhetorical baseline); it also motivates judges' selective admissions of uncertainty, through which judges are able to save face in the event other judges disagree.<sup>32</sup> Second, judges want to efficiently convey useful information to their primary audiences—other judges, lawyers, and litigants (in short, participants in the judicial system)—thereby effectively managing the judiciary in an

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26. See *infra* notes 111–112 and accompanying text. These findings and others appear to go against the “reactive escalation” account.

27. See Appendix Table 2.

28. See *infra* note 116 and accompanying text. These findings and others appear to go against the “power-grabbing” account.

29. See *infra* Sections II.C–D.

30. These are not judges' *only* preferences (they are human, after all) but they are illuminating and important ones for explaining judicial certainty rhetoric.

31. See generally NUNO GAROUPA & TOM GINSBURG, JUDICIAL REPUTATION: A COMPARATIVE THEORY (2015).

32. See *infra* Section II.B.1.

era of expanding caseloads.<sup>33</sup> This desire to provide various legal actors with useful information further motivates and constrains judicial certainty rhetoric.<sup>34</sup>

The “efficient management” account of judicial certainty rhetoric not only helps explain its otherwise puzzling persistence, but also sheds light on longstanding normative debates in the judicial decision-making literature, including discussions of judicial sincerity,<sup>35</sup> candor,<sup>36</sup> responsiveness to litigants,<sup>37</sup> approaches to mounting caseloads,<sup>38</sup> and forms of judicial minimalism.<sup>39</sup> One particularly important normative insight comes from recent work in the burgeoning philosophical literature on “social epistemology.”<sup>40</sup> Applying that field’s core insights to

33. Cf. Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 395–402 (1982) (characterizing various case management practices as part of “a quest for efficiency”).

34. See *infra* Section II.B.2. Lawyers’ certainty rhetoric provides an illuminating contrast: While repeat-player public litigants like U.S. Attorneys’ Offices may more credibly wield the rhetoric of certainty, most certainty rhetoric in briefs is unconstrained and therefore uninformative. See *infra* notes 106, 108 and accompanying text. Still, in terms of judicial decision-making, lawyers’ certainty rhetoric appears largely harmless—neither the counter-persuasive “tell” that the conventional view describes, nor the cause of increased judicial certainty rhetoric. See *infra* notes 108–110 and accompanying text. (This is not to say that lawyers’ certainty rhetoric is necessarily benign: Indeed, private lawyers’ certainty rhetoric may sometimes send a cheap and misleading signal to *clients* regarding their chances of success on appeal, or the quality of their legal representation, reinforcing the need for candid feedback from judges in the form of judicial certainty rhetoric. See *infra* note 156 and accompanying text.)

35. See *infra* notes 130–140 and accompanying text (arguing, based on social psychology research, empirical data reported in this Article, and the independent plausibility of the “efficient management” account, that judicial certainty rhetoric is typically sincere). For an introduction to the literature on judicial sincerity and judicial candor, see Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987 (2008).

36. See *infra* Section II.B. On judicial candor, see Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990).

37. E.g., Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 168–82 (2005) [hereinafter Oldfather, *Defining Judicial Inactivism*]; Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 744 (2006) [hereinafter Oldfather, *Remedying Judicial Inactivism*]; see *infra* note 57 and accompanying text.

38. See *infra* Section II.B.2. For an introduction to the “caseload crisis,” see Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2388 (2014) (reviewing WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* (2013)).

39. See *infra* Section II.C. For an introduction to various forms of judicial minimalism, see Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825 (2008).

40. Stein, *supra* note 7 (noting the paucity of legal scholarship addressing this “young and rapidly growing” field). For an accessible introduction, see Alvin Goldman & Thomas Blanchard, *Social Epistemology*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2016), <https://plato.stanford.edu/archives/win2016/entries/epistemology-social/>.

judicial certainty reporting reveals certainty rhetoric's *epistemic* utility, that is, its ability to facilitate not just efficient management, but also more rational and reliable belief formation, thereby increasing the judiciary's tendency to arrive at legal and factual truths and ferret out and discard falsehood.

While the efficient management account illuminates the many ways certainty rhetoric may facilitate better decision-making on the part of various legal actors, it leaves open the possibility that a shift toward greater expression of *uncertainty* would be worthwhile. But while such a rhetorical shift may indeed be salutary, it might also have unintended consequences for judicial decision-making—namely, reducing judicial deliberation and altering the particular form of error-minimizing judicial minimalism that rhetorical certainty norms currently promote.<sup>41</sup> In any event, whatever one's stance on the ideal baseline level of expressed certainty versus uncertainty in legal discourse, this Article shows that the case against reporting certainty is less certain than its many proponents' claim. Indeed, if this Article's main thrust is correct, then judges ought to report their attendant degree of relative certainty—whether it is low or, more likely, unreasonably high—*more* often, not less.

In light of this normative suggestion, here are two brief notes of clarification about the Article's scope. First, the Article doesn't specify exactly how often judges ought to report their attendant degree of certainty, nor does it specify the degree of precision with which they ought to do so. One could imagine a wide range of possible norms or rules.<sup>42</sup> The Article seeks to open a space for that

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41. See *infra* Section II.C.

42. A few analogies to systems with different rules and norms might help illustrate. National security briefings' "words of estimative probability" such as "possibly" and "certainly" are sometimes stipulatively defined, within and across briefings, to pick out specific numerical probability ranges or point estimates—effectively forcing authors to quantify their confidence level even as they write in ordinary English. See Jeffrey A. Friedman & Richard Zeckhauser, *Handling and Mishandling Estimative Probability: Likelihood, Confidence, and the Search for Bin Laden*, 30 INTELLIGENCE & NAT'L SEC. 77 (2015). Intriguingly, some natural and artificial languages' grammatical rules require more frequent specification of attendant degree of certainty than does English. See Joshua Foer, *Utopian for Beginners: An Amateur Linguist Loses Control of the Language He Invented*, NEW YORKER, Dec. 24, 2012, at 86. And in statistical studies, the norm of reporting p-values and confidence intervals accomplishes a similar task, more formally and with agreed-upon procedures for calculating those values. Of course, there are (interesting) ways in which analogizing to non-legal decision-making and language is fraught, and to be sure, the analogies aren't meant to imply

imaginative enterprise; it does not generate very specific prescriptions regarding an ideal certainty reporting regime. Second, the Article doesn't focus on the rhetoric found within the handful of headline-generating split constitutional opinions the Supreme Court publishes.<sup>43</sup> The causes, effects, and normative implications of those decisions' certainty rhetoric might well differ from the intermediate appellate court decisions on which this Article focuses.<sup>44</sup>

The rest of the Article proceeds as follows. Section I.A surveys the five explanations of when and why certainty rhetoric appears in judicial opinions and briefs. After articulating each theory, it notes the empirical predictions the theory generates, along with the theory's main normative implications. Section I.B examines reasons to doubt each theory, briefly scrutinizing their intuitive plausibility, then reporting new empirical evidence from the dataset described above. Part II articulates and defends the new "efficient management" account of judicial certainty rhetoric, focusing on the account's descriptive plausibility, noting how it better coheres with the empirical data, and examining its normative implications. Part III considers some of the present study's limitations and concludes.

## I. PREVIOUS ACCOUNTS AND REASONS FOR SKEPTICISM

### A. Five Explanatory Proposals and Their Implications

This section surveys potential explanations of the causes<sup>45</sup> and effects of certainty rhetoric in opinions and, to a lesser extent, briefs.<sup>46</sup> After describing each theory, I briefly articulate relevant

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that judges ought to attempt to quantify the confidence level that attends each of their assertions. But at the very least, imagining alternative certainty reporting regimes can shed light on the assumptions and values that underlie current practices.

43. See *infra* note 94.

44. See *infra* note 150 and accompanying text.

45. One tempting "explanation" won't do—namely, positing that that lawyers and judges use certainty rhetoric because there is a "norm" of using certainty rhetoric. That only pushes the question back further: Why did the norm develop?

46. These theories represent simplified, broad explanations, not exhaustive catalogues of all the possible reasons a given author might use a given AC or AU in a given opinion. Moreover, the theories are not necessarily mutually exclusive.

empirical predictions the theory generates, followed by the theory's main normative implications.<sup>47</sup>

### 1. Certainty rhetoric as misguided persuasion

One prominent explanation for judges' (and lawyers') certainty rhetoric is that they mistakenly think it's persuasive. Lawyers draft briefs with near single-minded focus on persuading judges, and judges – perhaps just as much as lawyers – want to persuade other judges, whether those judges are on the same panel, on the same court, in another circuit, or in a higher reviewing court.<sup>48</sup> As we've

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47. These normative implications relate primarily to judicial behavior, rather than litigant behavior, for two reasons. First, the literature contains far less normative theorizing about litigant behavior than about judicial behavior. Second, and relatedly, the litigant's task in writing a brief is more straightforward than the judge's task in writing an opinion. A brief succeeds if it persuades the judge in the case at hand. That may be an over-simplification, but no matter how nuanced one's account of the purposes of a brief, the criteria for a successful judicial opinion are more numerous and more disputed: Should its focus be persuading the parties to the dispute? Persuading some other audience? Providing guidance for other courts? Facilitating efficient appellate review? Creating narrow precedent? Broad precedent? Etc.

None of this should imply that the study of briefs is unimportant. To the contrary, the development of the law depends in large part on the quality of briefing. Hence judges' hesitance to decide issues not briefed and to base decisions on arguments not made by the litigants. See Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs' Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 EMORY L.J. 59, 65 (2013) ("[B]ad briefs impact judicial reasoning, skewing the caselaw"). For better or worse, American appellate judges – at the Supreme Court level, but much more so at the circuit court level, where caseloads are much higher and resources more constrained – depend on appellate legal briefs that clearly and thoroughly articulate the best arguments for and against a given outcome. Cf. Levy, *supra* note 38. In any event, if litigant certainty rhetoric causes judicial certainty rhetoric, see *infra* Section I.B, then those ultimately interested only in judicial certainty rhetoric should still be concerned about litigant certainty rhetoric.

48. See, e.g., Gluck & Posner, *supra* note 9, at 13 (emphasizing the importance judges place on writing opinions that are persuasive to colleagues, as revealed in interviews with forty-two active federal appellate judges); Alan B. Handler, *A Matter of Opinion*, 15 RUTGERS L.J. 1, 2 (1983); Michael J. Higdon, *Something Judicious This Way Comes*, 44 U. RICH. L. REV. 1213, 1242 (2010) ("Writing opinions is a lot like writing briefs. Both are, at bottom, efforts to persuade. Lawyers want to satisfy clients and win cases. Judges want to persuade lawyers, litigants, the community at large that the decision they have made . . . is the absolutely correct one." (quoting Judith S. Kaye, *Judges as Wordsmiths*, 69 N.Y. ST. B.J., Nov. 1997, at 10, 10)); Robert A. Leflar, *Quality in Judicial Opinions*, 3 PACE L. REV. 579, 584 (1983) ("The opinion . . . is an essay in persuasion. The value of the opinion is measured by its ability to induce the audience to accept the judgment." (quoting James D. Hopkins, *Notes on Style in Judicial Opinions*, 8 TRIAL JUDGES' J. 49, 50 (1969))); Wetlaufer, *supra* note 2 at 1561 ("[O]nce the judge has decided the case before her, she may assume a role as advocate that is in certain respects indistinguishable from the role that was played by the lawyers who argued the case. As was earlier true of the lawyers-with-clients, she has a position to defend." (footnote omitted)); cf. Irving Younger, *Symptoms of Bad Writing*, A.B.A. J., May 1, 1986, at 113, *reprinted*

seen, all commentators appear to agree that assertions of certainty are unpersuasive and signal weak arguments.<sup>49</sup> So the “misguided persuasion” account’s primary empirical predictions are that the best lawyers and judges avoid unnecessary certainty assertions, that parties using more of them lose more often, and that judicial opinions employing more of them are less influential (at least outside their circuit, where they represent merely persuasive authority).

As for its normative implications, the “misguided persuasion” account paints a grim picture of certainty rhetoric and of a judicial system that resorts to it as often as ours. If it is desirable that judges *attempt* to persuade, as many think it is,<sup>50</sup> it is disconcerting that they are using such a counter-productive method.<sup>51</sup> And if, as many commentators claim, certainty rhetoric signals its opposite—that is, if it signals weakness of argument rather than strength—then it represents a particularly embarrassing form of unpersuasiveness: it provides easily observable examples of judges making false statements (e.g., that X is “obvious” where X is actually non-

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in MICH. B.J., Mar. 2003, at 44, 44 (2003) (addressing the “solemn overstatement that many lawyers seem to think is the way to argue a case”). Granted, judges are not the only audience for briefs and opinions. The readers of briefs include opposing counsel and litigants (whose thoughts matter for settlement purposes), and sometimes the media. The readers of opinions may include the parties, other potential parties in future cases, lawyers in future cases, academics, media, politicians (especially where judges have opportunities for promotion), and the public (especially where judges are elected).

49. See, e.g., *supra* notes 8–10.

50. See, e.g., RUGGERO J. ALDISERT, OPINION WRITING § 10.1, at 118 (3d ed. 2012) (stating that a judicial opinion’s purpose is “to convince any reader that sound logic supports the court’s decision”); JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 280 (5th ed. 2007) (“[Good appellate opinions are] written essay[s] consciously designed to persuade the audience that the result is correct.”). That said, commentators differ as to how central a goal or concern persuasiveness should be, and all seem to agree that judges should avoid “advocacy”—a term with a murky meaning in this context, but one that is related to the attempt to persuade. See, e.g., FED. JUDICIAL CTR., *supra* note 8, at 19 (explaining, under the heading “Avoiding advocacy[,]” that “[a]n opinion can—and properly should—carry conviction”); Moses Lasky, *A Return to the Observatory Below the Bench*, 19 SW. L.J. 679, 688–89 (1965) (“[Some] opinion[s] read[] like a lawyer’s brief, the worst possible style for a judicial opinion. It discloses this kind of judge for what he is and ought not be, an advocate.”); *id.* (explaining that “dissenting judge[s] should state the points of disagreement forcefully and effectively without engaging in argument or advocacy”).

51. See Gibson, *supra* note 8; Dan Simon & Nicholas Scurich, *Lay Judgments of Judicial Decision Making*, 8 J. EMPIRICAL LEGAL STUD. 709 (2011); Wanderer, *supra* note 8; *supra* notes 8–10 and accompanying text.

obvious).<sup>52</sup> Finally, to the extent judges mistakenly think certainty rhetoric can effectively paper over flaws in their arguments, its availability and acceptability may create bad ex ante incentives. Specifically, if the author thinks she can accomplish through emphatic assertion the same degree of persuasiveness that might otherwise have required additional scrutiny and written analysis, she might be less likely to undertake that analysis in the first place. She might thus fail to closely scrutinize the propositions for which persuasive justification is most difficult to find or to articulate—likely the most dubious propositions on which the decision rests. The result may be less considered, more error-prone opinions than would come about absent certainty rhetoric.

