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DICTA AND ARTICLE III

MICHAEL C. DORF†

INTRODUCTION

At the heart of the federal judicial power lies a tension between the concrete and the abstract. On the one hand, Article III's case-or-controversy requirement prohibits federal courts from issuing advisory opinions.¹ Federal courts may not decide "abstract, hypothetical or contingent questions";² they must instead limit their exercise of judicial authority to concrete disputes that arise out of the adversary process.³ On the other hand, the precept that like cases should be treated alike—rooted both in the rule of law and in Article III's invocation of the "judicial Power"—rests upon the assumption that judicial decisions are necessarily abstract or general.⁴

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¹ See, e.g., *Muskrat v. United States*, 219 U.S. 346, 362 (1911) (noting that the Constitution does not confer upon the judiciary the function of advising legislative action and that the Supreme Court has consistently refused to do so).

² *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945).

³ See, e.g., *United States v. Freuhauf*, 365 U.S. 146, 157 (1961) (refusing to decide issue "not pressed before the Court with [a] clear concreteness" that results from "a clash of adversary argument").

⁴ Article III begins by vesting the "judicial Power" in the Supreme Court and whatever lower federal courts Congress creates. U.S. CONST. art. III, § 1. The term is not purely hortatory. It connotes the view that certain tasks are appropriately judicial and others are not, a separation-of-powers norm. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (noting that the judiciary may not be assigned or allowed tasks that ought to be performed by other branches, nor may Congress pass laws that threaten the integrity of the judiciary). Similarly, Article I's assignment of "[a]ll legislative Powers" to Congress and Article II's placement of "[t]he executive Power" in the President have been understood to entail substantive limits on the kinds of tasks that can be assigned to each branch. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (holding that because of the importance of separation of powers "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment"). Thus, for example, although a statute enacted by Congress and signed by the President would not represent an illegitimate exercise of authority simply because neither Congress nor the President explained the reason for the law, an exercise of the "judicial Power" derives its

To say that the reasoning in a prior case supports or even requires the same or similar result in a later case is to recognize that the first case does not merely resolve a dispute between the parties but announces a general principle applicable in future cases as well.⁵ Thus, Article III contains both a concreteness norm and an abstraction norm.

Courts and commentators tend to treat Article III as addressing the question of *what* cases federal courts may hear.⁶ Yet Article III is also relevant to the question of *how* those cases that can be heard ought to be decided. In other words, Article III raises jurisprudential questions.

This Article focuses on the jurisprudential implications of Article III for determining how federal courts ought to distinguish between the holdings and dicta of past cases. By viewing the holding/dictum distinction through the lens of Article III, I demonstrate that the federal courts' approach to the distinction is at best misguided and at worst dishonest.

In the course of this Article, I discuss a variety of views of precedent.⁷ I argue that some widely held conceptions of precedent overemphasize concreteness. I defend a view of the holding/dictum distinction that attributes special significance to the *rationales* of prior cases, rather than just their *facts and outcomes*.⁸

legitimacy from the court's elaboration of reasons, and reasons are inevitably somewhat abstract. Cf. Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754-55 (1988) (suggesting that Article III might be viewed as a source of the doctrine of stare decisis).

⁵ See Cass R. Sunstein, *Commentary, On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993). Sunstein notes:

[T]he analogizer's description of a particular holding inevitably has some general theoretical components. One cannot even characterize one's convictions about a case without using abstractions, and without taking a position on competing abstractions. We cannot fully describe the outcome in case X if we do not know something about the reasons that count in its favor.

Id. at 746-47 (citation omitted).

⁶ See, e.g., PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 65-72 (3d ed. 1988) and sources cited therein (discussing the prohibition of advisory opinions).

⁷ Scholarly treatment of the holding/dictum distinction typically focuses on general jurisprudential issues rather than Article III norms. I summarize the academic literature briefly below. See *infra* notes 142-43 and accompanying text.

⁸ I focus throughout this Article on cases in which a federal court (typically the United States Supreme Court) confronts the question of how to treat its own statements, as opposed to cases in which a trial or appellate court interprets the prior statements of another court. For a brief discussion of how a lower court should treat

The Article proceeds in four Parts. In Part I, I identify significant confusion in the use of the holding/dictum distinction: federal courts sometimes treat the question whether a particular judicial statement is holding or dictum as a feature of the facts and outcome of the case, but other times they treat this question as a feature of the rationale⁹ of the prior opinion under analysis. By tracing the Supreme Court's treatment of a recurring legal question, I illustrate that a too-narrow view of holdings often serves as a means by which judges evade precedents that cannot fairly be distinguished.

In Part II, I spell out the implications of Article III's abstraction norm. I argue that respect for the rule of law requires that the distinction between holding and dictum be treated as a feature of rationales, rather than facts and outcomes, of prior cases.

Part III describes how a rationale-focused holding/dictum distinction ought to work in practice. Drawing on principles of preclusion law, I explain what it means to say that a proposition is essential to the rationale of a case.

In Part IV, I address the objection that a rationale-focused view of precedent borders on formalism. I contend that the proposed distinction, if applied with sensitivity, is fully consistent with the legal realist perception that facts matter. I argue that fidelity to a rationale-focused holding/dictum distinction would play a useful role in a precedent-based legal system by fostering judicial candor. Despite remaining agnostic about what ought to count as a sufficient justification for overruling a prior decision, I suggest that candid overruling of erroneous decisions is preferable to dishonest manipulation of the holding/dictum distinction. I conclude that this approach best implements the design of Article III, even if it is not, strictly speaking, required by Article III.

a higher court's dicta, see *infra* part II.A.

⁹ Throughout most of this Article, I use the term "rationale" to refer to reasons a court gives for its decision at various levels of abstraction. One could usefully distinguish among such levels. See, e.g., Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 372-83 (distinguishing among "general doctrine," "specific doctrine," and "rationale"). Indeed, I attempt to do so in identifying essential aspects of rationales. See *infra* part III.

I. IMPRECISION IN THE USE OF THE TERM *DICTA*A. *The Problem*

The term *dicta* typically refers to statements in a judicial opinion that are not necessary to support the decision reached by the court.¹⁰ A dictum is usually contrasted with a *holding*, a term used to refer to a rule or principle¹¹ that decides the case.

It is a commonplace that holdings carry greater precedential weight than dicta, "which may be followed if sufficiently persuasive but which are not controlling."¹² Chief Justice Marshall's exegesis in *Cohens v. Virginia*¹³ of the principle that a court may give less precedential weight to its earlier dicta than to its holdings remains the standard:

It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.¹⁴

Chief Justice Marshall provides an instrumental justification for the maxim that dicta need not be followed. Dicta are less carefully considered than holdings, and, therefore, less likely to be accurate statements of law. Thus, according to Marshall, *accuracy* is the primary virtue that the holding/dictum distinction serves.

Courts sometimes rely upon a second justification for discounting dicta that involves not accuracy but *legitimacy*. According to this

¹⁰ See, e.g., *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935) (noting that "general expressions" should not be controlling in subsequent suits).

¹¹ Professor Sullivan has recently written an elegant account of the cleavages among the justices of the Supreme Court by reference to the difference between rules and standards. See Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992). For my purposes here, the distinction is not particularly useful, and I therefore use concepts such as "rules," "standards," and "principles" more or less interchangeably.

¹² *Humphrey's Executor*, 295 U.S. at 627; see also *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972) (stating that broad language of dicta "cannot be considered binding authority").

¹³ 19 U.S. (6 Wheat.) 264 (1821).

¹⁴ *Id.* at 399-400.

view, dicta have no precedential effect because courts have legitimate authority only to decide cases, not to make law in the abstract.¹⁵ This latter function is seen as the proper province of the political branches.

Although Chief Justice Marshall's discussion of holding and dictum in *Cohens* relies on general principles, both the accuracy and the legitimacy rationales rest ultimately on values that can be traced to the case-or-controversy requirement of Article III.¹⁶ The case-or-controversy requirement ensures that federal courts will make law only insofar as they are competent to do so and that in making law they do not usurp the proper role of another branch of government.¹⁷

¹⁵ Cf. *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2451 (1991) (Scalia, J., concurring in the judgment) (recognizing "that judges in a real sense 'make' law," but arguing that they may only do so in the context of resolving a factual dispute).

¹⁶ Article III's case-or-controversy requirement applies only to federal courts. State courts have greater latitude than federal courts to render advisory opinions. See *Doremus v. Board of Educ.*, 342 U.S. 429, 434 (1952) ("We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory."); Opinion of the Justices to the Senate, 436 N.E.2d 935, 947 (Mass. 1982) (noting that the Massachusetts Constitution gives the court the right to render advisory opinions). For simplicity, this Article primarily focuses on federal courts; nonetheless, parallel state law concerns about accuracy and legitimacy will typically inform the holding/dictum distinction in state courts.

Moreover, the United States Supreme Court does not distinguish between state and federal courts in its attempts to separate dicta from holdings. Early on, the Court invoked the principles applicable to construing the scope of its *own* holdings in deciding whether to treat language in a *state* court opinion as holding or dictum. See *Carroll v. Carroll's Lessee*, 57 U.S. (16 How.) 275, 286-87 (1853) (citing *Cohens*, 19 U.S. at 399-400).

¹⁷ See *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (stating that the case or controversy requirement limits the "role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government"); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 227 (1990) ("The case requirement delineates the reach of the federal judicial power, distinguishing the territory of the federal courts from that of the political branches and enforcing the mandate of limited federal jurisdiction.") (citations omitted).

Other doctrines rooted in Article III are also justified in terms of accuracy and legitimacy. Consider standing. Each litigant must have a sufficient "stake in the outcome" so that she will present the arguments for her position forcefully, and thereby enable the court to make an informed decision. *Baker v. Carr*, 369 U.S. 186, 204 (1962). This is an accuracy-based justification. In addition, standing can be justified in legitimacy terms. If a litigant brings a general grievance she will be denied standing because such problems should be resolved by the political branches. See, e.g., *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2145 (1992) ("Vindicating the public interest . . . is the function of Congress and the Chief Executive.").

Neither the accuracy-based justification nor the legitimacy-based justification for giving less weight to dicta than to holdings is unassailable. In particular, accuracy-based reasons for giving scant precedential weight to dicta are typically rooted in a faith in the adversary process and a corresponding skepticism about judges' capacities in the absence of that process. As Justice Souter recently put it: "Sound judicial decisionmaking requires 'both a vigorous prosecution and a vigorous defense' of the issues in dispute . . . and a . . . rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument."¹⁸ Yet the assumption that truth and justice will emerge after partisan presentations by parties with opposing interests has been questioned by critics of the adversary system.¹⁹ To one schooled in the Continental system, moreover, it might appear that a court is most likely to make true pronouncements when it acts on its own initiative, rather than when it addresses issues that have been framed solely by the interested parties before it.

The legitimacy-based rationale similarly rests on debatable assumptions. Champions of the model of public law litigation²⁰ have argued that the conditions of postindustrial society and the administrative state inevitably call for courts to play an active role in framing the questions for resolution.²¹ In this model, the making of broad pronouncements by courts does not represent a

¹⁸ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2247 (1993) (Souter, J., concurring in part and concurring in the judgment) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978)).

¹⁹ See LOIS G. FORER, *THE DEATH OF THE LAW* 132 (1975) ("The fairness of this sport known as litigation is seldom questioned even though the average civil litigant and the average indigent defendant have about as much chance as the unarmed Christians had in the gladiatorial combats with the lions in the Coliseum of ancient Rome."); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975) (arguing that "our adversary system rates truth too low among the values that institutions of justice are meant to serve"); R. J. Gerber, *Victory vs. Truth: The Adversary System and Its Ethics*, 19 ARIZ. ST. L.J. 3, 4 (1987) ("Seven years on the trial bench yield the conviction that our adversary method . . . is at times a cumbersome giant that, to some, may exalt trickery and victory over ethics and truth."); Harry W. Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957, 962 (1978) (questioning the acceptability of "unbridled partisanship"); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 1 (1984) (discussing the "inability of the American judicial system to adjudicate civil disputes economically and efficiently").

²⁰ See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288-1304 (1976) (describing the emergence of public law litigation, as opposed to the private law theory of civil adjudication).

²¹ See *id.* at 1302.

usurpation of legislative or executive power; it is simply a response to new kinds of cases.

These criticisms are not without force. Nevertheless, both the adversary system and the premise that courts have less authority to prescribe general-purpose rules than do legislatures²² are so firmly rooted in American legal practice as to rank as axiomatic. Therefore, in examining the role of the holding/dictum distinction they can be taken as valid starting points.

If we accept that judicial accuracy and legitimacy will be advanced by discounting dicta more readily than holdings, we are left with a critical definitional question: How do we distinguish between dicta and holdings?

At first blush, this question appears easy to answer. A dictum is a statement which is not "necessary" to the decision in the precedent case.²³ Or, as Chief Justice Marshall put it in *Cohens*, dicta are statements that "go beyond the case."²⁴ The very issue in many disputed cases, however, is precisely how far the earlier case went. What consequences follow from it? The *Cohens* definition of dicta is unilluminating unless we have some independent method for gauging the scope of earlier holdings. But no universal agreement exists as to how to measure the scope of judicial holdings.²⁵ Consequently, neither is there agreement as to how to distinguish between holdings and dicta.

Judges often appear to take for granted that discerning the difference between holding and dictum is a routine, noncontroversial matter. Yet an examination of the kinds of statements that

²² The areas in which the federal courts are authorized to promulgate rules in the absence of a concrete factual dispute are recognized to be limited exceptions to the general proposition. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) (noting that Congress has the power to delegate to the federal courts the authority to make rules); see also *Mistretta v. United States*, 488 U.S. 361, 387 (1989) (noting that certain rule-making powers may be conferred on the judicial branch). For an example of a statute authorizing federal courts to establish rules absent a factual dispute, see 28 U.S.C. §§ 2071-77 (1988 & Supp. IV 1992) (delineating the power of the federal courts to prescribe rules, including rules of evidence and procedure).

²³ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2247 (1993) (Souter, J., concurring in part and concurring in the judgment).

²⁴ 19 U.S. (1 Wheat.) 264, 399 (1821).

²⁵ This does not mean, however, that the decision to read a case narrowly or broadly is arbitrary. See LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 112-17 (1991) (asserting that no case can dictate, on its own terms, the proper level of generality at which it should be read); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1067-68 (1990) (same).

courts label dicta reveals gross inconsistencies. Taking our cue from Molière, we would find a consensus for the judgment that everything that is not holding is dictum and everything that is not dictum is holding,²⁶ but little in the way of a substantive definition of either term.

The failure to define the terms holding and dictum with any precision has serious consequences. It enables courts to avoid the normal requirements of stare decisis. In order to overrule an earlier decision, it is not enough that a court have a present disposition to resolve the question differently. Something more is required. The earlier decision must have been profoundly wrong from the outset,²⁷ overtaken by intervening factual developments,²⁸ or rendered anachronistic by changed legal doctrine,²⁹ or some combination of these factors must hold true.³⁰ Even then, a court may decline to overrule a previous decision if reliance interests have been built upon its foundation.³¹ These principles of stare decisis, if taken seriously, will often mean that a judge who wishes to decide a case for one party will be constrained to rule for the other party. This constraint will routinely operate on the judge, unless she can find some way to render the earlier decision irrelevant. One way to do this is to label the controlling principle from the earlier case dictum.³² Since dicta need not be followed, the controlling legal

²⁶ See JEAN BAPTISTE POQUELIN MOLIÈRE, *Le Bourgeois Gentilhomme*, in 2 OEUVRES COMPLÈTES 709, 730 (Georges Couton ed., 1971) (“*tout ce qui n’est point prose est vers; et tout ce qui n’est point vers est prose*”).

²⁷ See, e.g., *Carbone v. Ursich*, 209 F.2d 178, 183 (9th Cir. 1953) (stating that the earlier ruling was “mistaken”).

²⁸ See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting) (noting that stare decisis cannot be rigidly applied to factual conclusions because factual “conditions may have changed”).

²⁹ See, e.g., *Rodríguez de Quijás v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-81 (1989) (noting changing judicial attitudes toward arbitration); *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 488-89 (1973) (maintaining that judicial attitudes toward the requirement of exhaustion of state court remedies in a habeas corpus action have changed); *Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 322-23 (1972) (discussing evolution of the Court’s perspective on administrative remedies); *Construction & Gen. Laborers Local 438 v. Curry*, 371 U.S. 542, 552 (1963) (implementing new policy concerning hearing of interlocutory appeals).

³⁰ See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808-09 (1992) (listing the factors to be considered when deciding whether to overrule an earlier decision).

³¹ See *id.* at 2809 (citing reliance as one of many reasons for adhering to stare decisis). See also *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) (claiming reliance as rationale for upholding precedent).

³² There are other ways to avoid the apparent force of an earlier determination. See, e.g., *TRIBE & DORF*, *supra* note 25, at 91-96 (discussing the possibility of drawing arbitrary distinctions).

question becomes one of first impression, and the judge is free to rule as she likes. Because the term dictum has no fixed meaning, the ploy often goes unnoticed.

Of course, no legal category can be defined with complete precision.³³ Thus, the fact that some statements could reasonably be characterized as either holding or dictum presents no special problem. One could find such borderline examples for any legal distinction. The holding/dictum distinction suffers from a much more fundamental difficulty than peripheral ambiguity, however. As currently understood, the distinction is almost entirely malleable.³⁴ Consequently, attachment of the label dicta to past statements has been used as a means of avoiding the consequences of all kinds of legal pronouncements.

In order to discern legitimate from illegitimate uses of the holding/dictum distinction, it may be helpful to develop a typology of dicta. I turn now to that task.

B. *Legitimate Dicta*

To understand how the holding/dictum distinction has been used, we might ask a seemingly naive question: Given the limits that the case-or-controversy requirement places on a federal court's ability to make law in the abstract, why would a federal court *ever* make statements in dicta? After all, considerations of judicial restraint counsel that a federal court should not announce a rule broader than necessary to decide the case before it.³⁵ Such a narrow rule necessarily constitutes only holding, leaving no room

³³ See *Springer v. Government of the Phil.*, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting) (noting the impossibility of "mathematical precision" in law); H.L.A. HART, *THE CONCEPT OF LAW* 123 (1961) ("In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide.").

³⁴ Some commentators argue that all important legal categories exhibit complete ambiguity and malleability. See, e.g., Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1, 10 (1984) (discussing "[t]he claim that legal theory is infinitely manipulable"). This Article rejects that perspective, proceeding from the assumption that legal terms can be defined with sufficient definiteness to permit meaningful communication. In other words, I argue that the holding/dictum distinction has been misused, but that it is not, at its core, incoherent. See *infra* part IV.

³⁵ See, e.g., *Whitehouse v. Illinois Cent. R.R.*, 349 U.S. 366, 372-73 (1955) (claiming that judges must confine themselves to "deciding only what is necessary to the disposition of the immediate case"); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (same); *Liverpool, N.Y. & Phila. S.S. Co. v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885) (same).

for dicta. Moreover, as a rule or explanation, it would satisfy the reason-giving requirement implicit in Article III's invocation of the "judicial Power."

Some departures from this minimalist principle constitute deliberate throwaways—that is, statements a judge makes knowing them to have no direct precedential weight, but which she nevertheless hopes will be influential. Such conscious *asides*³⁶ are the paradigmatic instances of dicta.³⁷

Although in some sense a deliberate aside violates the rule against advisory opinions, not all asides are unjustifiable. For example, suppose that a plaintiff challenges an administrative regulation as inconsistent with both the promulgating agency's authorizing statute and the Constitution. Let us suppose further that a majority of the Supreme Court agrees with both the plaintiff's statutory and constitutional arguments. Ordinarily, it would be sufficient to write an opinion invalidating the regulation on statutory grounds without reaching the constitutional question. Nevertheless, it might be appropriate to comment on the constitutional question if, for example, the dissenters opine that both the statutory and constitutional claims lack merit. Under these circumstances, a statement like the following, though obviously dictum, would nonetheless be appropriate: "Although we do not reach respondent's constitutional claim, our silence on this point should not be taken as agreement with the views expressed by the dissent. The issue is at least close, and certainly open."³⁸ This

³⁶ Those who believe that the category *dicta* includes more than just asides sometimes call asides *obiter dicta*. See, e.g., KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* § 10, at 14 (Paul Gewirtz ed. & Michael Ansaldi trans., 1989).

