THE SCOPE OF PRECEDENT

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The scope of Supreme Court precedent is capacious. Justices of the Court commonly defer to sweeping rationales and elaborate doctrinal frameworks articulated by their predecessors. This practice infuses judicial precedent with the prescriptive power of enacted constitutional and statutory text. The lower federal courts follow suit, regularly abiding by the Supreme Court's broad pronouncements. These phenomena cannot be explained by—and, indeed, oftentimes subvert—the classic distinction between binding holdings and dispensable dicta.

This Article connects the scope of precedent with recurring and foundational debates about the proper ends of judicial interpretation. A precedent's forward-looking effect should not depend on the superficial categories of holding and dictum. Instead, it should reflect deeper normative commitments that define the nature of adjudication within American legal culture.

The account that emerges is one in which the scope of precedent is inextricably linked to interpretive theory and constitutional understandings. Divergent methods of interpretation, from originalism to common law constitutionalism and beyond, carry distinctive implications for describing a precedent's constraining effect. So, too, do various methods of interpretation in the statutory and common law contexts. Ultimately, what should determine the scope of precedent is the set of premises—regarding the judicial role, the separation of powers, and the relevance of history, morality, and policy—that informs a judge's methodological choices.

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a given precedent is broad enough to cover a newly arising dispute, it will exert constraining force that exceeds its persuasiveness. Unlike a merely persuasive proposition, a binding proposition requires a judge to show something more than disagreement in order to justify departing from the past. It is the definition of a precedent's *scope* of applicability that makes the *strength* of deference relevant to the analysis. The corollary is that, when judges interpret precedent broadly, the strength of deference becomes crucial to determining what is settled and what is open for debate.

B. *Starting Points: The Holding–Dicta Distinction*

The classic account of precedential scope revolves around a stark dichotomy. Judicial holdings receive deference in future cases. Dicta, by contrast, have no constraining force and are relevant only to the extent that their reasoning is persuasive.[34] Chief Justice Marshall made this point nearly two centuries ago in *Cohens v. Virginia*, noting that, while expressions that "go beyond the case . . . may be respected," they do not control "in a subsequent suit when the very point is presented for decision."[35]

The same principle is evident in the Supreme Court's modern case law.[36] The Court's decisions regularly confirm the nonbinding nature of dicta.[37] By way of illustration, consider the Court's recent echo of *Cohens* in noting that "we are not necessarily bound by dicta should more complete argument demonstrate that the dicta is not correct."[38] Consider, too, Justice Scalia's assertion that, even if dicta are "repeated" over time, they are "not owed *stare decisis* weight,"[39] as well as his statement that dicta are "binding upon neither" the Supreme Court nor the inferior courts.[40] Whenever a

34. For an account of the various ways in which authorities can be persuasive, see Lawrence B. Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, 91 Wash. U. L. Rev. 1 (2013). "Persuasive authority has four distinct but related components: (1) persuasion by reasons, (2) persuasion by epistemic authority, (3) persuasion by predictive authority, and (4) persuasion by legitimating authority." *Id.* at 38.

35. 19 U.S. (6 Wheat.) 264, 339 (1821).

36. *See, e.g.*, Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 520 (2012) (calling the *Cohens* language a "sage observation"); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) ("For the reasons stated by Chief Justice Marshall in [*Cohens*], we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

37. *See, e.g.*, Cent. Green Co. v. United States, 531 U.S. 425, 431 (2001) (noting that "dicta 'may be followed if sufficiently persuasive' but are not binding" (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 627 (1935))); U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 24 (1994) (noting the Supreme Court's "customary refusal to be bound by dicta").

38. Kirtsaeng v. John Wiley & Sons, 133 S. Ct. 1351, 1368 (2013).

39. Gonzales v. United States, 553 U.S. 242, 256 (2008) (Scalia, J., concurring in the judgment).

40. CIGNA Corp. v. Amara, 131 S. Ct. 1866, 1884 (2011) (Scalia, J., concurring in the judgment); *see also, e.g.*, Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 869 (2011) ("We

court treats a proposition as undeserving of deference because it was beyond "the narrow point decided," the holding–dicta distinction is at work.[41]

The Supreme Court has described the holding of a case as including its "final disposition" in addition to "the preceding determinations '*necessary* to that result.'"[42] Holdings must also be grounded in "the adjudicated facts";[43] hypothetical statements are the stuff of dicta. On this view, precedential effect attaches to the application of a targeted legal rule to a discrete set of facts that were actually presented in the underlying dispute. It is true, of course, that Supreme Court opinions are full of logical arguments and prescriptions for the future. As Justice Stevens has noted, "[v]irtually every one of the Court's opinions announcing a new application of a constitutional principle contains some explanatory language that is intended to provide guidance to lawyers and judges in future cases."[44] Even so, it is important to recognize that the distinction between holdings and dicta would deny deference to unnecessary and hypothetical statements even when they were clearly intended to guide future courts.[45] Such statements may or may not be convincing on the merits, but in no event would they warrant deference beyond their persuasive force.

