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Adam Steinman
University of Alabama - School of Law, steinman@law.tamu.edu

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TO SAY WHAT THE LAW IS: RULES, RESULTS, AND THE DANGERS OF INFERENTIAL STARE DECISIS

Adam N. Steinman[*]

[*] Professor of Law and Michael J. Zimmer Fellow, Seton Hall University School of Law. Thanks to Jenny Carroll, Amanda Frost, Abbe Gluck, Rachel Godsil, Ed Hartnett, Helen Hershkoff, John Leubsdorf, Arthur Miller, Henry Monaghan, Trevor Morrison, Alice Ristroph, Jon Romberg, Larry Solum, Charlie Sullivan, Andrew Terjesen, and Steve Vladeck for their excellent suggestions at various stages of this Article's development. This Article also benefited greatly from comments I received at the Judges & Judging Workshop at American University Washington College of Law and a summer faculty workshop at Seton Hall. In addition, thanks to Franklin Barbosa and Kevin Mahoney for their exceptional research assistance, and to the editors and staff of the *Virginia Law Review* for their fantastic work.

INTRODUCTION

SINCE our nation's earliest days, the federal judiciary has claimed for itself "the province and duty . . . to say what the law is."[1] Because of stare decisis, a judicial opinion creates law that can bind subsequent decision-makers just as much as a statute or constitutional provision.[2] In a world where codified law often leaves many questions unresolved,[3] determining the prospective lawmaking effect of judicial decisions is crucial. Yet the ground rules for discerning the law-generating content and scope of a judicial decision remain remarkably murky.[4]

Of course, there is also significant disagreement when it comes to interpreting statutes or the Constitution. But even the most challenging puzzles in those areas typically begin with an identifiable lawmaking text—the relevant constitutional or statutory provision, the enactment of which purposefully and plainly generates law. For a judicial decision, it is not even clear where we should look to find the part that creates prospectively binding law. Nonetheless, judicial opinions grow longer and longer, while often seeming to provide little guidance about the content of the law going forward.[5]

[1] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[2] Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1176–77 (1989) ("In a judicial system such as ours, in which judges are bound, not only by the text of code or Constitution, but also by the prior decisions of superior courts, and even by the prior decisions of their own court, courts have the capacity to 'make' law.").

[3] See, e.g., Sykes v. United States, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting) ("Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty.").

[4] See, e.g., Larry Alexander, Constrained by Precedent, 63 S. Cal. L. Rev. 1, 3 (1989) ("[I]f one were to ask law students, lawyers, judges, or legal academics what following precedent entails, one would almost surely get a variety of inconsistent answers.").

[5] See, e.g., Adam Liptak, Justices Long on Words but Short on Guidance, N.Y. Times, Nov. 18, 2010, at A1; see also Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 765 n.236 (1988) ("[The] distinction between holding and dicta. . . . seems to be particularly necessary with respect to often sprawling, undisciplined, heavily footnoted opinions issued by the Supreme Court." (citation omitted)); Richard A. Posner, Supreme Court 2013: The Year in Review, Entry 4: What's the Biggest Flaw in the Opinions This Term?, Slate.com (June 21, 2013 12:17 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/supreme_

If stare decisis means "to stand by things decided,"[6] there should be a sensible way to determine what "things" have in fact been "decided."[7] Scholars have struggled with this question in numerous thoughtful ways, stretching back for the better part of a century.[8] The topic seems to be in the midst of a resurgence, as we grapple with issues such as the precedential impact of the Supreme Court's recent decision upholding the Affordable Care Act,[9] the stare decisis effect of interpretive methodology,[10] and more.[11] The challenge of determining "what the law is" has been especially acute in the area of civil procedure, where blockbuster decisions

court_the_biggest_flaw_in_the_opinions_this_term.html ("I have the strong impression reading this term's opinions that most of them are too long—unnecessarily long, misleadingly long, and tedious."). Apparently this is not a recent phenomenon; writing in 1933, Karl Llewellyn noted "a certain verbosity, repetitiousness, and an obvious lack of technical perfection." Karl Llewellyn, The Case Law System in America § 70, at 105–06 (Paul Gewirtz ed., Michael Ansaldi trans., 1989).

