

## THE *DUBITANTE* OPINION

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MR. JUSTICE MARSHALL delivered the opinion of the Court. . . .  
MR. JUSTICE HARLAN, concurring in part and dissenting in  
part. . . . MR. JUSTICE WHITE, with whom MR. JUSTICE  
STEWART joins, concurring in the result. . . . MR. JUSTICE  
DOUGLAS, *dubitante*.<sup>1</sup>

The 2004 Term of the United States Supreme Court resulted in 203 full opinions written, including 61 concurrences and 63 dissents.<sup>2</sup> Judicial use of these three basic opinion types, the majority, concurring and dissenting opinions or variations thereof (*e.g.*, concurring in part and dissenting in part) has been the norm in the Court and lower federal courts over recent decades. Yet, another type of opinion exists—the *dubitante* opinion.<sup>3</sup>

Judges rarely write *dubitante* opinions or use the term, and informal polling suggests not many legal scholars are aware of the practice.<sup>4</sup> This

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1. *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967).

2. *The Supreme Court, 2004 Term—The Statistics*, 119 HARV. L. REV. 415, 420 (Table 1).

3. I first learned of the *dubitante* opinion while doing research on the United States Court of Appeals for the Seventh Circuit. See *United States v. Zendeli*, 180 F.3d 879, 887 (7th Cir. 1999) (Ripple, J., *dubitante*). The *dubitante* opinion is not a compiled category in the Harvard Law Review's annual statistics on the Court. See, *e.g.*, *The Supreme Court, 1967 Term—The Statistics*, 82 HARV. L. REV. 301 (1968); *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 103 (1965). It is likely that *dubitante* opinions are counted as dissents or concurrences. See *The Supreme Court, 1967 Term, supra*, at 302 (crediting a Justice with a dissent or concurrence whenever writing separately).

4. At least one law student is aware of the term and has named his web log after it. See *Dubitante*, <http://www.dubitante.blogspot.com/2004/02/about-dubitante.html> (last visited February 1, 2004) (A 1L's blog about law school and the distractions from it). His own definition of the term might explain some judges' desire to use the term—"For me, 'Dubitante' sums up my view of the world: extremely cynical, but a good sport about it. I disagree with many things, but am usually willing to play along . . ." Some law professors have noted the odd term; their links have helped my investigation. See *ProfessorBainbridge.com*, [http://www.professorbainbridge.com/2004/03/bainbridge\\_j\\_du.html](http://www.professorbainbridge.com/2004/03/bainbridge_j_du.html) (last visited March 16, 2004); *The Indiana Law Blog*, <http://www.indianalawblog.com/mt/archives/2004/03/000149.html> (last visited March 15, 2004).

short Essay endeavors to shed some light on the use of the term *dubitante* in judicial opinions and spark discussion as to the merits of the *dubitante* opinion—What is a *dubitante* opinion? When was the term first used, and how often is the term used? Who uses it and how? What are the consequences of its use?

A *dubitante* (pronounced d[y]oo-bi-tan-tee) opinion indicates that “the judge doubted a legal point but was unwilling to state that it was wrong.”<sup>5</sup> Said Lon Fuller, “[E]xpressing the epitome of the common law spirit, there is the opinion entered *dubitante*—the judge is unhappy about some aspect of the decision rendered, but cannot quite bring himself to record an open dissent.”<sup>6</sup>

In the United States, the term has been used in only 626 written opinions.<sup>7</sup> Clearly, concurrences, not *dubitante* opinions, are the norm when expressing reservations, but deciding to vote with the court’s majority. However, the term is most frequently used to express doubt in general, not to define a judge’s disposition in a given case. In colonial times, the term was first used to describe Judge Blair’s disposition in the case of *Bernard v. Stonehouse*, 2 Va. Colonial Dec. B60 (Va. Gen. Ct. 1737). It was used first in the new democracy by Maryland state court Judge Goldsborough in *Fulton v. Wood*, 3 H. & McH. 99, 100 (Md. 1792). The first federal court to use the term explained a concern of Judge Humphreys of the United States Court of Appeals for the District of Columbia (then known as the Supreme Court of the District of Columbia) in *Tuohy v. Martin* (1876).<sup>8</sup> However, none of these cases describe the term or provide information on its origins, nor do the early English cases that use the term. No English cases use the term prior to late 1700s cases written by American state court judges.<sup>9</sup>