The enduring salience of the holding–dicta distinction is visible whenever the Supreme Court marginalizes its past expressions by depicting them as peripheral or overbroad. A useful illustration is the Court's recent decision in *United States v. Alvarez*.[46] In *Alvarez*, which struck down a federal statute that prohibited fabricated claims of military commendation, a plurality of justices determined that false statements possess some value in the eyes of the First Amendment.[47] Before reaching that conclusion, the plurality had to confront language in the Court's prior opinions supporting the contrary view that false claims possess no intrinsic value.[48] The plurality downplayed

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now find that this dictum was ill-considered, and we decline to follow it."); District of Columbia v. Heller, 554 U.S. 570, 625 n.25 (2008) ("It is inconceivable that we would rest our interpretation of the basic meaning of any guarantee of the Bill of Rights upon such a footnoted dictum in a case where the point was not at issue and was not argued.").

41. Humphrey's Ex'r v. United States, 295 U.S. 602, 626 (1935).

42. Tyler v. Cain, 533 U.S. 656, 663 n.4 (2001) (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996)) (emphasis in *Tyler*); *cf.* BLACK'S LAW DICTIONARY 1177 (9th ed. 2009) (defining "obiter dictum" to mean a judicial comment "that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)").

43. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 14 (1994).

44. *See* Carey v. Musladin, 549 U.S. 70, 79 (2006) (Stevens, J., concurring in the judgment).

45. *See* Schauer, *supra* note 27, at 580 (noting that, "[i]n classical legal theory, articulated characterizations are often considered mere dicta").

46. 132 S. Ct. 2537 (2012) (plurality opinion).

47. *See Alvarez*, 132 S. Ct. at 2546–47 (plurality opinion).

48. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective.").

the problematic language as consisting of "isolated statements" uttered in a different context.[49] According to the plurality, all the opinions that had described false statements as valueless involved "defamation, fraud, or some other legally cognizable harm . . . such as an invasion of privacy or the costs of vexatious litigation."[50] There was no justification for deference outside of those situations, regardless of whether the Court's previous language suggested a general principle that false speech is valueless. By drawing a rigid line between fact-intensive rulings and nonbinding judicial exposition, the *Alvarez* plurality highlighted the importance of sorting holdings from dicta.

To the same effect is *United States v. Stevens*, a case dealing with a criminal statute aimed at depictions of animal cruelty.[51] In defending the statute's constitutionality, the U.S. Solicitor General pressed an argument grounded in cost–benefit analysis: because depictions of animal cruelty have meager social value but impose significant social harm, they should be treated as a categorical exception to First Amendment protection.[52] The Solicitor General's argument drew on previous cases in which the Court had described this type of cost–benefit analysis as relevant to constitutional protection.[53] But *Stevens* dismissed the Court's prior acceptance of cost–benefit analysis as merely "descriptive."[54] According to *Stevens*, the Court's language linking First Amendment coverage to cost–benefit analysis was window dressing. The language did not "set forth a test that may be applied as a general matter."[55] In this way, the Court framed its new approach to identifying categorical exceptions (which is expressly tied to historical practice rather than to the weighing of costs and benefits) as familiar despite the fact that it clashed with the language of decisions that preceded it.[56]

Similar dynamics are evident in the Supreme Court's most famous application of stare decisis, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[57] When the Court first addressed the constitutional implications of abortion in *Roe v. Wade*, it ventured far beyond the facts at hand to articulate an elaborate framework for evaluating abortion regulations based on the trimester of pregnancy.[58] That framework was not an essential statement or

49. *Alvarez*, 132 S. Ct. 2544 (plurality opinion).

50. *Id.* at 2545.

51. 130 S. Ct. 1577 (2010).

52. *Stevens*, 130 S. Ct. at 1585.

53. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 763–64 (1982) ("[I]t is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.").