³⁷ An archetypal aside appears in Justice Scalia's opinion for the Court in *California v. Hodari D.*, 111 S. Ct. 1547 (1991). The question presented in that case was whether a person has been "seized" within the meaning of the Fourth Amendment when he is in the process of fleeing from the police. The respondent had begun running upon noticing the police, but the State conceded that this did not provide either probable cause or reasonable suspicion for the police to pursue. See *id.* at 1549 n.1. Although the Court accepted this concession for purposes of deciding the case, Justice Scalia could not resist adding, as an aside: "That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense." *Id.* (citing Proverbs 28:1 ("The wicked flee when no man pursueth.")). To emphasize that this observation was only an aside, however, the Court then noted: "We do not decide that point here, but rely entirely upon the State's concession." *Id.* at 1549.

³⁸ In this context, consider the exchange between Justices Stevens and Kennedy in *Maryland v. Buie*, 494 U.S. 325 (1990). In that case, the Court held that the Fourth Amendment permits the police to conduct a protective sweep in the course of

kind of departure from the minimalist norm does not threaten to breach the case-or-controversy limitation because, by its terms, it does not purport to answer a legal question. Indeed, it does the opposite, because it states that a question remains open.

Asides—justifiable or not—comprise one category of statements commonly labeled dicta. A second category is somewhat more amorphous. It consists of those elaborations of legal principle broader than the narrowest proposition that can decide the case. In other words, sometimes a court will depart from the minimalist principle not merely to clarify a tangential point, but because it wishes to decide the case on broad grounds. Consider *Roe v. Wade*.³⁹ Some commentators, including Justice Ginsburg,⁴⁰ suggest that the Court's announcement in *Roe* of a broad constitutional right to abortion prior to viability was inappropriate because the case could have been decided on narrower grounds.⁴¹ The Texas statute challenged in *Roe* only permitted abortions to save the life of the pregnant woman.⁴² Justice Ginsburg ponders what

arresting a suspect at his home, provided the police have reasonable suspicion that the area to be swept may harbor an individual who poses a danger to the arresting officers. *See id.* at 336-37. Concurring, Justice Stevens asserted that on remand the state's burden of showing that reasonable suspicion was supported by the facts would be a difficult one to meet. *See id.* at 338 (Stevens, J., concurring) (the evidence "suggests that no reasonable suspicion of danger justified the entry into the basement"). Justice Kennedy, also concurring, criticized Justice Stevens for addressing a question that Justice Kennedy thought should be left open. *See id.* at 339 (Kennedy, J., concurring) ("The Court adopts the prudent course of explaining the general rule and permitting the state court to apply it in the first instance. The concurrence by Justice Stevens, however, makes the gratuitous observation that the State has a formidable task on remand."). Although Justice Kennedy apparently would have preferred to say nothing about the matter, he felt obliged to disagree with Justice Stevens, "lest by acquiescence the impression be left that Justice Stevens' views can be interpreted as authoritative guidance for application of [the Court's] ruling to the facts of the case." *Id.* On remand, the Maryland Court of Appeals agreed with Justice Kennedy. *See* Buie v. State, 580 A.2d 167, 170-71 (Md. 1990).

³⁹ 410 U.S. 113 (1973).

⁴⁰ *See* Ruth B. Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992). The publication date of Justice Ginsburg's article is misleading. She originally delivered her observations as a speech, the James Madison Lecture on Constitutional Law at New York University School of Law on March 9, 1993, while she was a judge on the United States Court of Appeals for the District of Columbia Circuit. The edited version that appears in print was completed after Ginsburg's appointment to the United States Supreme Court.

⁴¹ *See id.* at 1199-200. I too have expressed doubts about the wisdom of the Court's announcing a rule that was much broader than necessary to support the result in *Roe*. *See* TRIBE & DORF, *supra* note 25, at 63. On further reflection, however, I now have doubts about my earlier doubts.

⁴² *See Roe*, 410 U.S. at 164.

would have happened if "the Court had stopped there, rightly declaring unconstitutional the most extreme brand of law in the nation, and had not gone on, as the Court did in *Roe*, to fashion a regime that displaced virtually every state law then in force."⁴³ She speculates that "[a] less encompassing *Roe*, one that merely struck down the extreme Texas law and went no further on that day . . . might have served to reduce rather than to fuel controversy."⁴⁴

From this speculation, it is only a small step to Chief Justice Rehnquist's position. In his plurality opinion in *Webster v. Reproductive Health Services*,⁴⁵ the Chief Justice described "the holding of *Roe*" to be "that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause."⁴⁶ According to Chief Justice Rehnquist, the remainder of the opinion in *Roe*, including the Court's rationale for and scope of the right in general, was merely dictum. The narrow principle which suffices to explain the case is that the Texas statute goes too far; thus, whatever else the Court *said*, that is all that the case *held*.

Before considering the question whether this view of the holding/dictum distinction can be supported,⁴⁷ note the critical difference between this category of dictum and the first category, the aside. An aside is considered dictum because it forms no essential part of either the decision reached in the case or the rationale for that decision. Even if we assume that the court takes the opposite position on the issue addressed in the aside, neither the governing standard of law announced nor the outcome in the specific case will be changed.

Under the view espoused by the Chief Justice in *Webster*, however, a statement can be considered dictum so long as it is not

⁴³ Ginsburg, *supra* note 40, at 1199.

⁴⁴ *Id.* Justice Ginsburg suggests that in light of the general trend toward gender equality evident in the early 1970s as well as the liberalization of abortion laws in many states, a decision of "*Roe's* muscularity" may have been unnecessary. *Id.* at 1202; *see also id.* at 1198-209 (contrasting *Roe* to other contemporaneous abortions decisions). A more developed version of this argument appears in MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 42-46 (1987). Yet the evidence that the states would have uniformly guaranteed the abortion right absent judicial intervention is quite thin. *See* LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 42-51 (1990). Moreover, the notion that the Court should not enforce individual rights today because the states might do so tomorrow is constitutionally dubious.

⁴⁵ 492 U.S. 490 (1989).

⁴⁶ *Id.* at 521.

⁴⁷ *See infra* part II for a discussion of this question.

essential to the outcome of the case, even if it appears to be part of the rationale of the case. One can classify a statement as an aside (and therefore dictum) only by reference to the *opinion* in which it appears. By contrast, one may classify a statement as overly broad (and therefore dictum) without reference to the opinion in which it appears, but merely by considering the *facts* and *outcome* of the case in which it appears. Treating the question whether a statement is dictum as a feature of the opinion in which it appears will result in a broader view of holdings than will treating that question as a feature of the facts and outcome of the case in which it appears.

Although an aside comes much closer to violating the rule against advisory opinions than a broad rationale for a case, judges tend to use the term dictum—with its connotation that a statement approaches or perhaps exceeds the legitimate Article III bounds—indiscriminately to refer to both kinds of statements. In order to see this inconsistency in judicial use of the term dictum and its consequences, consider how the United States Supreme Court has treated its own past statements concerning a single recurring question. The question involves the power of Congress to limit the President's ability to fire executive officials, a subject first addressed in *Marbury v. Madison*.⁴⁸

C. *Presidential Removal Power: A Case Study in Revisionist History*

1. *Marbury v. Madison*

Although best known for its establishment of the Supreme Court's authority to declare an act of Congress unconstitutional, the immediate controversy at hand in *Marbury v. Madison* concerned a narrower question: whether the Court could issue a writ of mandamus directing Secretary of State James Madison to deliver William Marbury's sealed commission designating him as a justice of the peace for the District of Columbia. As the first step in his opinion, Chief Justice Marshall sought to establish that Marbury had a vested right to the commission and, therefore, that Madison's withholding of it was unlawful.⁴⁹ In the course of establishing this proposition, the opinion assumes that Congress has the power to limit the authority of the President (or his agents) to fire an official

⁴⁸ 5 U.S. (1 Cranch) 137 (1803).

⁴⁹ See *id.* at 154–62.

appointed by the President. The assumption is set forth expressly in several places in the opinion, including this statement: "as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country."⁵⁰

The *Marbury* Court clearly accepted the view that the President's power to remove an official whom the President appoints can be limited by Congress, at least where the official is a justice of the peace. At the same time, however, the actual result in *Marbury* in no way turned on the Court's view of the President's removal power. Nor was the Court's position on this question in any way essential (or even connected) to the rationale which decided the case. The Court resolved *Marbury* by finding that it lacked jurisdiction to issue a writ of mandamus. Had the Court thought that the President had inherent authority to dismiss Marbury, and had it said so instead of assuming the opposite, neither the result nor the reasoning of the opinion would have been affected. In other words, even if the Court had expressed doubts about Marbury's underlying entitlement to relief, its opinion would still signify that Marbury lost because Congress cannot constitutionally expand the original jurisdiction of the Supreme Court so as to authorize it to issue writs of mandamus.⁵¹ Thus, the *Marbury* Court's statements concerning the President's removal power constitute dicta in the first sense of the term: they are asides.

2. *Parsons v. United States*

Nearly a century after *Marbury* was decided, the Supreme Court called into question its seeming acceptance of the principle of congressional authority to limit the President's removal power.⁵²

⁵⁰ *Id.* at 162. Earlier in the opinion, the Court refers to Marbury as "an officer, not removable at [the President's] will," *id.* at 157, adding that the President, "having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him." *Id.* at 162.

⁵¹ For a useful summary of criticisms of this holding, see William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1.

⁵² The issue came before the Court in the middle of the nineteenth century as well. In *United States v. Guthrie*, 58 U.S. 102 (1855), the Court considered the claim by a former Chief Justice of the Territory of Minnesota that the President had wrongfully removed him from office prior to the completion of his statutory term of four years. *See id.* at 105. The Court held that a writ of mandamus ordering the Secretary of the Treasury to compensate the erstwhile jurist—the relief he had sought in the trial court—was not an appropriate remedy, and so did not address the

In *Parsons v. United States*,⁵³ the Court considered the claim that the President's dismissal of a district attorney whose statutory term of four years had not run was unlawful. The Court did not reach the constitutional question of whether Congress could restrict the President's power to fire a district attorney, holding that the statute under which the appellant held office itself provided for a tenure of four years, subject to the President's right to remove him sooner.⁵⁴

Although the result in *Parsons* rested on statutory grounds, the case was decided under the shadow of constitutional limits. The Court construed the relevant statute as it did in large part because it read the historical record to suggest that Congress itself believed it lacked the constitutional power to constrain the removal power of the President.⁵⁵ Thus, the Court concluded, Congress could not have intended such a constraint in the case before it.

Because the *Parsons* Court relied in part on what it perceived to be the prevailing congressional view of the constitutional question, it also addressed itself to *Marbury*. The Court avoided treating *Marbury* as controlling by labeling its consideration of the removal question dictum. Justice Peckham wrote for the Court:

Whatever has been said by that great magistrate [Chief Justice Marshall] in regard to the meaning and proper construction of the Constitution is entitled to be received with the most profound respect. In [*Marbury*], however, the material point decided was that the court had no jurisdiction over the case as presented.⁵⁶

Note Justice Peckham's ambivalence as to precisely why he considers the *Marbury* Court's view of the removal question dictum. On the one hand, he asserts that the Court's treatment of the removal question was not in any way essential to the "material point decided,"⁵⁷ which he describes very narrowly as holding that "the

government's contention that no statute could constitutionally prevent the President from dismissing a government official who lacks the tenure protection of Article III. *See id.* at 105-06. Justice McLean would have reached the constitutional question and, consistent with the *Marbury* dictum, would have rejected the government's argument that Congress lacks the authority to restrict the President's removal power. *See id.* at 107 (McLean, J., dissenting).

⁵³ 167 U.S. 324 (1897).

⁵⁴ *See id.* at 343.

⁵⁵ *See id.* at 328-35, 337-43.

⁵⁶ *Id.* at 335. The *Parsons* Court also distinguished *Marbury* on the ground that *Marbury* involved an office in the District of Columbia, with respect to which Congress has plenary power, but that the practice had been different with respect to the rest of the nation. *See id.* at 335-36.

⁵⁷ *Id.* at 335.

court had no jurisdiction *over the case as presented*.⁵⁸ In this description, the material point decided does not even appear to include the reason the *Marbury* Court gave for finding no jurisdiction. Under this facts-plus-outcome approach to holdings, the Court could presumably disregard Chief Justice Marshall's explanation of Congress's inability to expand the Court's original jurisdiction without being untrue to the holding of *Marbury*.

On the other hand, Justice Peckham also writes that *Marbury's* establishment of the Supreme Court's power to review the constitutionality of federal statutes is entitled to "the most profound respect."⁵⁹ This language suggests that he considers *Marbury's* establishment of the broad principle of judicial review to be an essential part of the holding of the case, notwithstanding the fact that the case could have produced the same result based on other jurisdictional grounds.⁶⁰ Thus, although the *Marbury* Court's discussion of the removal question would clearly qualify as dictum even under the rationale-based approach to holdings, the *Parsons* Court does not clearly indicate whether this is its reason for treating the *Marbury* Court's view as dictum, or whether it endorses the facts-plus-outcome approach to holdings.

What precedential weight should be given to the view expressed by the *Parsons* Court about the removal power? Or to put the question in more practical terms, how much freedom would the Court have had after *Parsons*, without overruling any of its cases, to find constitutional a congressional limitation on the presidential removal power?

In one sense, the Court's disparagement of the *Marbury* dictum in *Parsons* is itself dictum. Having resolved the case on statutory grounds, nothing the Court said about the constitutional question was part of the holding. On the facts-plus-outcome view, the *Parsons* Court's discussion of the removal power is dictum.

Taking the broader view of holdings, however, the *Parsons* Court's treatment of the constitutional question was much more than a half-baked aside. The constitutional question played an important role in the Court's resolution of the statutory issue, in part because it shed light on congressional intent, but also because

⁵⁸ *Id.* (emphasis added).

⁵⁹ *Id.*

⁶⁰ See Van Alstyne, *supra* note 51, at 30 (arguing that the *Marbury* Court misinterpreted the Judiciary Act of 1789 by reading it to authorize writs of mandamus in cases in which there was no independent basis for jurisdiction).

of the general maxim of statutory construction which states that statutes should be interpreted to avoid raising a constitutional question.⁶¹ Thus, had the Court viewed the constitutional question differently, it certainly would have written a different opinion. It would not have been able to rely on the prevailing constitutional understanding to infer Congress's intent with respect to the statutory removal question. Indeed, the Court might even have reached a different statutory result if it did not fear that to do so might create a constitutional infirmity. This possibility suggests that even under the facts-plus-outcome approach, the Court's treatment of the constitutional removal question does not constitute dictum.

We might therefore conclude that whether we consider the holding/dictum distinction to turn on opinions or whether we think it turns on facts and outcomes, the *Parsons* discussion of the constitutional implications of Congressional limits on the President's removal power is something more than dictum. But is it a holding? Surely it would be odd to say that a Court that expressly decides a case on statutory grounds partly in order to avoid reaching a constitutional question thereby resolves the constitutional question. The *Parsons* discussion appears to be neither dictum nor holding.

Perhaps, then, the statement of the *Parsons* Court regarding the President's removal power illustrates that the holding/dictum distinction oversimplifies matters by substituting a sharp dichotomy for a multidimensional spectrum running from narrow statements closely tied to the facts of the case to completely unrelated speculation. If this were so, we might have to abandon the distinction entirely.⁶² Before resorting to so radical an explanation, however, if we believe the holding/dictum distinction has utility, we may wish to ask whether we can make sense of the *Parsons* view of the removal power within the bounds of existing categories. I suggest that we can.

The *Parsons* Court's view of the removal power defies classification as either dictum or holding not because those categories are

⁶¹ See *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961) (arguing that all reasonable efforts must be made to construe a statute as constitutional); *Hooper v. California*, 155 U.S. 648, 657 (1895) (same). But see *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (stating that constitutional arguments which merely have "some force" are insufficient to trigger the principle that statutes should be construed so as to avoid constitutional questions).

⁶² But see *infra* part IV (arguing that a rationale-focused holding/dictum distinction can be very useful in fostering judicial candor).

inherently unstable, but rather because the *Parsons* Court does not express a view about the removal power itself at all. Instead, the *Parsons* Court addresses two closely related questions: first, it asks what view Congress took of the constitutional removal question, and second, in answering the first question, it asks whether support can be found for a congressional view that Congress lacks the authority to limit the President's removal power.

For comparison, consider the question: "Does the statement *S* express the view *V* as holding or dictum?" If *S* does not express the view *V* at all, then, of course, the question is meaningless. Returning to *Parsons*, we can say that since the *Parsons* Court does not express any view of the removal question, the question whether its view of the removal issue is holding or dictum is meaningless. The *Parsons* Court does, however, express a view as to the following question: Can support be found for the view that Congress lacks the authority to limit the President's removal? The Court gives a clear "yes" as its answer.

What, then, is the character of the Court's "yes"? Is it dictum or holding? Here, the answer depends on the breadth of one's views of holdings. Under the facts-plus-outcome view of holdings, the *Parsons* Court's recitation of authority for the proposition that the President has inherent removal power is dictum because one can readily imagine a different rationale leading to the same result in the case. The Court could have just said that, for reasons having nothing to do with the constitutional issue, the statute's language should be read to permit presidential removal prior to the completion of a statutory term. Thus, on this view, the Court's recitation of the constitutional history was in no way necessary to the decision of the case.

If, on the other hand, we treat the holding/dictum distinction as a feature of opinions, rather than as a feature of facts and outcomes, the Court's constitutional views must be deemed central to the holding of the case. On this view, *Parsons* effectively holds that there is strong, if not irrefutable, support for the position that the President's removal power may not be limited by Congress.⁶³

⁶³ The notion that a court may *hold* that a question is open or that there is strong support for a legal position, is hardly oxymoronic. Federal courts must routinely make such determinations when deciding whether an earlier decision dictated a later one for purposes of determining whether to apply the later decision retroactively. See *Butler v. McKellar*, 494 U.S. 407, 409 (1990) (holding that a rule generally will not be applied retroactively in a federal habeas corpus proceeding "unless the decision was dictated by precedent existing at the time the petitioner's conviction became final")

3. *Myers v. United States*

So matters stood when the Supreme Court next addressed the constitutional removal question in *Myers v. United States*.⁶⁴ Myers had been appointed to the position of first class postmaster by the President and confirmed by the Senate. The statute creating his office provided that his term would last for four years unless the President and the Senate dismissed him. After the President, acting without the concurrence of the Senate, dismissed Myers, Myers sued for his salary, claiming that the President's unilateral action violated his statutory rights. The Court of Claims rejected Myers's claim on timeliness grounds, but the Supreme Court found that Myers had not slept on his rights and proceeded to address the question of whether Congress had the constitutional authority to limit the President's power to remove an executive officer.⁶⁵

Chief Justice Taft's opinion for the Court in *Myers* is sweeping in scope and rationale. Throughout its seventy-one-page opinion, the Court repeatedly treats the case as posing the question whether Congress may limit the President's power to remove an *executive* officer,⁶⁶ barely pausing to consider whether any characteristics of the particular office of first class postmaster bear on the case.⁶⁷

(citing *Penry v. Lynaugh*, 492 U.S. 302 (1989)); *Teague v. Lane*, 489 U.S. 288, 295-96 (1989) (plurality opinion) (same). Courts must also make such determinations when deciding whether to permit recovery against a governmental official claiming qualified immunity who contends that the unlawful character of her conduct was not clearly established at the time it took place. See *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (allowing qualified immunity where action was reasonably believed to be lawful); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (discussing the longstanding tradition of allowing qualified immunity where there is no intentional illegal activity). Again, courts must make such determinations when deciding whether a written representation to the court "is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." FED. R. CIV. P. 11.