## 2. Certainty rhetoric as reactive escalation

A second account explains certainty rhetoric as a more or less impulsive reaction to others' rhetorical provocation—the sort of thing that happens in contentious verbal disputes.<sup>53</sup> Applied to judicial opinions, the reactive escalation account has three variants. First, judicial assertions of certainty might result from, and positively correlate with, the *losing* brief's use of certainty rhetoric, as the authoring judge reacts to incorrect and overblown statements with her own responsive bluster.<sup>54</sup> Alternatively, judicial opinions' certainty rhetoric might result from, and positively correlate with, the *winning* brief's use of certainty rhetoric (perhaps "parroting" the winning side's language).<sup>55</sup> And finally, in cases of split panel

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52. Note, though, that the misguided persuasion account allows that certainty rhetoric could be sincere or insincere. See Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 286 (2008) ("Honesty and [p]ersuasiveness [need not be] mutually exclusive.").

53. See Long & Christensen, *Justices (Sub-Consciously) Attack*, *supra* note 25, at 935 (arguing that the rhetoric in Supreme Court dissents and losing briefs is symptomatic of a subconscious reactive impulse that stems from a perception of being threatened).

54. Note that the "escalation" here need not mean employing greater certainty rhetoric *than the source to which it is reacting*. The theory does not predict that judicial opinions will use more certainty rhetoric than the briefs, for instance, but instead that a brief's greater-than-average certainty rhetoric will bring about a judicial opinion with greater than average certainty rhetoric.

55. See RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 21–22 (2007) (noting that judges "sometimes insert into their opinions, without attribution, verbatim passages from lawyers' briefs"); Moses Lasky, *Observing Appellate Opinions from Below the Bench*, 49 CALIF. L. REV. 831, 831–32 (1961) (same); Wetlaufer, *supra* note 2, at 1562 ("In [writing a judicial opinion], of course, the judge is repeating and perhaps improving upon the rhetorical moves

opinions, judges authoring majority opinions or dissents might react to what they consider overblown rhetoric in the other opinion, resulting in greater use of certainty rhetoric, and fewer statements of uncertainty, in split opinions.<sup>56</sup>

As a normative matter, the reactive escalation account gives little to be happy about. Granted, some scholars emphasize the importance of judicial responsiveness to litigants as a check on judicial inaction, and might be happy if it turned out that judges pay such close attention to the briefs while crafting their opinions.<sup>57</sup> But many would worry that such responsiveness is symptomatic of myopic decision-making or undesirable advocacy in opinion writing, evincing too much focus on arguing with the parties to the dispute and not enough on the careful wording of precedent.<sup>58</sup> And where panels are split, certainty rhetoric as reactive escalation might give rise to embarrassing and legitimacy-reducing rhetorical arms races between judges on the same panel,<sup>59</sup> with each judge becoming more and more entrenched and claiming greater and greater certainty in response to the sort of peer disagreement that

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that have already once been made by the winning lawyer in his now-successful arguments to the judge.” (emphasis omitted)); cf. Ethan J. Leib et al., *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 737–38 (2013). For related research on the extent to which different Supreme Court justices use language from the briefs, see Paul M. Collins, Jr. et al., *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 LAW & SOC’Y REV. 917 (2015); Adam Feldman, *A Brief Assessment of Supreme Court Opinion Language, 1946–2013*, 86 MISS. L.J. 105 (2017).

56. See, e.g., Long & Christensen, *Justices (Sub-Consciously) Attack*, *supra* note 25.

57. See Oldfather, *Remedying Judicial Inactivism*, *supra* note 37, at 744; Oldfather, *Defining Judicial Inactivism*, *supra* note 37, at 168–82. For studies of judicial responsiveness more generally, see Chad M. Oldfather et al., *Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal Scholarship*, 64 FLA. L. REV. 1189 (2012); Pamela C. Corley et al., *Lower Court Influence on U.S. Supreme Court Opinion Content*, 73 J. POL. 31 (2011); Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties’ Briefs*, 61 POL. RES. Q. 468 (2008).

58. See *Holmes v. Rogers*, 13 Cal. 191, 202 (1859) (petition for rehearing) (“An opinion is not . . . a brief in reply to the counsel against whose views we decide.”); FED. JUDICIAL CTR., *supra* note 8, at 19 (explaining, under the heading “Avoiding advocacy[,]” that “an opinion should not become an argument between the judge and the lawyers”). On the importance of precise wording in judicial opinions, see Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1254–55 (2007) (“[O]ne good quote is worth a hundred clever analyses of the holding.” (quoting Fredrick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 683 (1986) (book review))); *id.* at 1255 (“[T]he opinion’s language ‘will be carefully analyzed, and discussions of why one word rather than another was used will be common.’” (quoting Schauer, *supra*)); see also Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771, 813–14.

59. See Long & Christensen, *Justices (Sub-Consciously) Attack*, *supra* note 25.

ought rationally to spur greater *uncertainty*.<sup>60</sup> In short, as with the misguided persuasion account, the reactive escalation account raises concerns about judicial opinion-writing practices and gives reason to promote the avoidance of certainty rhetoric in both briefs and opinions.

### 3. *Certainty rhetoric as extralegal communication style*

Another possibility is that certainty rhetoric in legal opinions (and perhaps also briefs) is merely bleed over from the author's style of writing and speaking in other, extralegal contexts. The author's expressions of certainty or uncertainty merely reflect the communication style—assertive or tentative—that he or she employs in everyday life. This theory generates relevant empirical predictions by drawing from empirical research on gender, race, and assertive versus tentative communication styles. Specifically, that research indicates that women and racial minorities in contemporary America tend on average to use relatively tentative language compared to men and whites.<sup>61</sup> If ACs and AUs in legal opinions are simply manifestations of the same assertive or tentative communication styles people exhibit in other domains, then AUs should be more prevalent in opinions written by women and by nonwhites, while ACs should be more prevalent in opinions written by men and by whites.

As for the normative implications of this account, it's difficult to assess them without knowing more about the impact such rhetoric actually has on the audiences for judicial opinions. If audiences take such rhetoric at face value, then on this account opinions written by whites and males could have outsize influence, perhaps obtaining more citations or creating more expansive legal

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60. Cf. Stein, *supra* note 7; *infra* Section II.D.

61. See ROBIN TOLMACH LAKOFF, *LANGUAGE AND WOMAN'S PLACE* (1975); Faye Crosby & Linda Nyquist, *The Female Register: An Empirical Study of Lakoff's Hypotheses*, 6 *LANGUAGE SOC'Y* 313 (1977); Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 *PSYCH. PUB. POL'Y. & LAW* 133, 149 (2010); Rachael K. Hinkle et al., *A Positive Theory and Empirical Analysis of Strategic Word Choice in District Court Opinions*, 4 *J. LEGAL ANALYSIS* 407, 432 (2012) (finding that "women and African-Americans use[d] more hedges"); Lawrence A. Hosman & Susan A. Siltanen, *Powerful and Powerless Language Forms: Their Consequences for Impression Formation, Attributions of Control of Self and Control of Others, Cognitive Responses, and Message Memory*, 25 *J. LANGUAGE & SOC. PSYCHOL.* 33 (2006); Campbell Leaper & Rachel D. Robnett, *Women Are More Likely Than Men to Use Tentative Language, Aren't They? A Meta-Analysis Testing for Gender Differences and Moderators*, 35 *PSYCHOL. WOMEN Q.* 129 (2011).

rules than opinions written by nonwhites and females.<sup>62</sup> On the other hand, if audiences treat ACs as signaling weakness of argument<sup>63</sup> (and perhaps even AUs as signaling more critical thinking),<sup>64</sup> then maybe the outsize influence goes to traditionally underrepresented authors. But even then, the increased influence would still be unprincipled, resulting as it would from mere differences in general communication styles, rather than actual differences in attendant certainty. In short, legal certainty rhetoric as bleed over from extralegal communication styles would make such rhetoric at best normatively neutral, and quite possibly normatively undesirable.

#### 4. *Certainty rhetoric as power-grabbing*

Unlike the “reactive escalation” and “extralegal communication style” theories, the “power-grabbing” theory posits a more strategic and forward-looking purpose behind judges’ use of certainty rhetoric. According to this account, judges use the language of certainty as a tool for pushing legal doctrine further in their favored direction than it would otherwise go. If, for example, an opinion states that, given what police officers knew at the time of a search, they “certainly” had probable cause, the opinion may articulate a more expansive probable cause holding than it would have if the word “certainly” had not been used. Additionally, lawyers seeking to defend officers’ searches may cite the opinion’s certainty language more readily than they would cite an opinion that is silent as to attendant degree of certainty.<sup>65</sup> On this view, ideologically

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62. See sources cited *infra* notes 69–71 and accompanying text.

63. See sources cited *supra* notes 1–10 and accompanying text.

64. See Cross & Pennebaker, *supra* note 16, at 873 (“One study of students found that tentativeness was associated with greater critical thinking, while certainty was associated with lesser critical thinking.”) (citing Monica Metrick Kennison, *The Evaluation of Critical Thinking, Reflective Writing, and Cognitive Word Use in Baccalaureate Nursing Students* (2003) (unpublished Ph.D. dissertation, West Virginia University) (on file with West Virginia University Scholar Institutional Repository)).

65. From the dataset described in Section I.B.2 below, see, for example, *United States v. Whitaker*, 546 F.3d 902, 911 (7th Cir. 2008) stating,

“The information obtained by the police after their arrival at the scene . . . *certainly* gave the officers the requisite authority to search the cabin of Mr. Whitaker’s car . . . . All of these factors, when assessed in their totality, *certainly* constituted a sufficient basis to justify the officers’ inspection of the cabin for a weapon.”

(emphases added).

unified panels would be more likely than other panels to use certainty rhetoric.<sup>66</sup> Additionally, opinions with more certainty statements would garner more citations per page both inside and outside of the circuit (because they have created a more expansive rule, because they provide especially useful sound bites, or both).

As a normative matter, those who advocate judicial minimalism and worry about overreliance on dicta will likely find the “power-grabbing” account distressing.<sup>67</sup> That said, as dicta goes, this might be a less troubling kind than some: adding the word “obviously” does not require the sort of far-flung diversion that commentators worry wastes judicial resources, ventures into territory not sufficiently briefed by the parties, or creates merely advisory opinions. In other words, the same quality that makes certainty rhetoric an especially tempting form of dictum may make it relatively benign in terms of the institutional competence, role, and resource allocation concerns that motivate some commentators’ aversion to dicta.<sup>68</sup>

### 5. Certainty rhetoric as legitimacy bolstering

A final possible explanation for judicial certainty rhetoric is that judges claim certainty because they think that doing so promotes or helps sustain the judiciary’s legitimacy.<sup>69</sup> In other words, judges

66. See Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464 (2014) (addressing the “attitudinal model” of judicial decision-making in political science literature, where “attitude” is often measured using political party of appointing president) (reviewing LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013)).

67. See Cass R. Sunstein, *The Supreme Court, 1995 Term – Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7–9, 15 (1996) (discussing benefits of judicial minimalism).

68. See Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005); Michael Gentithes, *Check the Invitation: The Trouble with Appeals Invited by Supreme Court Justices*, 82 MO. L. REV. 339 (2017).

69. See, e.g., Gerwitz, *supra* note 7 (“[T]he rhetoric of certainty seems to result from the perceived need of judges to preserve the institutional authority of the court.”); Anne E. Mullins, *Subtly Selling the System: Where Psychological Influence Tactics Lurk in Judicial Writing*, 48 U. RICH. L. REV. 1111 (2014). I focus here on institutional, rather than individual, reputation—i.e., on the perceived ability of judges, exercising the judicial craft, to arrive at clearly correct answers, rather than on the individual judge’s extraordinary ability, compared to other judges, to arrive at clearly correct answers. Cf. Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1071–72 (positing that private adjudicators may stress their confidence in order to signal to potential customers superior capability). Privately employed lawyers are in this respect more like private adjudicators than they are like unelected federal judges: private lawyers must impress a lay audience to attract and

use certainty rhetoric to convey to readers the impression that the litigation process and exercise of judicial craft result in conclusions that are unavoidable and clearly correct.<sup>70</sup> On this account, one might predict that certainty assertions appear less frequently in opinions concerning areas of law where the judiciary's legitimacy is less at issue—for example, less in commercial contract disputes than in, say, search and seizure cases (where courts use notoriously slippery balancing tests to justify the state's use of coercive force).<sup>71</sup> This account would also predict that dissenting opinions will refrain from asserting certainty, lest the court's majority opinion be undermined, while the majority opinion will employ greater-than-average AC usage (and lower-than-average AU usage) in order to affirm, in the face of dissent, that the court's conclusions are unavoidable and clearly correct.

Normatively, there's nothing inherently wrong with a judiciary that wants to enhance its institutional reputation or legitimacy, but most commentators worry that certainty rhetoric is a bad way to go about it. First, if certainty rhetoric is as unpersuasive and embarrassing as the literature suggests, then it may be counterproductive as a means to bolster the judiciary's legitimacy.<sup>72</sup> Second, even assuming that certainty rhetoric actually does produce an increase in apparent legitimacy, it might nonetheless be undesirable insofar as the appearance of legitimacy is the product

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keep customers. (In this vein, it would be interesting to study whether elected judges express greater certainty in their opinions leading up to re-election. Cf. Michael J. Nelson, *Elections and Explanations: Judicial Retention and the Readability of Judicial Opinions* (Nov. 18, 2014) (unpublished manuscript) (online at <http://mjnelson.org/papers/NelsonReadability.pdf>) (finding that elected judges produce more "readable" opinions directly preceding reelection).)

70. At the appellate level, facts are treated as settled. I therefore focus here primarily on the need to convey legal determinacy and accuracy of legal conclusions. Much of the literature on judicial behavior and legal theory focuses on the judiciary's need to convey to the public the determinacy of *law*, neglecting the judiciary's role in conveying to the public that *facts* have been determined accurately and with a high degree of warranted confidence. But both are probably important for perceived legitimacy.

71. Cf. Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 112 n.127 (1988) ("These [Fourth Amendment] balancing opinions are radically underwritten: interests are identified and a winner is proclaimed or a rule is announced . . . . Of course, the hidden process raises the specter of the kind of judicial decisionmaking that the Realists warned us about and that balancing promised to overcome.") (quoting T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 976 (1987)). On the ideological divisiveness of Fourth Amendment law, see CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? (2006); and Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261 (1996).

72. See *supra* notes 1–10 and accompanying text.

of insincere or otherwise misleading assurances (e.g., that X is obvious, where it actually is not).<sup>73</sup> Finally, if judges come to “[b]elieve [t]heir [o]wn [h]ype,”<sup>74</sup> they might misapprehend the scope or extent of their institutional legitimacy or expertise. That could result in a greater tendency to, for example, write expansive opinions or defer less to other branches than would exist if judges maintained a more sober appraisal of the degree to which their certainty is warranted.