54. *Stevens*, 130 S. Ct. at 1586.

55. *Id.*

56. *See id.* at 1584–86.

57. 505 U.S. 833 (1992).

58. 410 U.S. 113, 163–66 (1973).

an application of law to specific facts presented for adjudication. It was an abstract and generalized set of instructions for handling future cases.

In *Casey*, the Court preserved *Roe*'s "central holding" that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[59] At the same time, a plurality of justices jettisoned the trimester framework, which they did "not consider to be part of the essential holding of *Roe*."[60] That distinction, which Justice Scalia criticized as a "new, keep-what-you-want-and-throw-away-the-rest version" of stare decisis, reflected a view that core holdings are entitled to very different treatment than peripheral exposition.[61]

The lower federal courts also furnish some notable support for policing the line between holdings and dicta. Judge Boggs has written that "the holding/dicta distinction demands that we consider binding only that which was necessary to resolve the question before the [Supreme] Court."[62] Likewise, Judge Leval has contended that Supreme Court dicta are "not law."[63] In his estimation, the consequence is not merely that inferior-court judges should feel free to depart from such dicta. The implications go further: judges "may not treat the Supreme Court's dictum as dispositive."[64] A judge who does so "fail[s] to discharge" her "responsibility to deliberate on and decide the question which needs to be decided."[65] Judge Aldisert has taken a similar position, reasoning that "[t]he common-law tradition requires starting with a narrow holding and, then . . . either applying it or not applying it to subsequent facts."[66] Examples like these demonstrate the continued relevance of the classic holding–dicta distinction to American jurisprudence.

C. *Precedential Breadth at the Supreme Court*

Given the persistence of the holding–dicta distinction, one might infer that the scope of precedent is commonly defined in a narrow fashion. After

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59. *Casey*, 505 U.S. at 860.

60. *Id.* at 873 (plurality opinion).

61. *Id.* at 993 (Scalia, J., concurring in the judgment in part and dissenting in part).

62. Grutter v. Bollinger, 288 F.3d 732, 787 (6th Cir. 2002) (en banc) (Boggs, J., dissenting), *aff'd*, 539 U.S. 306 (2003).

63. Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1274 (2006).

64. *Id.*

65. *Id.* at 1250; *cf.* United States v. Crawley, 837 F.2d 291, 292 (7th Cir. 1988) ("What is at stake in distinguishing holding from dictum is that a dictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject.").

66. Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 Pepp. L. Rev. 605, 610 (1990); *cf. In re* Am. Express Merchs.' Litig., 681 F.3d 139, 147 (2d Cir. 2012) (Jacobs, J., dissenting from denial of rehearing en banc) ("[E]ven if the . . . dicta were to have the meaning the panel ascribes to it, it is nonetheless still dicta.").

all, an insistence on separating holdings from dicta can be understood as reflecting discomfort with a broad conception of precedent.

In practice, however, the scope of precedent tends to be remarkably capacious. We can observe this phenomenon both at the Supreme Court, which is the topic of this Section, and in the lower federal courts, which are the topic of the next.

In examining the Supreme Court's broad conception of precedential scope, it will be instructive to consider the Court's treatment of four categories of propositions: (1) unmistakable dicta; (2) doctrinal frameworks; (3) codifying statements; and (4) supporting rationales.

1. Unmistakable Dicta

The Supreme Court sometimes cites its prior articulations of legal principles even while acknowledging those articulations as dicta.[67] Such citations do not prove that dicta receive binding force, but they do suggest that the Court ascribes some significance to the fact that a principle has a historical lineage—in other words, that the Court values precedent qua precedent—even when the principle was expressed in dicta.[68]

Occasionally, the justices offer more explicit indications that dicta can carry binding force beyond their persuasive appeal. In *Kappos v. Hyatt*, the Supreme Court considered the treatment of new evidence in civil actions contesting the denial of patent applications.[69] One of the precedents the Court discussed was *Butterworth v. United States ex rel. Hoe*, which described civil actions as independent of the initial patent application, with the consequence that new evidence could be presented in subsequent litigation.[70] The *Kappos* Court characterized *Butterworth*'s pronouncements as worthy of deference despite acknowledging that the relevant "discussion was not strictly necessary to *Butterworth*'s holding."[71] The Court explained that, although the pertinent statements in *Butterworth* were technically dicta, they were "not the kind of ill-considered dicta that we are inclined to ignore."[72] To the contrary, the *Butterworth* discussion reflected a "careful[ ] examin[ation]" of

67. *See, e.g.*, South Carolina v. North Carolina, 130 S. Ct. 854, 871 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("[W]e have strongly intimated in other decisions (albeit in dictum) that private entities can rarely, if ever, intervene in original actions involving the apportionment of interstate waterways."); Rivera v. Illinois, 129 S. Ct. 1446, 1455 (2009) ("We disavowed this statement . . . albeit in dicta . . . .").