[6] Black's Law Dictionary 1537 (9th ed. 2009).

[7] The idea that courts are meaningfully bound by prior decisions is sometimes treated with skepticism in the context of horizontal stare decisis, where—for example—the Supreme Court has the power to overrule its prior decisions. See, e.g., Henry P. Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. Rev. 1, 3 (1979) ("[T]he received tradition among most Justices and commentators denies that members of the Court are or should be meaningfully constrained by stare decisis."); see also Michael J. Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68, 76–77 (1991) (noting that "the apparent lack of consistency in the Justices' standards or reasons for overruling precedents has led many commentators to argue that precedents make little real difference to the Court" but arguing that this view "overlooks the degree to which precedents actually influence constitutional decisionmaking"). Even so, overruling a prior decision is appropriate only in certain circumstances, see infra note 225 and accompanying text, although it is admittedly up to the Court itself to decide whether those circumstances are present. In the context of vertical stare decisis, where lower courts do not have the leeway to overrule superior court decisions, stare decisis has more bite. See infra notes 222–23 and accompanying text.

[8] For just a few examples, see Kent Greenawalt, Statutory and Common Law Interpretation 177–277 eexo(2013); Monaghan, supra note 5, at 763–67, and see generally Llewellyn, supra note 5; Precedent in Law (Laurence Goldstein ed., 1987); Michael Abramowicz & Maxwell Stearns, Defining Dicta, 57 Stan. L. Rev. 953 (2005); Alexander, supra note 4; Michael C. Dorf, Dicta and Article III, 142 U. Pa. L. Rev. 1997 (1994); Arthur L. Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L.J. 161 (1930); James Hardisty, Reflections on Stare Decisis, 55 Ind. L.J. 41 (1979); Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. Rev. 1249 (2006); Roscoe Pound, What of Stare Decisis?, 10 Fordham L. Rev. 1 (1941); Max Radin, Case Law and Stare Decisis: Concerning *Präjudizienrecht in Amerika*, 33 Colum. L. Rev. 199 (1933).

[9] See infra notes 34–43 and accompanying text.

[10] See infra notes 47–48 and accompanying text.

[11] See, e.g., infra notes 27–32 and accompanying text.

in *Wal-Mart Stores, Inc. v. Dukes*[12] and *Ashcroft v. Iqbal*[13] have overhauled class actions and pleading standards. Or perhaps they have not—it depends, in large part, on what the basic rules are for determining the lawmaking effect of such judicial decisions.[14]

Wal-Mart and *Iqbal* shed a different light on one long-standing question in particular. Does stare decisis obligate future courts to follow the *explicit rules* stated by the precedent-setting court in its opinion? Or is the obligation an implicit one, where future courts must *infer* a justification for the precedent-setting decision that reconciles that result with decisions going forward? According to the conventional wisdom, stare decisis constrains future courts the most when it requires them to follow the rules adopted by the precedent-setting court. Future courts have more flexibility, by contrast, if they are required only to infer a justification for the precedent-setting case that explains its ultimate result.[15]

This widely accepted account has hidden from view the potential dangers of inferential stare decisis. *Wal-Mart* and *Iqbal* illustrate how inferential stare decisis can prove more radical and more destabilizing than an obligation to follow explicitly stated rules. The general rules that the Court articulated in *Wal-Mart* and *Iqbal* are not inherently controversial, and could easily be applied consistently with the status quo.[16] Under a rule-based stare decisis approach, therefore, these decisions need not be viewed as creating bad law. What is potentially so problematic about these decisions are their ultimate results: that the *Wal-Mart* class did not satisfy Rule 23(a)(2)'s threshold requirement that the class share at least one common question of law or fact,[17] and that *Iqbal*'s complaint did not satisfy the transsubstantive pleading standard set forth in Rule 8(a)(2).[18]

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[12] 131 S. Ct. 2541 (2011).

[13] 556 U.S. 662 (2009).