⁶⁴ 272 U.S. 52 (1926).

⁶⁵ See *id.* at 106-08.

⁶⁶ See, e.g., *id.* at 106 ("This case presents the question whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate."); *id.* at 109 (discussing "removal of executive officers"); *id.* at 119 (discussing "officers" generally); *id.* at 129 (discussing "removals of all appointed by the President").

⁶⁷ The Court does note that prior to the enactment of the statute in question, the power to appoint postmasters had been exercised not by the President but by the Postmaster General, pursuant to Congress's power to vest the power to appoint "inferior Officers" in the "Heads of Departments." *Myers*, 272 U.S. at 160 (quoting U.S. CONST. art. II, § 2, cl. 2). Even in this passing observation, however, the Court does not concern itself in any way with the duties or functions of a first class

Instead, the Court marshals a variety of arguments to establish the broad proposition that any executive officer appointed by the President with the consent of the Senate must serve at the pleasure of the President. The arguments made by the Court include the following:

1) Under the Articles of Confederation, Congress alone had the power to remove executive officials, but the Constitution gave this power, along with all other executive powers, to the President alone.⁶⁸

2) When the First Congress, whose views on constitutional matters must be given great deference, established the offices of the Department of Foreign Affairs, it rejected a proposal to make officers “removable by the President” so as to avoid the implication that the removal power, which inheres in the President, was granted by Congress.⁶⁹

The Court then approvingly recounts the views of James Madison, including the following arguments:

3) The doctrine of separation of powers requires that the branches remain separate except where the Constitution expressly authorizes one branch to share in the powers of another.⁷⁰

4) The experience under the Articles of Confederation convinced the delegates to the 1787 Constitutional Convention of the need for a strong Executive, as reflected in the fact that the Constitution gives to the President alone the obligation to “take care that the laws be faithfully executed.”⁷¹ Since the President can only execute the laws through subordinates, he must have the power to control his subordinates by dismissing those who do not carry out his wishes.⁷²

5) The Senate’s participation in the appointment process does not imply a Senate role in the removal process, because the requirement of Senate approval of executive officers responded to the Framers’ specific concern that the President might otherwise make too many appointments of citizens of large states, and no

postmaster.

⁶⁸ See *id.* at 110–11.

⁶⁹ *Id.* at 111–14.

⁷⁰ See *id.* at 116–18; see also *id.* at 131 (describing Madison’s fear that if given a check on the President’s removal power, Congress could use it for political purposes to thwart executive policies).

⁷¹ *Id.* at 117 (quoting U.S. CONST. art. II, § 3).

⁷² See *id.* at 116–18.

Senate role in removal is necessary to further this purpose.⁷³

6) When the Senate considers a nominee for confirmation, it is no less qualified to pass judgment on the nominee's fitness for office than is the President, but after the officer has served in his or her office for some period, the President will be more familiar with the officer's performance, and will therefore be in a better position than the Senate (or the House) to decide whether to remove the officer.⁷⁴

Chief Justice Taft also recounts the pre- and post-*Parsons* history of widespread congressional and executive acceptance of the view that the President has sole constitutional removal power,⁷⁵ dismissing disagreements as aberrational.⁷⁶ And, of course, the *Myers* Court considers prior judicial statements concerning the removal question. In dispatching the *Marbury* Court's view of the removal question, the *Myers* Court essentially adopts the same approach as the *Parsons* Court. The Court first notes that the *outcome* of *Marbury* in no way turned on the removal question.⁷⁷ The *Myers* Court goes on to note that, even assuming that the *Marbury* Court's treatment of *Marbury*'s right to his commission may be considered essential to the case, "under the *reasoning* of the opinion" in *Marbury*, nothing turned on whether or not the office *Marbury* held was subject to presidential removal.⁷⁸ In other words, like the *Parsons* Court, the *Myers* Court gives two reasons for its view that the *Marbury* Court's treatment of the removal question is dictum: it was necessary to neither the *outcome* nor the *reasoning*. Again, like the *Parsons* Court, the *Myers* Court does not state whether it views both reasons as necessary conditions.

⁷³ See *id.* at 119–20.

⁷⁴ See *id.* at 121–22.

⁷⁵ See *id.* at 136–71.

⁷⁶ See, e.g., *id.* at 136–38 (observing that although Hamilton had taken the view in THE FEDERALIST NO. 77 (Alexander Hamilton) that the Senate's consent would be required to remove an executive officer who had been confirmed by the Senate, he abandoned that view as Secretary of the Treasury in the Washington administration); *id.* at 175–76 (characterizing Reconstruction Era legislation limiting the President's removal power as the product of "[t]he extremes to which the majority in both Houses carried legislative measures" in the wake of the Civil War, which justifies according legislation of that period less weight than the constitutional views of the First Congress).

⁷⁷ See *id.* at 140 ("The [case] was discharged by the Supreme Court for the reason that the Court had no jurisdiction in such a case to issue a writ for mandamus. The Court had, therefore, nothing before it calling for a judgment upon the merits of the question of issuing the mandamus.").

⁷⁸ *Id.* at 141 (emphasis added).

If the removal question remained open after *Marbury* and *Parsons*, it was settled by *Myers*. *Myers* appeared to establish the firm proposition that any executive official appointed by the President and confirmed by the Senate must serve at the President's pleasure, notwithstanding any legislative limits on removal.

Although one might think that the use of the term "executive" officer in *Myers*⁷⁹ permits room for distinctions among officers who carry out quintessential executive and administrative functions, and other officers whose duties have a different character, the rationale for the decision in *Myers* unequivocally rejects such distinctions. The Court states:

Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officers's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.⁸⁰

The Court categorically rejects what may be termed a *functional* approach—one that turns on the functions the officer performs—to the removal question. Since this rejection follows ineluctably from the *Myers* Court's strict unitary executive theory, the Court's characterization of the scope of the holding of *Myers* in its next major removal case is particularly surprising.

4. *Humphrey's Executor v. United States*

In *Humphrey's Executor v. United States*,⁸¹ the Court addressed a claim made on behalf of the estate of a former member of the Federal Trade Commission (FTC) who had been appointed by President Hoover and dismissed by President Roosevelt before the

⁷⁹ *Id.* at 127, 131-32.

⁸⁰ *Id.* at 135.

⁸¹ 295 U.S. 602 (1935).

expiration of his seven-year term of office. The statute creating the FTC provided that the President could remove a member for "inefficiency, neglect of duty, or malfeasance in office."⁸² Since there was no contention that Humphrey's dismissal fell within these statutory criteria,⁸³ the case appeared to fall directly within the rule set forth in *Myers*: the President has inherent authority to remove an executive official appointed by the President and confirmed by the Senate.

The Court did not, however, follow this course in *Humphrey's Executor*. Instead, treating the question as one of first impression, it described the duties of the FTC and its need for independence from executive control in order for it to carry out Congress's intent that it function as a body of nonpartisan experts.⁸⁴ Of course, in order to treat the question as one of first impression, the Court had to find some way to cabin *Myers*. It relied on the holding/dictum distinction, stating:

[T]he narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved.⁸⁵

Significantly, the *Humphrey's Executor* Court did not claim that the considerations justifying a departure from stare decisis were present; instead, the Court treated the rationale of *Myers* as outside the rule of stare decisis.

⁸² *Id.* at 619 (quoting 15 U.S.C. § 41 (1988)) (internal quotation marks omitted).

⁸³ The government did argue that despite the statute's apparently clear limits on the President's power to remove a Federal Trade Commissioner, he nonetheless retained the authority to dismiss a Commissioner for no reason at all. *See id.* at 621 (citing *Shurtleff v. United States*, 189 U.S. 311 (1903)). In *Shurtleff*, the Court had held that a similar limitation in the statute establishing the office of an appraiser of merchandise was not violated when the President dismissed an appraiser without assigning any reason. *See Shurtleff*, 189 U.S. at 318-19. The statute at issue in *Shurtleff*, however, prescribed no term of office for appraisers, so that a contrary ruling would have given appraisers life tenure. By contrast, as the Court noted in *Humphrey's Executor*, the Federal Trade Commission Act established specific limited terms of office, making the logic of *Shurtleff* inapplicable. *See Humphrey's Executor*, 295 U.S. at 623.

⁸⁴ *See id.* at 623-26.

⁸⁵ *Id.* at 626.

The Court then invoked the familiar *Cohens* principle that dicta are not binding,⁸⁶ and proceeded to set forth a new theory to reconcile the result in *Myers* with sustaining the Federal Trade Commission Act's limitation on the President's removal power. According to the *Humphrey's Executor* Court, limitations on the President's power to remove officials (such as Federal Trade Commissioners) with "quasi-judicial and quasi-legislative"⁸⁷ duties are constitutionally permissible, while limitations on the President's power to remove an "executive officer restricted to the performance of executive functions"⁸⁸ (such as a postmaster) are not. In short, the *Humphrey's Executor* Court adopted the functional approach that the *Myers* Court had expressly rejected.

Whereas in the previous removal cases the Court could justify its departure from the view of the *Marbury* Court on the grounds that the view was essential to neither the outcome nor the reasoning of *Marbury*, the *Humphrey's Executor* Court's treatment of *Myers* can only be justified on the facts-plus-outcome view of holdings: whatever the rationale of *Myers*, its outcome is consistent with the outcome of *Humphrey's Executor*, at least when seen through the lens of the Court's newly minted, albeit previously rejected, theory.

The approach to precedent taken by the *Humphrey's Executor* Court is ultimately self-destructive. For if, as the *Humphrey's Executor* Court says of *Myers*, only the outcome of a case acts as a precedent, then what will prevent a future Court from casting aside the very framework that *Humphrey's Executor* itself erects to explain the outcomes of the relevant cases? As the last in the line of removal cases illustrates, the answer is: nothing.

5. *Morrison v. Olson*

In *Morrison v. Olson*,⁸⁹ the Supreme Court considered a challenge to the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978.⁹⁰ Under certain circumstances, the Act provided for prosecutions by a government official appointed by a court and not directly answerable to the President. Like the Federal Trade Commissioners in *Humphrey's Executor*, an independent counsel appointed pursuant to the Ethics in Govern-

⁸⁶ See *id.* at 627.

⁸⁷ *Id.* at 624.

⁸⁸ *Id.* at 627.

⁸⁹ 487 U.S. 654 (1988).

⁹⁰ 28 U.S.C. §§ 49, 591-93 (1988).

ment Act could only be dismissed by the President, acting through the Attorney General, "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."⁹¹ The Act granted the independent counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice,"⁹² and the Court treated this as a grant of *executive* authority.⁹³ Thus, one might think that the case would fall within the functional category in which the *Humphrey's Executor* Court placed *Myers*: since the prosecution power is executive, one who exercises it, unlike a quasi-legislative or quasi-judicial official, must be removable by the President.⁹⁴ Yet the Court did not follow this course.

In *Morrison*, the Court once again reinvented its removal power jurisprudence, stating:

We undoubtedly did rely on the terms "quasi-legislative" and "quasi-judicial" to distinguish the official[] involved in *Humphrey's Executor* . . . from those in *Myers*, but our present considered view is that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as "purely executive." . . . We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.⁹⁵

⁹¹ 487 U.S. at 663 (quoting 28 U.S.C. § 596(a)(1)) (internal quotation marks omitted); see also *Humphrey's Executor*, 295 U.S. at 602, 622 (observing, in the statutory language, that a Federal Trade Commissioner "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office") (internal quotation marks omitted).

⁹² 487 U.S. at 662 (quoting 28 U.S.C. § 594(a)) (internal quotation marks omitted).

⁹³ See *id.* at 673-77 (considering the question whether the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, forbids vesting the power to appoint an executive official in the judiciary).

⁹⁴ Unlike the officials in *Myers* and *Humphrey's Executor*, the independent counsel was not subject to Senate confirmation. This distinction did not appear to play any significant role in the Court's resolution of the removal question, however. See *id.* at 685-92.

⁹⁵ *Id.* at 689-91 (footnotes omitted).

As easily as the Court adopted the functional approach in *Humphrey's Executor*, so it overthrew that approach in *Morrison*. The Court did not purport to overrule *Humphrey's Executor* or *Myers*, since the *holdings* of those cases relate only to the particular officials and statutes in question.⁹⁶ For the same reason, the Court did not find it necessary to consider the factors that ordinarily govern a departure from *stare decisis*, treating the question as one of first impression.

D. *Lessons of the Removal Cases*

In his impassioned dissent in *Morrison*, Justice Scalia observed of the Court's treatment of the categories set forth in *Humphrey's Executor*: "It is in fact comforting to witness the reality that he who lives by the *ipse dixit* dies by the *ipse dixit*."⁹⁷ The observation is intriguing. At a superficial level, the pejorative use of the phrase *ipse dixit* invokes a criticism of judicial fiat, in which courts make law by broad pronouncement rather than by narrowly deciding the cases before them. But this is hardly what Justice Scalia meant. Rather, he appears to criticize the Court in *Humphrey's Executor* and *Morrison* for saying *too little*.

An *ipse dixit* is a statement that lacks reasoning to support its conclusion but, nevertheless, must be taken as true simply because the court says so.⁹⁸ A court that aspires to give reasons for its decisions will avoid *ipse dixit*. The removal cases clearly demonstrate a correlation between, on the one hand, treating the holding/dictum distinction as a product of facts and outcomes, and on the other, reliance on *ipse dixit*. In order to avoid the result that the *Myers* rationale apparently supports, the *Humphrey's Executor* Court substitutes a different rationale, one consistent with the outcome in *Myers* and the outcome the Court wishes to reach in *Humphrey's Executor*. Similarly, in order to avoid the result that the *Humphrey's*

⁹⁶ See, e.g., *id.* at 690 ("Myers was undoubtedly correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." (quoting *Myers v. United States*, 272 U.S. 52, 132-34 (1926))). One wonders why the office of postmaster is more quintessentially executive than that of prosecutor, or why insulating a postmaster from presidential removal would pose a greater peril to the Union than so insulating a prosecutor. *Morrison* provides no guidance.

⁹⁷ *Id.* at 726 (Scalia, J., dissenting).

⁹⁸ See BLACK'S LAW DICTIONARY 961 (4th ed. 1951) ("He himself said it; a bare assertion resting on the authority of an individual.").

Executor functional approach requires, the *Morrison* Court substitutes yet a new rationale. But whereas the *Humphrey's Executor* Court could rationalize the results in *Myers* and *Humphrey's Executor* with a coherent rule (albeit one that does not keep faith with the opinion in *Myers*), the *Morrison* Court has a more difficult task. Because it must harmonize a larger number of cases, it must choose its general principle carefully so that the principle fits the outcome of each of the cases. It does so tautologically, adopting a wholly empty test: "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."⁹⁹ As Justice Scalia observes, this "ad hoc approach . . . is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law [because] [t]he law is, by definition, precisely what the majority thinks, taking all things into account, it ought to be."¹⁰⁰

Thus, the strategy of avoiding seemingly preordained results by characterizing earlier Court statements as dicta eventually leads to a pointillist view of the law. In *Parsons* and *Myers*, the Court could easily circumvent the views of the *Marbury* Court because those views truly played no part in the outcome of *Marbury*. By the time the Court decided *Humphrey's Executor*, however, it had to deal with an elaborate theory of separation of powers that clearly underlay the decision in *Myers*. In order to salvage the outcome in *Myers* while

⁹⁹ *Morrison*, 487 U.S. at 691. I do not mean to suggest that the Court could not have come up with any principled justification for the result in *Morrison* while remaining faithful to *Humphrey's Executor*. For instance, the Court could have adhered to the functional approach and recognized that criminal prosecution is not, under all circumstances, a quintessentially executive act. Cf. PA. STAT. ANN. tit. 16, § 1409 (1956 & Supp. 1993) (providing authority for judicial appointment of a private prosecutor); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987) (affirming the principle that a disinterested private party may prosecute a criminal contempt action); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993) (upholding the qui tam provisions of the False Claims Act of 1986, which provide a private party a right to bring a civil action on behalf of the government); *United States ex rel. Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1153 (2d Cir. 1993) (same). For an argument that *Morrison* stands only for the correct proposition that prosecution is not a core executive function, see Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function?* *Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069 (1990). For discussions of the removal question in broader contexts, see Stephen L. Carter, Comment, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988) (treating *Morrison* as a departure from originalism in separation of powers); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (discussing the role of independent agencies in the federal government).

¹⁰⁰ *Morrison*, 487 U.S. at 734 (Scalia, J., dissenting).

jettisoning its reasoning, the *Humphrey's Executor* Court had to develop a new theory. As the Court iterates this process over an increasing number of cases, its freedom to develop new theories becomes more constricted. Each additional result presents an additional data point which the theory must fit. Eventually, theory fails. No abstract principle explains all of the outcome-oriented results, except for the very unprincipled principle that they are all decisions of the Supreme Court.

In the removal context, the Court's desire to retain perfect flexibility results in a "rule"—Congress may not impede the President's ability to perform his constitutional duty—that fits all prior outcomes but predicts no future ones. This is inconsistent with the rule of law. As I argue in the next Section, the lawlessness follows ineluctably from an overeager willingness to dismiss as dicta any statements that a court finds unnecessary to its reconstruction of the outcome of an earlier decision.

II. THE HOLDING/DICTUM DISTINCTION AND THE RULE OF LAW

Judicial decision-making would benefit greatly were federal courts to apply a consistent distinction between holding and dictum. In part, clarification would lead to less arbitrary decision-making whatever distinction is adopted. But the choice of a distinction is not merely a matter of clarifying the law. By now, it should come as no surprise that I consider the question whether a particular judicial statement constitutes holding or dictum to be a feature of the opinion in which the statement appears, rather than just the facts and outcome of the case. In this Section, I argue for greater precision in distinguishing dicta from holdings. I then justify a distinction that turns on rationales rather than just facts and outcomes. I argue that basic principles of accountability of Article III judges would be undermined by widespread acceptance of the broad definition of dicta employed by the *Morrison* Court.

A. *The Need for Clarity*

In order to understand fully the problem created by the federal courts' inconsistent treatment of the question of how to distinguish holdings from dicta, it may be useful to shift our focus. Thus far we have considered issues that arise when a court considers its own precedents. Such cases present questions of so-called *horizontal stare*

decisis.¹⁰¹ While the answer to the question of when must a court follow its own precedents may be extremely complex,¹⁰² questions of *vertical stare decisis*,¹⁰³ that is, questions of a lower court's obligation to follow the precedents of a higher court, present fewer difficulties. A lower court must *always* follow a higher court's precedents.¹⁰⁴ By looking to the treatment of dicta in the relatively simpler vertical situation, we may gain some useful insights about the more difficult horizontal case.

For concreteness, consider the position of a federal district court faced with a case that is factually indistinguishable from *Humphrey's Executor*, prior to the Supreme Court's decision in that case.¹⁰⁵ Would that court have been required to treat as binding the *Myers* Court's pronouncements regarding the test for determining whether a particular official must serve at the President's pleasure? If so, then it would have been obligated to reject the functional argument that a Federal Trade Commissioner is less "executive" than a first class postmaster, since the *Myers* Court expressly rejected that argument. But what if the trial court were

¹⁰¹ See Mark A. Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 436-37, 437 n.89 (1992) (noting that horizontal stare decisis "describes the obligation of a court to follow its own prior decisions").

¹⁰² See, e.g., C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 42 (1990) (arguing in favor of the use of anticipatory overruling by the lower courts); Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENTARY 67, 67 (1993) (analyzing conservative approaches to precedent in abortion cases); Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on Planned Parenthood of Southeastern Pennsylvania v. Casey*, 68 NOTRE DAME L. REV. 11, 11 (1992) (discussing the proper role of precedent in the abortion context).

¹⁰³ See Thurmon, *supra* note 101, at 436-37, 437 n.89.