### *B. Reasons to Doubt the Explanatory Proposals*

The previous section surveyed five potential accounts of the causes, effects, and normative implications of litigant and judicial certainty rhetoric. This section provides reasons to doubt each. Section II.A briefly explores some questionable aspects of each account as a matter of intuitive plausibility. Section II.B reports the results of an empirical examination of certainty and uncertainty expressions in appellate briefs and appellate opinions, noting various inconsistencies between the empirical data and the predictions generated by each of the accounts.

#### *1. Intuitive plausibility*

Before getting to the empirical data, it is worth noting a few preliminary reasons to doubt the explanatory proposals surveyed above. First, the “misguided persuasion” account gives implausibly little credit to judges (as well as lawyers). After all, everybody who has addressed the subject—including judges themselves—claims that judges find assertions of certainty

73. Cf. Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563 (2012); Simon, *Psychological Model*, *supra* note 2, at 141 (“[J]udges and their audiences must become comfortable with the wielding of power by this non-majoritarian institution through decisions devoid of putative certainty.”). The mismatch between the appearance and the reality of legal certainty (and, consequently, judicial legitimacy) could be problematic on deontological or consequentialist grounds. William Popkin provides an interesting take on the latter. See WILLIAM D. POPKIN, *EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES* 173 (2007). He argues that the “traditional use of an authoritative tone” poses a danger to the judicial system not because “the general public will pay much attention to the way judges write opinions,” but because “the greatest risk to judging comes from cynicism bred within the legal profession,” and the traditional tone represents “a consistently fictional style of presenting judicial opinions [that] can erode professional confidence in judging,” breeding intraprofessional cynicism. *Id.*

74. See Zev J. Elgen and Yair Listoken, *Do Lawyers Really Believe Their Own Hype, and Should They? A Natural Experiment*, 41 J. LEGAL STUD. 239 (2012).

unpersuasive and even *counter-persuasive*, that is, signals of “weakness” and “lack of logical proof” —in short, “exactly [the] opposite [of] their original meaning.”<sup>75</sup> Could the lawyers and judges using certainty rhetoric really be so clueless? We should at least hesitate and examine alternative hypotheses before concluding that they are, especially if (as the data reported in the next Part indicate) seemingly high-quality lawyers and judges are no less apt to use it.

The second, “reactive escalation,” and third, “extralegal communication style,” accounts, while both somewhat plausible, also give suspiciously little credit to the authors of briefs and opinions. For example, the “reactive escalation” account relies on analogizing arguments made in appellate briefs and opinions to the sorts of quick, knee-jerk rhetorical defensiveness linguists have observed in extemporaneous verbal responses.<sup>76</sup> But these writings (especially precedential judicial opinions) are not knee-jerk rhetorical reactions; they are carefully considered texts whose words, one might expect, were chosen deliberately as the result of some conscious decision. The “extralegal communication style” account is subject to similar concerns.

The fourth, “power-grabbing,” account would cohere with substantial political science literature concerning judicial preferences and political ideology.<sup>77</sup> But it may fail to explain the ACs that appear in the run-of-the-mill cases that comprise a large portion of courts’ dockets. In such cases, judges may have no ideological preference one way or another, let alone a preference for an expansive rule that reaches beyond the facts of the case. To the extent that certainty rhetoric appears in such cases, it may be hard to conceive of it as an attempt to grab outside influence for the sake of accomplishing some policy preference the panel supposedly shares.

The fifth, “legitimacy bolstering,” account may help explain how baseline stylistic norms developed in the first place. But it fails

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75. See *supra* notes 5–10 and accompanying text.

76. The reactive escalation account also suffers from a further problem: It does not explain why anybody would be the first to unnecessarily assert certainty in any given appellate case.

77. E.g., CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); Jonathan P. Kastellec, *Panel Composition and Judicial Compliance on the US Courts of Appeals*, 23 J.L. ECON. & ORG. 421 (2007).

to grapple with the fact that, in the mine-run of cases (even published appellate cases), judges cannot expect their opinion to affect institutional legitimacy; they cannot expect an audience for their opinion beyond a small set of highly informed observers—namely, judges and lawyers whose impression of the judiciary’s legitimacy is unlikely to be influenced by such rhetoric (let alone favorably influenced). Moreover, given the seemingly universal disdain for certainty rhetoric amongst the primary audiences of most judicial opinions (judges, lawyers, and legal commentators), one might predict that individual judges would free-ride on others’ certainty rhetoric. That is, each individual judge would leave to other judges the task of bolstering institutional legitimacy in this embarrassing way, with the result that certainty rhetoric would be eliminated absent some (currently nonexistent) coordination mechanism.

Finally, as a general matter, it is also worth noting that most of the explanatory hypotheses cannot account for statements of *uncertainty*. Indeed, four of the five accounts arguably render somewhat bizarre the practice of even occasionally reporting uncertainty.<sup>78</sup> According to the “misguided strategic persuasion” account, authors would think AUs unpersuasive and hence not use them. The “reactive escalation” theory posits a one-way ratchet favoring increasing certainty with no concomitant account of how uncertainty would enter the mix. The “power-grabbing” and “legitimacy bolstering” accounts likewise render AUs somewhat mysterious, if not inexplicable.<sup>79</sup> One might respond by positing that AUs are better explained by some account unrelated to that which explains ACs. Indeed, most commentators addressing certainty rhetoric say little or nothing about assertions of

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78. The extralegal communication style account does not run into this problem.

79. The “power-grabbing” account might most naturally accommodate uncertainty statements. Under a modified version of that account, AUs could be used by ideologically unified panel authors to intentionally diminish the scope or influence of a decision with which they disagree or dislike but feel bound to adopt due to legal constraints. Cf. Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464 (2014) (reviewing LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013)). Additionally, in ideologically diverse panels, minority-ideology judges could join the majority on the (explicit or implicit) condition that the opinion’s scope and impact be limited (including through use of AUs). This latter modified “power-grabbing” account for ideologically divided panels might find some corroboration in the empirical data, which showed ideologically diverse panels using AUs more frequently. See Appendix Table 2.

uncertainty. But ACs and AUs seem sufficiently related that, at the very least, an explanation of one should not render the other more mysterious, let alone inexplicable. And the literature's failure to consider uncertainty statements seems sometimes to render its arguments suspect, as when some suggest that dissenting judges behave according to a reactive escalation model, without considering whether dissenting opinions show a concomitant increase in assertions of *uncertainty* (which, at least in the dataset described below, they do).<sup>80</sup> Ideally, a theory could fit and explain expressions of both certainty and uncertainty.

## 2. Empirical evidence

This section reports a body of original empirical evidence that sheds light on the five theories articulated in Part I. Section II.B.1 describes the dataset, variables coded, and statistical models used to analyze the data; sections II.B.2–3 report the study's specific findings, touching on the five theories' empirical predictions along the way; and section II.B.4 provides a more general overview and discussion of how the theories fare in light of the data.<sup>81</sup>

*a. The dataset, variables, and statistical models.* The dataset contains 428 cases (483 opinions, counting majority opinions, concurrences, and dissents separately) published in 2007 and 2008 in the Fifth, Seventh, and Ninth Circuit Courts of Appeals, along with the 344 appellate briefs submitted in 121 of those cases.

For each case, I coded (1) *subject matter* attributes, (2) *judicial opinion* attributes, and (3) *judge and panel* attributes. For subject matter, the cases were in three categories: Fourth Amendment search and seizure; commercial contract disputes presenting at least one civil procedure issue; and combination criminal/civil cases presenting at least one civil procedure issue.<sup>82</sup> For *judicial opinion* attributes, I coded outcome, that is, appellant win or loss;<sup>83</sup>

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80. See Long & Christensen, *Justices (Sub-Consciously) Attack*, *supra* note 25.

81. The original data is available upon request.

82. See *infra* notes 92–93 and accompanying text.

83. As is common, I coded both complete and partial appellant wins (e.g., “affirmed in part and reversed in part”) as appellant wins, and all else as appellant losses. See, e.g., Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts Redux? An Empirical Study of State Court Trials on Appeal*, 12 J. EMPIRICAL LEG. STUD. 100, 115 n.72 (2015) (explaining and employing the same approach); Gregory C. Sisk & Michael Heise, “Too Many Notes”? An

rate of AC and AU use per 10,000 words;<sup>84</sup> whether the opinion was written by a majority, a majority in the presence of dissent, or a dissenter;<sup>85</sup> and number of subsequent case citations to the opinion inside and outside of the circuit.<sup>86</sup> And for *judge and panel* attributes, I coded authoring judge's gender, race, and law school attended;<sup>87</sup> and ideological unity or disunity of the panel.<sup>88</sup> For each corresponding appellate brief, I coded (1) *subject matter* attributes (same three subjects described above); (2) *brief* attributes (rate of AC and AU use per 10,000 words); and (3) *litigant and legal representation* attributes (appellee or appellant; represented by federal government, top-ranked law firm,<sup>89</sup> or other). A table in the Appendix shows the total number of each of these variables.<sup>90</sup>

Before describing how two of the key variables, ACs and AUs, were coded, a brief explanation of case selection is in order. I chose three circuits in order to facilitate across-circuit comparison.<sup>91</sup> I chose the Fifth, Seventh, and Ninth Circuits because they are geographically diverse, well-respected, and likely to have a cross section of legal representation types (including top-ranked law firms). I chose the years 2007–2008 because they were recent enough to reflect current practice, but not so recent that they would fail to reflect significant divergences in the number of citations an opinion receives after its publication. For case subject matter, I relied on Westlaw's keynote categorization system. I chose three

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*Empirical Study of Advocacy in Federal Appeals*, 12 J. EMPIRICAL LEGAL STUD. 578, 582 (2015) (same).

84. See *infra* text accompanying note 101.

85. Opinions concurring in part and dissenting in part were coded as dissents.

86. Count data was obtained via LexisNexis as of January 2012.

87. Following Sisk, Heise, and Moriss's categorization, which they based on numerous ranking sources such as *U.S. News and World Reports*, rankings of faculty publication rates, and other sources, Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998), a juris doctorate degree from one of the following schools counted as "elite": Chicago, Columbia, Harvard, Michigan, Stanford, Virginia, and Yale. Judge gender and race were obtained via the Auburn dataset, online at <http://www.wmich.edu/nsf-coa/>, and the Federal Judicial Center's biographical directory, online at <http://www.fjc.gov/public/home.nsf/hisj>. Per curiam opinions were not included in analyses concerning authoring judge characteristics.

88. Each judge was coded as either Republican or Democrat based on their appointing president's party.

89. A "top ranked law firm" was defined as any firm listed on Vault's top-twenty firms of 2008 in Texas (for the 5th Circuit), Chicago (for the 7th Circuit), and California (for the 9th Circuit).

90. See Appendix Table 1.

91. In the end, the data did not reveal significant differences across the circuits as to the questions addressed in this study.

subject matter areas to facilitate across-subject-matter comparison, particularly across the criminal-public/civil-private law divide, which would facilitate comparison of different types of legal representation and different degrees of ideological salience. Specifically, on the criminal side, I chose Fourth Amendment search and seizure cases because Fourth Amendment law is notoriously ideologically divisive and standard-based, and might therefore shed light on the impact of ideology and institutional legitimacy concerns.<sup>92</sup> As a contrasting set of cases on the civil side involving less ideologically salient issues, I chose commercial contract disputes raising an issue of civil procedure. Finally, I chose cases presenting part criminal, part civil-procedural issues as a middle ground.<sup>93</sup> The 428 cases in the dataset represent all of the published cases that fit the circuit, time, and subject matter criteria just described.<sup>94</sup> The 344 briefs in the dataset represent all of the corresponding briefs submitted in the Fourth Amendment and the commercial contract/civil procedure subject matter categories (the

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92. See *supra* note 71 and accompanying text.

93. These cases concerned a more diverse set of substantive legal issues than the other two categories. They include, e.g., cases concerning habeas corpus, RICO, False Claims Act, antitrust violations, contempt of court, and civil rights claims.

94. The dataset is thus comprised of appellate cases generally, not just those that are most difficult, however that might be assessed. Cf. Keith Carlson et al., *supra* note 16 (noting that qualitative “analysis of style tends to focus on the gems in judicial writing, . . . neglecting the mine-run of workaday opinions”); Gluck & Posner, *supra* note 9, at 1306 (“We . . . share a strong belief in the merits of turning more scholarly attention away from the Supreme Court and instead to the everyday decisionmakers in the system[, especially intermediate appellate judges.]”); *id.* at n.20 (citing “a few exceptions to the myopic focus on the [Supreme] Court”); Michael A. Livermore et al., *The Supreme Court and the Judicial Genre*, 59 ARIZ. L. REV. 837 (2017); Sutton, *supra* note 11, at 872 (“[I]n assessing the influences on judicial behavior, there is much to be learned from considering how judges resolve the run-of-the-mine cases, not the hardest ones.”). That said, given the high rate of cases decided via unpublished summary disposition, the fact that a case results in a published opinion provides some evidence that the issues it addresses are relatively novel or difficult. See Morgan L. W. Hazelton et al., *Sound the Alarm? Judicial Decisions Regarding Publication and Dissent*, 44 AM. POL. RES. 649 (2016) (finding that nearly sixty percent of the U.S. Courts of Appeals cases from 2005 to 2008 which cite the Fourth Amendment were unpublished); Michael Kagan et al., *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO L.J. 683, 684 (2018) (“Nearly 90% of decisions in federal courts of appeals are now designated ‘unpublished.’ The rates vary considerably by circuit, however, with the most extreme circuit publishing less than 4%.”); David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791, 1801 (2009) (reviewing RICHARD A. POSNER, *HOW JUDGES THINK* (2008)); Norman R. Williams, *The Failings of Originalism: The Federal Courts and Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 762 (2004) (“[T]he published written opinion—the hallmark of American appellate justice—is now the exception rather than the rule.”).

two categories with the greatest variety of legal representation types) that were available on Westlaw.<sup>95</sup>

Now, on to an explanation of how ACs and AUs were coded. The following terms were, depending on the context in which they appeared, coded as ACs and AUs:

ACs: clear\*, obvious\*, certain\*, undoubted\*, doubt\*, unquestionabl\*, "no\* serious\*", indisputabl\*, "not dispute\*", eas\*, inarguabl\*, simpl\*, spurious, dishonest\*, utter\*, fathom\*, unfathom\*, comprehen\*, incomprehensibl\*, conceive\*, inconceivabl\*, "straight face", (one /2 conclusion), sure\*, imagin\*, confident\*, "well-established", "of course", [negated AUs such as "not difficult\*"]

AUs: difficult\*, admit\*, sincere\*, respect\*, uncertain\*, unclear\*, arguabl\*, grant\*, hard, debate\*, "to be sure", complicated, [negated ACs such as "not obvious\*"]

In manually coding the opinions and briefs, context played a crucial role in excluding some instances in which the above terms were used. For example, terms that would otherwise count as ACs did *not* count where they were used in legal doctrinal phrases such as "clear error," or "beyond a reasonable doubt," nor where they were invoked in a direct application of those doctrinal phrases.<sup>97</sup> And a term listed above as an AC would not be coded as an AC where it was used as part of a quote not endorsed by the author. Similarly, "simply" was not coded as an AC where it could be substituted for "merely," nor was "of course" where it could be substituted for "granted," as used when conceding something. Context was also key in determining when terms like "imagin\*" or "comprehen\*" constituted the author's own ACs, rather than a description of somebody else's viewpoint (e.g., in the phrase "We cannot imagine a worse reason," which would count as including

95. For cases with cross-appeals, briefs were coded only for one party on each side of the litigation (the first listed party whose briefs were available on Westlaw).