[14] In suggesting the possibility that *Wal-Mart* and *Iqbal* should not be read to compel stricter approaches to class certification and pleading, I do not doubt that—as an empirical matter—these decisions have impacted the behavior of judges and litigants. In the context of pleading standards, for example, there is strong empirical evidence that *Iqbal* has had a significant effect. See, e.g., Jonah B. Gelbach, Locking the Doors to Discovery? Assessing the Effects of *Twombly* and *Iqbal* on Access to Discovery, 121 Yale L.J. 2270, 2338 (2012); Alexander A. Reinert, The Costs of Heightened Pleading, 86 Ind. L.J. 119, 161 (2011). Whether such effects are mandated as a matter of stare decisis is a distinct inquiry.

[15] See infra notes 77–78.

[16] See infra Section II.C.

[17] See *Wal-Mart*, 131 S. Ct. at 2557.

[18] See *Iqbal*, 556 U.S. at 680.

To be sure, *Wal-Mart* and *Iqbal* were rather remarkable cases factually. *Wal-Mart* involved a nationwide, 1.5-million-member class encompassing every female employee of the largest private employer in the United States.[19] *Iqbal* sought monetary damages against the two highest-ranking law enforcement officers in the land (the Attorney-General and the FBI Director) based on their actions in the immediate aftermath of the 9/11 attacks.[20] That said, the ultimate results in *Wal-Mart* and *Iqbal* are hard to distinguish based on these facts because the decisions were grounded on a particular positive law structure—the Federal Rules of Civil Procedure. The bases for the Supreme Court's decisions in *Wal-Mart* and *Iqbal*—the threshold "common question" requirement of Rule 23(a)(2) and the transsubstantive pleading standard in Rule 8(a)(2)—do not readily allow future courts to distinguish those cases based on the facts that made them so remarkable. Accordingly, an inferential, result-based approach to stare decisis may obligate judges to reach identical results in the full range of future cases, because even more run-of-the-mill scenarios are not necessarily distinct in ways that are salient to the specific parts of the Federal Rules at issue in *Wal-Mart* and *Iqbal*.

This Article uses *Wal-Mart* and *Iqbal* as a jumping-off point to examine what aspects of precedent-setting decisions ought to create stare decisis obligations. There are sensible reasons to require future courts to follow rules that are explicitly stated in precedent-setting decisions. As Justice Brandeis put it long ago, "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[21] Having judges declare such rules may not be perfect, but the benefits of clarity and predictability can outweigh the costs of having each judge, in each different case, develop and apply different sets of rules. To the extent judicially declared rules are overly broad, there remains the potential safeguard that future courts can distinguish those rules when new cases present unconsidered circumstances.[22]

[19] See infra notes 152–53.

[20] See infra notes 154–55.

[21] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Readers will recall that Justice Brandeis made this observation in the course of arguing that the Supreme Court should be free to overrule earlier decisions when justified by "the lessons of experience and the force of better reasoning." Id. at 407–08. But the premise was that—until such overruling occurred—a judicial decision could "settle[]" the "applicable rule of law" via stare decisis. Id. at 406.

[22] See infra notes 217–19, 369–84 and accompanying text.

Inferential, result-based stare decisis—on the other hand—can raise significant, yet largely overlooked, problems. To make mere results binding requires future courts to find law in a place where the precedent-setting court's supply of rules has been exhausted. After all, if there were some additional set of guiding principles that dictated the result of a precedent-setting case, the court could have said so; and future courts would have thereby been bound under a rule-based approach. One might respond that it is still intuitively desirable to have the results of future cases be consistent with the results of earlier ones—and to require future courts to achieve such consistency as a matter of stare decisis. The danger, however, is that an inferential, result-based approach may force future courts to read decisions more sweepingly than is justified. Indeed, recent Supreme Court decisions on class actions and pleading indicate that *Wal-Mart* and *Iqbal* did not compel a drastic shift.[23] While some might accuse the Court of giving conflicting legal directives, it may be more accurate to say that this range of results occupies a space where the law—at least as far as the Court has specified it—has run out.