¹⁰⁴ A lower court will occasionally hold that a decision of a higher court has been effectively overruled sub silentio by subsequent decisions of that same higher court. See, e.g., *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1200 (9th Cir. 1989) (agreeing with the Seventh Circuit that the permissibility of group libel claims by the Supreme Court has been substantially weakened by subsequent rulings). That is quite different, however, from ignoring a higher court's decision simply because the lower court believes the decision *ought* to be overruled. *But cf. Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (in the course of affirming a lower court ruling that a line of Supreme Court precedent was obsolete, the Court admonished the lower courts for not respecting the sole right of the Supreme Court to deliver the finishing blow).

¹⁰⁵ In the real *Humphrey's Executor*, the suit was filed in the Court of Claims, but that court did not address the constitutional issue, certifying it to the Supreme Court instead. See *Humphrey's Executor v. United States*, 295 U.S. 602, 618 (1935).

to view that portion of the *Myers* opinion as merely dicta, as the Supreme Court itself ultimately did in *Humphrey's Executor*? Would the trial court then be free to ignore the *Myers* Court's rejection of a functional approach? The cases give conflicting answers.

Some lower courts do not view themselves as bound by a higher court's dicta,¹⁰⁶ while others take the position that all considered statements of a higher court are binding.¹⁰⁷ Each view has some merit. Since the higher court itself would not be bound to follow its own dicta, the lower court may reasonably assume that it has no greater obligation. On the other hand, the lower court might view the higher court's dicta as a fairly reliable prediction of what the higher court would do if it actually had to decide the question previously addressed only in dictum. Because the higher court can reverse the lower court for the latter's failure to predict the former's legal views, the prudent lower court may choose to follow dicta as a way to avoid being overruled.¹⁰⁸

Despite the apparent differences between the horizontal and vertical cases, they pose quite similar problems. How much precedential weight a high court's statement carries when announced should not vary depending on whether the question is posed to the high court itself or to a lower court. Although higher courts and lower courts differ in their ability to weaken or overrule a precedent, they do not differ in their ability to understand a precedent.

¹⁰⁶ See, e.g., *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) (examining the difference between holding and dictum and concluding that "dictum is not authoritative"); *United States v. 5.935 Acres of Land*, 752 F. Supp. 359, 362 (D. Haw. 1990) (finding that the higher court's earlier statement was dictum and therefore not binding); *In re Benassi*, 72 B.R. 44, 48 (Bankr. D. Minn. 1987) (noting that "this Court is not obligated to follow what it perceives to be dicta").

¹⁰⁷ See, e.g., *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120 n.8 (7th Cir. 1989) (noting that "[t]his court should respect considered Supreme Court dicta"); *In re Bremer*, 104 B.R. 999, 1005 (Bankr. W.D. Mo. 1989) (noting that "lower courts should give great weight to statements made by the Court of Appeals in their circuit, even though the statements were dicta"); *Lewis v. Sava*, 602 F. Supp. 571, 573 (S.D.N.Y. 1984) (arguing that even if Supreme Court analysis is dicta, the court is obliged to follow it in the absence of clear authority to the contrary); *Max M. v. Thompson*, 585 F. Supp. 317, 324 (N.D. Ill. 1984) ("In the absence of a controlling Supreme Court ruling, a federal district court is required to give great weight to the pronouncements of its Court of Appeals, even though those pronouncements appear by way of dictum.").

¹⁰⁸ This justification for following a higher court's dicta might fail if the personnel of the higher court have changed between the time of the original pronouncement and the decision of the later case.

Lower courts' confusion about how to treat higher courts' dicta may result from all courts' confusion about exactly what constitute dicta. When a court honestly treats its own prior statements as dicta, it does not, after all, overrule any cases. It merely declares what the law is. In such a situation, the court acts no differently from a lower court, for lower courts too must declare what the law is. If the distinction between holding and dictum were clearly demarcated, lower courts might not hesitate to ignore higher courts' dicta.¹⁰⁹ Because the distinction has not been so demarcated, however, declaring a prior statement dictum is quite similar to overruling a previously established legal principle.

Thus, a lower court judge may experience cognitive dissonance when faced with an argument that a higher court's statement is dictum. In one sense, the lower court judge is asked only to say what the law is (or, more precisely, what it is not). This she may freely do. Yet the judge recognizes that in another sense she is being asked to overrule a principle of law established by a higher court, which she lacks the power to do. This tension may underlie the disagreement about whether a lower court must follow a higher court's dicta.

Of course, lower courts do not constitute the only interpreters of judicial opinions. Primary actors such as private citizens, corporations, and government entities must conform their conduct to law as well. If dicta do not constitute the law, primary actors may choose to ignore them. True, the prudent lawyer will advise her client to pay attention to dicta as a means of predicting what a court will do in a later case. But then, the prudent lawyer might also look to the extra-judicial articles, speeches, and other musings of judges as a means of predicting how they will vote in a given case. That enterprise is quite distinct from advising a client what the law is.¹¹⁰

¹⁰⁹ A lower court is, of course, always free to treat a higher court's dicta as persuasive authority.

¹¹⁰ Positivists or realists might object that the law *is*, by definition, whatever the highest court to hear the case ultimately *says it is*, relegating my distinction between predicting and ascertaining the law to the category of metaphysical nonsense. See Oliver W. Holmes, *The Path of the Law*, in COLLECTED PAPERS 173 (1920) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."); Max Radin, *Case Law and Stare Decisis: Concerning Prajudizienrecht in Amerika*, 33 COLUM. L. REV. 199, 211 (1933) ("[L]aw . . . is a conjecture of what a court would do."); cf. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified."). I acknowledge that the distinction is metaphysical but deny that it is nonsense. In any

A large part of the problem faced by lower court judges and practicing lawyers stems purely from their uncertainty in distinguishing between holdings and dicta. As economists note, in many contexts, a *clear* rule, whatever its content, is preferable to an ambiguous standard.¹¹¹ Indeed, the fact that courts sometimes treat the distinction between dictum and holding as turning on outcomes and other times treat it as turning on rationales does create a predictability problem. Which viewpoint should we choose?

Perhaps the reliance interests underlying the principle of stare decisis hold the key. As the Supreme Court has recently emphasized in a wide variety of contexts, reliance interests often tip the balance in favor of retaining a rule of law that might otherwise be overturned.¹¹² Private citizens, legislators, government agents, judges, and others making decisions and ordering their affairs rely on the knowledge that their actions will have predictable legal consequences. But, no less than they rely on outcomes of cases, these actors may rely on rationales. Thus, one could argue, reliance interests counsel in favor of a rationale-oriented distinction.

Yet the reliance argument here, as in other contexts, is circular.¹¹³ If it were definitively established that courts would treat only the facts and outcomes of cases as establishing precedents, then no one could reasonably rely on judicial rationales. In short, reliance interests underscore the need for a clear holding/dictum distinction, but they do not indicate where the clear line ought to be drawn. Nonetheless, the selection of a criterion to distinguish between holding and dictum is not a matter of indifference. As I argue below, independent reasons exist to reject the narrow outcome-driven view of holdings.

event, the realist attitude toward law, however helpful to lawyers, provides little guidance to the conscientious judge who must decide what the law is.

¹¹¹ See, e.g., Herbert Hovenkamp, *Marginal Utility and the Coase Theorem*, 75 CORNELL L. REV. 783, 787 (1990) (arguing that the Coase Theorem should be "stated as a theorem . . . rather than an empirical proposition"). See generally RONALD H. COASE, *THE FIRM, THE MARKET AND THE LAW* 95-185 (1988).

¹¹² See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2809 (1992) (evaluating the significant social benefits and reliance that *Roe v. Wade* created among the American public); *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1915 (1992) (noting that stare decisis "counsels [the Court] not lightly to set aside specific guidance" that has been previously articulated); *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991) (pointing out the benefits of stare decisis, while declining to follow precedent where governing decisions are "unworkable" or "badly reasoned").

¹¹³ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 608 (2d ed. 1988) (discussing the circularity inherent in defining property rights in terms of expectations).

B. *Judicial Accountability as a Function of Judicial Rationality*

By the deliberate design of Article III, federal judges cannot be held accountable to political pressures. While an independent judiciary may be essential to protecting unpopular minorities and civil liberties, it does not come without costs. The very independence which safeguards against majority tyranny and other arbitrary exercises of power may itself be abused by judges who simply wish to find their own individual views implicit in all legal texts.¹¹⁴

Legal and judicial culture play a critical role in checking abuses of the judge's countermajoritarian power.¹¹⁵ Central to that culture is the notion that any judicial decision must be justified by the giving of reasons.¹¹⁶ A justice who refuses to explain her decisions might not thereby commit an impeachable offense, but she would lose the respect of the legal community, which, in the long run, would undermine her ability to translate her views into law.¹¹⁷ For the judiciary, giving reasons justifies the exercise of governmental authority, much as elections justify its exercise by the political branches.

Viewed from this perspective, the reasons a court gives for a decision constitute a critical part of the decision itself, just as a legislative body's representation of the people it governs is critical to assessing the legitimacy of the laws it enacts.¹¹⁸ When a court

¹¹⁴ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting) (noting that substantive due process "was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation").

¹¹⁵ See LLEWELLYN, *supra* note 36, § 55, at 77-78 (discussing how a judge is constrained in her decision-making by her membership in society and her legal training).

¹¹⁶ See Bandes, *supra* note 17, at 277-79 (discussing the interrelatedness of the courts' case-deciding and norm-articulating roles); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) ("A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power.") (footnote omitted).

¹¹⁷ For an argument that precisely this phenomenon occurred in modern times, see BERNARD WOLFMAN ET AL., *DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES* 137-38 (1975).

¹¹⁸ Cf. Neil MacCormick, *Why Cases Have Rationales and What These Are*, in *PRECEDENT IN LAW* 155 (Laurence Goldstein ed., 1987). MacCormick asserts:

To make the point that the judicial opinion which sets or constitutes a precedent is a judge's opinion *considered as stating a justification of a decision* matters a great deal. For it is as *justificatory* reasoning that judicial opinions are normative, and it is only as being normative that they can go toward the construction of normative law.

discards the reasoning of a prior opinion as *merely dictum*, unless it suggests an alternative basis for the outcome of the precedent case, it essentially relegates the prior decision to the position of an unjustifiable, arbitrary exercise of judicial power. This, as I argued above, fairly characterizes the *Morrison* Court's treatment of *Myers* and *Humphrey's Executor*.¹¹⁹

Generally, however, in describing the reason given for an earlier decision as dictum, courts will *replace* the original reasoning with a new set of reasons. Thus, for example, the *Humphrey's Executor* Court substituted the functional approach for the strict separation-of-powers view of *Myers*.¹²⁰ Although a less bold assertion of power than the move typified by *Morrison*, even such recharacterization represents a serious challenge to the norm of judicial reason-giving, as a familiar example will illustrate.

Let us return to the views expressed by Justice Ginsburg and Chief Justice Rehnquist about *Roe v. Wade*. Recall Ginsburg suggested that a sounder course than announcing a broad right to abortion in *Roe* would have been to strike down the Texas statute as draconian without spelling out exactly how much latitude the states have to regulate abortion.¹²¹ Of course, even if it had left the precise contours of the right undefined, the *Roe* Court would nevertheless have been obligated to give some indication of why the Texas statute went too far. Although not discussed by Justice Ginsburg, a narrow principle suggests itself. The Texas statute at issue in *Roe* contained no provision for abortions in cases in which the pregnancy was the result of rape or incest.¹²² Assuming that in 1973 a majority of Justices believed that whatever else a statute regulating abortion may contain, it must also include a rape exemption, would not the restrained¹²³ course have been to invalidate the Texas statute on this narrower ground, leaving for

Id.

¹¹⁹ See *supra* part I.C.5.

¹²⁰ See *supra* part I.C.4.

¹²¹ See *supra* note 41 and accompanying text.

¹²² See *Roe v. Wade*, 410 U.S. 113, 164 (1973).

¹²³ I use the term "restrained" here to mean a judicial attitude favoring piecemeal development of the law. The term is sometimes used to refer to an attitude of reluctance to recognize previously unrecognized rights. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7 (1971) (describing "judicial restraint" as the tactic of "stating a principle so narrowly that no embarrassment need arise in applying it to all cases it subsumes"). See generally Peter M. Shane, *Rights, Remedies and Restraint*, 64 CHI.-KENT L. REV. 531 (1988) (analyzing various rhetorical uses of the phrase "judicial restraint").

another day the outer limits of the abortion right?¹²⁴ Would a narrower ruling in *Roe*, one based on this or some other specific defect,¹²⁵ have been unassailable?

This question assumes that deciding the case on the basis of the missing rape exemption would in fact have been a *narrower* basis for decision, rather than merely a *different* basis. Although a majority of the Justices may have believed that denying a woman the right to choose to have an abortion when she has been raped is a particularly egregious violation of the abortion right, the fact that a pregnancy is a result of rape is *constitutionally* irrelevant under *Roe*. A woman has a constitutional right to an abortion before viability whether or not the pregnancy results from rape,¹²⁶ and the state may prohibit postviability abortions regardless of whether the pregnancy results from rape.¹²⁷

Faced with the facts and statute before it in *Roe*, the Court had to decide whether to: (1) focus on the absence of a rape exemption and remain silent about the stage of pregnancy, or (2) focus on the stage of pregnancy and remain silent about the reason for the pregnancy. These are certainly different options, but it hardly follows that option one is narrower than option two. Indeed, given that the Court apparently believed the cause of pregnancy to be

¹²⁴ Cf. Ginsburg, *supra* note 40, at 1199 (suggesting that *Roe* could have declared Texas's statute unconstitutional on narrow grounds rather than delivering a sweeping "set of rules that displaced virtually every state law then in force").

¹²⁵ In one sense, relying on a specific defect of the Texas statute that was not implicated by petitioner's circumstances would have been a *broader* ground for decision, since a ruling of unconstitutional overbreadth has more far-reaching consequences than a ruling that a law is unconstitutional as applied to a particular litigant. As I have noted elsewhere, however, the actual decision in *Roe* employed overbreadth analysis, so that reliance on a more specific defect would only have substituted one overbreadth rationale for another. See Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 272-73 (1994).

¹²⁶ See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806 (1992) (equating the complete denial of abortion rights with state permission of abortions only "in those rare circumstances in which the pregnancy is itself a danger to [the woman's] own life or health, or is the result of *rape* or incest") (emphasis added); *id.* at 2821 ("Regardless of whether exceptions are made for particular circumstances [such as rape], a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.").

¹²⁷ Although nowhere expressly announced by the Supreme Court, this principle appears to follow from the rationale the *Casey* plurality gives for adhering to the viability line. Apart from considerations of *stare decisis*, the plurality points to the fetus's capacity for independent existence and the inference "that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." *Id.* at 2817. Neither of these considerations (nor *stare decisis*) turns in any way on whether pregnancy resulted from a consensual act or rape.

largely irrelevant, to have based the decision in *Roe* on the fact that the Texas law lacked a rape exemption would have been to give the *wrong reason* for the ruling.

Still, there were narrower options available in *Roe*. The Court might have said that where a pregnancy has been caused by rape *and* is in its early stages, the State may not prohibit abortions. But, of course, any judicial opinion may be criticized in this manner; the critic points to some fact in the record that the court deems irrelevant and argues that this fact should be considered a crucial part of the holding. The process, if carried to its logical conclusion, requires that every fact of the case be denominated part of the holding.¹²⁸

Chief Justice Rehnquist appeared to go nearly this far in his plurality opinion in *Webster v. Reproductive Health Services*,¹²⁹ where he described "the holding of *Roe*" to be "that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause,"¹³⁰ deliberately omitting from this description the *Roe* Court's rationale for and scope of the right.

Surely, the Chief Justice's distinction between the holding and dictum of *Roe* overextended the principle that a federal court should not announce a rule broader than necessary to decide the case before it. For the law to consist of more than an arbitrary collection of facts and outcomes, judges must be permitted to distinguish between what they deem relevant and what they deem irrelevant.¹³¹ Thus, far from exhibiting a callous disregard for the

¹²⁸ For the *reductio ad absurdum* of this approach, consider the Court's remarkable statement of its holding in *Escobedo v. Illinois*, 378 U.S. 478 (1964):

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

Id. at 490-91 (quoting *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963)) (citation omitted). Why not just append the complete record in the case to the statement, "We hold that petitioner wins"?

¹²⁹ 492 U.S. 490 (1989).

¹³⁰ *Id.* at 521.

¹³¹ See TRIBE & DORF, *supra* note 25, at 114 ("[L]aw must proceed from the

case-or-controversy requirement, a judicial opinion that focuses on some facts while ignoring others fulfills the requirement of any precedent-based legal system that judges give principled justifications for their decisions.

None of this should be taken to mean that principles of restraint play no proper role in limiting the scope of a holding. Often, for example, a court will face a case that can readily be resolved under a well-established principle of law. Nonetheless, the court goes out of its way to renounce the governing principle and announce a new one, even though the outcome of the case would be the same under the old principle. Although often justifiable,¹³² such a practice

assumption that judges can tell the difference between the essential and the trivial in reading and applying prior decisions. Otherwise, there would be no such thing as precedent, and indeed no such thing as law.”).

Justice Scalia leveled a similar criticism at the portion of the joint opinion in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), which announced and applied the “undue burden” test. According to Justice Scalia:

[T]he approach of the joint opinion is, for the most part, simply to highlight certain facts in the record that apparently strike the three Justices as particularly significant in establishing (or refuting) the existence of an undue burden; after describing these facts, the opinion then simply announces that the provision either does or does not impose a “substantial obstacle” or an “undue burden.” We do not know whether the same conclusions could have been reached on a different record, or in what respects the record would have had to differ before an opposite conclusion would have been appropriate. The inherently standardless nature of this inquiry invites the district judge to give effect to his personal preferences about abortion.

Id. at 2880 (Scalia, J., concurring in the judgment in part and dissenting in part) (citation omitted).

¹³² Given the Court’s substantive views, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), provides an example of a justifiable decision to go beyond the preexisting law. In *Wards Cove*, the Court reversed a federal appeals court’s finding that plaintiffs had proven a violation of Title VII by showing (a) a disparity between the minority population in defendant’s cannery and the minority population in the general local population, where (b) the defendant had failed to show that the disparity was necessary to its business. *See id.* at 650.

The Court held that the appeals court erred by comparing defendant’s nonwhite workforce with the general nonwhite population rather than with the pool of qualified applicants in the general population. *See id.* at 653. That the appeals court had erred in this respect was quite clear under the pre-*Wards Cove* law, *see Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308-09 & n.13 (1977), and it would have been sufficient to resolve the case for the Supreme Court to point this out. The Court went on to hold, however, that it disagreed with the court of appeals in a second respect. The Court stated that once a Title VII plaintiff establishes a prima facie case of disparate impact, the defendant bears only the burden of producing evidence that its selection methods are job-related, rather than the burden of proving them necessary, *Wards Cove*, 490 U.S. at 658-59, a rather marked departure from the prior

may legitimately be criticized as inconsistent with case-or-controversy norms.

The fact that a court may be criticized for deciding more than it needed to decide in a given case does not mean, however, that it did not actually decide what it did. For example, in *Illinois v. Gates*,¹³³ the Court abandoned its two-pronged approach to the question of whether an informant's tip to a police officer constitutes probable cause under the Fourth Amendment. Under that approach, probable cause would only be found if there was evidence establishing that the informant was both credible and had a reliable basis of knowledge.¹³⁴ In *Gates*, the Court replaced these requirements with a "totality of the circumstances" test, under which the informant's credibility and basis of knowledge remain important factors, but neither is essential.¹³⁵ Concurring in the judgment, Justice White complained that the Court's abandonment of the old two-part test was particularly inappropriate because under the facts of *Gates*, the test was met.¹³⁶ One might agree with Justice White that the majority in *Gates* addressed a question it did not have to resolve. Yet it would be a gross misreading of *Gates* to term its entire discussion of the totality of the circumstances test dictum. As in *Roe*, so in *Gates*, a different rationale for the decision reached by the Court may have been plausible, but that does not change the actual rationale of the case.