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5. BLACK’S LAW DICTIONARY 515 (7th ed. 1999). See also DAVID M. WALKER, THE OXFORD COMPANION TO LAW 379 (Oxford Univ. Press. 1980) (defining *dubitante* as “the term used in a law report of a judge who devotes a proposition of law but does not go so far as to repudiate it as bad or wrong”).

6. LON FULLER, ANATOMY OF THE LAW 147 (1968). Cases have also quoted Fuller’s definition. See, e.g., *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1151 (9th Cir. 2005).

7. Both LEXIS and Westlaw have cases that date back to the 1600s. As of June 30, 2005, Westlaw shows 626 cases using the term *dubitante*, while LEXIS only shows 600.

8. 2 MacArth. 572, 577 (D.C. 1876) (“HUMPHREYS, J., expressed himself *dubitante* on one point, that is, whether any charge ought to be made upon Mrs. Martin’s devise until the exhaustion of the estate specially encumbered by the expense of the monument.”).

9. I found English cases from the early 1800s using the term. See, e.g., *Pitt v. Laming*, (1814) 171 Eng. Rep. 24 (“Held: assuming that the condition was legal, as to which *dubitante*, the omission to make the endorsement within three months did not avoid the policy, and, therefore, there was no breach of the covenant to insure.”); *Pelly v. Wathen*, (1851) 42 Eng. Rep. 457 (using term to describe a judge’s disposition stating “KNIGHT-BRUCE, LJ, *dubitante*”). Similar to the

Both American state and federal courts employ the term *dubitante*. Of the 626 total cases using the term, 269 are federal cases, twelve of those coming from the United States Supreme Court. Needless to say, in examining the frequency of its use, mere citation hits do not paint an accurate picture. While the Supreme Court may have written the word *dubitante* twelve times, only four times was it in reference to a Justice's disposition in the case at issue (*i.e.*, a *dubitante* opinion), as opposed as a phrase used in the text to express reservations about a specific issue or fact rather than the majority's entire opinion.<sup>10</sup> Of the 269 federal cases, most are not *dubitante* opinions (this includes 69 district court cases and 134 appellate decisions).

Over one-third of these textual uses of the term (*i.e.*, not *dubitante* opinions) can be attributed to the First Circuit, and, more specifically, Judges Sandra L. Lynch and Michael Boudin, who account for over three-quarters of the First Circuit's use. In other words, these two judges account for nearly 20% of all uses of the term ever, not just in the dispositional context, in the history of the United States federal judiciary.<sup>11</sup> These two judges are especially likely to use the term when assuming a condition or fact that they otherwise might question.<sup>12</sup> However, that still leaves 66 cases from the courts of appeals where *dubitante* is used in reference to a judge's disposition in the case at issue or in another appellate case.

Amazingly, nearly one-half of these citations to *dubitante* opinions can be attributed to only four fairly well-known judges—Frank M. Coffin (First Circuit); Henry J. Friendly (Second Circuit); Frank H. Easterbrook (Seventh Circuit); and James C. Hill (Eleventh Circuit).

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United States, I also note that the term is not routinely used in English courts.

10. *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 403 (1967) (Douglas, J., *dubitante*); *O'Keefe v. Smith, Hinchman & Grylls Assocs.*, 380 U.S. 359, 371 (1965) (Douglas, J., *dubitante*); *Radio Corp. of Am. v. United States*, 341 U.S. 412, 421 (1951) (Frankfurter, J., *dubitante*); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 111 (1949) ("MR. JUSTICE RUTLEDGE acquiesces in the Court's opinion and judgment, *dubitante* on the question of equal protection of the laws.").