Accordingly, stare decisis should focus on the rules stated by the precedent-setting court, not the bare results. Under this approach, a decision can "say what the law is"[24] only if it does *say* what the law *is*. This view may sound controversial—we learn from our earliest days in law school about how the law develops by reconciling the results of judicial decisions. My goal, however, is not to banish this form of legal analysis entirely. The results of prior cases may remain valuable for many reasons: some courts may find it inherently attractive to be consistent with prior results; prior results may give courts a better sense of the universe of scenarios that can arise in a given area; and prior results may help predict how particular judges might decide future cases. So courts still *could* look to the mere results of prior decisions. But we ought to dispense with the idea that courts *must*, as a matter of law, be faithful to those results in and of themselves.

This Article begins in Part I by describing a number of important uncertainties about how stare decisis operates in the federal system. Part II examines the Supreme Court's recent decisions in *Wal-Mart* and *Iqbal*, using them to illustrate how requiring future courts to infer obligations from the mere results of cases can sometimes be more problematic and

[23] See infra notes 170–82 and accompanying text.
[24] *Marbury*, 5 U.S. (1 Cranch) at 177.

destabilizing than requiring them to follow explicitly-stated rules. Part III considers the costs and benefits of rule-based and result-based stare decisis, and argues that stare decisis should apply only to the rules that the precedent-setting court states explicitly. While the ultimate results may be instructive, they do not generate binding law and should not create an obligation to reconcile future decisions with those results. Part IV develops a more systematic method for mapping judicial opinions in order to identify the rules that would be entitled to stare decisis effect under this approach. I use that method to examine other aspects of the Court's reasoning in *Wal-Mart* and *Iqbal*, and to conceptualize additional challenges, such as when an explicitly-stated rule is necessary to a court's decision such that it should be given stare decisis effect.

I. STARE DECISIS PROBLEMS

The scope of stare decisis is a multifaceted question that courts and commentators have struggled with for centuries.[25] Stare decisis defines the extent to which a judicial decision creates binding obligations on future courts, an inquiry that is often framed in terms of the distinction between a decision's "holding" and its "dicta."[26] Although it is one of the most basic Anglo-American legal concepts, it continues to pose practical and theoretical challenges at the highest levels.

A. Prominent Issues

One of the most hotly contested issues surrounding stare decisis is when it can be ignored. That is, when is it proper for courts to overrule binding precedent? Although "stare decisis is not an inexorable command,"[27] there is a wide range of views on how strong a showing is re-

[25] It is not quite certain how many centuries, although "[l]egal historians widely agree that before the eighteenth century there was no firm doctrine of *stare decisis* in English common law." Gerald J. Postema, The Philosophy of English Common Law, *in* The Oxford Handbook of Jurisprudence and the Philosophy of Law 589 (Jules Coleman & Scott Shapiro eds., 2002); see also Greenawalt, supra note 8, at 178–79.

[26] See, e.g., Abramowicz & Stearns, supra note 8, at 957 (noting that "before a court can decide whether to apply the doctrine of stare decisis to a given case," it must first "determine whether an identified proposition is holding or dicta"); Kent Greenawalt, Reflections on Holding and Dictum, 39 J. Legal Educ. 431, 432 (1989) ("The distinction between holding and dictum concerns what the first case establishes, as opposed to what its opinion may say that is not established." (emphasis omitted)).

[27] Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) (emphasis omitted) (internal quotation marks omitted).

quired to justify overruling precedent. There has been an especially vibrant debate when it comes to constitutional interpretation by the Supreme Court,[28] and it has figured prominently in hot-button cases on abortion,[29] gun control,[30] campaign finance regulation,[31] and constitutional criminal procedure.[32]

Another thorny question stems from the commonly stated notion that future courts are bound only by "those portions of the opinion *necessary* to" the court's decision.[33] This idea may play a significant role as courts try to determine the precedential impact of last Term's decision upholding the Affordable Care Act.[34] A majority of Justices in *NFIB v. Sebe-*