Still, so long as the substituted rationale makes sense, what is wrong with reconceptualizing a prior decision? We might grant that

law as most courts and commentators had understood it. See, e.g., Mack A. Player, *Is Griggs Dead? Reflecting (Fearfully) on Wards Cove Packing Co. v. Atonio*, 17 FLA. ST. U. L. REV. 1, 10-11 & n.39 (noting that prior to *Wards Cove*, every circuit court understood *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), to mean that a prima facie case shifted the *persuasion* burden to the employer).

Arguably, the Court reached out unnecessarily to decide the second question in *Wards Cove*. Had the lower courts decided on remand that no prima facie case could be made under the appropriate standard, the question of the employer's burden would have dropped out of the case. Still, there was a substantial likelihood that a prima facie case would be found, and given this, judicial economy was no doubt best served by the Court's setting forth (what it viewed as) the appropriate standard to be applied at that point, rather than invite the lower court to apply a standard which would then have to be overruled for a further remand.

¹³³ 462 U.S. 213 (1983).

¹³⁴ See *Aguilar v. Texas*, 378 U.S. 108, 114 (1964) (requiring that a magistrate be informed about the basis on which a police officer concluded that an informant was credible and his information reliable); see also *Spinelli v. United States*, 393 U.S. 410, 413 (1969) (applying *Aguilar's* "credible and reliable" test).

¹³⁵ *Gates*, 462 U.S. at 230-31 & n.6.

¹³⁶ See *id.* at 272 (White J., concurring).

the failure to offer a plausible new rationale for the prior decisions renders the new decision illegitimate, but surely the same cannot be said for a decision that harmonizes the prior outcomes based on a sound, albeit new, theory. Or, to put the matter more concretely, *Morrison's* failure to articulate a coherent rationale for the prior removal decisions may be illegitimate, but the same cannot be said of the functionalist theory adopted in *Humphrey's Executor*.¹³⁷ If judicial reasoning justifies judicial power, why should we care that a court adopts a different reason for following a prior decision from the one articulated in that decision, so long as the new reason is sound?

Indeed, as Oliver Wendell Holmes discerned, the common law evolves through a process of rerationalization.¹³⁸ As the original basis for a legal rule ceases to operate or is forgotten, a new basis arises, and then takes on a life of its own.¹³⁹ For example, Learned Hand looked at the rules of liability developed over centuries in response to a wide variety of contingent historical circumstances, and reconceptualized these rules as flowing out of an implicit cost-benefit analysis.¹⁴⁰ That reconceptualization then took on a life of its own, and is now routinely invoked to decide cases.¹⁴¹ Seen against this backdrop, *Humphrey's Executor* employs a time-tested jurisprudential method.

While there is much to recommend Holmes's analysis, reconceptualization has its limits. Although it has been argued that common

¹³⁷ 295 U.S. 602 (1935); see also *supra* part 1.C.4 (discussing *Humphrey's Executor*). But see *Morrison v. Olson*, 487 U.S. 654, 725 (1988) (Scalia, J., dissenting) (criticizing the artificiality of the line between "purely executive" functions and "quasi-legislative" or "quasi-judicial" functions" (quoting *Bowsher v. Synar*, 478 U.S. 714, 761 n.3 (1986) (White, J., dissenting))); *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting) (criticizing use of "quasi" as a "smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed").

¹³⁸ See OLIVER W. HOLMES, *THE COMMON LAW* 5 (1881).

¹³⁹ See *id.*

¹⁴⁰ See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (explaining that "if the probability be called *P*; the injury, *L*; and the burden of adequate precautions, *B*; liability depends upon whether *B* is less than *L* multiplied by *P*"); see also *Gunnarson v. Robert Jacob, Inc.*, 94 F.2d 170, 172 (2d Cir. 1938) ("[L]iability depends upon an equation in which the gravity of the harm . . . multiplied into the chance of its occurrence, must be weighed against the expense, inconvenience and loss of providing against it.").

¹⁴¹ See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 31, at 171 (5th ed. 1984) ("Against this probability, and gravity, of the risk, must be balanced in every case the utility of the type of conduct in question."); *RESTATEMENT (SECOND) OF TORTS* §§ 291-93 (1977) (discussing the method of valuing unreasonableness, risk, and utility of conduct).

law courts are never bound by the words used by earlier courts but only by the outcome on the facts,¹⁴² this view is ultimately incoherent, "because every material fact in a case can be stated at different levels of generality, each level of generality will tend to yield a different rule, and no mechanical rules can be devised to determine the level of generality intended by the precedent court."¹⁴³ In any

¹⁴² See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2 (1949). Levi writes that the common law judge

is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important. It is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification.

Id. (citation omitted); see also Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 162 (1930) [hereinafter, Goodhart, *Determining the Ratio Decidendi*] ("The reason which the judge gives for his decision is never the binding part of the precedent"); Arthur L. Goodhart, *The Ratio Decidendi of a Case*, 22 MOD. L. REV. 117, 119 (1959) [hereinafter Goodhart, *Ratio Decidendi*] (responding to criticism of his earlier *Determining the Ratio Decidendi* article by emphasizing his position that "[i]t is by his choice of the material facts that the judge creates law"); Radin, *supra* note 110, at 210 ("It is the decision itself which must be followed and not the opinion").

¹⁴³ MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 53 (1988) (giving credit for this observation to Julius Stone, *The Ratio of the Ratio Decidendi*, 22 MOD. L. REV. 597 (1959)). Goodhart, the target of Stone's critique, was at least partially aware of the problem of identifying the proper facts in the precedent case. He attempted to solve it by positing that a nonprecedent court must accept the precedent court's selection of the relevant facts. See Goodhart, *Determining the Ratio Decidendi*, *supra* note 142, at 169. The mechanical method Goodhart endorses for determining the relevant facts does not, however, solve the level of generality problem. See *id.* at 182-83; cf. TRIBE & DORF, *supra* note 25, at 73 ("The selection of a level of generality will necessarily involve value choices.").

Professor Larry Alexander has noted that despite its incoherence, the facts-plus-outcome approach to precedent continues to be widely understood as typifying common law reasoning. See Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 28-29 (1989) (critiquing what he calls the "result model of precedent," while recognizing its acceptance among "such otherwise jurisprudentially diverse types as Edward Levi, Steve Burton, Brian Simpson, Joseph Raz, and perhaps Ronald Dworkin" (citing STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 27-40, 59-64 (1983); RONALD DWORIN, LAW'S EMPIRE 240-50 (1986); RONALD DWORIN, TAKING RIGHTS SERIOUSLY 110-15 (1977); LEVI, *supra* note 142, at 1-27; JOSEPH RAZ, THE AUTHORITY OF LAW 183-89 (1979); A.W.B. Simpson, *The Common Law and Legal Theory*, in 2 OXFORD ESSAYS IN JURISPRUDENCE 77, 87-88 (A.W.B. Simpson ed., 1972); A.W.B. Simpson, *The Ratio Decidendi of a Case and the Doctrine of Binding Precedent*, in 1 OXFORD ESSAYS IN JURISPRUDENCE 148, 164-75 (A.G. Guest ed., 1961))); see also Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, in PRECEDENT IN LAW, *supra* note 118, at 185 (describing "the well-established practice of discounting whole portions of stated holdings as 'dicta'");

event, whatever legal theorists believe, the courts do not accept the facts-plus-outcome view of holdings:¹⁴⁴ when they are not busy circumventing precedent by abusing the holding/dictum distinction, judges typically pay a great deal of attention to the words as well as the results of judicial decisions.¹⁴⁵

Furthermore, the reconceptualizations Holmes describes operate at the level of metarules rather than first-order legal rules. Judge Hand does not say: "This case, decided under a negligence standard, would come out the same way under a strict liability standard, and therefore I may account for it as a strict liability case." Instead, the common law enterprise of reconceptualization proceeds

Linda Meyer, "Nothing We Say Matters": Teague and New Rules, 61 U. CHI. L. REV. 423, 459-76 (1994) (describing the common law method as one which pays attention only to facts and outcomes, and contrasting this method to that of positivism, which purportedly cannot distinguish between holding and dictum at all because all statements of a court are, ipso facto, authoritative, in the course of an otherwise elegant and insightful critique of the Supreme Court's approach to the question of retroactive application of "new rules" in habeas corpus cases); Henry P. Monaghan, *Taking Supreme Court Opinions Seriously* 39 MD. L. REV. 1, 5-6 (1979) (attributing the facts-plus-outcome approach to the professorial habit of rereationalizing cases and to a modern Zeitgeist in which the notion of permanent truth is anathema); cf. Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1045 (1990) (suggesting that the phenomenon Monaghan laments has been ongoing for at least three centuries).

¹⁴⁴ Professor Alexander demonstrates that the facts-plus-outcome view of precedent is incoherent. See Alexander, *supra* note 143, at 28-34. It is not clear, however, that this is a sufficient reason for academic commentators to ignore it. If the courts routinely applied (or tried to apply) the facts-plus-outcome approach, then it would remain a fit topic for academic discourse, notwithstanding its incoherence. We would have to muddle through as best we could. Cf. TRIBE & DORF, *supra* note 25 at 70-71 (arguing that despite the powerful realist critique of a presocial conception of private property, the Fifth Amendment's Takings Clause presupposes such a notion, and that interpreters of the Constitution must therefore accept this starting point). In the present context, the important point is that the courts do not ordinarily employ the facts-plus-outcome approach to precedent.

¹⁴⁵ See *County of Allegheny v. ACLU (Greater Pittsburgh Chapter)*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("As a general rule, the principle of stare decisis directs us to adhere not only to the holdings, [that is, outcomes] of our prior cases, but also to their explications of the governing rules of law."). The fact that individual judges so frequently write separate concurrences and concurrences in the judgment confirms the importance they attach to the stated rationales of cases. Indeed, some of the most fiery exchanges between Justices on the Supreme Court in recent memory were occasioned by cases in which the Justices unanimously agreed upon the outcome. See, e.g., *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2550 (1992) ("I agree with the majority that the judgment of the Minnesota Supreme Court should be reversed. However, our agreement ends there.") (White, J., concurring in the judgment); *Burnham v. Superior Court*, 495 U.S. 604, 629 (1990) (Brennan, J., concurring in the judgment) (disputing Justice Scalia's reliance on "pedigree" and "history," and stating "I therefore concur only in the judgment").

at the level of theory supporting legal rules, not legal rules themselves. The common law permits judges to seek a new justification for a negligence standard without purporting to overrule past cases; it does not contemplate wholesale changes in the governing standard used to decide concrete cases. To return to the removal context, applying the Holmesian method of the common law, after *Myers*¹⁴⁶ it would be acceptable for the Court to suggest a new justification for the principle that an executive official must serve at the pleasure of the President; however, the Holmesian method would not support the eradication of that principle, which *Humphrey's Executor* accomplishes.¹⁴⁷

Finally, in terms of Article III case-or-controversy values, reconceptualizations rarely pay sufficient attention to the real issues at stake in the earlier case. When a court attempts to re-explain a prior decision, the court necessarily focuses greater attention on the case before it at the moment than on the prior case. The reason is straightforward. The parties before the court care about how today's case comes out: no one represents the parties to the earlier case.

For example, in *Humphrey's Executor*, the Court argued that the outcome of *Myers* was consistent with a functional approach because

[t]he office of a postmaster is so essentially unlike the office [of a Federal Trade Commissioner] that the decision in the *Myers* case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power.¹⁴⁸

How did the *Humphrey's Executor* Court know with such certainty that a postmaster carries out inherently executive functions? Might not the setting of postage rates be considered quasi-legislative? Could not the application of those rates to particular parcels be termed quasi-adjudicatory? Whatever the answers to these questions, the *Humphrey's Executor* Court found itself in a particularly poor position to resolve them because the litigation did not focus

¹⁴⁶ 272 U.S. 52 (1926); see also discussion *supra* part 1.C.3.

¹⁴⁷ Common law methods may not be entirely applicable to other adjudicatory contexts, although there is substantial overlap. See TRIBE & DORF, *supra* note 25 at 114-17 (arguing for a common law approach to constitutional questions); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1496-97 (1987) (suggesting the same for questions of statutory interpretation).

¹⁴⁸ 295 U.S. at 627.

on postmasters but on Federal Trade Commissioners. Perhaps the office of postmaster may be properly characterized as purely executive, but one would have greater confidence in that conclusion were it reached in a case in which it bore some direct relation to the actual issue litigated.

Rather than disingenuously distinguishing *Myers*, the more appropriate course would have been to overrule *Myers*, assuming that the criteria justifying a departure from *stare decisis* were met.¹⁴⁹ But suppose, as may well have been the case, that the *Humphrey's Executor* Court honestly believed that the outcome of *Myers* was correct, although its rationale was incorrect. Would overruling really be appropriate under those circumstances? Perhaps the prudent course would be to overrule the *rationale* of *Myers*, leaving open the question whether *Myers* was correctly decided on its facts—open because, as we saw above, the *Humphrey's Executor* Court was not in a position to say whether *Myers* was rightly decided on its facts. The crucial distinction between this procedure and the procedure actually followed in *Humphrey's Executor* is that candid overruling of an earlier case's rationale ought only occur if the criteria for departing from *stare decisis* are met.¹⁵⁰

The classical justification for according less precedential weight to judicial statements regarding questions not directly presented by the facts of the case before a court is that the court will find itself poorly positioned to address such questions.¹⁵¹ Somewhat ironi-

¹⁴⁹ See *infra* part IV.C.

¹⁵⁰ In some sense, one case never overrules anything but the rationale of an earlier case, since the facts of the overruling case will never be identical to those of the precedent case. Of course, often it will be perfectly obvious that the rejection of the precedent case's rationale also leads to a different outcome in the precedent case, either because the facts of the two cases are so similar, *compare* *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (finding that requiring public school students to salute the flag and pledge allegiance violates the First and Fourteenth Amendments) *with* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (holding that similar requirement does not violate the Constitution), or because the overruling decision thoroughly eviscerates any basis for the result in the precedent case. *Compare* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-94 (1937) (holding that state regulation of employment contracts does not deprive employees of their freedom of contract) *with* *Lochner v. New York*, 198 U.S. 45, 57-58 (1905) (finding that state regulation of employment conditions interferes with employers' right of free contract).

¹⁵¹ See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821) ("The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.").

cally, the very same argument counsels against reconceptualizing a prior decision, even if the original rationale for the decision was in some sense broader than the proposed substituted rationale. In short, whatever the relative merits of a broad or narrow decisional principle in the initial case, after the adoption of a legal principle—broad or narrow—a later court should not lightly cast it aside as mere dictum.

As we have seen, judicial accountability and legitimacy derive from judicial rationality, which in turn will be found in the rationales offered by courts to justify their decisions. To discard the rationale of an earlier decision without the kind of compelling reasons that justify any departure from precedent does more than merely reinterpret a past case. It delegitimizes that case, and in the process, delegitimizes the decision in the case before the court. In sum, a commitment to the rule of law and a proper understanding of the source of legitimate authority in our constitutional order will result in a holding/dictum distinction that turns on rationales, not just facts and outcomes.

III. REFINING THE RATIONALE-FOCUSED HOLDING/DICTUM DISTINCTION

While widespread judicial understanding that the holding/dictum distinction properly turns on rationales rather than facts and outcomes would play an important role in fostering the rule-of-law values implicit in Article III, difficult questions regarding the scope of decisions will remain. In particular, how does one discern the *rationale* of a past decision? Without attempting a comprehensive answer to this question,¹⁵² I would suggest that the very considerations which lead to the adoption of a rationale-focused holding/dictum distinction provide considerable guidance in determining the rationale of a decision. In this Part, I consider how best to approach this question and some particularly thorny kinds of cases.

The question of how to ascertain the rationale of a decision is hardly new. Legal scholars have produced a large body of literature addressing it.¹⁵³ Moreover, these scholars have tended to agree on the purpose of this inquiry: the rationale, or *ratio decidendi*, is

¹⁵² For my own attempt to grapple with one aspect of the problem, see Tribe & Dorf, *supra* note 25, at 1058, 1103 (noting the difficulty of selecting which level of generality to describe a right previously protected).

¹⁵³ For a summary of this literature, see *supra* notes 142-43; Thurmon, *supra* note 101, at 423-26; Meyer, *supra* note 143, at 465 n.181.

binding law.¹⁵⁴ To know the rationales of cases is, therefore, to know the law. Unfortunately, the generally accepted test provides little guidance.¹⁵⁵

Consider the following rather uncontroversial statement by a commentator on English law: "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury."¹⁵⁶ Fair enough, but we now must address the very same question that John Marshall left us in *Cohens v. Virginia*:¹⁵⁷ How do we know what constitutes a "necessary" element of a decision?

Perhaps we can gain some insight from a related field: preclusion law. Although preclusion and stare decisis questions raise somewhat different concerns, both doctrines concern the scope of judicial decisions.

At the level of abstract definition, preclusion law fails to provide obviously more helpful answers. Consider the generally accepted definition of the circumstances under which a court should preclude relitigation of an issue: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."¹⁵⁸ Conversely, "If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded [since s]uch determinations have the characteristics of dicta"¹⁵⁹ Now we must ask: What is essential?

Fortunately, preclusion law consists of more than abstract

¹⁵⁴ See Thurmon, *supra* note 101, at 423 & n.18 (citing JOHN C. GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1921); EUGENE WAMBAUGH, *THE STUDY OF CASES* §§ 11-13 (1894); Goodhart, *Determining the Ratio Decidendi*, *supra* note 142, *passim*; Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928)).

¹⁵⁵ This should hardly come as a surprise, since even one such as Goodhart, who believed that the reasons given by judges for their decisions are mere dicta, acknowledged that cases have rationales. But for Goodhart, the rationale, or "principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them." Goodhart, *Determining the Ratio Decidendi*, *supra* note 142, at 182. Clearly, this notion of a rationale is significantly narrower than the sense in which I have been using the term.

¹⁵⁶ RUPERT CROSS & J.W. HARRIS, *PRECEDENT IN ENGLISH LAW* 72 (4th ed. 1991).

¹⁵⁷ 19 U.S. (6 Wheat.) 264 (1821).

¹⁵⁸ RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

¹⁵⁹ *Id.* § 27 cmt. h.

statements of principle. At least in its widely accepted canonical form, the *Restatement of Judgments*, preclusion law takes clearer shape from examples. Turning to one example, consider the alternative judgment rule: According to the *Restatement*, when an appellate court bases a decision on two grounds, each of which, standing alone, would support the judgment, preclusive effect will be given to both determinations.¹⁶⁰ The analogous circumstance for stare decisis purposes concerns the precedential weight to be given to alternative rationales for a decision. Does the alternative judgment rule shed any light on the holding/dictum distinction in this context? An illustration will show that it does.

In *United Brotherhood of Carpenters v. Scott*,¹⁶¹ the Supreme Court considered whether a conspiracy to interfere violently with labor picketing is actionable under 42 U.S.C. § 1985(3), which provides a right of action to those injured by a conspiracy formed "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."¹⁶² The Court held that it was not and gave two reasons.

First, the Court stated, where the complaint alleges a violation of a constitutional right that is not protected against private action, state involvement in the conspiracy or an attempt by the conspirators to influence state activity must be shown.¹⁶³ Since the plain-

¹⁶⁰ See *id.* § 27 cmt. o. If the rule were the same with respect to trial court judgments, then a litigant who lost on two independent grounds in the trial court might appeal even though she knew she had little chance of prevailing on one issue, solely for the purpose eliminating the judgment's preclusive effect as to the other issue. Consequently, the *Restatement* does not give preclusive effect to alternative judgments rendered by a trial court. See *id.* § 27 cmt. i. But some courts nonetheless give preclusive effect to unappealed alternative judgments by a trial court, since "[a] rule declining to accord res judicata effect to an alternate ground must of course apply to both grounds, which would mean that a case which is doubly inadequate can be refiled whereas a case inadequate in only one respect cannot." *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983); see also *id.* at 1193-94 & n.9 (noting division of authority).

¹⁶¹ 463 U.S. 825 (1983).

¹⁶² 42 U.S.C. § 1985(3) (1988).