96. "\*" symbolizes a "root extender," such that, for example, "clear\*" would retrieve "clear", "clearly", and "clearer." "(one /2 conclusion)" represents a retrieval of any instance where the word "one" appeared within two words of the word "conclusion," such as, for example, both "one conclusion" and "one obvious conclusion" were retrieved.

97. Cf. *infra* Section II.B.2 (discussing the study's focus on unnecessary assertions of certainty and uncertainty, rather than those that are invoked by necessity in applying a legal doctrine). For example, the following, contained in a single section of a brief, would be coded as containing zero ACs: "The district court's decision was clearly erroneous. . . [omitted discussion]. . . Thus, the district court clearly erred."

one AC, but not in the phrase “*Defendant* could not have comprehended what the officer was saying,” which would count as including zero ACs). In short, manual coding provided numerous advantages over automated coding, given the goals of this study.

Despite manual coding’s advantages in the present context, it has two important and inevitable drawbacks that are worth emphasizing. First, due to the subjectivity involved in deciding whether to count this or that term, in context, as an AC or AU, manual coding makes replication of results difficult and risks reflecting the biases of the coders. Here, coder subjectivity is particularly worrisome because I coded the results myself, rather than, say, enlisting multiple research assistants to do so independently and without awareness of what would or would not tend to produce interesting results. Second, due to the time-consuming nature of manual coding, the resulting sample size is far smaller than automated computer coding would have allowed. A smaller sample size makes it especially problematic to draw inferences about the absence of effects; small effects might be present yet only detectable with a larger sample.<sup>98</sup>

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98. Before reporting the results, it may be useful to briefly describe the ways in which previous studies differ from the one reported here. A study by Hinkle et al. considered whether district court judges whose political ideology differed from that of the appellate judges who review their decisions used more “hedging language” (and more “intensifiers” in the “Facts” section of the opinion) than district court judges whose political ideology aligned with that of the circuit’s appellate judges. See Hinkle et al., *supra* note 61. Hinkle et al.’s study differed in four important respects from the present study. First, it studied a much broader set of linguistic devices (specifically, “intensifiers” and “hedges”) than ACs and AUs (of the 86 words and phrases studied by Hinkle et al., only four are coded in the present study, and Hinkle et al. only coded them in the Facts section of judicial opinions). See *id.* at 427, 429 (defining hedges and intensifiers); COLLINS ESSENTIAL ENGLISH DICTIONARY 415 (2d ed. 2006) (explaining that an intensifier is “a word, especially an adjective or adverb, that intensifies the meaning of the word or phrase that it modifies, for example, very or extremely”). Second, Hinkle et al. used computer-automated coding whereas this Article uses manual coding. As a result, whereas the present study omits from its coding non-discretionary uses of ACs and AUs – most prominently, the use of such words in a formulaic legal doctrinal standard – Hinkle et al.’s study includes intensifiers and hedges found in such standards. Cf. Epstein, *supra* note 16, at 2072 n.325 (noting that the computer software dictionaries used for automated content analysis like that performed by Hinkle et al. “were not designed for legal texts”). Third, Hinkle et al. coded district court language, whereas the present study coded appellate court language (which is typically written with less possibility of reversal, among other differences). Fourth, Hinkle et al. did not examine several of the variables considered in the present study, including, e.g., the impact of briefs, and the number of citations an opinion receives.

Two other studies share many of the same distinguishing features. In the first one, for example, Corley and Wedeking did computer-automated content analysis of 110

Finally, before turning to the results, a brief note on the regression models used to analyze the data. There are two kinds of dependent variables in the results reported below. First, there are binary outcomes (appellant win versus appellant loss),<sup>99</sup> for which I use logistic regression.<sup>100</sup> Second, there are count outcomes (counts of AC or AU per 10,000 words in a given document),<sup>101</sup> for which I use quasipoisson regression, as is common where, as here, count data show evidence of overdispersion.<sup>102</sup> To ensure that

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Supreme Court cases, coding 83 words or phrases associated with “authoritativeness,” or “certainty” (including only six of the terms coded in the present study). Pamela C. Corley & Justin Wedeking, *The (Dis)Advantage of Certainty: The Importance of Certainty in Language*, 48 LAW & SOC’Y REV. 35, 36–37 (2014) (coding as indicia of “certain” or “authoritative” tone, e.g., the words “all,” “every,” “fact,” “must,” and “never,” and concluding that lower courts are more likely to follow Supreme Court cases written using these authoritative words). In the second, Long and Christianson studied briefs filed in state and federal court, coding intensifiers—the same broader set of linguistic devices Hinkle et al. studied—rather than ACs or AUs, and analyzing their effect on litigant win rates. Lance N. Long & William F. Christensen, *Clearly, Using Intensifiers Is Very Bad—or Is It?*, 45 IDAHO L. REV. 171 (2008) [hereinafter Long & Christensen, *Intensifiers*] (studying the effect of briefs’ intensifiers on litigant win rates and concluding that they have a mixed effect, sometimes decreasing and other times increasing win rates).

99. See *infra* note 108 (reporting relation between brief AC usage and appellant win versus appellant loss).

100. See, e.g., EPSTEIN ET AL., *supra* note 79, at 22 (explaining appropriateness of logistic regression for binary outcome variables such as appellant win versus appellant loss).

101. When used as independent variables, AC and AU usage per 10,000 words were standardized, which means that they were centered (had their means subtracted) and divided by their standard deviation, over the entire data set, prior to the estimation procedure. The result is a standardized predictor, which expresses the quantity in terms of number of standard deviations above or below the mean value. This is done to make it easier to understand the result: the effects of different independent variables can be compared directly. Thus, the effect of increases in the rate of AC become directly comparable with increases in the rate of AU, despite the fact that, in absolute terms, these numbers are on different scales.

102. See, e.g., Hinkle et al., *supra* note 61, at 429 (“Since these are count data that show evidence of overdispersion, we use quasipoisson models.”) (citing JOHN FOX, APPLIED REGRESSION ANALYSIS AND GENERALIZED LINEAR MODELS (2d ed. 2008)); William Gardner et al., *Regression Analyses of Counts and Rates: Poisson, Overdispersed Poisson, and Negative Binomial Models*, 118 PSYCHOL. BULL. 392, 396–99 (1995). The Poisson distribution is defined in terms of the rate of occurrence of a specific outcome in a large set of events, taking this to be interchangeable with a count, under the assumption that the size of the large set of events is always the same. But here, the counts of AC and AU are taken from documents with different total numbers of words. I thus added the logarithm of the total number of words in the given document as an offset for each observation. (For opinions, total words were counted. For briefs, word counts were imputed using the number of words per page—calculated using a random set of twenty briefs spanning the three circuits; all three circuits had the same font and spacing requirements during the relevant period—multiplied by the number of pages.) The offset is a constant term added to each observation that does not affect the estimation procedure. Unless otherwise noted, “greater or lesser AC or AU usage” and

modeling choice did not unduly influence results, I also ran the more basic Ordinary Least Squares (OLS) regression and compared the results to the quasipoisson regression results. The two models generated consistent results, with only a few inconsequential exceptions (noted below),<sup>103</sup> thereby demonstrating the robustness of the results.

*b. Results.* By way of concise summary: None of the five theories fares very well. The Appendix contains a table summarizing the results, but here is a brief description of each prediction and its fit, or lack of fit, with the data.<sup>104</sup>

(1) *Misguided persuasion.* The misguided persuasion account generated three predictions. First, the account predicted that the best judges and lawyers would avoid ACs. With respect to judges, using elite law school attendance as a proxy for judge quality, the data reveal no significant difference.<sup>105</sup> That said, with respect to lawyers, the prediction arguably fared better: the federal government's briefs did indeed contain fewer ACs than other litigants' briefs, and top law firms' briefs likewise contained fewer ACs than other litigants' briefs (though the effect for law firms was not statistically significant).<sup>106</sup> Second, the account predicted that

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similar phrases herein refer not to absolute numbers of ACs and AUs in a given document, but rather to frequency, or rate, of ACs or AUs in a given document, adjusting for the length (i.e., number of words) in the document.

103. Specifically, there was one instance in which the use of an OLS model would make results that the quasipoisson model shows to be statistically significant (at the .05 level) instead nonsignificant. See *infra* note 119 (dissents used significantly more ACs than majority opinions in the presence of a dissent (4.02 times more, 25.17 versus 6.90 per 10,000 words;  $p = 0.001$ ) (OLS:  $p = 0.13$ )). And there were two instances in which an OLS model would make results that the quasipoisson model shows to be marginally significant (at the .10 level) instead be not marginally significant, or vice versa. See *infra* notes 114 (female judges use 1.19 times more AUs ( $p = 0.43$ ) (OLS:  $p = 0.08$ )), 183 (Unified panels had an average of 1.82 AUs per 10,000 words, versus 2.50 for nonunified panels ( $p = 0.09$ ) (OLS:  $p = .35$ )).

While on the subject of caution in interpreting the results, it is worth stressing again that failure to detect a statistically significant relationship between two variables, a null result, can lead to the conclusion that there is no relationship between those variables, but extra caution is needed to avoid a false negative, such as those generated by small or unrepresentative samples.

104. See Appendix Table 2.

105. The slight decrease in AC usage among judges who attended elite law schools is nonsignificant (0.84 times lower AC usage rate,  $p = 0.33$ ).

106. Federal government litigants had an average of 6.29 ACs per 10,000 words, versus 12.21 for other litigants ( $p < 0.0001$ ). Top law firms had an average of 9.53 ACs per 10,000 words, versus 12.34 for other non-government litigants ( $p = 0.27$ ). Although top law firm status was not a statistically significant predictor of AC usage, this may have been due to the extremely small number of top law firm briefs (only 14) in the dataset.

opinions using more ACs would be less influential, at the very least outside their circuits (where their force as precedent rests in their persuasiveness). But the data provide no support for this prediction.<sup>107</sup> Third and finally, the account predicted that litigants using more ACs would be more likely to lose. But the data show no significant relation between higher use of ACs and the odds of winning or losing.<sup>108</sup>

(2) *Reactive escalation*. The “reactive escalation” account predicted that judges’ AC use would correlate with litigants’ AC use (either responding to losing brief or parroting winning brief). But neither the winning litigant’s heavier use of ACs, nor the losing litigant’s heavier use of ACs, showed a significant relation to the rate at which the resulting judicial opinion used ACs.<sup>109</sup> As applied

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107. Regarding ACs, an increase of one standardized unit of AC in an opinion was associated with a nonsignificant increase in within-circuit citations (1.06 times greater within-circuit citations;  $p = 0.71$ ). Outside circuit citations increased by a nonsignificant factor of 1.07 ( $p = 0.75$ ). One might object that what matters is *favorable* citations, rather than unfavorable or negative ones. Cf. Robert Anderson IV, *Distinguishing Judges: An Empirical Ranking of Judicial Quality in the United States Court of Appeals*, 76 MO. L. REV. 315 (2011). But at least using LexisNexis’s favorable and unfavorable citation counts, unfavorable citations are so low in number that including them or excluding them changes none of the analysis presented here. Cf. Nina Varsava, *The Citable Opinion: A Quantitative Analysis of the Style and Impact of Judicial Decisions* (Oct. 22, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3197209>. One could weigh negative citations more heavily in the analysis to compensate, but the weight would inevitably be somewhat arbitrary, and this Article does not attempt such an analysis.

108. An increase of one AC in standardized units in *appellant opening* briefs was associated with 0.79 times lower odds of winning the case ( $p = 0.47$ ). Combining appellant opening and reply briefs, an increase of one standardized unit of AC usage was associated with 0.79 times lower odds of winning ( $p = 0.30$ ). An increase of one standardized AC in appellee briefs was associated with 1.23 times higher odds of the appellee winning the case ( $p = 0.29$ ). Discrepancies between appellant and appellee AC usage show no significant impact. The nonsignificant and very small trend is for relatively high appellant AC usage (compared to the appellee) to increase the odds of an appellant win (adding the ratio of appellant to appellee AC usage to the model, with appellant usage partialled out, gives an estimated increase in the odds of winning of 1.16,  $p = 0.23$ ). The upshot is this: the oft-made claim that certainty rhetoric signals losing arguments—like the popular claim that long briefs signal losing arguments—likely says more about judges’ interests generally than about how to vindicate litigants’ interests in any given case. Compare, e.g., Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. Rev. 325 (claiming that long briefs signal losing arguments), and Robbins, *supra* note 9, at 280–81 (same), with Sisk & Heise, *supra* note 83 (finding that longer briefs are sometimes advantageous). The dataset here is consistent with Sisk & Heise’s findings, and also reveals that the federal government and top law firms may, on average, file longer briefs than do other litigants.

109. A one unit increase in standardized AC in the winning litigant’s brief was associated nonsignificantly with 1.002 times greater AC usage in the resulting opinion ( $p = 0.98$ ). A one unit increase in standardized AC in the losing litigant’s brief was associated nonsignificantly with 0.87 times lower AC use in the resulting opinion ( $p = 0.14$ ).

to the subset of cases containing a dissent, the reactive escalation account predicted that both the majority and dissent would use more ACs and fewer AUs than usual. This prediction, though initially intuitive, appears only half right: cases with dissenting opinions have greater AC usage than cases without;<sup>110</sup> interestingly, though, AUs increase by a roughly equivalent proportion when a dissent is present,<sup>111</sup> with the increase in AUs occurring both in the majority opinion and in the dissent.<sup>112</sup>

(3) *Extralegal communication style*. The “extralegal communication style” account predicted greater AC usage and lesser AU usage by male authors compared to female authors, and white authors compared to nonwhite authors. But gender and race showed no significant relation to AC usage.<sup>113</sup> And although female authors did use AUs slightly more frequently than male authors (a result that was not statistically significant using the quasipoisson model, and was only marginally significant using the OLS model),<sup>114</sup> nonwhite authors appeared significantly less likely to use AUs, contrary to the extralegal communication style account’s prediction.<sup>115</sup>

(4) *Power-grabbing*. The power-grabbing account predicted that ideologically unified panels would use more ACs than ideologically nonunified panels. But the ideological unity or disunity of the panel—that is, whether or not the panel members

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110. Opinions in cases with a dissent had an average of 2.80 times more ACs than opinions in cases without a dissent (17.84 per 10,000 words, versus 6.36;  $p = 0.0001$ ). Almost all of the difference is driven by the dissenting opinion’s increased ACs, with majority opinions in the presence of a dissent using approximately the same frequency of ACs as majority opinions in the absence of a dissent. *Infra* note 119.