[28] Compare, e.g., Akhil Reed Amar, *Heller*, *HLR*, and Holistic Legal Reasoning, 122 Harv. L. Rev. 145, 150 (2008) ("[T]oday's Court should heed an earlier Court case precisely to the degree that today's Justices believe that the prior Court was likely correct about what the Constitution meant when enacted and amended."), with Richard H. Fallon, Jr., Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence, 86 N.C. L. Rev. 1107, 1107–08 (2008) (arguing that "nonoriginalist and otherwise initially erroneous precedent can possess the status of binding law" but that Justices have "a power, to be exercised in accord with legal standards, to determine which initially erroneous precedents to overrule"), with Lawrence B. Solum, The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights, 9 U. Pa. J. Const. L. 155, 196, 201 (2006) (arguing that "decisions of the Supreme Court which respect [the Constitution's] text and original meaning [should be] given binding effect" but recognizing the possibility that the Court may "overrule (or limit) precedents for formalist reasons, including the special reason that a prior decision is inconsistent with the whole body of precedent").

[29] Compare, e.g., *Casey*, 505 U.S. at 870 (concluding that *Roe v. Wade* should be followed as a matter of stare decisis), with id. at 944 (Rehnquist, J., dissenting) ("We believe that *Roe* . . . can and should be overruled.").

[30] See Amar, supra note 28, at 149–56 (discussing District of Columbia v. Heller, 554 U.S. 570 (2008)).

[31] Compare Citizens United v. FEC, 558 U.S. 310, 319 (2010) ("We . . . hold that *stare decisis* does not compel the continued acceptance of *Austin*."), with id. at 373 (Roberts, C.J., concurring) ("I write separately to address the important principles of judicial restraint and *stare decisis* implicated in this case."), with id. at 409 (Stevens, J., dissenting) ("The Court's central argument for why *stare decisis* ought to be trumped is that it does not like *Austin*.").

[32] Compare Ring v. Arizona, 536 U.S. 584, 589 (2002) ("*Apprendi*'s reasoning is irreconcilable with *Walton's* holding . . . and today we overrule *Walton* in relevant part."), with id. at 619 (O'Connor, J., dissenting) ("I understand why the Court holds that the reasoning of *Apprendi v. New Jersey* is irreconcilable with *Walton v. Arizona*. Yet in choosing which to overrule, I would choose *Apprendi*, not *Walton*." (citations omitted)).

[33] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996) (emphasis added); see also Black's Law Dictionary 1177 (9th ed. 2009) (defining "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential").

[34] See Lawrence B. Solum, How *NFIB v. Sebelius* Affects the Constitutional Gestalt, 91 Wash. U. L. Rev. (forthcoming 2013) (manuscript at 16–28), available at http://ssrn.com/abstract=2152653.

lius[35] upheld the law as a constitutional exercise of Congress's tax power.[36] But Chief Justice Roberts agreed with the four dissenters that the Act was not a proper exercise of Congress's commerce power (even as supplemented by the Necessary and Proper Clause).[37] One could argue, however, that it was not necessary to confront the Commerce Clause at all given the majority's finding on the tax power; therefore, the opinion's discussion of the commerce power was non-binding dicta.[38]

The Affordable Care Act decision may also exemplify another stare decisis quandary: how to determine the prospective lawmaking impact of a split decision that lacks a clean majority opinion as to all issues. For such decisions, the Supreme Court often invokes what is known as the *Marks* rule: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[39] Is *NFIB* a case where "no single rationale explaining the result enjoys the assent of five Justices"?[40] Perhaps it is, because four Justices concluded the Act is constitutional under both the tax and the commerce powers, four concluded it is not constitutional under either power, and one (the Chief Justice) concluded that it is constitutional under one but not the other.[41] If so, does that make Chief Justice Roberts the "Member[] who concurred . . . on the narrowest grounds" for purposes of *Marks*?[42] Relatedly, does *Marks*'s focus on those who "concurred" mean that the views of dissenting Justices are irrelevant, or can binding law be created as long as five Justices support a particular proposition?[43] These sorts of ques-

[35] 132 S. Ct. 2566 (2012).