¹⁶³ See *Scott*, 463 U.S. at 830. The Court thus distinguished *Griffin v. Breckenridge*, 403 U.S. 88 (1971), in which the defendants' conduct was found to violate the statute although there was no state action or attempt to influence state action. According to the *Scott* Court, "the conspiracy at issue [in *Griffin*] was actionable because it was aimed at depriving the plaintiffs of rights protected by the Thirteenth Amendment and the right to travel guaranteed by the Federal Constitution," *Scott*, 463 U.S. at 832, both of which the Court treats as rights protected against private actors.

tiffs claimed a violation of their First Amendment rights, applicable only against the state, they failed to meet this requirement, and the Court reversed the ruling of the court of appeals to the contrary.¹⁶⁴

Rather than decide the case simply on this basis, however, the *Scott* Court went on to state that "the Court of Appeals should also be reversed on the dispositive ground that § 1985(3)'s requirement . . . [of] 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus'" was not met.¹⁶⁵ After canvassing the legislative history of the Act, the Court concluded that § 1985(3) should not be construed to reach "conspiracies motivated by economic or commercial animus."¹⁶⁶ The Court left open the question whether animus against any group other than African Americans and their supporters would suffice.¹⁶⁷

The holding of *Scott* would appear to be the following: In order to state a claim under § 1985(3), a plaintiff who alleges a conspiracy to violate a right not protected against private action must plead both (1) state participation in the conspiracy or an attempt by the conspirators to influence the state's activity, and (2) racial or perhaps other class-based animus that is not simply economic or commercial. *Scott* holds that both conditions are necessary to a successful § 1985(3) claim.

Or does it? In a purely logical sense, neither the Court's statement regarding state action nor its statement about class-based animus was essential to the outcome. The Court would have reached the same result even had it thought there was no state action requirement, since it could have relied solely on the absence of noneconomic animus. And conversely, if the Court thought that economic animus was sufficient, it would have reached the same result it did based solely on the state action point.¹⁶⁸ Thus,

¹⁶⁴ See *Scott*, 463 U.S. at 833-34.

¹⁶⁵ *Id.* at 834 (quoting *Griffin*, 403 U.S. at 102).

¹⁶⁶ *Id.* at 838.

¹⁶⁷ See *id.* at 836 ("It is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes.")

¹⁶⁸ This may not be strictly correct. After rejecting the court of appeals's conclusion that no state action was required to make out a § 1985(3) claim based upon an abridgment of First Amendment rights, the *Scott* Court stated that a remand for consideration of whether the record supported an inference of a violation of some right protected against private action was unnecessary, since no inference of prohibited class-based animus could be shown. See *id.* at 833-34. Thus, had the Court viewed the animus question differently, the bottom line of the opinion might have read "Reversed and remanded" rather than simply "Reversed." I take this to be a

neither rationale is essential to the Court's conclusion that the lower courts erred in ordering relief for the plaintiffs.

Nevertheless, it would be wrong to treat either or both rationales as dicta. The Court gave careful consideration to both rationales, after all. Thus, judicial accuracy will not be undermined by treating both propositions as precedent. Nor does the legitimacy-based justification for limiting the scope of precedents support an argument for treating neither rationale as precedent. Since a decision based on either ground would have been legitimate, no loss of legitimacy results from reliance on both grounds.

The alternative rationale example illustrates that to be able to say that acceptance of a legal proposition constitutes a necessary element of a court's resolution of the case before it, one need not demonstrate *logical* necessity, in the sense of a necessary condition. This should not come as a surprise. As we saw in the preclusion context, although the general definition of the scope of a judgment includes a notion of necessity to the outcome, a concrete example—the alternate judgment rule—illustrates that something less than logical necessity will suffice.

We might explain away the case of alternative rationales by resorting to quasi-equitable considerations. Consider an analogy from tort law. Ordinarily, the burden of persuasion by a preponderance of the evidence means that if a plaintiff cannot show a greater than fifty percent likelihood that the defendant's wrongful conduct caused the plaintiff's injury, judgment must be entered for the defendant. The California Supreme Court permits an exception, however, where the evidence of causation points equally to each of two morally blameworthy defendants. Absent some particular evidence to distinguish the two defendants, they cannot escape liability by pointing at one another.¹⁶⁹ One could argue similarly that in the case of alternative rationales, since either rationale would be sufficient to support the judgment, the existence of both should not undercut either. Thus, "equitable" considerations may lead us to consider each of two sufficient rationales given to support a

minor difference, and in any event, other cases will present the situation of pure alternative rationales. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia's antimiscegenation law on the alternate grounds that it violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

¹⁶⁹ See, e.g., *Summers v. Tice*, 199 P.2d 1, 3 (Cal. 1948) (finding two members of a hunting party jointly negligent in shooting plaintiff where responsibility of each defendant could not be ascertained).

judgment to be in some sense truly necessary or essential to the reasoning.¹⁷⁰

The case of alternative rationales is not unique. Suppose, for example, that a criminal defendant challenges her conviction on appeal, arguing that the trial court erroneously admitted a coerced confession. The government argues that the confession was not coerced and that, in any event, even if it was, its admission in evidence constituted harmless error.¹⁷¹ The appeals court rules: (1) the trial court erred by admitting the confession because it was coerced, but (2) the error was harmless beyond a reasonable doubt, so the conviction is affirmed. Is part (1) dictum? It is not, after all, essential to the reasoning, since the court would have quite clearly reached the same result—affirmance—even if it found no coercion.

Nonetheless, proposition (1) is not dictum in the sense of an aside. It forms an essential ingredient in the *process* by which the court decides the case, even if, viewed from a post hoc perspective, it is not essential to the *result*.¹⁷² Consider how the case looks to the court before it rules. The court can first address the question whether there was error at all. If it reaches a negative answer, the court will not have to address the harmless question. Alternatively, the court can first answer the question whether, assuming there was error, it was harmless. Here, a positive answer would obviate the need to decide whether there was in fact error.

Whichever question the court considers first, until it actually decides the matter, it will not know whether choosing to consider that question first prevents the need to consider the other question. If the court first decides that there was error, it will have to

¹⁷⁰ The argument could be extended to judgments supported by three, four, or more rationales. At some point, however, one would begin to wonder whether the court gave adequate consideration to a principle which constitutes only one of many bases for its decision. And here the tort analogy may break down. Those courts that extend the logic of *Summers* to cases of many tortfeasors provide for proportional rather than joint and several liability. See, e.g., *Sindell v. Abbott Lab.*, 607 P.2d 924, 936-37 (Cal. 1980) (analyzing *Summers* but concluding that market share mechanism for assessment of damages against drug manufacturers is preferable). What would a rule of partial or proportional stare decisis look like? Perhaps if there are more than two rationales, the law ought to presume that none of them is a full-fledged holding, at least absent some clear indication that the precedent court truly would have relied on any one rationale alone. Or perhaps, like well-considered dicta, each of many alternate rationales ought to be treated as persuasive authority only.

¹⁷¹ See *Arizona v. Fulminante*, 499 U.S. 279, 295, 302 (1991) (holding, or at least stating, that the admission of a coerced confession can be harmless error, but finding that in the particular case it was not harmless).

¹⁷² See EDMUND M. MORGAN, INTRODUCTION TO THE STUDY OF LAW 109-10 (1926).

consider harmless; if the court first decides, that assuming error, the error was not harmless, it will then have to ask whether there was error.

Of course, the order in which the court considers the questions will not always be a matter of indifference. For instance, the norm that courts should not resolve a constitutional question if a case can be resolved on subconstitutional grounds¹⁷³ will sometimes suggest the appropriate course of action. But absent such considerations, surely a court should not be faulted for addressing issues in the order that they logically present themselves.

Other things being equal, it simply makes more sense to resolve the question whether there was any error before deciding whether a putative error was harmless. For one thing, until the court passes on the substantive question, it will not know exactly what the error is that it must test for harmlessness. When the court considers the question whether there was any error at all, it does so for the purpose of resolving the case. Its considered opinion on the matter ranks as an essential part of the rationale. Thus, it is not dictum.

The harmless error example closely parallels a much broader category of cases. A court announces a standard of law. It applies that standard to resolve the case. The result it reaches would not vary, however, if a different standard were used. Is the standard dictum or holding? To see the relation of this inquiry to the harmless error example, consider another concrete example.

Suppose that an individual objects to paying taxes on the ground that to do so conflicts with his religion.¹⁷⁴ To decide the case the court must decide two questions: (1) What standard applies; and (2) What outcome results from applying the proper standard? Let us assume that there are only two possible standards. Either a law that does not target religion for special burdens is *ipso facto* constitutional, or a law that burdens religious liberty directly or indirectly

¹⁷³ See, e.g., *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 157-58 (1984) (stating the "fundamental" rule of judicial restraint in which the Court "will not reach constitutional questions in advance of the necessity of deciding them" (citing *Leroy v. Great W. United Corp.*, 443 U.S. 173, 181 (1979); *Massachusetts v. Westcott*, 431 U.S. 322, 323 (1977) (declining to decide an issue because of the "longstanding" policy of avoiding constitutional questions unless necessary); *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring))).

¹⁷⁴ See *United States v. Lee*, 455 U.S. 252 (1982). In *Lee*, an Amish farmer refused to withhold social security taxes from Amish workers because of a religiously based belief that such payments of taxes and receipt of benefits would violate the Amish faith. See *id.* at 254-55.

must be "essential to accomplish an overriding governmental interest."¹⁷⁵ Let us call these standards the *Smith*¹⁷⁶ standard and the *Sherbert*¹⁷⁷ standard, respectively.

If the court applies the *Smith* standard, the only question it need resolve is whether the tax targets religion. On the other hand, if the court applies the *Sherbert* standard, it must ask whether an overriding governmental interest justifies the application of the tax to the particular case. Since the government will have an easier job meeting the *Smith* standard than the *Sherbert* standard,¹⁷⁸ the court could attempt to resolve the case by assuming that the *Sherbert* standard applies; if, even under this assumption, the government wins, then the court will not have to choose between the two standards. Of course, this procedure will not necessarily save the court any work, for if the court decides that the government loses under the *Sherbert* standard, then it will have to choose between the *Smith* and *Sherbert* standards. Hence, the more straightforward course would be to decide upon a standard first, and then apply it.

Suppose that the court settles upon the more stringent *Sherbert* standard.¹⁷⁹ In each of the several cases in which it applies the standard, however, the court rules in favor of the government and against the claimant.¹⁸⁰ If someone were to argue that the *Sherbert* standard was therefore never truly adopted,¹⁸¹ we can envision the

¹⁷⁵ *Id.* at 257-58 (citing *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Gillette v. United States*, 401 U.S. 437 (1971); *Sherbert v. Verner*, 374 U.S. 398 (1963)).

¹⁷⁶ *See* *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 890 (1990) (holding that termination of employment and denial of unemployment benefits to employees fired for using illegal substances for religious purposes was permitted by Free Exercise Clause).

¹⁷⁷ *See* *Sherbert v. Verner*, 374 U.S. 398, 408-09 (1963) (holding that discharge of an employee who refused to work on Saturdays because of her religious belief was an unconstitutional burden on employee's freedom of religion).

¹⁷⁸ One might argue that in some circumstances the *Smith* standard will actually be more difficult for the government to meet if, for example, a law targets religion but imposes only a very minor burden. However, the *Smith* dissenters do not disagree with the majority of the Court that a law targeting religion is invalid; they merely argue that such singling out is a sufficient but not a necessary condition of a free exercise violation. *See* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2250 (1993) (Blackmun, J., joined by O'Connor, J., concurring in the judgment); *see also id.* at 2240 (Souter, J., concurring in part and concurring in the judgment).

¹⁷⁹ *See* *United States v. Lee*, 455 U.S. 252, 257 (1982).

¹⁸⁰ *See, e.g., id.* at 259-60 (finding religious belief provides no basis for resisting payment of social security tax).

¹⁸¹ *See, e.g.,* *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 883-85 (1990) (finding the *Sherbert* test inapplicable to cases in which a litigant seeks

obvious response: the rejection of the free exercise claim “hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before [the Court].”¹⁸² Justice O’Connor, the author of this passage, reminds us that to treat like cases alike requires that we care about more than just the bottom line. For Justice O’Connor, the reasoning process a court sets forth to justify its decision is essential to the decision.

Of course, not every legal principle or rule announced in the process of a court’s setting forth of a legal standard necessarily constitutes an essential aspect of the court’s reasoning. For example, if the Supreme Court announces a multipart rule, and the case before the Court implicates only one part of the rule, the remaining portions would constitute dicta—at least so long as they are not required to explain why the Court adopts the portion of the rule it does apply. But this caveat should not be overstated. The portions of the rule that are not implicated by the first case may be applied in a later case, and when that happens they are transformed into holding.¹⁸³

an exemption from a generally applicable prohibition of socially harmful conduct).

¹⁸² *Id.* at 897 (O’Connor, J., concurring in the judgment). Ironically, Justice Souter appeared to ignore this warning when he suggested that *Smith* ought to be overruled in *Lukumi*. In *Lukumi*, Justice Souter termed the majority’s invocation of the *Smith* principle “dicta.” 113 S. Ct. at 2240 (Souter, J., concurring in part and concurring in the judgment). According to Justice Souter, *Smith* really consisted of two principles: (1) laws targeting religion violate the free exercise clause, and (2) laws not targeting religions do not violate the free exercise clause. *See id.* Since only principle (1) applied in *Lukumi*, Justice Souter viewed the majority’s invocations of principle (2) “dicta.” But in so doing, Justice Souter ignored the fact that to the majority principles (1) and (2) were inseparable. Although it is certainly possible to construct a coherent theory of free exercise that accepts principle (1) but not principle (2), that is not what the *Smith* or *Lukumi* majorities did. *See, e.g.*, *Lukumi*, 113 S. Ct. at 2250-52 (Blackmun, J., joined by O’Connor, J., concurring in the judgment); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). The Court in each of those cases formulated the sole free exercise test as: Does the law target religion? The outcome of the test in a particular case does not render the application of that test dictum.

Note that Congress rejected the *Smith* test and reinstated the *Sherbert* standard by statute. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (to be codified at 42 U.S.C. § 2000bb).

¹⁸³ The fact that a statement was previously made in dictum does not excuse the later court from justifying it fully when the court decides to adopt the statement as a holding. *See* *United States v. Rabinowitz*, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting) (“These decisions do not justify today’s decision. They merely prove how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a

Thus, we have seen that a rationale-focused holding/dictum distinction accords the status of holding to a considerable portion of judicial decisions, without breaching the case-or-controversy requirement. In the next Part, I consider (and reject) some reasons why one might wish not to use this standard.

IV. THE UTILITY OF A SHARPENED HOLDING/DICTUM DISTINCTION

Thus far, I have argued that a coherent understanding of the rule of law requires that the holding/dictum distinction turn on whether a principle is essential to the rationale of a case, not just its result, and that such a distinction provides a workable framework for implementing the design of Article III. In this Part, I consider two critiques of this view. The first, which I term the radical critique, posits that any distinction between holding and dictum is inherently arbitrary, and therefore doomed to fail. The second, which is more modest, accepts the necessity of distinguishing between holding and dictum, but attacks the rationale-based distinction as excessively wooden. After considering and rejecting both critiques, I suggest that adherence to a rationale-based holding/dictum distinction would have the salutary effect of promoting judicial candor.

A. *A Radical Critique Considered (and Rejected)*

In my discussion of the removal cases, I concluded that the Court distorted precedent in the name of the holding/dictum distinction.¹⁸⁴ Perhaps this is an unfair charge. Perhaps the flaw lies not with the uses to which the distinction has been put, but with the artificiality of dividing the universe of judicial statements into dicta and holdings.

Would it be more accurate to classify judicial pronouncements

decision.”). It also follows that merely citing, as opposed to applying, the earlier statement does not transform it from holding to dictum. *See* *United States v. Dominguez-Mestas*, 687 F. Supp. 1429, 1432 (S.D. Cal. 1988) (explaining that when subsequently decided cases have cited cases containing dictum as authority, it “does not transform the dictum into law” (citing *Hyde v. United States*, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting) (“[A] dictum . . . gains no new force from the repetition by text writers. It is one of misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.”))), *aff’d*, 929 F.2d 1379 (9th Cir. 1991).

¹⁸⁴ *See supra* notes 97-100 and accompanying text.

along a spectrum, running from those very closely tied to the facts and outcome to those that are much more abstract? Moreover, shouldn't the spectrum be multidimensional? Indeed, why must we classify judicial statements at all?¹⁸⁵ It could be argued that precedent is always a matter of degree.¹⁸⁶ Whether a court ought to treat a statement from the precedent case as holding or dictum may have more to do with the circumstances of the later case than the language of the initial case.

This is a forceful critique. Grand theorists may see adjudication as a process that operates at the level of selection and announcement of deep principles,¹⁸⁷ but more usually law operates by quite incompletely theorized, contextual judgments.¹⁸⁸ All the words used by a court to explain its result contribute to the justification, and parsing the opinion into holding and dictum attributes a degree of precision to the enterprise of judicial decision-making that it lacks in actual practice.¹⁸⁹

If we believe the holding/dictum distinction to be a useful one, how might we respond to this critique? Initially, we might attempt

¹⁸⁵ As I have noted elsewhere, some entrenched legal dichotomies obscure more than they explain. See Dorf, *supra* note 125, at 294 ("The distinction between as-applied and facial challenges may confuse more than it illuminates.").

¹⁸⁶ See generally Meyer, *supra* note 143.

¹⁸⁷ See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 225 (1977) ("According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."). But see Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1, 55-56 (1993) (arguing that even such antagonists as Dworkin and Stanley Fish share the mistaken view that jurisprudence is about interpretation rather than the more mundane task of describing the multifarious methods by which lawyers make arguments).

¹⁸⁸ See Sunstein, *supra* note 5, at 747-48.

¹⁸⁹ One might add a sociological element to this critique. At least during the Reconstruction era, Supreme Court Justices had only passing familiarity with any of the words in the opinions of their colleagues, since their only exposure to these opinions was a single oral reading of the opinion by its author. See 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88 pt. 1, at 69-70 (Paul A. Freund ed., 1971). Professor Monaghan suggests that at that time, a Justice could not be reasonably bound by the "dicta" of an opinion he did not author. See Monaghan, *supra* note 143, at 15. At least since the time the Court adopted the practice of internally circulating drafts of opinions prior to publication, this suggestion would appear to be inoperative. And even with respect to opinions from the earlier period, it is not obvious that the precedential force of an opinion should turn on the internal work pattern of a court. See *id.* at 16 (asking, with regard to the behavioral characteristics of the Court, "Do we care?").

to distinguish common law adjudication from statutory and constitutional interpretation. Even if analogical reasoning prevails in common law adjudication, adjudication that begins from a textual source need not resort to particularized factual comparisons because interpretation may refer back to broader principles—those embodied in the words of the statute or constitution. If the argument against distinguishing dictum from holding is that the task is an inherently positivist one,¹⁹⁰ then perhaps areas of the law that begin with positive texts are amenable to the distinction.¹⁹¹

The difficulty with this response should be immediately apparent. Statutory and constitutional interpretation may begin with texts, but in most truly important modern cases, these enterprises look very much like common law adjudication.¹⁹² More fundamentally, our topic concerns the precedential force to be given to prior decisions. Even if the precedent case was decided on the basis of the “plain language” of a statute, in the second case the question will be how far the first case went. The answer to this question will not depend upon whether the original source of law in the precedent case was textual or judge-made.¹⁹³ Thus, we cannot cabin the radical critique of the holding/dictum distinction by contending that it only applies to common-law adjudication.¹⁹⁴

¹⁹⁰ See, e.g., Meyer, *supra* note 143, at 460-76 (distinguishing positivist from common-law approaches to precedent).

¹⁹¹ Cf. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2751 (1993) (“[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code.”).

¹⁹² See, e.g., *TRIBE & DORF*, *supra* note 25 at 114-17 (describing the method of the common law as appropriate in constitutional adjudication); Eskridge, *supra* note 147, at 1497-538 (providing a justification for reading statutes dynamically).