111. Opinions in cases with a dissent had an average of 2.65 times more AUs (5.79 per 10,000 words, versus 2.19;  $p < 0.0001$ ) than cases without.

112. Majority opinions in the presence of a dissent had significantly more AUs than those without (1.87 times more, 3.74 per 10,000 words versus 2.00;  $p = 0.01$ ). Compared to majority opinions in cases without a dissent, dissenting opinions contained a much higher rate of AU usage (3.03 times more, 6.08 per 10,000 words versus 2.00;  $p < 0.0001$ ). Dissents also used a greater rate of AUs than did majority opinions in the presence of a dissent, though the difference was not statistically significant (1.62 times more, 6.08 per 10,000 words versus 3.74;  $p = 0.21$ ).

113. Female judges show nonsignificantly greater AC usage, 1.022 times higher ( $p = 0.92$ ). Nonwhite judges show nonsignificantly lower AC usage, 0.79 times as high ( $p = 0.43$ ).

114. Female judges use 1.19 times more AUs ( $p = 0.43$ ) (OLS:  $p = 0.08$ ).

115. Nonwhite judges showed significantly lower AU usage, .45 times as much ( $p = 0.01$ ).

were all nominated by the same political party—showed no significant relation to AC usage.<sup>116</sup>

(5) *Legitimacy bolstering*. The legitimacy bolstering account made three predictions. Its first prediction was that opinions concerning Fourth Amendment searches and seizures would contain more ACs than cases concerning commercial contract disputes, but this appears not to be the case.<sup>117</sup> Its second and third predictions fared even worse: the account predicted that dissenting opinions would contain fewer ACs than majority opinions generally, but the opposite is true;<sup>118</sup> and the account predicted that majority opinions in the presence of a dissent would contain more ACs than majority opinions in cases without a dissent, but there was almost no such increase in the dataset (instead, the increase in AC usage in cases with split opinions was almost entirely attributable to the dissent itself).<sup>119</sup>

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In sum, the five accounts examined above do not fare especially well (though to be sure, none has been disproven). Each account faced problems as a matter of intuitive plausibility, and none found much support in the empirical data, which both failed to corroborate the accounts' predictions and revealed associations between variables that are in serious tension with the accounts.

We are left, then, with the puzzle we started with, though at least we are now able to add some precision to the claim that unnecessary certainty rhetoric pervades legal discourse and is heavily skewed towards assertions of certainty, rather than uncertainty: Judicial opinions contained an average of 7.03 ACs and 2.43 AUs per 10,000 words, and briefs contained an average of 10.06 ACs and 0.84 AUs per 10,000 words. Even if these figures are difficult to evaluate without a comparator class of non-legal texts,

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116. Unified panels had an average of 6.66 ACs per 10,000 words, versus 7.84 for nonunified panels ( $p = 0.38$ ).

117. Fourth Amendment opinions had an average of 7.40 ACs per 10,000 words, versus 5.95 for commercial contracts ( $p = 0.11$ ).

118. See *supra* note 110.

119. Majority opinions in the presence of a dissent had slightly more ACs than those without (1.10 times more, 6.90 per 10,000 words versus 6.26;  $p = 0.61$ ). Dissents used ACs far more frequently than majority opinions without a dissent (4.02 times more, 25.17 per 10,000 words versus 6.26;  $p < 0.0001$ ). Dissents also used significantly more ACs than majority opinions in the presence of a dissent (3.65 times more, 25.17 versus 6.90 per 10,000 words;  $p = 0.001$ ) (OLS:  $p = 0.13$ ).

the frequency of AC usage is well above the recommended rate of zero, and the relative infrequency of AUs shows that legal rhetoric is heavily skewed toward assertions of certainty as opposed to uncertainty. Moreover, this was broadly true across all authors regardless of quality: Even the best judges and lawyers express certainty at alarming rates.<sup>120</sup> Why? To what effect? And is it really a bad thing—for individual authors, and more importantly, for the judicial system as a whole?

## II. RELATIVE CERTAINTY REPORTING AS EFFICIENT MANAGEMENT

The previous section showed that, despite universal disparagement of certainty rhetoric, judges and litigants frequently employ it, and employ it in ways that appear inconsistent with the core predictions of the five theories of its causes and effects—each of which was in any event problematic on its merits even without the aid of empirical data. This Part articulates a new account of judicial certainty rhetoric, focusing primarily on the independent theoretical motivations for the account, but noting along the way how it better coheres with the empirical data than do the five previous accounts, and how its normative implications differ from those accounts' normative implications.

The discussion of this Article's new account—the “efficient management” account—proceeds as follows:

Section II.A shows how certainty rhetoric, understood in context (as it is by its primary audiences) reports certainty relative to an already high-certainty rhetorical baseline. As a result, certainty rhetoric tends to be more nuanced and informative than has been appreciated, is less likely to be objectively false than is often claimed, and is more likely to be sincere than the literature implies.

Section II.B addresses the two judicial preferences that are the primary causes of judicial certainty rhetoric: judges desire to (1) maintain good individual reputation and (2) provide useful information to other actors in the judicial system. Specifically, section II.B.1 explains how *individual reputation* concerns constrain and motivate judges' statements of relative certainty, rendering them credible signals of more than just a single author's subjective

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120. See *supra* notes 105–106 and accompanying text; Appendix Table 2.

certainty. Section II.B.2 examines some important ways in which these credible signals are *useful tools for managing the judicial system* in an era of expanding caseloads, efficiently conveying relevant information to various audiences and thereby diminishing inefficient informational asymmetries and reducing decision costs.

Section II.C considers the effects of current judicial certainty norms on judicial decision-making and argues that the effects are not as bad as they are often portrayed. And while an increase in baseline levels of expressed uncertainty may be desirable, the shift could also have unintended consequences that many would find objectionable—potentially decreasing both judicial deliberation and a type of error-reducing minimalism that currently permeates judicial decision-making.

Section II.D discusses the relation between relative certainty reporting, understood as a tool for efficient management of the judiciary, and recent work in the philosophical field of social epistemology—specifically, that literature’s insights concerning peer disagreement and truth-conducive institutional design. The section concludes that insofar as the judicial system aims not just at efficiency but also at discovery and maintenance of factual and legal “truth” over time, judges ought to report relative certainty at least as often, and probably more often, than they presently do.

### A. Rhetorical Baselines and Relative Certainty

ACs sometimes convey *relative* or *comparative* certainty; they convey not that the truth of some proposition is “obvious” or “indisputable” in an objective, acontextual sense, but that it is *more* obviously or *more* undoubtedly true than some other set of propositions. Sometimes ACs do so explicitly, as when an author writes, “Perhaps X, but *certainly* Y.”<sup>121</sup> I suspect that those who

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121. From the dataset, see, for example, *Redding v. Safford Unified School Dist. No. 1*, 531 F.3d 1071, 1099 (9th Cir. 2008) (en banc) (Hawkins, J., dissenting) (“While Redding’s role in all this was somewhat unclear at this point, *certainly* Jordan’s account . . . supported a reasonable suspicion . . .” (emphasis added)) aff’d in part, rev’d in part, 557 U.S. 364 (2009); *Nelson v. NASA*, 530 F.3d 865, 879 (9th Cir. 2008) (“This government interest is *undoubtedly* relevant to the constitutional balancing inquiry . . . . We are less convinced, however, that the government’s interest should inform the threshold question . . . .” (emphasis added)), rev’d, 562 U.S. 134 (2011). In addition to explicitly specifying greater or lesser certainty, judges sometimes explicitly specify identical certainty. See, e.g., *Redding*, 531 F.3d at 1079 (“It is now beyond dispute that the [federal constitutional prohibition on unreasonable searches and

disparage ACs on the grounds that they are typically false or embarrassingly overblown will at least find such explicitly comparative ACs less objectionable than others. Even if in some sense legal certainty is “an illusion,”<sup>122</sup> and little of what is stated in published appellate opinions (and their accompanying briefs) is “obvious,” “undoubted,” and the like, at least Y can be *more* certain, *more* obvious, etc., than X. Comparative certainty rhetoric is not only less likely to be false or overblown, but is also more informative: Instead of claiming to meet some impossibly high standard (i.e., “certainty,” “obviousness,” etc., in a rarefied, acontextual sense) comparative certainty statements situate propositions in a smaller section of the continuum between the obviously false and the obviously true.

The key further point for present purposes is that ACs and AUs *implicitly* convey relative or comparative certainty, obviousness, and the like, and are therefore more informative and less likely to be false than has typically been appreciated.<sup>123</sup> Three sets of propositions serve as implicit comparator classes. First, the surrounding propositions in the text in which the AC or AU appears. For example, when an author claims that “X, Y, and obviously Z,” one naturally infers, without needing to know the author or the genre, that the author believes Z to be more obvious than X and Y.<sup>124</sup> (This is an example of what linguists call “conversational implicature.”<sup>125</sup>) Second, readers at all familiar with the author will implicitly interpret the certainty claim relative to the rhetorical tenor and level of certainty in the author’s other

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seizures applies to] state officers. *Equally indisputable* is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials.” (emphasis added) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985))).

122. Holmes, *supra* note 7 (“[C]ertainty generally is illusion . . .”); Llewellyn, *supra* note 7; see also LLEWELLYN, *supra* note 4 (aiming for judicial certainty is “a waste of time”).

123. On context’s role in increasing the informativeness of vague terms, see Paul Egré & Florian Cova, *Moral Asymmetries and the Semantics of Many*, 8 SEMANTICS & PRAGMATICS 13:1 (2015). On implicit contextual norms’ role in generating disagreements that superficially appear to concern the truth or falsity of ambiguous claims, but may actually concern implicit proposals to update the relevant conversational context, see Justin Khoo & Joshua Knobe, *Moral Disagreement and Moral Semantics*, 52 NOÛS 109 (2018).

124. See, e.g., *Redding*, 531 F.3d at 1101 (“This does not suggest that the planner independently justified the search, and it is *certainly* not ‘guilt-by-association.’” (emphasis added)); *id.* at 1113 (“I would find this search constitutional, and would *certainly* forgive the Safford Officials’ mistake as reasonable.” (emphasis added)).

125. See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 22–40 (1989).

writings or communications.<sup>126</sup> An author known for rhetorical bombast will signal less by calling something “obvious” than would an author known to be more selective in claiming certainty. Third, the rhetoric that typifies the genre more generally is an important determinant of the implicit rhetorical baseline. When interpreting an AC or AU, it matters whether one is reading, say, a scientific journal article, a philosophical treatise on the existence of the external world, or a judicial decision. Different rhetorical contexts have different norms concerning expressed degree of certainty, and readers implicitly interpret ACs and AUs according to those norms and their concomitant rhetorical baselines.

So certainty rhetoric, understood in context by sufficiently informed observers, implicitly signals certainty, obviousness, etc., *relative* to claims made in the document, in the author’s other communications, and in the genre more broadly—in effect making *more nuanced and potentially informative* claims concerning degree of certainty than is typically assumed.<sup>127</sup> By the same token, certainty rhetoric is *less likely to be false or overblown* than is often alleged.<sup>128</sup> Something may be “obvious” for purposes of an appellate case outcome while being nonobvious for other purposes; the difference is reflected in the rhetorical baseline, and is readily and implicitly understood by judicial opinions’ primary audiences (judges and lawyers).<sup>129</sup>

Moving now from the charges of *uninformativeness* and *falsity*, consider the charge of *insincerity*. To the sincerity skeptic, the stuff of published appellate opinions (and the accompanying briefs) simply isn’t obvious, undoubted, etc. If it were, then the case would not have gotten to appellate court and be the subject of a published appellate opinion. Surely judges are smart enough not to believe their certainty rhetoric, and yet they persist in using it; hence their certainty rhetoric must be insincere. The above discussion suggests one possible response to the sincerity skeptic: assuming judges tend not to believe false or overblown things, the context-

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126. Cf. Frederick Schauer & Barbara A. Spellman, *Calibrating Legal Judgments*, 9 J. LEGAL ANALYSIS 125 (2017) (discussing the common practice, when evaluating a given judgment, of considering other judgments made by the utterer of the judgment presently under consideration).

127. See, e.g., sources cited *supra* notes 1–11.

128. See, e.g., sources cited *supra* notes 9–10.

129. What matters for practical purposes is whether rhetorical baselines remain stable enough to permit informative deviations, a point to which I will return below.

relative nature of certainty rhetoric—which renders certainty rhetoric less likely to be false or overblown—in turn renders more plausible the possibility that judges sincerely believe their own certainty rhetoric.

But the sincerity skeptic might double down, asserting that even with wiggle room for high baseline levels of certainty, appellate judges cannot seriously consider the stuff of published appellate opinions obvious, undoubted, etc., by any stretch of those terms. At least, they cannot do so nearly as often as they claim to, leaving most certainty rhetoric insincere. The next section will provide a more affirmative case for believing judicial certainty rhetoric to be sincere, but for now, here are two reasons to remain open-minded about the possibility of sincerity in judicial certainty rhetoric.

First, recent evidence from experimental psychology indicates that even highly skilled judges and lawyers may feel every bit as certain as their opinions and briefs suggest, regardless of whether this certainty strikes outsiders as misguided.<sup>130</sup> Familiar psychological phenomena<sup>131</sup>—“over-confidence bias,”<sup>132</sup> “confirmation bias,”<sup>133</sup> and the tendency to engage in “motivated” or “coherence-based” reasoning<sup>134</sup>—highlight that people tend to

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130. See, e.g., Simon & Scurich, *supra* note 2, at 421 (explaining that the “cognitive explanation” for “judicial overstating” posits that “judges portray their decisions as singularly-correct because that is the way they actually perceive the legal dispute at the time they make their decision”).

131. See BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); Avani Mehta Sood, *Motivated Cognition in Legal Judgments – An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307 (2013).

132. See BEHAVIORAL LAW AND ECONOMICS, *supra* note 131; Sood, *supra* note 131. A related bias is the “superiority bias”—believing ourselves better than average at all sorts of tasks, including formation of correct beliefs. See Mark D. Alicke & Olesya Govorun, *The Better-Than-Average Effect*, in THE SELF IN SOCIAL JUDGMENT 85 (Mark D. Alicke et al., eds., 2005).

133. See Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998) (explaining that we are more likely to note and take seriously evidence supporting our views than evidence tending to undermine our views, and more likely to construe equivocal pieces of evidence as confirming, rather than disconfirming, our views).