[36] Id. at 2601; id. at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[37] See id. at 2591–92; id. at 2644 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[38] See, e.g., David Post, Commerce Clause "Holding v. Dictum Mess" Not So Simple, Volokh Conspiracy (July 3, 2012, 8:17 AM), http://www.volokh.com/2012/07/03/commerce-clause-holding-v-dictum-mess-not-so-simple ("To decide that the mandate is within Congress' taxing power, [the Court] didn't have to decide that it is not within its Commerce Clause power.").

[39] Marks v. United States, 430 U.S. 188, 193 (1977) (internal quotation marks omitted).

[40] Id.

[41] See supra notes 35–37 and accompanying text.

[42] *Marks*, 430 U.S. at 193; see Solum, supra note 34, at 20–21.

[43] See, e.g., John Elwood, What Did the Court "Hold" About the Commerce Clause and Medicaid?, Volokh Conspiracy (July 2, 2012, 11:28 AM), http://www.volokh.com/2012/07/02/what-did-the-court-hold-about-the-commerce-clause-and-medicaid (discussing *Marks* and conflicting approaches to this issue in the lower courts).

tions arise with some frequency, affecting areas of law ranging from personal jurisdiction[44] to affirmative action.[45] Courts struggle to extract holdings from fractured decisions, only to find themselves "baffled and divided."[46]

Finally, there has been some important scholarship recently on the prospective lawmaking effect of a judicial decision's interpretive methodology. The Supreme Court does not appear to have addressed the issue squarely, but the conventional wisdom is that the method used by a court in interpreting a particular statutory or constitutional provision does not prospectively bind future courts to embrace that same methodology in other cases.[47] As Professor Abbe Gluck has argued, however, the idea that interpretive methodology is not binding via stare decisis is hard to square with other methodological frameworks—such as *Chevron* deference toward interpretations of statutes by administrative agencies—that are treated as prospectively binding.[48]

B. A More Fundamental Question

The issues described in the previous Section are important ones to be sure. But there is an even more fundamental question about stare decisis that remains surprisingly muddled—one that arises even when there is a unanimous decision, on a single issue, that is unquestionably necessary to the court's ultimate disposition of the case. Precisely what parts of a judicial decision must future courts follow?

In answering this question, there is an important distinction between what one might call explicit or textual stare decisis and what one might

[44] See, e.g., Adam N. Steinman, The Lay of the Land: Examining the Three Opinions in *J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. Rev. 481, 481–82 (2012) (citing J. McIntyre Mach. v. Nicastro, 131 S. Ct. 2780 (2011); Burnham v. Superior Court, 495 U.S. 604 (1990); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987)) (describing how three Supreme Court opinions on personal jurisdiction all failed to generate a majority opinion).

[45] See Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

[46] Nichols v. United States, 511 U.S. 738, 746 (1994).

[47] See, e.g., Abbe R. Gluck, The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism, 119 Yale L.J. 1750, 1765 (2010) ("[T]he Court does not give stare decisis effect to *any* statements of statutory interpretation methodology."). Some state judicial systems are different in this regard. See id. at 1754.

[48] See Abbe R. Gluck, Intersystemic Statutory Interpretation: Methodology as "Law" and the *Erie* Doctrine, 120 Yale L.J. 1898, 1910–11 (2011).

call implicit or inferential stare decisis.[49] A classic illustration of this dichotomy is rule-based stare decisis and result-based stare decisis.[50] Under a rule-based model, the "thing[] decided"—by which future courts must "stand"[51]—is the rule explicitly stated by the precedent-setting court in its decision.[52] This is sometimes called a "legislative holding."[53]

Under a result-based model, the thing decided is the ultimate result that the precedent-setting court reached, given the facts of the case that set the precedent.[54] Result-based stare decisis has been given a number of different labels: "material facts,"[55] "*ratio decidendi*,"[56] "facts-plus-outcome,"[57] and "reconciliation."[58] All of them, however, impose implicit or inferential obligations on future courts, rather than obligations that are explicitly stated as generalizable rules. For example, the future court would be obligated to identify the material facts in the precedent-setting case, and to decide future cases consistently with the view that those material facts must lead to the result reached in the precedent-

[49] See, e.g., Peter M. Tiersma, The Textualization of Precedent, 82 Notre Dame L. Rev. 1187, 1187–88 (2007) (contrasting a traditional approach to common law that required "[f]iguring out what an opinion meant" with a "textual" approach where "the judge writing for the majority will . . . specify exactly what the holding is in carefully crafted text").