68. On the distinctive purposes for which judges can use precedent, see Kozel, *supra* note 24, at 1849–55.

69. 132 S. Ct. 1690 (2012).

70. *Kappos*, 132 S. Ct. at 1698 (discussing Butterworth v. United States *ex rel.* Hoe, 112 U.S. 50 (1884)).

71. *Id.*

72. *Id.*

the statutory context and inferior-court decisions.[73] The Court had also "reiterated *Butterworth*'s well-reasoned interpretation . . . in three later cases."[74] The dicta were therefore entitled to some degree of deference.

Kappos serves as a starting point in probing the barrier between binding holdings and dispensable dicta. It is difficult to discern precisely how much deference the *Butterworth* dicta received, because the *Kappos* Court also found them persuasive on the merits.[75] But the central takeaway is the recognition of distinctions among different types of dicta in light of considerations such as their evident degree of deliberation. By distinguishing "ill-considered dicta" from dicta that ought not be "ignor[ed]," *Kappos* offers a subtle but significant challenge to the holding–dicta dichotomy. The case implies that even dicta can be worthy of deference under the right circumstances.

A comparable example comes from Justice Breyer's dissent in *Parents Involved in Community Schools v. Seattle School District No. 1*.[76] In *Parents Involved*, the Supreme Court considered the authority of school districts to make school assignments based on factors including students' race. The Court struck down the relevant districts' practices as violating the Equal Protection Clause.[77]

Justice Breyer dissented on behalf of himself and three others, criticizing the treatment of precedent in a portion of the Court's opinion that was joined by a plurality of justices. In particular, Justice Breyer emphasized a statement from the 1970 case of *Swann v. Charlotte-Mecklenburg Board of Education*[78] that arguably expressed approval of race-based enrollment decisions made "in order to prepare students to live in a pluralistic society."[79] The *Parents Involved* plurality had characterized that part of *Swann* as inapposite, outmoded, and nonbinding dicta.[80] On the dicta point, Justice Breyer conceded that the statement "was not a technical holding in the case."[81] But he countered that the *Swann* Court "set forth its view prominently in an important opinion joined by all nine Justices, knowing that it would be read and followed throughout the Nation."[82] In addition, the statement had come

73. *Id.*

74. *Id.*

75. *See id.* (describing the *Butterworth* approach as "well-reasoned").

76. 551 U.S. 701 (2007).

77. *Parents Involved*, 551 U.S. at 710–11.

78. 402 U.S. 1, 16 (1970).

79. *Parents Involved*, 551 U.S. at 823 (Breyer, J., dissenting) (quoting *Swann*, 402 U.S. at 16) (internal quotation marks omitted); *see also* James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 Harv. L. Rev. 131, 137 (2006) (arguing that *Swann* "clearly endorsed the proposition that school officials have the authority to seek racial integration voluntarily").

80. *See Parents Involved*, 551 U.S. at 737–38 (plurality opinion).

81. *Id.* at 823 (Breyer, J., dissenting).

82. *Id.* at 831.

to enjoy "wide acceptance in the legal culture."[83] And "it reflected a consensus that had already emerged among state and lower federal courts."[84] The plurality's "rigid distinctions between holdings and dicta" were therefore insufficient.[85] If the plurality wished to reconsider the statement in *Swann*, it should have acknowledged an obligation to "explain to the courts and to the Nation *why* it would abandon guidance set forth many years before."[86]

Justice Breyer's language suggests that he regarded the *Swann* dicta as carrying something more than persuasive effect. In his view, it was not enough to ask whether the position taken in *Swann* was convincing on the merits. The statement deserved a degree of respect above and beyond its soundness. This status owed in part to the perceived intention of the issuing Court, and in part to the role that the statement came to play over time. Dicta or not, the statement constituted "authoritative legal guidance."[87] Departing from it accordingly required a better answer to the question, "[W]hy change?"[88]

As with the Court's opinion in *Kappos*, Justice Breyer's dissent in *Parents Involved* implies that, in certain situations, it is appropriate to defer to judicial statements even if they fall into the category of unnecessary dicta. Justice Breyer advanced the same basic position in a previous case, asserting in 2004 that dicta with a "lengthy history" can be entitled to deference if they are "the kind of strong dicta that the legal community typically takes as a statement of the law."[89] Similar sentiments appear in a 2008 opinion from Justice Souter contending that, even if a particular statement was technically a dictum, "it was dictum well considered, and it stated the view of five Members of this Court."[90] The common theme is that not all dicta are created equal; some are entitled to precedential weight.