¹⁹³ Although discerning what a precedent is may be the same enterprise in common law, statutory and constitutional adjudication, it is often asserted that the weight of precedent differs in these areas. See, e.g., Alexander, *supra* note 142, app. a at 57 (noting that “[s]ome commentators believe that the whole notion of being constrained by precedent is problematic when the subject is statutory and/or constitutional interpretation rather than common law decisionmaking”). Similarly, because of the difficulty of “correcting” a constitutional error by the amendment process, the doctrine of *stare decisis* has been found to have less force in constitutional cases. See, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 518 (1989) (plurality opinion) (“*Stare decisis* . . . has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes.” (citing *United States v. Scott*, 437 U.S. 82, 101 (1978))).

¹⁹⁴ See Alexander, *supra* note 143, app. a at 57-58 (“[The] argument for judicial finality—for making the courts’ interpretations supreme over the correct interpretations as assessed by other actors—. . . also supports making the precedent court’s interpretation of a statute or constitutional provision supreme over the constrained court’s interpretation.”).

There is, however, a powerful response to the charge that the holding/dictum distinction is incoherent. The claim that precedent is always a matter of degree—which lies at the heart of the radical critique—runs counter to the expectations placed upon lower court judges and their experiences. To say, as our hierarchically organized court systems do, that a lower court must “follow” the precedents of a higher court, is to acknowledge that the decision in one case can truly control the decision in a later case—not merely as a matter of rough analogy which could as easily have gone the other way, but in a considerably more binding sense.

This is not to say that a higher court’s cases will often dictate the result for a lower court (although sometimes they will).¹⁹⁵ Rather, the important point is that lower court judges feel greater restraints than high court judges. This is one reason why Supreme Court Justices sometimes confound predictions based on their records as lower court judges.¹⁹⁶ For the same reason, lawyers will often make different kinds of arguments to lower courts and high courts.

The radical critique only works if we focus exclusively on a court of last resort, which has the power to overrule its past decisions. Such a court can conflate the question of what a prior case held with whether it ought to be followed without fear of reversal. A lower court cannot. Although lower courts may exhibit some confusion about their obligation to follow dicta,¹⁹⁷ they understand that at the very least they are obligated to follow precedent.

Indeed, it is precisely because lawyers and judges ordinarily understand what it means to follow precedent that attempts to use the holding/dictum distinction to evade the force of stare decisis appear illegitimate. Moreover, as the removal cases illustrate, the illegitimacy is more than a matter of appearances. The claim that all judicial statements are equal—and therefore that all such

¹⁹⁵ See *Butler v. McKellar*, 494 U.S. 407, 408-09 (1990) (noting that a rule is “new” for habeas corpus nonretroactivity purposes if it is not “dictated by precedent”).

¹⁹⁶ See, e.g., Al Kamen, *Kennedy Moves Court to Right: Justice More Conservative than Expected*, WASH. POST, Apr. 11, 1989, at A1. Of course, the greater freedom of Supreme Court Justices on questions of precedent is not the only factor that explains the phenomenon of Justices confounding predictions. See Richard D. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 YALE L.J. 1283, 1301 (1986) (noting that “[j]ust as issues change, so do Justices”). See generally LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPE OUR HISTORY* 110 (1985).

¹⁹⁷ See *supra* notes 101-10 and accompanying text.

statements may be discarded by a later court—undermines the rule of law.¹⁹⁸

The holding/dictum distinction, like any legal distinction, is an imperfect one. But it helps ensure that like cases are treated alike while simultaneously confining the lawmaking authority of the courts to areas of their institutional competence. Because these are important purposes, the distinction is useful.¹⁹⁹

B. *A Modest Critique*

Even someone who believes in the possibility of a coherent holding/dictum distinction might object that the view of precedent I have espoused in this Article is excessively wooden. According to this critique, courts need flexibility to accommodate previously unanticipated circumstances; a somewhat imprecise holding/dictum distinction permits courts to bend precedent without breaking it, and thereby to achieve substantive justice.

This critique is based in part on the “natural model” of precedent.²⁰⁰ According to the natural model, the fact that a court decided case *A* in a certain way counts as precedent for case *B* only insofar as it would be unfair to treat the litigants differently. The model is natural in that it mirrors the way precedent works outside of the law. For example, if I read and comment upon a practice examination for one of my students, that “precedent” will play an important role in my decision whether to do the same for a second student. The first decision does not bind me in the second case, except to the extent that a fairness argument based upon it appeals to me as a conscientious teacher.²⁰¹

Under the natural model, a precedent is merely one factor for the judge to consider in trying to reach a just result. It has no

¹⁹⁸ See *supra* notes 97-99 and accompanying text.

¹⁹⁹ To say that it is important to be able to distinguish between holdings and dicta is not to say that dicta ought to be ignored. Dicta can be persuasive authority and useful in predicting how a court will resolve a question. See *supra* notes 106-08 and accompanying text. Moreover, to the extent that the term dicta encompasses judicial rhetoric—comprising not only what courts say, but how they say it—such rhetoric can have far-reaching effects. See Sherry F. Colb, *Words That Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy?*, 72 B.U. L. REV. 101, 105 (1992) (“When legal actors read rhetoric, their actions translate the rhetoric into law, thereby profoundly influencing society at large.”).

²⁰⁰ Alexander, *supra* note 143, at 5 & n.5 (citing Moore, *supra* note 143, at 183).

²⁰¹ For an elegant model of legal precedent as one kind of social precedent, see Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

independent force.²⁰² Since the natural model blends together what courts ordinarily treat as the quite separate enterprises of determining whether case *A* establishes a precedent for case *B* and deciding whether case *A* ought to be followed or overruled in case *B*,²⁰³ it provides the judge much greater flexibility to achieve substantive justice.

Consider one response to this critique: when precedent is given no weight, *qua* precedent, the virtue of flexibility becomes the vice of arbitrary decision-making. A workable legal system requires predictability, even if it must occasionally come at the cost of otherwise correct outcomes. Thus, Professor Larry Alexander argues that even if we begin by assuming that we ought to follow the natural model, that model itself will lead us to adopt a more constraining approach because in the long run adherence to rules furthers substantive justice to a greater extent than direct pursuit of just results would.²⁰⁴

Still, one might reject both the natural model and the facts-plus-outcomes model of precedent as too open-ended, but also remain uncomfortable with the apparent rigidity of a notion of rule-based precedent.²⁰⁵ Consider an example. In *West Virginia State Board of Education v. Barnette*,²⁰⁶ the Supreme Court ruled that the Free Speech Clause of the First Amendment prohibits public school officials from requiring students to salute the flag and recite the pledge of allegiance.²⁰⁷ Speaking for the Court, Justice Jackson opined: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."²⁰⁸

²⁰² See Moore, *supra* note 143, at 210 ("One sees the common law as being nothing else but what is morally correct, all things considered—with the hooker that among other things considered are some very important bits of institutional history which may divert the common law considerably from what would be morally ideal.")

²⁰³ See *id.* at 211.

²⁰⁴ See Alexander, *supra* note 143, at 48-49.

²⁰⁵ Alexander contrasts the natural model with what he terms the rule model. See *id.* Although I agree with much of the substance of his comments, I dislike the *rule* label because I believe it implies a more rigid conception than I in fact hold. One may accept the proposition that holdings include rationales without adopting the position that every case stands for some rigidly defined rule. See *infra* notes 208-13 and accompanying text.

²⁰⁶ 319 U.S. 624 (1943).

²⁰⁷ See *id.* at 642.

²⁰⁸ *Id.*

Under the view of the holding/dictum distinction espoused in this Article, one could plausibly argue that this language is part of the holding of *Barnette*, because of its central role in the Court's reasoning. Yet later cases clearly do not take Justice Jackson's words at face value. In *Rust v. Sullivan*,²⁰⁹ for example, the Court held that when the government funds private speech—in the particular case, the speech of doctors at federally funded family planning clinics—it may condition the grant of funds on the speaker's expressing only the government-approved viewpoint—in *Rust*, one that disapproves of or remains silent about abortion.²¹⁰ In short, if the speech in question is on the government's dime, government officials may indeed prescribe what is orthodox.

The critic of my approach to holdings and dicta might argue that I must be mistaken because under my view, *Rust* appears to overrule *Barnette*, a shocking proposition. After all, even one who believes that *Rust* was wrongly decided (as I do)²¹¹ must acknowledge that there are important distinctions between the government threatening to punish someone for not espousing an official viewpoint and the government itself choosing not to voice a viewpoint with which it disagrees.²¹²

²⁰⁹ 111 S. Ct. 1759 (1991).

²¹⁰ See *id.* at 1774.

²¹¹ I should add in the interest of full disclosure that I participated in the preparation of the petitioners' briefs on the merits in the Supreme Court in *Rust*.

²¹² The *Rust* majority may be criticized for treating government funding of private speech as identical to government speech. In other contexts, government support of private speech does not, ipso facto, become government speech, as the Court's public forum cases illustrate. See, e.g., *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992); *United States v. Kokinda*, 497 U.S. 720 (1990); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). The Court has held that even when public property is not a public forum, government regulations of speech on that property may not be viewpoint-based. See *Perry Local Educators' Ass'n*, 460 U.S. at 46 (citing *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 n.7 (1981)). If one analogizes the funds in question in *Rust* to public property, which in a literal sense they are, then the regulations upheld violate the public forum doctrine's proscription against viewpoint discrimination. See also Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 599-600 (1993) (criticizing the Court for erroneously assuming that: (1) patients do not implicitly trust their doctors' advice; (2) poor women can seek alternate medical advice; and (3) the impact of the regulations would not extend beyond the privacy of the doctor-patient relationship into the public lives of the women affected).

Nevertheless, all of this goes to show that the result in *Rust* may be incorrect; it hardly demonstrates that it is in any way controlled by *Barnette*. Indeed, the very existence of a separate First Amendment doctrine for cases involving public property indicates that *Rust* raised questions that *Barnette* did not answer.

Nevertheless, the view of the holding/dictum distinction espoused in this Article does not require the conclusion that *Rust* overrules *Barnette*. To say that the holding of a case can be characterized by a reasonably abstract principle is not equivalent to saying that every abstract statement of principle that the court announces in the course of its reasoning is coextensive with the holding of the case. Courts often do not definitively state the "rule" of the case, and even when they do, such a statement cannot be read in isolation from the rest of the opinion. Moreover, this critique of my approach attacks a straw man. It posits that giving weight to precedent qua precedent is tantamount to treating judicial opinions as if they were statutes.²¹³ Yet, as Professor Monaghan has observed, "[t]he view that a judicial precedent is the equivalent of a legislative act has never existed in American law, and no one has proposed that it should."²¹⁴ One may simultaneously believe that rationales comprise an essential part of precedent and that the process by which a later court determines the rationale of a prior case (and applies it) requires some considerable measure of judgment or craft.²¹⁵ In short, my argument that rationales cannot simply be dismissed as dicta does not commit me to a rigid model of precedent. It merely rules out some very open-ended models.

Thus, we need not ignore the legal realist's insight that facts matter.²¹⁶ Holmes (perhaps the first realist) is surely correct that "[g]eneral propositions do not decide concrete cases."²¹⁷ But neither do facts alone decide cases. Principles do.²¹⁸ Principles may be more or less abstract.²¹⁹ Application of a principle that was necessary to the resolution of case *A* in case *B* requires, as an initial matter, that the court deciding case *B* ascertain the appropri-

²¹³ See Radin, *supra* note 110, at 200.

²¹⁴ Monaghan, *supra* note 4, at 757.

²¹⁵ See *id.* at 764-65. (arguing that in applying precedent, "the Court is asked to measure the scope of the rule or standard by the reasoning behind it. Of course, the reasoning must be set in the context of the facts, and some notion of obiter dicta is necessary").

²¹⁶ See LLEWELLYN, *supra* note 36, § 56 (applauding judges for generally making "fact-guided" decisions).

²¹⁷ *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

²¹⁸ See generally RONALD DWORIN, *A MATTER OF PRINCIPLE* (1985).

²¹⁹ To say that a principle is too abstract to decide a particular case is not equivalent to expressing disagreement with the general principle. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 62 (1960) (noting that it is possible to approve of a general rule of law and still dispute its application to the facts of a specific case).

ate level of generality to describe the reasons given by the court in case A. This task requires judgment.²²⁰

Consider a variation on *Rust*. When the Surgeon General requires that cigarette packages carry a particular health warning, does she thereby prescribe an orthodoxy in violation of *Barnette*? One who wished to escape the literal language of *Barnette* might point out that the harmful effects of smoking are so well established that this particular orthodoxy does not concern a matter of opinion but of fact. Of course, the tobacco industry lawyers would dispute this characterization and might argue that orthodoxies are most dangerous to heretics when the orthodox views are widely held. In response to an argument that *Barnette* was only about the free speech of natural persons, these same lawyers would note that the First Amendment fully protects speech by corporations.²²¹ I do not mean to suggest that *Barnette* does or does not control the case challenging the Surgeon General's prescribed warnings. It should be clear, however, that for a court to decide whether *Barnette* ought to be read as limited to speech about truly controversial questions, or speech by natural persons, or speech compelled by threat of punishment rather than discouraged by a promised reward for silence, requires nuanced judgment, not rigid categorization.

Indeed, even if we accept a fairly abstract characterization of the holding of the first case, that does not preclude exceptions. "A rule that ends with the word 'unless . . . ' is still a rule."²²² Nor is it obvious that the exceptions must be articulated along with the governing rule or principle. In the first case, the precedent court may reason at a very high level of abstraction, so that its reasoning appears to apply to a broad range of circumstances not presented or contemplated. When a litigant later presents to the court its earlier ruling and asks for an unjust or even absurd result, *stare decisis* does not require that the court oblige.

Conversely, sometimes a court will include particular examples to illustrate a general point. If the particular examples are merely

²²⁰ See *TRIBE & DORF*, *supra* note 25, at 112-17 (arguing that common law methods can be simultaneously principled and somewhat indeterminate).

²²¹ See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) ("The proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the law] abridges expression that the First Amendment was meant to protect.")

²²² *HART*, *supra* note 33, at 136; see also *FREDERICK SCHAUER, A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 115 (1991).

illustrative, then when the same court faces a case in which a litigant seeks a result that is consistent with the general principle but inconsistent with the specific examples, a decision for that litigant would not be properly characterized as overruling the first case.²²³

Recognizing that reasons courts give for their decisions matter does not preclude the practice of drawing principled distinctions. The critical question should be as follows: Does the distinction or exception undermine the original principle itself?²²⁴ In a case such as *Humphrey's Executor*, the answer is apparent. The functional approach the Court adopts to distinguish *Myers* was fully considered and rejected by the *Myers* Court. Thus, when the *Humphrey's Executor* Court "excepts" quasi-legislative and quasi-judicial officials, its exception obliterates the logic of *Myers*. The same cannot be said of the *Rust* exception to *Barnette*. Regardless of whether *Rust* is rightly decided, it cannot be gainsaid that application of a different rule from the anti-orthodoxy principle in the context of government-funded speech leaves intact the basic reasoning of *Barnette*.

Indeed, immediately after reciting the anti-orthodoxy principle, the *Barnette* Court adds, "If there are any circumstances which permit an exception, they do not now occur to us."²²⁵ We may view government-funded speech as an exception that the *Barnette* Court itself did not anticipate,²²⁶ or we may view the scope of

²²³ For example, Professor Tribe and I have argued for an approach to constitutional law based in large part on the method espoused by Justice Harlan in his separate opinion in *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting on jurisdictional grounds) ("The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points It is a rational continuum"). See TRIBE & DORF, *supra* note 25, at 77-80. Using Justice Harlan's framework, we argued that *Bowers v. Hardwick*, 478 U.S. 186 (1986), which held a Georgia antisodomy statute constitutional as applied to gay sex partners, was wrongly decided. See TRIBE & DORF, *supra* note 25, at 78. Yet Justice Harlan stated in his *Poe* opinion that laws forbidding "homosexual practice" are constitutional. *Poe*, 367 U.S. at 546. Suppose that Justice Harlan had been speaking for the Court in *Poe*. Would that mean that an argument for the overruling of *Hardwick* would also call for the overruling of (Harlan's) *Poe*? On the contrary, since the example of laws prohibiting "homosexual practice" was purely illustrative, we would be free to argue that the example was itself inconsistent with the general principle employed in (Harlan's) *Poe* to invalidate Connecticut's ban on contraceptive use by married couples.

²²⁴ See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 401-02 (1821) ("The general expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion; limitations which in no degree affect the decision in that case, or the tenor of its reasoning.")

²²⁵ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. at 624, 642 (1943).

²²⁶ Despite its disclaimer that it could not think of any exceptions, the *Barnette*

Barnette's anti-orthodoxy principle more narrowly, as applying principally to speech compelled or restricted by more coercive means than funding. Both views take as their starting point the notion that the reasons given by the *Barnette* Court command respect, but neither adopts a rigidly literalist interpretation of the Court's statement of reasons.

We can now answer what I take to be the most troubling question for any theory of precedent that starts by taking opinions as well as outcomes seriously: When we permit the words of the precedent court to define the holding of its opinions, don't we cede to the dead hand of the past too much control over our contemporary legal problems?

As a first response, we should note that the question could be applied to the practice of following precedent at all, not only to treating a court's statements as part of the holding of a case. Why should the *outcome* of a past case govern a contemporary legal problem? Although one can legitimately question the propriety of following precedent under any circumstances, I have taken as a starting point the premise that absent some important justification, precedents ought to be followed.²²⁷ Once we have subtracted this general attack, we are left with a somewhat narrower question: Why should an institution whose *raison d'être* is the resolution of concrete disputes propound general principles?²²⁸

As I argued above, the precedential force of an earlier case ultimately rests upon the reasons underlying the court's decision. This is true both because absent a consideration of reasons, namely, abstract principles, there is no such thing as precedent, and because precedents derive their legitimacy from their reasoning.²²⁹

Court itself states that the rules governing the military do not fall within the scope of its holding. *See id.* at 642 n.19.

²²⁷ Professor Schauer identifies four reasons for following precedent: (1) fairness, which results from treating like cases alike; (2) predictability; (3) efficiency, which results from freeing courts from the necessity of deciding all questions anew; and (4) stability, which undergirds each of the other three justifications. *See Schauer, supra* note 201, at 595-602; *see also* Monaghan, *supra* note 4, at 748 (listing "consistency, coherence, fairness, equality, predictability, and efficiency" as reasons for following precedent). To these instrumental justifications, one might also add that precedents ought to be followed simply because they are precedents. *See Kronman, supra* note 143, at 1048-49 (arguing, after Burke, that the continued existence of human culture depends on each generation's preservation of its inheritance); Radin, *supra* note 110, at 200-01 (arguing that, strictly speaking, all true arguments from precedent are noninstrumental).

²²⁸ *See* Moore, *supra* note 143, at 187.

²²⁹ *See supra* part II.B.

Should the critic still charge that this view of precedent leads to an ossified law, we may give two responses. First, as our comparison of *Rust* and *Barnette* indicates, it need not work that way. Acknowledging that *Barnette*'s holding does not *require* one result or the other in *Rust*, lawyers and judges may still use *Barnette* to support a particular result. The lawyer for the petitioners may argue that in a society where governmental funding of medical services is pervasive, the threatened withholding of funds is more than a mere choice by the government not to speak; it acts to coerce speech (or nonspeech) by private doctors, and thus presents the same kind of evil as was present in *Barnette*. In other words, even where precedent is not binding, lawyers may argue from precedent by analogy.²³⁰

Second, we should frankly admit that as we broaden our understanding of the scope of holdings, we accord more significance to prior decisions, and this will in turn limit the freedom of modern courts to reconfigure past decisions. Sometimes this will prevent what might be deemed progress²³¹—although to the extent that we associate progress with an expansive interpretation of the Constitution and other sources of law, in an era when the current Court remains considerably more conservative than the Court that gave the law its general shape, an expansive view of precedent will generally lead to more progressive results than a narrow view.

If precedent thwarts justice in a manner that is truly unacceptable, the appropriate response is not to distort precedent, but to overrule it. I now consider the reasons why candid overruling of otherwise governing cases is preferable to an expansive definition of dicta.