11. In fact, this figure is underestimated because Judges Lynch and Boudin were both members of a number of panels that filed per curiam opinions where the term was used.

12. *See, e.g., Lesley v. Chie*, 250 F.3d 47, 56 n.10 (1st Cir. 2001) ("Thus, without using the burden-shifting model, we simply assume *dubitante* that the evidence Lesley has put forward is sufficient to require us to consider Dr. Chie's reasons for his referral."); *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 262 (1st Cir. 2001) ("In any event, even were we to assume *dubitante* that Reed adequately requested an accommodation allowing her to walk away from conflicts with supervisors, Reed was never prevented from exercising such accommodation during her June 1, 1996 meeting with Callahan."); *United States v. Brady*, 168 F.3d 574, 580 (1st Cir. 1999) ("But a significant purpose to obstruct is enough, even if we assume *dubitante* that a pure desire not to rat would avoid the obstruction charge.").

These opinions reveal that Judge Hill, whose *dubitante* opinions account for most of these citations, uses the term *dubitante* in a manner synonymous with any level of disagreement with the majority opinion. For example, his opinions often begin “HILL, J., dissenting *dubitante*”<sup>13</sup> or “HILL, J., concurring *dubitante*.”<sup>14</sup>

The same cannot be said of the other three judges. The term *dubitante* can best be seen as a level of agreement between fully joining the majority opinion and a concurrence.<sup>15</sup> In other words, the judge can be seen as agreeing with the rationale in the majority opinion, but having reservations about the very same rationale. For example, Judge Easterbrook, in *Majors v. Abell*, explains, “Given *McConnell*, I cannot be confident that my colleagues are wrong in thinking that five Justices will go along. But I also do not understand how that position can be reconciled with established principles of constitutional law.”<sup>16</sup>

In *Feldman v. Allegheny Airlines, Inc.*, Judge Friendly expresses doubt by stating, “Although intuition tells me that the Supreme Court of Connecticut would not sustain the award made here, I cannot prove it. I therefore go along with the majority, although with the gravest doubts.”<sup>17</sup> Judge Frank Coffin, in *Kartell v. Blue Shield of Massachusetts, Inc.*, laments, “While I share the court’s desire to defer to the Massachusetts courts for all the help we can get, and feel its resolution makes sense, I confess to some uneasiness about our privilege as an appellate court simply to abstain when the district court has not seen fit to do so.”<sup>18</sup> In using the unusual term *dubitante* to describe their

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13. See, e.g., *Archer-Daniels-Midland Co. v. United States*, 37 F.3d 321, 324 (7th Cir. 1994) (Hill, J., dissenting *dubitante*).

14. See, e.g., *In re Alvarez*, 224 F.3d 1273, 120 (11th Cir. 2000) (Hill, J., concurring *dubitante*).

15. There are at least five other levels of judicial (dis)agreement—(1) when two judges sign the same opinion without any separate opinions, regardless of who wrote the opinion; (2) when a judge concurs with another judge’s opinion; (3) when a judge concurs in part and dissents in part; (4) when a judge concurs only in the judgment of the other judge’s opinion; and (5) full disagreement, where a judge dissents from a majority opinion. See Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, UNIV. OF CHI., PUBLIC LAW WORKING PAPER NO. 102 (2005), <http://ssrn.com/abstract=773865>.

16. *Majors v. Abell*, 361 F.3d 349, 358 (7th Cir. 2004) (Easterbrook, J., *dubitante*). See also *Nat’l Solid Wastes Mgmt. Ass’n v. Killian*, 918 F.2d 671, 685 (7th Cir. 1990) (Easterbrook, J., *dubitante*) (“Still, I am not so sure as my colleagues that § 18 preempts state rules.”).