2. Doctrinal Frameworks

By their very nature, doctrinal frameworks sweep far beyond the facts at hand to address other situations not concurrently before the court. Yet while Supreme Court justices occasionally refuse to accept the validity of doctrinal frameworks with which they disagree,[91] in many cases the frameworks are

83. *Id.* at 823 (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)) (internal quotation marks omitted).

84. *Id.* at 827.

85. *Id.* at 831.

86. *Id.*

87. *Id.*

88. This language is drawn from a recent dissent by Justice Breyer dealing with shifts in administrative policy. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1832 (2009) (Breyer, J., dissenting).

89. Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 198 (2004) (Breyer, J., dissenting).

90. Boumediene v. Bush, 553 U.S. 723, 799 (2008) (Souter, J., concurring).

91. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting) ("I adhere to the view expressed in my dissenting opinion in *BMW of*

taken as given, with the real differences concerning their application to particular sets of facts.[92] Disputes over the Commerce Clause tend to accept the relevance of asking whether "economic activity substantially affects commerce."[93] Disputes over racial classifications generally assume that the appropriate question is whether the government has narrowly tailored its regulations to serve a compelling interest.[94] Disputes over the Ex Post Facto Clause give canonical force to Justice Chase's four categories of prohibited laws as articulated in *Calder v. Bull*.[95] Disputes over administrative law accept the two-step protocol set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[96] as appropriate for a large chunk of cases.[97] In these and scores of other situations, generalized doctrinal frameworks exert binding force.

An illuminating example recently arose in the context of firearm regulation. In the *Slaughter-House Cases*, decided in 1873, the Supreme Court interpreted the Fourteenth Amendment's Privileges or Immunities Clause[98] as

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North America, Inc. v. Gore, 517 U.S. 559, 598–599 (1996), that the Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable' awards of punitive damages.").

92. *See* Caminker, *supra* note 43, at 14 (1994) ("[J]urists generally agree that legal rules or doctrines invoked by a judge to justify her disposition of a case qualify for precedential status.").

93. *Compare* United States v. Lopez, 514 U.S. 549, 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."), *with id.* at 615–16 (Breyer, J., dissenting) (arguing that the commerce power "encompasses the power to regulate local activities insofar as they significantly affect interstate commerce" and pointing out that "to speak of 'substantial effect' rather than 'significant effect' would make no difference in this case"). *See also id.* at 585 (Thomas, J., concurring) ("In an appropriate case, I believe that we must further reconsider our 'substantial effects' test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.").

94. *Compare* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (stating that racial "classifications are constitutional only if they are narrowly tailored to further compelling governmental interests"), *with id.* at 378 (Rehnquist, C.J., dissenting) ("I agree with the Court that, 'in the limited circumstance when drawing racial distinctions is permissible,' the government must ensure that its means are narrowly tailored to achieve a compelling state interest.").

95. *See, e.g.*, Peugh v. United States, 133 S. Ct. 2072, 2081 (2013) (citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798)).

96. 467 U.S. 837 (1984).

97. *See, e.g.*, City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013) ("As this case turns on the scope of the doctrine enshrined in *Chevron*, we begin with a description of that case's now-canonical formulation."); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1817 (2010) ("*Chevron* is precedential for much more than its mere substantive (environmental law) holding; far more significant has been the *methodology* it sets forth for all future potential deference cases." (footnote omitted)).

98. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .").

protecting "only those rights 'which owe their existence to the Federal government, its National character, or its laws.'"[99] That opinion was eventually characterized by many as undermining the argument that the Privileges or Immunities Clause incorporates the Bill of Rights against the states.[100] The Court's eventual response was the "selective incorporation" of most of the Bill of Rights via the Fourteenth Amendment's Due Process Clause.[101] The inquiry became whether a particular right is "fundamental to our scheme of ordered liberty and system of justice."[102]

The validity of selective incorporation under the Due Process Clause reemerged in *McDonald v. City of Chicago*, which involved local laws banning the possession of handguns in the home. The Court had recently invalidated a comparable District of Columbia law as violating the Second Amendment.[103] The question in *McDonald* was whether the same analysis should apply to state and local laws. The challengers asked the Court to depart from the practice of selective incorporation under the Due Process Clause and to rule that the Second Amendment should be applied to state and local governments via the Privileges or Immunities Clause.[104] But a plurality of justices declined the invitation. The plurality conceded that "many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation."[105] Yet it chose to continue down the path of Due Process Clause analysis.[106]

The *McDonald* opinion evinces a broad understanding of precedential scope. The Supreme Court's selective incorporation doctrine is a wide-ranging framework designed to apply to cases dealing with a host of constitutional rights. Nevertheless, the *McDonald* plurality treated the framework as entitled to deference despite forceful criticisms—criticisms that the plurality did not attempt to rebut—of its soundness on the merits. The *McDonald*

99. McDonald v. City of Chicago, 130 S. Ct. 3020, 3028 (2010) (quoting the *Slaughter-House Cases*, 83 U.S. 36, 79 (1873)).

100. *Cf.* Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 394 n.80 (2011) ("[M]any constitutional scholars believe that the Court improperly failed to interpret the Privileges or Immunities Clause of the Fourteenth Amendment as applying the Bill of Rights to state and local action."). *But see* Kurt T. Lash, The Fourteenth Amendment and the Privileges and Immunities of American Citizenship 264–65 (2014) (arguing that it was not the Court's approach in the *Slaughter-House Cases*, but rather its subsequent opinion in *United States v. Cruikshank*, 92 U.S. 542 (1876), that led to a constrained interpretation of the Privileges or Immunities Clause).

101. *McDonald*, 130 S. Ct. at 3034.

102. *Id.* (emphasis omitted).

103. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (holding that the "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense").

104. *See McDonald*, 130 S. Ct. at 3028.

105. *Id.* at 3029.

106. *Id.* at 3030–31.

opinion thus stands as another endorsement of the view that the Court possesses considerable authority to articulate generalized doctrinal frameworks that will be imbued with precedential effect.

Even some cases that ostensibly suggest a more restrictive understanding of precedent ultimately accept the constraining force of doctrinal frameworks. Recall the example of *Casey*, which preserved the constitutional right to abortion while rejecting the trimester framework set forth in *Roe v. Wade*.[107] *Casey* drew a clear line between *Roe*'s central holding and its other constituent elements, but the plurality did not stop there. Instead, it embraced a different doctrinal framework—one focused on whether a regulation places an "undue burden" on abortion rights[108]—as the proper analytical rubric to replace the disfavored trimester approach. In describing its preferred rubric, the plurality also explained that "[r]egulations which do no more than create a structural mechanism" for "express[ing] profound respect for the life of the unborn are permitted," so long as "they are not a substantial obstacle to the woman's exercise of the right to choose."[109] In effect, the *Casey* plurality treated *Roe*'s trimester framework as unworthy of deference while endorsing an alternative framework to guide future courts. What began as a relatively restrictive approach to precedent gave way to a far more inclusive paradigm.

3. Codifying Statements

Related to the crafting of broad doctrinal frameworks is the Supreme Court's practice of couching some of its directives in remarkably elaborate terms. There is no better illustration of such a "codifying decision[ ]"[110] than *Miranda v. Arizona*, which announced a detailed litany of warnings to serve as "procedural safeguards" during custodial interrogations of suspected criminals.[111] As Judge Easterbrook has noted, the *Miranda* warnings theoretically "could be disregarded on the ground that Ernesto Miranda had not been given any warning, so the Court could not pronounce on the consequences of giving three but not four of the warnings on its list."[112] And yet the Supreme Court has treated the warnings as representing a binding mandate of criminal procedure.[113]

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107. *See supra* Section I.B.

108. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) (plurality opinion).

109. *Id.* at 877.

110. Faheem-El v. Klincar, 841 F.2d 712, 730 (7th Cir. 1988) (en banc) (Easterbrook, J., concurring).

111. 384 U.S. 436, 444–45 (1966).

112. *Faheem-El*, 841 F.2d at 730.