134. See Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 532–33 (2004) [hereinafter Simon, *Third View*] (explaining that, when confronted with a difficult decision, people engage in “motivated” or “coherence-based” reasoning: preliminary conclusions—even tentative ones—tend to feed back into our reasoning process, making us more confident in our conclusions as we consider them and seek to articulate or persuade others of them, regardless whether we have good reason to

feel more confident that their beliefs are correct (and obviously so) than is warranted. Lawyers and judges may be especially prone to over-confidence in the correctness and obviousness of their assertions:<sup>135</sup> Lawyers come to “believe their own hype” as they contemplate and hone the arguments in favor of their clients’ positions;<sup>136</sup> judges develop the same “habit of mind” in their earlier careers as lawyers, and, once they are on the bench, that habit is further cemented by persistent exposure to lawyers’ overblown assertions of certainty.<sup>137</sup> Finally, the process of writing a judicial opinion, much like writing a legal brief, involves repeated exposure to and articulation of one’s own arguments.<sup>138</sup> In sum, experimental psychology provides reason to think certainty rhetoric (and the corresponding paucity of uncertainty statements) is more sincere than it may appear to the detached observer.

Second, the data reported in Part I provide some additional reasons to remain open-minded toward the possibility of sincere judicial certainty rhetoric. Recall that the explanatory proposal, seemingly most supportive of the insincerity hypothesis—the “power-grabbing” account—failed to find confirmation in the

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grow more sure of them); Dan Simon et al., *The Emergence of Coherence over the Course of Decision Making*, 27 J. EXPERIMENTAL PSYCHOL. 1250 (2001).

135. See Elgen & Listoken, *supra* note 74 (providing evidence that lawyers tasked with arguing for a particular position become more confident of that position’s being correct than they would have had they been tasked with arguing for the contrary position); Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL’Y & L. 133, 137 (2010); Lewis D. Solomon, *Perspectives on Curriculum Reform in Law Schools: A Critical Assessment*, 24 U. TOL. L. REV. 1, 5 (1992) (describing the adversarial nature of the U.S. legal curriculum and arguing that it trains lawyers to eschew doubt).

136. Elgen & Listoken, *supra* note 74, at 241. Lawyers representing a client at trial or on appeal are perhaps even *more* likely to exhibit irrationally inflated certainty than lawyers at earlier stages of a case: not only have they spent more time arguing for their client’s position (and considering the client’s perspective), but the mere fact that their case has not settled suggests that at least one side in the litigation has an irrationally inflated sense of confidence in its likelihood of prevailing. See Frank B. Cross, *Decision Making in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1491 (2003) (explaining that, under a “litigant-driven” model of litigation, “[w]hen cases do proceed to trial or are appealed [rather than settling], the parties presumably have significantly divergent expectations about the outcome”).

137. See Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 85–86 (1998) (“Repeated exposure to adversaries’ arguments, set up as opposing poles, establish a habit of mind for judges who in turn write opinions as though they present a preordained correct answer, which embraces by necessity only one position or viewpoint.”); Simon, *Psychological Model*, *supra* note 2, at 1.

138. See Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1309 (2008); Simon, *Third View*, *supra* note 134.

data.<sup>139</sup> Moreover, positing sincerity would help explain the findings concerning ideologically diverse panels' increased AU usage, as well as dissenters' increased AC and AU usage.<sup>140</sup> As to the former, a candid and sincere report of an ideologically diverse panel's consensus position seems likely to contain more AUs than an ideologically unified panel's decision. As for dissenters' increased AC and AU usage, whereas a panel of three may often agree on case outcome and reasoning without agreeing on the attendant degree of certainty (in which case relative certainty may go unreported), a single dissenter writing for himself faces no such constraint. Split opinions offer an opportunity to sincerely report relative certainty without any need to confer with colleagues as to this technically unnecessary (but practically useful) feature of the judge's decision. Again, more will be said about sincerity further on, but the contention that judicial certainty rhetoric is sincere should at this stage at least not seem surprising or outlandish.

In sum, appreciating the *context-relative* nature of judicial certainty rhetoric helps highlight how it could be (a) more nuanced and informative, (b) less likely to be false or overblown, and (c) less likely to be insincere, than the conventional views assume. But that does not explain much about its actual causes or effects. It is also, from a normative perspective, faint praise: Just because it lacks some of the negative traits conventionally attributed to it does not mean certainty rhetoric is on the whole beneficial. Still, only after having shown that judicial certainty rhetoric is neither false nor insincere can the main deontological objections to it be put aside, leaving room for an examination of its causes and effects that can yield interesting normative implications.<sup>141</sup> So let's now examine the causes and effects of certainty rhetoric in judicial opinions and, in the process, note some actual benefits it may have.

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139. See *supra* note 116 and accompanying text.

140. See *supra* notes 110–112 and accompanying text; Appendix Table 2.

141. For more on those deontological objections, see sources cited *supra* notes 35–36.

## B. Explaining the Presence and Credibility of Judicial Certainty Reporting

### 1. Individual Reputation as Constraint (and Motivation)

Judges want to improve or at least preserve their individual reputations.<sup>142</sup> This desire constrains their use of certainty rhetoric.<sup>143</sup> Judges know that they cannot purchase esteem and good individual reputation by reporting greater certainty than others.<sup>144</sup> Indeed, such a strategy would backfire: resorting to certainty rhetoric where others might disagree would make a judge *less* esteemed and less likely to be upheld on appeal, since his signal would become mere noise—or worse, if routinely used to cover up areas of uncertainty—to the judges reviewing his opinions on appeal. Those judges, after all, have repeated exposure to his work.<sup>145</sup> Even for intermediate appellate judges, whose work is rarely reviewed by the Supreme Court, calling things obvious that are not obvious is at best unlikely to impress colleagues, and at worst likely to embarrass the author, given the seemingly universal

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142. See GAROUPA & GINSBURG, *supra* note 31.

143. District court judges have perhaps the most to lose by abusing the rhetoric of certainty, and the most to gain from admitting uncertainty in close cases, the latter approach serving to blunt reputational blowback in the event of reversal. Because appellate judges have little to no chance of reversal in most cases (and Supreme Court Justices have essentially none), both may become somewhat less inclined toward AU usage and more haphazard with AC usage. Still, they remain unlikely to falsely report for strategic purposes greater certainty than they actually feel, since doing so would tend to be largely ineffective and diminish their reputation.

As an aside, most *lawyers* do not face the sort of reputational constraints that lead judges to selectively and sincerely report relative certainty. (One partial exception might be institutional repeat-player litigants such as U.S. Attorneys' Offices, who used fewer ACs than did other litigants in the data reported above. See *supra* note 34 and accompanying text.)

144. In this way they may be different from private adjudicators and lawyers. See *supra* note 69 (noting private adjudicators' incentives to exaggerate certainty). Indeed, unless a lawyer represents a large public body like the federal government, there may be a temptation to use certainty rhetoric to "cheaply" impress clients. Lawyers need to be perceived as "zealously" representing their clients even when they know their client will almost certainly lose, see MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. (AM. BAR ASS'N 2018), and, more cynically, private lawyers also must assure their clients that there is good reason the case has not settled and the lawyers are still being paid. Cf. Cross, *supra* note 136 (explaining that, under a "litigant-driven" model of litigation, "[w]hen cases do proceed to trial or are appealed [rather than settling], the parties presumably have significantly divergent expectations about the outcome"); Goodman-Delahunty et al., *supra* note 135, at 136 (discussing reasons why it is often in lawyers' professional interest to exude confidence).

145. On the other hand, for district courts, certainty rhetoric regarding factual assertions might sometimes help shield an opinion from review without risking individual reputational harm.

disdain for ACs.<sup>146</sup> Consequently, regardless of the *institutional* reputation concerns that may have brought about the uniformly high baseline level of certainty rhetoric characteristic of current legal discourse,<sup>147</sup> *individual* reputation concerns constrain the degree of departure from that baseline. And by constraining certainty rhetoric, individual reputation concerns help render it a credible signal.

Individual reputation concerns also help explain the presence and credibility of judicial statements of *uncertainty*. By expressing uncertainty as to a proposition the authoring judge considers dubious or vulnerable to attack, the judge can lower the reputational cost of reversal or other criticism or negative reaction from judicial colleagues. This helps explain the increased use of AUs in the majority and dissenting opinions where panels are split.<sup>148</sup> Statements of uncertainty are thus likely to provide credible information about what propositions the authoring judge finds dubious, less likely to garner other judges' agreement, or otherwise vulnerable to attack.

The safest strategy given individual reputational concerns, then, is for judges to report certainty and uncertainty (when they do so) sincerely – that is, only report certainty or uncertainty when they genuinely believe something to be certain or uncertain.<sup>149</sup> But

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146. See *supra* notes 1–10 and accompanying text.

147. See *supra* notes 1–7; Section I.A.5.

148. See *supra* notes 110–112 and accompanying text.

149. One might object to this claim about the likelihood of sincerity along the following lines: You've shown that judges will claim certainty and uncertainty in accordance with whether they think other judges will agree or disagree with them, but that's not sincere reporting about what one actually considers certain or uncertain; instead, it's a prediction about others' views, masquerading as what the author thinks. In response, and without getting into deep arguments about the nature of law, I'll simply note that in law, more so than in many other fields (e.g., mathematics), the truth of many propositions depends in an important sense on how other legal actors treat them. A judge's contention that "the Fourth Amendment prohibits X" is in an important sense not true *if* the Supreme Court states otherwise in a binding opinion. This is apparent to intermediate appellate judges whose contentions might be reversed on appeal, but it applies even to propositions endorsed by Supreme Court Justices, whose rulings can be adopted or rejected in more authoritative texts—namely, later Supreme Court rulings. The point is not merely that law counsels epistemic humility; after all, other fields do too—mathematicians possess warranted uncertainty where they are concerned others will disagree with their conclusions and that those others will turn out to be right. The point is instead that law is a social practice wherein a judge's statements about the law (and sometimes, in certain respects, about the facts that are to govern the resolution of a case) may be rendered untrue *by virtue of* other legal actors' disagreement expressed in authoritative texts. For the objection noted at the beginning of

even if judges are likely to be sincere when they report relative certainty, why should they ever bother to report it, rather than stay silent about it? Whereas reputational concerns help explain the *presence* or *motivation* for occasional reports of *uncertainty*, they do little to explain the presence of, or motivation for, reporting certainty.

## 2. Managerial Concerns as Motivation (and Constraint)

The information conveyed by relative certainty reporting is not just credible and sincerely given; it is also *relevant* and *useful* to judges, lawyers, and litigants. Indeed, that is a large part of why judges choose to report relative certainty and uncertainty. According to the “efficient management” account, judges desire to write useful opinions that efficiently guide other resource-constrained judges, lawyers, and litigants,<sup>150</sup> and they use certainty rhetoric toward that end. In short, by sincerely reporting a piece of information that is cheap for the judge to obtain (all it requires is brief introspection) and to convey (an additional word or phrase will do), judges further their goal of managing the judiciary.<sup>151</sup> Let’s

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this footnote to hold, not only would some judges need to be staunch anti-positivists, but those very same judges would need to be reporting certainty not in accordance with their view of what the law is but rather in accordance with their predictions of what others agree the “law” is. But for most judges, there is not such a yawning gap between the law and what authoritative legal texts (like binding judicial decisions) declare the law to be. To sincerely report an estimation of one is typically to sincerely report an estimation of the other. *Cf.* Holmes, *supra* note 7, at 461 (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

150. Granted, judges (like lawyers) may sometimes write with audiences outside the legal system in mind. For example, judges and lawyers may attempt to persuade the public or garner media attention. *Cf.*, Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667, 667–68 (2015) (discussing rhetoric in high-profile Supreme Court constitutional decisions and its impact on national “constitutional discourse”). In the vast majority of cases, though, both of those audiences will be largely irrelevant. *See* Popkin, *supra* note 73 (“[I]t is . . . unlikely that the general public will pay much attention to the way judges write opinions. . . . [W]hat evidence we have on public acceptance of judicial opinions stresses substantive results, not judicial style, as the most important criterion in gaining public support”) (citing VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS (2003)); *see also* Simon & Scurich, *supra* note 51 (assessing laypeople’s reactions to mock judicial opinions and determining that agreement with the outcome far outstripped any other attribute of an opinion in predicting whether laypeople assessed the opinion positively). Nonetheless, *elected* judges, like certain public lawyers, may write with greater concern for lay reactions, particularly as election time nears. *See* Nelson, *supra* note 69.

151. On further aspects of judges’ judicial management practices, and discussion of increasing caseloads, *see* Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109 (2011);

now consider the relevance and utility of the information that certainty reporting conveys.

*a. Non-doctrinal relevance.* Relative certainty statements provide useful signals to courts reviewing a decision on appeal, to courts consulting an opinion as nonbinding precedent, and to lawyers and litigants in the case in which the opinion is written and in future cases. I will address each in turn, before addressing, in the next section, certainty statements' more formal, doctrinal relevance.

First, appellate judges (and their clerks), whether consciously or not, may find useful and influential a lower court's assertion that a given proposition is relatively obvious, undoubted, etc. For example, the reviewing court may spend less time plumbing the record or case law to scrutinize a proposition that the lower court thought obvious in a case it deemed easy, particularly where the lower court judge has a good reputation.<sup>152</sup> As for statements of uncertainty, the same reputational concerns that might lead a judge to note uncertainty about a given proposition<sup>153</sup> may serve to efficiently alert the reviewing judge to the vulnerability of a given statement.

For similar reasons, certainty rhetoric may provide useful information to judges other than those reviewing the decision on appeal, in much the same way that an academic researcher benefits from information concerning error rates in a statistical study. Both

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Resnick, *supra* note 33. Of course, if judges were to report relative certainty in thoroughly haphazard ways, the signal would lose all utility as a management tool. Moreover, if in such a regime judges, lawyers, and litigants mistook such meaningless certainty rhetoric for a credible signal, judicial certainty reporting might actually *reduce* the system's efficiency. Judges' desire to efficiently manage the judiciary thus constrains judges' use of certainty rhetoric. On the *epistemic*, rather than efficiency, benefits of relative certainty reporting, see *infra* Section II.D.

152. Or, if the proposition at issue appears dubious, the lower court's credible report of its own certainty, even if unwarranted, might again provide useful information; perhaps, for example, the lower court and the parties glossed over the issue too readily and failed to recognize a contrary argument or fact. In this way, even unwarranted ACs help to flag for a reviewing court what may have gone wrong. Moreover, where patterns emerge—patterns either of persistent expressions of uncertainty among lower courts concerning a given issue, or of emphatic but inconsistent assertions of certainty among lower courts concerning a given issue—relative certainty reporting may also help appellate courts decide where to allocate their resources. This is true not only for the Supreme Court, which chooses its docket through the certiorari process, but also for intermediate appellate courts, which not only choose whether to address a given issue en banc, but also whether to write and publish a precedential opinion, and how extensive that opinion ought to be with respect to any issue it addresses.