C. *The Virtue of Judicial Candor*

Those who wish to see courts more tightly constrained in their decision making even at the cost of substantively unjust rules of law, will likely find much to their liking in the view of the holding/dictum distinction advanced in this Article. By suggesting courts ought to treat more of past decisions than the mere outcomes as

²³⁰ See generally Sunstein, *supra* note 5 (discussing how lawyers argue from precedent using analogy).

²³¹ See Monaghan, *supra* note 4, at 751 (“[T]he very existence of a body of precedent is a conservative, stabilizing force.”); Schauer, *supra* note 201, at 605 (“The constraints of precedent have been and perhaps should be reserved not for our institutions of progress, but for our institutions of restraint.”).

binding, my view of precedent appears to give judges less room for creativity than a narrower view of holdings would. But I would make a broader claim—that my view of the holding/dictum distinction is correct, independent of one's views about the strength of *stare decisis*, so long as precedent is given some nonnegligible force. Even those who share Holmes's opinion that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV"²³² ought to accept the view of the holding/dictum distinction I have advanced. In other words, a judge who feels the constraints of precedent only weakly still ought to prefer frank overruling of erroneous decisions to distorting such decisions.

As an initial matter, one might object that this has nothing to do with candor. When a judge who believes that the holding/dictum distinction turns solely on facts and outcomes, rather than rationales as well, says as much, how does that display a lack of candor? If the judge sincerely holds the view that holdings comprise facts and outcomes, an opinion applying that view is not dishonest. But recall that the facts-plus-outcome approach to precedent is not merely an undesirable approach; it is incoherent. A judge who claims she is applying this approach is either confused (in which case we need only point out her confusion to convince her to abandon the method), or dissembling as a means of masking the fact that she is evading precedent.

Honesty being preferable to dishonesty, the case for candor would seem straightforward. Indeed, someone unfamiliar with the literature concerning judicial candor might think that the question, "Should judicial opinions contain the true reasons for a court's decision, or should they instead consist of lies and misleading statements?" is an extraordinarily easy one: Of course judges should be truthful. To be sure, we can imagine cases in which it might be necessary for judges to lie, such as to avoid a very great evil,²³³ but presumably the great majority of cases fall outside this exception.²³⁴

Nonetheless, as one of the leading academic proponents of

²³² OLIVER W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 187 (1920). But see Kronman, *supra* note 143, at 1035.

²³³ See David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 749 (1987) (arguing that to avoid great evil is the only circumstance that justifies a lack of judicial candor, and giving the prevention of genocide as an example).

²³⁴ See *id.*

judicial candor, Professor David Shapiro, observed not too long ago, a rather large number of commentators take the view that judicial candor can be and ought to be sacrificed in order to advance other policies, even absent some risk of moral catastrophe.²³⁵ According to Shapiro, none of these other reasons that have been advanced justify overriding what he and others consider to be a presumption in favor of candor.²³⁶ Without rehearsing the entire debate over judicial candor, it suffices for present purposes to note that none of the arguments advanced against judicial candor, even if accepted, would lead to a less than perfectly candid attitude with respect to the specific question of the holding/dictum distinction.

Of the kinds of arguments against judicial candor in certain circumstances that Shapiro identifies, only one directly concerns the question of how to characterize the scope of prior opinions.²³⁷

²³⁵ See *id.* at 731 n.4 (citing Guido Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 428-30 (1979)); see also Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 236-41 (1968); Grant Gilmore, *Law, Logic and Experience*, 3 HOW. L. J. 26, 37-38 (1957); Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 17 n.29 (1934).

²³⁶ See Shapiro, *supra* note 233, at 736-38. For agreement with the proposition that there ought to be a presumption in favor of candor, see Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 39 (1957) ("There are few occasions when the candid and deliberate confrontation of the truly decisive issue is not the most desirable course for the Court to take."); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 666-68 (1983); Alan Hirsch, *Candor and Prudence in Constitutional Adjudication*, 61 GEO. WASH. L. REV. 858, 859 (1993) (reviewing JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND* (1992)).

²³⁷ Shapiro considers five kinds of values that one might weigh against candor. The first, continuity, is discussed in the text, *infra*. The last, concerning moral catastrophe, is discussed above, *supra* note 233 and accompanying text. Shapiro rejects the remaining three arguments against judicial candor.

He rejects the claim that the need for collegiality on a multi-judge court requires compromise—and therefore the suppression of disagreement—on matters of basic principle. See Shapiro, *supra* note 233, at 743.

Shapiro next discusses a variety of arguments that the effect of truthfulness would, in some contexts, undermine the very result the court seeks to advance. See *id.* at 744-45 (giving arguments suggested by Charles L. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, HARPER'S, Feb. 1961, at 63, Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984), and MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY* 45-66 (1973)); Hirsch, *supra* note 236, at 864. Shapiro responds that respect for the people entailed by democracy ought to rule out such paternalistic considerations.

Finally, Shapiro rejects the contention that dishonesty is sometimes necessary to help us avoid noticing that we wish to act in ways that are inconsistent with our

This consists in arguments based in what he labels continuity. By this Shapiro means that courts will sometimes make stronger or weaker claims about precedent than a fair reading implies in order "to improve a tradition while transmitting it."²³⁸

Shapiro rejects this justification because he believes that the distortion assumes a static view of precedent no longer commonly accepted.²³⁹ This, of course, is a capsule version of the argument I gave above in response to the "modest critique" that a broad view of holdings leads to an ossified law.²⁴⁰ Even accepting the rationale of a case as part of its holding, there will be very few cases that are strictly controlled by an earlier case. On those rare occasions "when a precedent cannot be distinguished away even under the narrowest approach consistent with fair argument,"²⁴¹ Shapiro concludes (as I do) that the harm that a dishonest reading of precedent would do to the rule of law outweighs whatever benefits would result from failure to follow the precedent.

Since Shapiro's observations, Professors Nicholas Zeppos and Scott Altman have each suggested that judicial candor about how much freedom judges have to decide cases however they wish would be detrimental for a reason not discussed by Shapiro: If the judiciary acknowledges its freedom, that acknowledgment will itself adversely affect the decision-making process.²⁴² Both Zeppos and Altman accept as their starting point the proposition that judges are typically much less constrained in their decision making than they commonly acknowledge.²⁴³ They then offer quite different diagnoses.

Zeppos offers a number of reasons why courts engaged in statutory interpretation ought not candidly look beyond originalist sources to their own conception of morality. He argues first that

professed values. See Shapiro, *supra* note 233, at 747.

²³⁸ Shapiro, *supra* note 233, at 739 (quoting LON FULLER, *THE LAW IN QUEST OF ITSELF* 13 (1940)).

²³⁹ See *id.* at 740.

²⁴⁰ See *supra* part IV.B.

²⁴¹ Shapiro, *supra* note 233, at 734.

²⁴² See Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989).

²⁴³ Altman derives this point from the Critical Legal Studies movement. See Altman, *supra* note 242, at 298. Zeppos, who limits his treatment to cases involving statutory interpretation, derives it from the descriptive aspects of the theories set forth by Guido Calabresi and William Eskridge. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); William Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). See generally Zeppos, *supra* note 242.

although predictability is ordinarily seen as a virtue of candor, a candidly open-ended interpretivist pose lacks this virtue.²⁴⁴ Second, he argues, contra Shapiro, that as a general matter truth is merely one value to be weighed against other values by a "utilitarian" judiciary.²⁴⁵ He then notes that "illusions and myths," such as the belief that courts interpreting statutes find the determinate intent of the legislature, "can serve useful purposes," among them the preservation of judicial legitimacy.²⁴⁶ Zeppos concludes that the real problem may not be a lack of judicial candor, but a lack of judicial self-awareness.²⁴⁷

Altman reaches the opposite conclusion. He argues that a judge who is aware that the law is often no constraint at all will be more likely to adopt a manipulative attitude towards the law where she formerly would have acted in a restrained manner.²⁴⁸ For Altman, it is important the judiciary not learn the true status of the illusions and myths underlying our legal system, for such knowledge would undermine the power of those illusions and myths to constrain.

Whatever one makes of these arguments, one thing is clear: they do not undercut the case for candor with respect to the holding/dictum distinction. The theories of Altman and Zeppos both address a situation in which judges say that they are *more* constrained than they in fact are. By contrast, I have argued in this Article that a lack of candor with respect to the holding/dictum distinction manifests itself when judges purport to be *less* constrained by precedent than a fair reading of prior cases suggests.

None of the general attacks on judicial candor undermines the specific case for candor in the holding/dictum context. That case rests on a general background norm that honesty ought to be preferred to lying and a particularized judgment that any short-term benefits one might accomplish through dishonesty are outweighed by the long-term costs. Since I take the general background norm to be fairly uncontroversial, I turn now to the prudential considerations that might be offered in favor of a judge's purporting to apply an outcome-focused holding/dictum distinction as a means of

²⁴⁴ See Zeppos, *supra* note 242, at 402.

²⁴⁵ *Id.* at 405.

²⁴⁶ *Id.* at 406.

²⁴⁷ See *id.* at 411 ("The problem, then, is not so much a lack of candor in statutory interpretation, but a lack of self-awareness in judging.")

²⁴⁸ See Altman, *supra* note 242, at 302. As Altman points out, his argument is really one against introspection, rather than against candor: "judges should be candid but not introspective." *Id.* at 297.

circumventing decisions the judge does not wish to overrule.

Why might a judge wish to characterize a prior opinion dishonestly narrowly rather than frankly overrule it? One possibility is that the judge does not believe that, under her view of *stare decisis*, the precedent ought to be overruled, but nonetheless wishes to decide the case in a manner contrary to the precedent. This is an exceedingly weak justification in that it amounts to simple lawlessness. A judge who does not feel that precedent ought to be a particularly strong constraint on her decision-making process is free to adopt a weak model of *stare decisis*. It is difficult to imagine that one who holds a weak view of *stare decisis* would find the constraints of precedent so burdensome as to justify their routine circumvention, especially since even robust views of *stare decisis* permit overruling a past decision that is seriously wrong.

A more plausible reason for manipulating the scope of precedent rests on the nature of decision making on multi-judge courts. Suppose Judge Flexible believes that the rule laid down in the case of *X v. Y* governs the case of *Z v. T*, but Flexible also believes that *X v. Y* ought to be overruled. However, Flexible knows that her colleague, Judge Rigid, will not go along with an opinion overruling *X v. Y* because Rigid overrules cases with much greater reluctance than Flexible does. In an attempt to forge consensus, might not Flexible write or join an opinion dismissing as dictum the controlling point of *X v. Y*?

This course could be justified were it not for the fact that Flexible has a much more honest option that accomplishes much the same thing. Flexible (or in the appropriate case, Rigid) can concur in the judgment, setting forth her true reasons for reaching the result she does.²⁴⁹

But what if Flexible fears that an honest statement of the fact that to rule as she does requires the overruling of *X v. Y* will scare off one or more of her colleagues? Perhaps she believes she can trick Judge Foolish into going along with an opinion that disingenuously narrowly characterizes the holding of *X v. Y*, but only if she, Judge Flexible, goes along as well.

There are at least two reasons to believe that such an approach would not succeed very often. First, in a case in which Flexible

²⁴⁹ See Shapiro, *supra* note 233, at 743 (observing that the distinction between a concurrence in an opinion and a concurrence in a judgment "is not insubstantial," and adding that "though the alternative to dissembling may be a proliferation of separate opinions . . . the evils of that development have been overstated").

needs Foolish's vote for a majority, there likely will be a dissent by some other judge arguing that the result does not square with *X v. Y*, and even if there is not, one of the lawyers will likely point this out. Thus, despite Flexible's efforts, the cat will be out of the bag.

Second, even Judge Foolish must have an attitude towards the scope of holdings. Whatever other arguments might appeal to Foolish, one that says "if you treat outcomes alone as holdings you will be susceptible to disingenuous persuasion by your colleagues" certainly will not. Thus, quite apart from the principled reasons for giving an honest account of precedent, a policy of deliberate narrow characterization appears unlikely to succeed.

Furthermore, any advantages that might be obtained by dissembling would be short-lived. As the removal cases illustrate, once a judge goes down the path of sub silentio overruling by recharacterization, she can expect similar treatment of her own decisions by her successors.²⁵⁰ Indeed, she virtually guarantees such treatment, since, as we have seen, the facts-plus-outcome approach to holdings will render most of her opinion irrelevant in future cases.

I do not wish to be understood as saying that there will never be occasions on which a court or judge might be justified in purporting to distinguish as dictum a proposition that it actually understands as holding. Like Shapiro, I merely contend that such circumstances will arise infrequently. They do not, therefore, provide a basis for adopting a general rule. Moreover, because such cases involve situations in which the judge subordinates the claims of law to the claims of morality, they necessarily fall outside description by reference to the principle of the rule of law. When the rule of law governs, as it must in the overwhelming proportion of cases that come before the courts, honesty truly is the best policy.

CONCLUSION

The law libraries are filled to overflowing with the reported cases of the federal courts, and each year brings many more volumes. Why? Alerting the parties to each dispute of the court's reasons for its decision cannot justify publication. Instead, a judge writes and publishes an opinion because she believes, quite rightly,

²⁵⁰ Cf. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2243 (Souter, J., concurring in part and concurring in the judgment) (suggesting that the Court's apparent departure from prior precedent in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), might justify a departure from the principles announced in *Smith*).

that her reasons for decision in one case will play some important role in a later case.

When judges and commentators argue that every aspect of a prior opinion except the facts and outcome may be ignored as dicta, they implicitly assert that the process of public justification of judicial decisions is an exercise in futility. Yet we have seen that quite to the contrary, the giving of reasons makes a judicial pronouncement consistent with the rule of law and thereby fulfills the obligation of Article III judges to exercise the "judicial Power."²⁵¹

At the same time, however, case-or-controversy norms rooted in notions of limited judicial legitimacy and competence counsel against giving the judiciary carte blanche to pronounce authoritative rules of conduct outside the context of a concrete case. Thus, the tension between the demands of the rule of law and the limits of judicial authority produces the need for a holding/dictum distinction.

Judges sometimes lose sight of the fact that two opposing forces produce this tension, focusing only on the requirements of concrete decision making. They cavalierly dismiss clearly authoritative pronouncements as mere dicta. Other times they disingenuously manipulate the distinction. Whether inadvertently or deviously, they thereby undermine the rule of law.

Do they also violate the Constitution? Throughout this Article, I have approached the holding/dictum distinction by invoking principles derived from Article III. Does this mean that Article III commands a particular view of the holding/dictum distinction? To put the matter more concretely, would a Supreme Court decision adopting a position as to what constitutes a holding be an interpretation of the Constitution?

It is worth noting in this context that the courts could not effectively adopt the facts-plus-outcome approach. In order to establish the proposition that holdings consist of nothing but outcomes, a judge would have to state the proposition in the course of deciding a case. But then that very statement would not be part of the outcome of the case, and thus, by its own terms, could be discarded as dictum in a later case. Thus, the facts-plus-outcome approach could only be established by extrajudicial means.

Accordingly, we might ask whether an act of Congress com-

²⁵¹ U.S. CONST. art. III, § 1.

manding the facts-plus-outcome view of holdings would be consistent with the Constitution. One would be hard-pressed to support a negative answer. We know that Congress may, after all, direct the courts not to give *res judicata* effect to an earlier case.²⁵² It hardly seems anomalous to recognize Congress's power to craft rules of *stare decisis*.²⁵³

Nevertheless, while there may be a wide range of constitutionally permissible views of the scope of precedent, some must be ruled out. For example, a statute authorizing the federal courts to give advisory opinions, and then to give precedential weight to those opinions, would clearly violate the case-or-controversy requirement. At the other end of the spectrum, were Congress to forbid the courts to write opinions, or forbid the courts from considering past opinions in deciding current cases, serious questions would arise as to whether the courts could exercise their constitutional duty to employ the "judicial Power."²⁵⁴

²⁵² See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 390-91 (1980) (noting that Congress's amendment to the Indian Claims Commission Act of 1946 directed the court of claims to hear a claim "without regard to the defense of *res judicata*").

²⁵³ Of course, *Sioux Nation* is distinguishable. In that case, the Court placed considerable reliance on the fact that Congress directed the courts to ignore the *res judicata* effect of a judgment that was favorable to the United States, accepting the theory that Congress may effectively waive a defense the United States would otherwise have available. See *id.* at 396-405. A more general congressional power to adjust the rules of *stare decisis* in cases not involving the United States as a party might be more problematic, as an example supplied by Professor Monaghan suggests. See Monaghan, *supra* note 4, at 745.

Suppose that Congress enacted a statute requiring the Court to reconsider the constitutionality of abortion restrictions without giving any weight to prior precedent. Monaghan suggests that, whatever one's views about *stare decisis*, the statute might be seen as a congressional usurpation of judicial authority. See *id.* at 755. To be sure, some unease may be caused by the fact that in this example Congress has singled out a particular class of cases, in an apparent attempt to circumvent the Constitution. See Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HAR. C.R.-C.L. L. REV. 129 (1981). But a more even-handed attempt at congressional control over such matters may also raise separation-of-powers concerns, even if one takes the view that the Court itself has some latitude to shape its own understanding of precedent. See Monaghan, *supra* note 4, at 755.

²⁵⁴ U.S. CONST. art III, § 1. It could be argued that the various rules of the federal courts of appeals providing for unpublished opinions amount to just such a prohibition. See Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 940 & n.1 (1989) (listing rules). I do not wish to suggest that these rules violate Article III, although unpublished opinions do pose significant dangers. See *id.* at 940 (arguing that the existing rules result in a system of differential access to unpublished opinions that favors certain litigants); George M. Weaver, *The Precedential Value of*

At the very least, sensitivity to the concerns underlying Article III ought to rule out extremely broad and extremely narrow conceptions of precedent. Moreover, as I have argued throughout this Article, those same concerns may constrain the notions of holding and dictum even further, if not as a matter of constitutional law, then perhaps as a matter of federal common law.²⁵⁵

Certainly, one may legitimately question the wisdom of constructing a judicial system based on precedent, and indeed, many Continental systems seem to function quite adequately with a very different conception of precedent from the one that prevails in the Anglo-American model.²⁵⁶ But given the starting point that precedent plays some nontrivial role in judicial decision making, one must have at least approximate criteria for determining what precedent is. Recognizing that here, as elsewhere in the law, reasons matter would be an important step towards establishing those criteria.²⁵⁷

Unpublished Opinions, 39 MERCER L. REV. 477, 477 n.1 (1988) (collecting critiques).

²⁵⁵ See generally Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986).

²⁵⁶ "While formally free to disregard legal opinions of their superiors, [Continental] judges continue[] to look to high courts for guidance." MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 36 (1986). According to Damaska, the Continental view of what constitutes precedent (as distinct from how much force it ought to be given) more closely resembles the "rule model" than does the Anglo-American view. See Alexander, *supra* note 143, at 17-27 (discussing the "rule model"). Damaska states further:

Decisions of high courts, whether binding or not, were not treated as exemplars of how a life situation had been resolved in the past so that the case sub judice could be matched with these examples of earlier decision-making. Rather, what the judge was looking for in the "precedent" was a rulelike pronouncement of higher authority.

DAMASKA, *supra*, at 33-34. Damaska attributes this difference in attitude to the greater degree of hierarchy in Continental courts than in Anglo-American courts. See *id.* at 33-46. To the extent that the federal system exhibits a greater degree of hierarchical organization than English and state courts, even under Damaska's analysis, the rule model—which is a variant on the model proposed in this Article—would appear to be an appropriate one for the federal courts. Damaska admits as much, but contends that the existence of disagreements among lower federal courts indicates a characteristic American attitude of decentralization. See *id.* at 45-46 n.64. This last claim appears far-fetched. Cf. SUP. CT. R. 10.1 (listing the existence of a conflict among the lower courts as an important consideration warranting the grant of a petition for writ of certiorari).

²⁵⁷ See OLIVER W. HOLMES, *THE COMMON LAW* 7 (1881) ("[E]ven a dog distinguishes between being stumbled over and being kicked.").