113. *See id.*; *see also* Dickerson v. United States, 530 U.S. 428, 444 (2000) ("*Miranda* announced a constitutional rule that Congress may not supersede legislatively."); *id.* at 435 (The *Miranda* guidelines "established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings.").

Like doctrinal frameworks, codifying statements float free of the factual context surrounding any particular dispute. But even though they are broad statements of guiding principles, they can exert binding force as a matter of federal practice. Once again, the effect is to expand the constraining power of the Supreme Court's decisions.

4. Supporting Rationales

The reasons offered to support a judicial ruling are distinct from the ruling itself. Some conceptions of precedent are broad enough to treat supportive reasoning as carrying binding force.[114] On other accounts, judicial rationales should not receive deference when they are exported to new factual contexts that were not before the issuing court at the time of its decision. The latter position reflects the belief that "under the doctrine of *stare decisis* a case is important only for what it decides—for the 'what,' not for the 'why,' and not for the 'how.'"[115]

The debate has been with us for decades. In 1928, Professor Oliphant lamented that "we are well on our way toward a shift from following decisions to following so-called principles, from *stare decisis* to . . . *stare dictis*."[116] Justice Kennedy took a contrary position some sixty years later in stating that "the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."[117]

That latter view is most consistent with the Supreme Court's characterization of its contemporary practice. The Court has stated that a "well-established rationale upon which the Court based the results of its earlier decisions" is entitled to stare-decisis effect.[118] As explained above, the Court has not been uniform in its solicitude for underlying rationales, and there are notable examples in which articulated reasons are denied deference.[119] But in other cases, rationales continue to exert binding force.[120]

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114. *See* Leval, *supra* note 63, at 1256 ("If the court's judgment *and the reasoning which supports it* would remain unchanged, regardless of the proposition in question, that proposition . . . is superfluous to the decision and is dictum." (emphasis added)).

115. *In re* Osborne, 76 F.3d 306, 309 (9th Cir. 1996) (making the quoted statement in the context of circuit precedent); Aldisert, *supra* note 66, at 607.

116. Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 72 (1928).

117. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also* Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring in part and dissenting in part) ("Although technically dicta, the discussion [of a relevant statute in a previous decision] was an important part of the Court's rationale for the result it reached, and accordingly is entitled to greater weight than the Court gives it today.").

118. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66–67 (1996).

119. *See supra* Section I.B.

120. *E.g.*, *Seminole Tribe of Fla.*, 517 U.S. at 66.

D. *Precedential Breadth in the Lower Federal Courts*

The inclusive view of precedent is even more prevalent in the lower federal courts. This Part has identified prominent federal judges who have endorsed a fairly restrictive approach to precedent.[121] Yet the attitude exemplified by those judges is far from universal.[122] As Professor Schauer observes, it is often true that, within "interpretive arenas below the Supreme Court, one good quote is worth a hundred clever analyses of the holding."[123] From the determined efforts of lower-court judges to "parse Supreme Court opinions in seeking to identify applicable doctrine," it can seem as if there is "little meaningful difference between the effect of a congressional statute[ ] and a new doctrinal rule adopted by the Court."[124]

Many lower courts have described Supreme Court statements as entitled to deference even when those statements were made in dicta.[125] The strength of deference varies from court to court. Some lower courts describe Supreme Court dicta as akin to Supreme Court holdings, such that dicta can demand adherence in what would otherwise "be an extremely close case."[126] Other opinions contemplate an intermediate degree of deference,[127] with judges asserting that Supreme Court dicta bind "almost as firmly" as holdings.[128] Still other courts describe dicta as entitled to "considerable weight"

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121. *See supra* Section I.B.

122. *See* Caminker, *supra* note 43, at 75 ("[L]ower courts frequently give considerable, and sometimes even dispositive, weight to nonbinding but well-considered dicta when addressing novel legal questions." (footnotes omitted)); Dorf, *supra* note 14, at 2026 ("Some lower courts do not view themselves as bound by a higher court's dicta, while others take the position that all considered statements of a higher court are binding." (footnote omitted)).

123. Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 683 (1986) (book review); *see also id.* ("[I]t is not what the Supreme Court held that matters, but what it *said*.").

124. Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power"*, 80 B.U. L. REV. 967, 994 (2000); *see also id.* ("[T]he traditional judicial distinction between dictum and a holding seems to play an increasingly insignificant role in the Court's opinions formulating the 'rule' that they create, and subsequently in lower courts' decisions analyzing and applying those rules.").