17. *Feldman v. Allegheny Airlines, Inc.*, 524 F.2d 384, 393 (2d Cir. 1975) (Friendly, J., *dubitante*).

18. *Kartell, v. Blue Shield of Massachusetts, Inc.*, 592 F.2d 1191, 1195 (1st Cir. 1979) (Coffin, J., *dubitante*), *aff’d in part, rev’d in part, vacated in part by*, *Kartell v. Blue Shield*, 749 F.2d 922 (1st Cir. 1984). See also *Fischer v. Bar Harbor Banking & Trust Co.*, 857 F.2d 4, 9 (1st Cir. 1988) (Coffin, J., *dubitante*) (“I respectfully question whether the district court properly granted summary judgment on the issue of the Bank’s malice.”); *In re Marcus*, 491 F.2d 901, 904 (1st Cir.

opinions, these three judges have lived up to their reputations as scholars most interested in language, vocabulary, and the meaning of words. After all, Easterbrook often cites to Wittgenstein,<sup>19</sup> Coffin wrote the book *A Lexicon for Oral Advocacy* (1985), and Friendly once asked, “[W]hat is a chicken?”<sup>20</sup>

Upon initial analysis, one might conclude that there are several advantages to *dubitante* opinions. A *dubitante* opinion provides a more nuanced description of an individual judge’s level of concern with the case’s disposition. Thus, these opinions can serve as a signal to lawyers that a better, but not yet conceived, legal argument may exist. *Dubitante* opinions can also be brief and do not connote a high level of disagreement with fellow judges. In fact, a judge can join a majority opinion *dubitante* without a writing. (This seems to have been the historical tradition.) Therefore, judges need not use significant amounts of time and will not hamper judicial collegiality in writing these opinions, while at the same time providing more robust information to the legal community. However, while *dubitante* opinions offer efficiency and intellectual advantages, they may also create substantial difficulties, or at least uncertainties, in practice.

In an analysis of *dubitante* opinions in the context of Florida Supreme Court use, concerns are raised about writing *dubitante*

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1974) (Coffin, C.J., *dubitante*) (“While I cannot, with conviction, fault the court’s reasoning, neither can I say that it rests comfortably with the clear indication that Congress was deeply interested in requiring strict accountability of the Attorney General for such technological invasions of privacy as he may deem necessary.”), *vacated by*, *Marcus v. United States*, 417 U.S. 942 (1974).

19. *Cont’l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union Pension Fund*, 916 F.2d 1154, 1157 (7th Cir. 1990) (citing *In re Erickson*, 815 F.2d 1090 (7th Cir. 1987)) (“You don’t have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities.”); *Stevens v. Tillman*, 855 F.2d 394, 399 (7th Cir. 1988) (citing SAUL A. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* 8-24 (1982)).

20. *Frigalment Importing Co. v. B. N. S. Int’l Sales Corp.*, 190 F. Supp. 116, 117 (S.D.N.Y. 1960). Judge Friendly stated:

The issue is, what is chicken? Plaintiff says ‘chicken’ means a young chicken, suitable for broiling and frying. Defendant says ‘chicken’ means any bird of that genus that meets contract specifications on weight and quality, including what it calls ‘stewing chicken’ and plaintiff pejoratively terms ‘fowl’. Dictionaries give both meanings, as well as some others not relevant here. To support its, plaintiff sends a number of volleys over the net; defendant essays to return them and adds a few serves of its own. Assuming that both parties were acting in good faith, the case nicely illustrates Holmes’ remark ‘that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties’ having meant the same thing but on their having said the same thing.’ *The Path of the Law*, in *Collected Legal Papers*, p. 178. I have concluded that plaintiff has not sustained its burden of persuasion that the contract used ‘chicken’ in the narrower sense.