153. See *supra* Section II.A and accompanying text.

district court and appellate court judges inside or outside of the circuit in which an AC appears might benefit when, in determining whether to follow, or how broadly to construe, a given decision, they have credible information not just about the outcome reached and the reasoning, but also about the degree of certainty the authoring judge or panel had concerning the various legal and factual premises and conclusions comprising the opinion. Time-constrained judges consulting precedent might rationally and desirably be influenced not only by who authored the opinion, but also by how confident that author was in the truth of the assertions at issue.

Reporting relative certainty might reduce decision costs not just for judges consulting the case (on appeal or for persuasive precedent), but also for lawyers attempting to predict the law going forward.<sup>154</sup> Those predictions may concern the same litigation (i.e., for purposes of determining whether to settle,<sup>155</sup> to move for reconsideration, to appeal, etc.). Or they may concern future cases (i.e., for purposes of determining how likely future courts are to defer to, and to distinguish or extend, a given decision).

And litigants themselves (as opposed to their lawyers) may obtain from judicial certainty rhetoric a rare piece of relatively disinterested feedback concerning their counsel.<sup>156</sup> In appellate cases, the client's counsel has taken the statistically unusual step of foregoing settlement, and may, due to pecuniary self-interest or irrationally inflated confidence, have overly encouraged the client to continue litigating the case. For many litigants, the judge's feedback may be the only check on what the client has been told by her counsel. Indeed, in extreme cases, judicial certainty rhetoric may alert a litigant not just to the need to find new lawyers in the

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154. This sort of predictability about how judges will decide future cases is precisely the sort of "legal certainty" with which most American Legal Realists were concerned. See, e.g., Holmes, *supra* note 7, at 461 ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997).

155. For example, it is common practice to closely review a judge's prior decisions to determine how good or bad a "draw" she is, with chances of settlement increasing to the extent more information is available concerning her likely disposition toward the case—an inquiry that relative certainty reporting in those earlier cases aids.

156. Cf. Moss, *supra* note 47, at 65–66 (arguing that "[l]egal services markets do not readily drive out bad performance[,] and clients' 'imperfect information'—in part attributable to 'how hard briefs are for laypeople to . . . analyze'—leads them to 'persistently choose' bad lawyers).

future, but also to a potential malpractice suit or ineffective assistance claim (or, on the flip side, judicial certainty rhetoric might alert the litigant or her counsel to the likelihood of obtaining Rule 11 sanctions against the other side or of bringing a meritorious malicious prosecution suit).

In sum, the “efficient management” account posits that intermediate appellate judges attempt to provide useful information that facilitates the efficient disposition of cases.<sup>157</sup> This information may not be strictly relevant as a matter of doctrine, but then again neither is the authoring judge’s name. Relative certainty rhetoric, like a signed opinion, is a useful tool for managing the judiciary efficiently.

*b. Doctrinal relevance.* In addition to their less formal relevance to resource- and information-constrained actors, relative certainty statements sometimes carry direct legal consequences. Many doctrinal standards contain ACs—for example, “plain error,” “clearly established law,” and “beyond a reasonable doubt.”<sup>158</sup> The data reported in Part I do not count these as ACs, since those data sought to answer why judges (and litigants) choose to report relative certainty discretionarily (i.e., where they need not do so, rather than where a legal doctrine necessarily invokes them). But even when certainty rhetoric is not invoked as part of a doctrinal phrase like “clear error,” and even when it is not invoked during analyses directly applying such a standard, it may *turn out* to have bearing on the application of one of those standards at some later time.

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157. This emphasis on managerial efficiency may also explain the relative paucity of AUs in Fourth Amendment cases. In such cases, police departments are tasked with implementing the Supreme Court’s rulings going forward, and may need particularly clear rules stated in no uncertain terms. This need for certainty has both a non-doctrinal component (in that a police department may need very clear rulings before it changes its behavior) and a doctrinal component (in that future applications of the exclusionary rule and of qualified immunity may depend on earlier statements of relative certainty). Cf. James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957 (2019).

158. See also, e.g., *Hagans v. Lavine*, 415 U.S. 528, 537 (1974) (stating that the words “wholly” and “obviously” when used in the phrases “wholly insubstantial” and “obviously without merit” have “cogent legal significance” (quoting *Ex parte Poresky*, 290 U.S. 30, 32 (1933)). These and other doctrinal standards, for better or worse, likely both reflect and affect the rhetorical baseline in a way that might make difficult the sort of largescale shift in the rhetorical baseline (from greater expression of certainty to lesser) that commentators appear to favor.

Such future relevance may be more or less foreseeable in different contexts, and for this reason it may be a good habit for judges to report their relative certainty when they draw conclusions accompanied by relative certainty levels that significantly depart upward or downward from the rhetorical baseline. As an example, consider the rule the Supreme Court articulated in *National Cable & Telecommunications Assn. v. Brand X Internet Services*<sup>159</sup>: a court's prior construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision found that the statute was clear and unambiguous.<sup>160</sup> After *Brand X*, courts would be tasked with determining whether *prior* courts had determined a statute was "clear" regarding a disputed term, with agency deference dependent on this *ex post* interpretation of judicial opinions issued prior to the rule.<sup>161</sup> ACs that may not have seemed as important under the prior case law became much more important in the wake of *Brand X*, and the content of prior judicial opinions in this regard would henceforth require judicial scrutiny.<sup>162</sup>

### C. *Ex Ante* Effects of Certainty Norms on Judicial Decision-making

One prominent argument against the current norm of high levels of reported certainty is that it has bad *ex ante* effects on judicial decision-making. If judges are permitted or encouraged to write opinions that sweep away difficulties, dismiss potential counterarguments as "clearly meritless," and use claims of "obviousness" as substitutes for thorough explanations, why would they bother thoroughly considering both sides in the first place? If instead judges were expected to refrain from ACs, and to use AUs more often, writing in a more tentative or exploratory

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159. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

160. *Id.* at 982.

161. *Id.* at 1018.

162. Other potential examples of more or less foreseeable future doctrinal relevance of ACs and AUs abound. One example concerns courts' (and police departments') inquiries into "clearly established law" for purposes of sovereign immunity. See, John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851 (2010) (discussing the notoriously murky tests courts use to determine whether law was clearly established). Another concerns deference to prior factual or legal determinations. Courts reviewing for plain error, for instance, may look to their previous decisions for indications that the type of error at issue has previously been deemed "clearly" or "obviously" to have been an error. Cf. Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643 (2015).

tone, this might encourage *more* deliberation and *better* deliberation. Unfortunately, current rhetorical norms allow or even encourage judges to skirt tough issues.<sup>163</sup>

While valid, this concern should not be overstated. As to the “more deliberation” point, current norms of certainty and nonadmission of doubt<sup>164</sup> incentivize judges to consider a case until they can pronounce a decision confidently.<sup>165</sup> Once a judge internalizes the norm of writing emphatically certain opinions, deliberating until certain is the only way to avoid the embarrassment and cognitive dissonance involved in emphatically stating that which colleagues and reviewing courts may consider mistaken. In the event that resolving the case in a particular way results in an opinion that “won’t write” comfortably in accordance with current high-certainty norms, it might add pressure to change one’s position, or to look for alternative arguments or rationales amenable to greater certainty.<sup>166</sup> In short, by stripping judges of the option to admit uncertainty and cease deliberation, a norm of high

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163. See, e.g., Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255, 270 (1961) (contending that for judges, “a paramount danger of too quick a grasp at certainty” in legal discourse is that judges may “gain a false confidence in their own conclusions” without having “struggle[d] quite so hard” to transcend their own biases in the process of arriving at a decision); Simon & Scurich, *supra* note 2, at 419 (arguing that the “tendency to endorse an overstated and one-sided view of the legal question is bound to prevent judges from appreciating the complexity of the case and tempt them to avoid grappling with the painstaking arguments”).

164. See Simon, *Psychological Model*, *supra* note 2, at 12 n.58 (noting an instance in which Justice Breyer’s expression of uncertainty provoked negative media attention, including the claim that Breyer’s admission was “disturbing”); POPKIN, *supra* note 73 (same); Dan Simon, *Freedom and Constraint in Adjudication: A Look Through the Lens of Cognitive Psychology*, 67 BROOK. L. REV. 1097, 1137 n.95 (2002) (discussing an instance in which media concern arose regarding a Delaware judge’s having expressed doubt in a judicial opinion); FED. JUDICIAL CTR., *supra* note 8, at 19 (judicial opinions “should . . . carry conviction”).

165. See LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 2 (1993) (“[T]here is pressure on [judges] to speak decisively.”); William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law,”* 42 REC. ASS’N B. CITY N.Y. 948, 962 (1987); Oldfather, *Remedying Judicial Inactivism*, *supra* note 37, at 792 (“Judges frequently observe that the mere fact of having to write an opinion affects the process of deciding a case.”). Justice Brandeis once claimed that “the difficulty with this place is that if you’re only fifty-five percent convinced of a proposition, you have to act and vote as if you were one hundred percent convinced.” Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L.J. 1149, 1188 n.235 (2010). One way to attempt to reduce that difficulty is by deliberating further in hopes of attaining additional certainty (though, to be sure, such certainty might never be forthcoming, and if it does come, it may be mistaken).

166. Cf. Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1447 (1995) (“In thinking about a case, a judge might come to a definite conclusion yet find the conclusion indefensible when he tries to write an opinion explaining and justifying it.”).

certainty and low admission of doubt might bring about more deliberation, not less.<sup>167</sup>

Of course, it could still be the case that a norm encouraging greater admission of uncertainty would produce a *better* kind of deliberation.<sup>168</sup> But this contention, too, rests on a somewhat shaky foundation. Current certainty norms pressure judges to adhere to a type of “minimalism” that is pervasive but often overlooked: judges decide cases on the ground that they are most comfortable asserting with maximal certainty—typically the easiest possible ground for resolution, or the least error-prone one. Certainty norms thus influence the issues the court chooses to address (where there is more than one potential dispositive issue), as well as the rationale for those issues’ resolution.<sup>169</sup> At least for intermediate appellate courts facing only miniscule chances of reversal, certainty norms’ promotion of this form of minimalism may thus prevent judges from authoring decisions that rest on less firm, more error-prone ground.

In sum, whether or not it is a net positive, the current norm of judicial certainty rhetoric may have more mixed *ex ante* effects on judicial decision-making than has been appreciated. Though it may be desirable to have a more balanced rhetoric that more often admits of uncertainty, those who advocate proceeding in that direction have some reason for caution.

#### *D. Social Epistemology and Relative Certainty Reporting*

The focus on “efficiency” in much of the above discussion may turn some readers off, and understandably so; after all, the judicial system should be evaluated not merely according to its efficiency

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167. See Sutton, *supra* note 11, at 862 (“Posner likewise overstates his case in maintaining that it is ‘naïve’ to believe that there are right answers to legal questions. . . . This perspective . . . enables, if not encourages, judges to minimize the task at hand. Why work at answering a difficult legal problem correctly if it is a fool’s errand . . . ?” (citation omitted)); Altman, *supra* note 36 (awareness of discretion loosens bounds). All this said, more deliberation is not an unmitigated good, given resource constraints and growing caseloads (not to mention the litigants’ desire for speedy case resolution). The key point is whether case outcomes improve, and by how much, in light of the trade-offs.

168. See POPKIN, *supra* note 73; *supra* note 11.

169. This form of minimalism is distinguishable from other forms sometimes advocated by judges and scholars (e.g., proposals that judges ought to create as little change to the status quo as possible, to avoid overturning other branches’ actions, to avoid reaching constitutional issues, or to avoid taking sides on deeply contested moral or cultural issues). See Sunstein, *supra* note 39, at 826.

but also its accuracy — that is, the extent to which the conclusions it reaches tend to be correct. The same goes for evaluating the judicial system's use of certainty reporting. The question is, does such rhetoric merely facilitate *efficient* resolution of disputes, or does it also facilitate their *correct* resolution? Does it, in other words, aid in the judiciary's epistemic, or truth-seeking, goals?<sup>170</sup>

A “rapidly developing”<sup>171</sup> philosophical literature on “social epistemology” considers just such questions,<sup>172</sup> though it is only now beginning to receive attention from legal scholars.<sup>173</sup> My description of the field here is very brief, but hopefully allows one to appreciate why, from the perspective of social epistemology, relative certainty reporting is probably a good thing for the judiciary *qua* epistemic institution.

Social epistemology “investigat[es] the epistemic effects of social interactions and social systems.”<sup>174</sup> It is part of a “naturalized” program in epistemology that, rather than dwelling on *idealized* processes of knowledge attainment, forefronts “the realities of how epistemic processes — processes for the acquisition of knowledge — work.”<sup>175</sup> This naturalized epistemology “tailor[s] . . . normative advice about belief formation” to the

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170. I put aside more fundamental questions concerning the nature of legal, as opposed to factual, “truths,” including whether the former is sometimes or always a subcategory of the latter. See generally Brian H. Bix, *Metaphysical Realism and Legal Reasoning*, in LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE 311 (Kimberly Kessler Ferzan & Stephen J. Morse eds., 2016); Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160 (2015).

171. Stein, *supra* note 7, at 53.

172. For general introductions to the field, see ALVIN I. GOLDMAN, *A Guide to Social Epistemology*, in RELIABILISM AND CONTEMPORARY EPISTEMOLOGY 221, 226–29 (2012); Goldman & Blanchard, *supra* note 40.

173. For two recent examples, see William Baude & Ryan D. Doerfler, *Arguing with Friends*, 117 MICH. L. REV. 319 (2018); Stein, *supra* note 7; see also Brian Leiter & Matthew X. Etchemendy, *Naturalism in Legal Philosophy*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2017), <https://plato.stanford.edu/archives/sum2017/entries/lawphil-naturalism/> (“Normative Naturalism[] is exemplified in epistemology by [Alvin] Goldman . . . but its implications for jurisprudence and law have, to date, only been partly developed.”).

174. Goldman & Blanchard, *supra* note 40; see also GOLDMAN, *supra* note 172, at 228–29 (describing “systems oriented social epistemology,” which “examine[s] the [epistemic] systems [sic] in question to see whether its mode of operation is genuinely conducive to the specified epistemic ends”); Goldman & Blanchard, *supra* note 40 (emphasizing social epistemology’s concern with assessing institutional and social practices “in terms of how the chosen procedures ‘perform’ in yielding judgments with high truth ratios”).