125. *See, e.g.*, McCravy v. Metro. Life Ins. Co., 690 F.3d 176, 181 n.2 (4th Cir. 2012); ACLU of Ky. v. McCreary Cnty., 607 F.3d 439, 447 (6th Cir. 2010); Schwab v. Crosby, 451 F.3d 1308, 1325 (11th Cir. 2006); Stone Container Corp. v. United States, 229 F.3d 1345, 1349–50 (Fed. Cir. 2000); United States v. Oakar, 111 F.3d 146, 153 (D.C. Cir. 1997); Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 495 n.41 (3d Cir. 1992); United States v. Miller, 604 F. Supp. 2d 1162, 1167 (W.D. Tenn. 2009) (noting that while "[c]ourts generally treat dicta in case law as non-binding . . . [m]ost federal circuits have recognized that 'by the way' statements made by the Supreme Court resonate more forcefully than dicta from other sources"); Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 479 (2012) ("[T]he lower courts . . . tend to treat the high court's dicta as quite authoritative, indeed nearly binding.").

126. Myers v. Loudoun Cnty. Pub. Sch., 418 F.3d 395, 410 (4th Cir. 2005) (Motz, J., concurring in the judgment).

127. *See* Caminker, *supra* note 43, at 76 (arguing that "the courts giving significant weight to dicta make it quite clear that they do not consider dicta to be *binding* as they do unified-majority dispositional rules").

128. McCoy v. Massachusetts, 950 F.2d 13, 19 (1st Cir. 1991).

but add that "we are not necessarily bound to follow" them.[129] Another court has noted that, while dicta are "not binding," neither can they be taken "lightly"—although they may give way in the face of unanticipated circumstances.[130] And the descriptions do not end here; lower courts also refer to Supreme Court dicta using words like "respect,"[131] "great weight,"[132] "great deference,"[133] and "more appropriate . . . than any test we might fashion."[134]

Statements of this sort, which disavow the treatment of Supreme Court dicta as unworthy of deference, expressly adopt an inclusive paradigm of precedent. Rather than being denied any weight beyond their persuasiveness, Supreme Court dicta receive substantial, and sometimes controlling, deference in the lower courts.[135] A recent empirical study by Professor Klein and Professor Devins underscores this point by confirming the "frequent decisions" among inferior courts "to abide by statements from higher courts even though they are recognized as dicta."[136] Whatever its merits as a normative matter—an issue that will be taken up in Part III, below—the practice of deferring to dicta provides a final, and striking, piece of evidence for the inclusive paradigm's resonance in contemporary practice.

II. Clarifying the Inclusive Paradigm of Precedent

The previous Part explained the ways in which the prevailing approach to Supreme Court precedent is broadly inclusive. Generalized, sweeping, and unnecessary propositions commonly exert forward-looking effect in the Supreme Court and lower courts alike.

The crucial normative questions are whether the prevalence of this inclusive paradigm is something to be cheered or lamented, and how the legal system should respond to the tension between the inclusive paradigm and the more restrictive definition of precedent that is implied by the classic holding–dicta distinction. These questions provide the backdrop for the remainder of the Article.

To facilitate the process of normative evaluation, this Part clarifies three aspects of the inclusive paradigm of precedent. To summarize:

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129. United States v. Bell, 524 F.2d 202, 206 & n.4 (2d Cir. 1975).

130. Official Comm. of Unsecured Creditors of Cybergenics Corp. *ex rel.* Cybergenics Corp. v. Chinery, 330 F.3d 548, 561 (3d Cir. 2003) (en banc).

131. Nichol v. Pullman Standard, Inc., 889 F.2d 115, 120 n.8 (7th Cir. 1989).

132. *See, e.g.*, Coeur D'Alene Tribe of Idaho v. Hammond, 384 F.3d 674, 683 (9th Cir. 2004); United States v. Santana, 6 F.3d 1, 9 (1st Cir. 1993).

133. United States v. Colasuonno, 697 F.3d 164, 179 (2d Cir. 2012).

134. Grutter v. Bollinger, 288 F.3d 732, 746 n.9 (6th Cir. 2002) (en banc), *aff'd*, 539 U.S. 306 (2003).

135. *See* Caminker, *supra* note 43, at 76 ("It is . . . quite clear that courts do not follow dicta merely because they are moved by the dicta's intrinsic persuasive force; courts occasionally follow dicta with which they expressly disagree.").

136. Klein & Devins, *supra* note 17, at 2044.