*Id.*

opinions.<sup>21</sup> For example, if a judge writes a *dubitante* opinion, without stating “concurring *dubitante*,” can this judge’s vote automatically be relied upon as the second (in the courts of appeals), fourth (in many state supreme courts) or fifth vote (in the U.S. Supreme Court) needed to create a binding decision?<sup>22</sup> Even if the answer is yes, to what extent is the precedential value diminished because it is unclear whether this majority, including the judge filing the *dubitante* opinion, agreed on the same rationale for the decision?<sup>23</sup>

While issuance of a *dubitante* opinion by a judge expresses reservations with the majority’s holding, the *dubitante* opinion nevertheless, by design, also indicates a judge’s (possibly reluctant) agreement with the majority’s rationale.<sup>24</sup> Thus, an opinion issued *dubitante* should be considered to represent a vote with the majority and does become binding precedent (*i.e.*, not a plurality) where the *dubitante* opinion is the deciding vote.<sup>25</sup> However, for a court of last resort, where a *dubitante* opinion was needed to create the majority, the opinion may be a candidate for reversal (because the *dubitante* opinion calls out for a better legal argument to be made).<sup>26</sup>

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21. Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 NOVA. L. REV. 1151, 1176-77 (1994). This article has since been updated. See Harry Lee Anstead, Gerald Kogan, Thomas D. Hall, and Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court of Florida* (2005), [http://www.floridasupremecourt.org/pub\\_info/documents/juris.pdf](http://www.floridasupremecourt.org/pub_info/documents/juris.pdf) (last visited Dec. 15, 2005). Only limited definitions and commentaries are offered in other secondary sources. See, e.g., Laura Krugman Ray, *The Road to Bush v. Gore: The History of the Supreme Court’s Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517, 530 (2000) (stating that *dubitante* signals “that even a Justice who doubts his own tentative position is more inclined to express it in writing than to join a supposedly clear-cut opinion”); B. Rudolph Delson, Note, *Typography in the U.S. Reports and Supreme Court Voting Protocols*, 76 N.Y.U.L. REV. 1203, 1205 n.12 (2001) (considering *dubitante* opinions to be a type of dissent).

22. See Kogan & Waters, *supra* note 21, at 1177.

23. See *id.*

24. See, e.g., *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 403 (1967) (Douglas, J., *dubitante*) (questioning the scope of the majority’s holding); *Radio Corp. of Am. v. United States*, 341 U.S. 412, 421 (1951) (Frankfurter, J., *dubitante*) (“Since I am not alone in entertaining doubts about this case they had better be stated.”). See also *supra* notes 16-18 & accompanying text. *Contra* Anstead, Kogan, Hall, and Waters, *supra* note 21, at 33 (arguing that there must be “clear” agreement for the majority’s rationale).

25. My understanding of the word does represent a slight disagreement with the definition of Kogan & Waters. See Kogan & Waters, *supra* note 21, at 1177 (citing *In re Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d 543, 549 (Fla. 1992) (“However, there also seem to be times when an opinion marked merely ‘dubitante’ is neither a dissent nor a concurrence, but an expression of doubts so grave that the judge or justice can neither agree nor disagree with the majority. This probably is the best construction . . .”).

26. Perhaps this is the same as suggesting that a majority outcome requiring the *dubitante* opinion is entitled to “some diminished form of precedential value.” Anstead, Kogan, Hall, and Waters, *supra* note 21, at 33.

This construction of the *dubitante* opinion gives the judicial tool a unique definition separate from a concurrence, avoids the confusion often caused by plurality opinions,<sup>27</sup> and promotes judicial efficiency by providing lower courts with binding precedent to follow. If this is not an accurate characterization of a judge's view of the case's outcome or authority, and in most cases it is not, the judge should describe his or her disposition as "concurring" on slightly different grounds, or merely "concurring in the judgment" elaborating on his or her differing rationale from the majority opinion.

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27. See, e.g., *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265 (1978).