175. Brian Leiter, *The Epistemology of Admissibility: Why Even Good Philosophy of Science Would Not Make for Good Philosophy of Evidence*, 1997 BYU L. REV. 803, 805.

realistic capacities of the individual and institutional knowers at issue, in order to critique and improve those individuals' and systems' tendency towards acquiring true belief in light of their acknowledged limitations (e.g., their resource, evidentiary, and cognitive constraints).<sup>176</sup> Treating these limitations as a given, much recent work in social epistemology concerns reliance on *others' testimony* about *their* beliefs concerning a given proposition, as a source of "second-order" evidence bearing on the truth-value of the proposition at issue<sup>177</sup> – that is, it emphasizes the ways we do, must, and should rely on other people's statements about their own beliefs when rationally forming our own.<sup>178</sup>

Social epistemology's core insights apply straightforwardly to the judiciary's practice of reporting relative certainty. Judges cannot possibly run every issue to the ground. To arrive at true conclusions, they do, must, and should rely at least to some extent on the testimony of other judges who have considered a given issue. This is true not just as a doctrinal matter (though many doctrines, such as *stare decisis* and deferential appellate review, do require granting some deference to others' opinions); it is also true where, for example, judges consult nonbinding opinions outside their circuit, or when judges consider the fact that one of their colleagues disagrees with them about some issue in a case.<sup>179</sup>

How much evidentiary value ought judges assign to other judges' beliefs? That depends, in large part, on the epistemic position of the judges in question. Sometimes another judge has delved deeper into the relevant primary evidence, has received more thorough briefing on the issue, etc., and so is, in the jargon of social epistemology, an "epistemic superior," whose view deserves

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176. *Id.*; see also, e.g., GOLDMAN, *supra* note 172; Leiter & Etchemendy, *supra* note 173.

177. See Jonathan Matheson, *Disagreement and Epistemic Peers*, in OXFORD HANDBOOKS ONLINE: SCHOLARLY RESEARCH REVIEWS 5–6 (2015), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935314.013.13>; Richard Feldman, *Evidentialism, Higher-Order Evidence, and Disagreement*, 6 EPISTEME 294, 295 (2009) ("[E]vidence of peer disagreement is . . . higher-order evidence—evidence about the significance of one's first-order evidence.").

178. See generally David Christensen & Jennifer Lackey, *Introduction to THE EPISTEMOLOGY OF DISAGREEMENT: NEW ESSAYS* 1, 1–3 (David Christensen & Jennifer Lackey eds., 2013) (outlining issues addressed by recent philosophical work on the epistemology of disagreement).

179. See Stein, *supra* note 7.

extra deference as to that particular issue.<sup>180</sup> Other times, the other judge—perhaps on the same panel in a given case—has consulted the same evidence, deliberated the same amount, etc., and is thus an “epistemic peer.”<sup>181</sup> In either situation, the very fact that the other judge holds a given view constitutes *at least some* second-order evidence of the truth of that view.

Now, the crucial step is seeing that another valuable piece of information relevant to deciding *how much* weight to give another’s opinion is *how certain the other person is of its truth*. That is, in addition to knowing another judge’s opinion on a given matter, and knowing whether that judge is an epistemic superior, inferior, or peer as to that issue, one ought to be curious about that judge’s relative certainty. And upon learning another’s certainty level, one ought rationally to update one’s own view to take that into account. On the institutional level, then, insofar as we are concerned about the judiciary’s proper functioning as an epistemic system,<sup>182</sup> we should want judges to provide that useful information to each other, and to have it influence each other’s processes of rational belief formation.<sup>183</sup>

In sum, social epistemology shows how the judicial system can more effectively discover and retain truth, and ferret out and

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180. Likewise, sometimes another judge simply has a reputation as a particularly bright or learned judge generally (hence the practice of noting an opinion’s authorship when it is written by a well-regarded jurist) or as to some specific substantive area of expertise (e.g., Judge Robert Sack on defamation, or Judge Frank Easterbrook on antitrust).

181. See Christensen & Lackey, *supra* note 178.

182. Recall that the judiciary’s goals are not *exclusively* epistemic. See, e.g., sources cited *supra* notes 12 and 150.

183. Cf. *supra* note 42 (analogizing to other epistemic institutions such as scientific fields and intelligence-gathering agencies, where relative certainty reporting is both more frequent and more precise than it is in the modern judiciary).

A brief note is in order regarding social epistemology’s implications for the appropriate rhetorical baseline. By stressing the rationality of deference to epistemic peers’ disagreement, the field does suggest that uncertainty in an absolute sense is more often warranted than judicial opinions imply on their face (particularly in split opinions, though also in cases where at least one judge in the majority has reservations). I am ultimately sympathetic to this view, the arguments in section I.I.C notwithstanding. Still, for those who lament judges’ unwillingness to express uncertainty in the face of peer disagreement, the data examined in section I.B, *supra*, provide at least some cause for hope. Specifically, AU usage is higher in split opinions than in unanimous ones, see *supra* notes 110–115, and the data show a marginally significant increase in AU amongst ideologically diverse panels (unified panels had an average of 1.82 AUs per 10,000 words, versus 2.50 for nonunified panels ( $p = 0.09$ ) (OLS:  $p = .35$ ); Appendix Table 2. So contrary to the “rhetorical escalation” account’s predictions, judges do seem willing to report uncertainty when confronted with peer disagreement, even if they should do so more often.

discard falsity, by candidly reporting confidence levels associated with legal and factual contentions. That, in a nutshell, is the upshot of social epistemology's normative naturalism, its realistic focus on actual institutional capacities, and its acknowledgment of the inevitability and desirability of relying on others' testimony during the process of rational belief-formation. What began this Part's analysis as a tool for efficient management turns out also to be a means for more effective truth-discovery.

### III. CONCLUSION

This Article set out to understand why judges and litigants so frequently employ certainty rhetoric despite seemingly universal disdain for it, as well as what effects it has and whether it is as undesirable as it is typically made out to be. The Article's tentative conclusions represent only an initial step toward answering those questions, focusing on overt and unnecessary assertions of certainty and uncertainty, obviousness and nonobviousness, etc. After showing why common explanations of the causes and effects of certainty rhetoric fall short—leaving their associated normative claims open to doubt—this Article argued in favor of a rosier picture of certainty rhetoric, though one that may or may not ultimately justify the current certainty-laden discourse.

I posited that a judicial preference for audience esteem and ongoing influence—in short, good reputation—helps constrain certainty rhetoric, making it largely sincere and informative. I then argued that the information which certainty rhetoric provides to judges, lawyers, and litigants is both relevant and useful, in ways that make it a powerful tool for appellate judges seeking to manage the judicial system efficiently in an era of increasing caseloads. In addition, norms of judicial certainty may have some salutary *ex ante* effects on judicial decision-making, partially justifying the high rhetorical certainty baseline characteristic of current judicial opinion rhetoric, even if it sometimes appears comically overwrought or misleading. At the very least, it is a good thing that judges report their relative certainty or uncertainty when it departs significantly from the rhetorical baseline, rather than staying silent as to degree of certainty, obviousness, and the like. And it is good not only for purposes of efficient management, but also for accomplishing the judicial system's epistemic goals.

Before concluding, it is worth stressing some limitations of the present study. First, more empirical work would need to be done before Part I's traditional explanatory accounts could be definitively rejected or Part II's new account adopted with much confidence. As it stands, the empirical data reported in Part I open only an initial exploratory window into legal certainty rhetoric. Though the data are consistent with, and help render plausible, the explanatory account provided in Part II, the empirical study was designed to investigate the five accounts examined in Part I. Second, while the explanatory proposal in Part II may be applicable to judicial behavior outside the federal appellate courts, extra caution is warranted in generalizing beyond that context. For example, certainty rhetoric could have altogether different causes, effects, and normative implications in the small subset of Supreme Court cases that present highly publicized constitutional issues. Still, one should not ignore the possibility that the same mundane managerial and reputational concerns that give rise to certainty rhetoric in the mine-run of cases also help explain and partially justify it in those highly unusual, headline-worthy cases.

Of course, one might be skeptical of any attempt to make generalizations or craft a theory concerning a practice so diverse as the use of certainty rhetoric in legal discourse. There may be such varied causes, effects, and normative implications of different instances of certainty rhetoric that any theory is bound to fail. But if that is true, then the conventional and seemingly universal disdain for certainty rhetoric, along with the assumptions that undergird it, rest on far more uncertain foundations than their proponents let on. Moreover, there would remain the mystery of why, despite being universally lamented, certainty rhetoric persists even among the very people who have been taught to, and have in some cases told others to, eschew it. Continuing to investigate that mystery can improve our understanding and evaluation of judicial and litigant behavior, facilitating better-supported normative prescriptions concerning legal discourse and decision-making.

## APPENDIX

**Table 1.** Case, Opinion, and Brief Characteristics.

<u>Cases</u>	<u>Total</u>	<u>428</u>	<u>100%</u>
Circuit	5th Circuit	111	26%
	7th Circuit	173	40.5%
	9th Circuit	144	33.5%
Subject Matter	Fourth Amendment	130	30.4%
	Commercial Contracts	147	34.3%
	Combination Crim. / Civ. Pro.	151	35.3%
Panel Ideological Unity <sup>184</sup>	Ideologically Unified	98	27%
	Ideologically Nonunified	263	73%
<u>Opinions</u>	<u>Total</u>	<u>483</u>	<u>100%</u>
Majority, Separate	Majority	428	88.6%
	Concurrences	23	4.8%
	Dissents	32	6.6%
Author Attributes <sup>185</sup>	Male	290	71%
	Female	121	29%
	White	370	90%
	Nonwhite	41	10%
	Elite law school graduate	211	51%
	Nonelite law school graduate	200	49%
<u>Briefs</u>	<u>Total</u>	<u>344</u>	<u>100%</u>
Opening, Responsive	Appellant Opening	121	35%
	Appellee Opposition	120	35%
	Appellant Reply	103	30%
Author Attributes	Federal Government	63	18%
	Top Law Firm	14	4%
	Other	268	78%

184. Percentages here concern the 361 cases for which the political party of all three judges on the panel was available via sources reporting federal appellate judges' appointing president's political party. In the cases where no such data was available, one of the three judges was sitting by designation and not a federal appellate judge. *Cf. supra* note 88.

185. Percentages here concern the 411 cases for which author demographics were available via sources reporting federal appellate judges' appointing president's political party. In the cases where no such data was available, the authoring judge was sitting by designation and not a federal appellate judge. *Cf. supra* note 88.

**Table 2.** The Five Theories’ Predictions, and Relevant Empirical Analyses.

<u>Theory</u>	<u>Predictions</u>	<u>Key Independent Variables</u>
<b>Misguided Persuasion</b>	Higher quality judges use fewer ACs <sup>186</sup>	Elite law school J.D. vs. nonelite law school J.D.
	Higher quality lawyers use fewer ACs	Top law firm vs. not top law firm and non-fed. govt.
		Fed. govt. vs. not fed. govt.
	Judicial opinions using more ACs are less influential (at least outside their circuit)	Op. ACs (increase of one unit) <sup>187</sup>
		Op. ACs (increase of one unit)
	Briefs using more ACs lose at higher rates	Appellant Br. ACs (increase of one unit) – opening and reply combined
		Appellee Br. ACs (increase of one unit)
<b>Reactive Escalation</b>	Higher losing brief ACs result in higher opinion ACs	Losing br. ACs
	Higher winning brief ACs result in higher opinion ACs	Winning br. ACs
	In split opinions, both majority and dissent use more ACs and fewer AUs than in nonsplit opinions	Dissent present vs. no dissent present

186. All ACs and AUs here are short for “ACs per 10,000 words” and “AUs per 10,000 words” respectively.

187. See *supra* note 101 for an explanation of unit standardization.

<u>Dependent Variable</u>	<u>Effect Size, Direction</u> <sup>188</sup>	<u>Statistical Significance</u> <sup>189</sup>
Op. ACs	0.84 times as many ACs	$p = 0.33$
Br. ACs	0.77 times as many ACs	$p = 0.27$
Br. ACs	0.52 times as many ACs	$**p < 0.0001$
Inside-circuit citations	<u>1.06 times more citations</u>	$p = 0.71$
Outside-circuit citations	<u>1.07 times more citations</u>	$p = 0.75$
Appellant win vs. appellant loss	0.79 times as high odds of winning	$p = 0.30$
Appellee win vs. appellee loss	<u>1.23 times higher odds of winning</u>	$p = 0.29$
Op. ACs	<u>0.87 times as many ACs</u>	$p = 0.14$
Op. ACs	1.002 times more ACs	$p = 0.98$
Op. ACs	2.81 times more ACs	$**p = 0.0001$
Op. AUs	2.64 times more AUs	$**p < 0.0001$

188. Underlined indicates effect in opposite direction of prediction.

189. "\*\*\*" indicates statistical significance at the .05 level. "\*\*" indicates marginal significance, at the 0.10 level.

<u>Theory</u>	<u>Predictions</u>	<u>Key Independent Variables</u>
<b>Extralegal Communication</b>	Racial minority judges use more AUs, fewer ACs than white judges and than male judges	Nonwhite vs. white
	Female judges use more AUs, fewer ACs than white judges and than male judges	Female vs. Male
<b>Power-Grabbing</b>	Ideologically unified panels use more ACs, fewer AUs than ideologically diverse panels	Ideologically unified vs. ideologically diverse
<b>Legitimacy Bolstering</b>	Search & seizure cases contain more ACs than commercial cases	Search & seizure cases vs. commercial cases
	Dissenting opinions contain fewer ACs than majority opinions without a dissent	Dissent vs. maj. op. w/o dissent present
	Dissenting opinions contain fewer ACs than majority opinions with a dissent	Dissent vs. maj. op. with dissent present
	Majority opinions in the presence of a dissent contain more ACs than opinions without a dissent present	Maj. op. in presence of dissent vs. maj. op. not in presence of dissent

<u>Dependent Variable</u>	<u>Effect Size, Direction</u> <sup>190</sup>	<u>Statistical Significance</u> <sup>191</sup>
Op. ACs	0.79 times as many ACs	$p = 0.43$
Op. AUs	<u>0.45 times as many AUs</u>	$**p = 0.01$
Op. ACs	<u>1.02 times more ACs</u>	$p = 0.92$
Op. AUs	1.19 times more AUs	$p = 0.43$ <sup>192</sup>
Op. ACs	<u>0.85 times as many ACs</u>	$p = 0.38$
Op. AUs	0.73 times as many AUs	$*p = 0.09$ <sup>193</sup>
Op. ACs	1.24 times more ACs	$p = 0.11$
Dissenting op. ACs	<u>4.02 times more ACs</u>	$**p < 0.0001$
Dissenting op. ACs	<u>3.65 times more ACs</u>	$**p = 0.001$ <sup>194</sup>
Op. ACs	1.1 times more ACs	$p = 0.61$

190. Underlined indicates effect in opposite direction of prediction.

191. "\*\*\*" indicates statistical significance at the .05 level. "\*" indicates marginal significance, at the 0.10 level.

192. OLS:  $p = 0.08$ .

193. OLS:  $p = .35$ .

194. OLS:  $p = 0.13$ .