[50] See, e.g., Greenawalt, supra note 8, at 185; Monaghan, supra note 5, at 763 (describing these "widely divergent concepts").

[51] Black's Law Dictionary 1537 (9th ed. 2009) (entry for "stare decisis").

[52] See, e.g., Greenawalt, supra note 8, at 185 (noting one approach that would define the court's holding as "the rule(s) of law that the court explicitly states, or that can reasonably be inferred, that it regarded as necessary to (or important in) its resolution of the case"); Monaghan, supra note 5, at 764 ("What the Court said must include the Court's rule or standard. . . . This is the core of the precedent.").

[53] See Solum, supra note 28, at 188 (noting "the emergence of what might be called the legislative holding" (emphasis omitted)).

[54] See, e.g., Pound, supra note 8, at 8 ("It is the result that passes into the law.").

[55] Goodhart, supra note 8, at 169.

[56] See id. at 179 (defining the "*ratio decidendi*" in terms of the "material facts" that generated a particular conclusion); Solum, supra note 28, at 189 (noting that under the traditional approach, the effect of a new decision is "demarcated by the facts which define *ratio decidendi* of the new case"). Use of the phrase "ratio decidendi" has not been entirely uniform. Compare, e.g., Goodhart, supra note 8, at 164 ("[T]he first rule for discovering the *ratio decidendi* of a case is that it must not be sought in the reasons on which the judge has based his decision."), with Llewellyn, supra note 5, at 15 (defining the ratio decidendi as "the legal rule stated by the court itself as controlling the case before it" and distinguishing that from "'the *rule of the case*,' the 'principle' for which a case stands").

[57] Dorf, supra note 8, at 2012.

[58] Abramowicz & Stearns, supra note 8, at 1045.

setting decision.[59] Thus, any rule future courts use to decide future cases must explain or justify the result of the precedent-setting case.[60] Put another way, a result-based approach requires future courts to identify—inferentially and retrospectively—a principle that would resolve the precedent-setting case as the precedent-setting court did given the salient facts of that case; but that principle does not need to be the one the precedent-setting court actually articulated.

If one surveys Supreme Court opinions, one can find hallmarks of both rule-based and result-based approaches. To many, the idea that rules stated in precedent-setting decisions are binding via stare decisis might seem almost self-evident. Indeed, for each of the stare decisis puzzles described in the preceding Section, it is presumed that such rules are ordinarily binding; the question is whether, in certain situations, that presumption does not apply.[61] At times, the Supreme Court has explicitly endorsed a rule-based approach. In *Seminole Tribe of Florida v. Florida*,[62] for example, it stated that "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound";[63] this includes "the well-established rationale upon which the Court based the results of its earlier

[59] See, e.g., Hardisty, supra note 8, at 56 ("Under result stare decisis, a court adheres to an otherwise 'binding' precedent regardless of whether it adheres to its justifying rule, as long as similarity in results follows similarity in facts and a difference in results reflects a difference in facts."). This approach might have two distinct flavors. Under one variant, the future court must view the facts that the precedent court *itself* regarded as material as the ones that justify the ultimate result in the precedent-setting case. See Greenawalt, supra note 8, at 185; see also Goodhart, supra note 8, at 169 ("[O]ur task in analyzing a case is . . . to state the material facts as seen by the judge and his conclusion based on them."). Under another variant, the future court is free to choose for itself which facts about the precedent-setting case justified the result in that case. See Greenawalt, supra note 8, at 185; see also Monaghan, supra note 5, at 766 n.246 (noting the view that "permits courts unrestrained authority to realign prior cases in terms of the material facts as it sees them: the precedent-setting court's own view of the material facts" (citing Edward H. Levi, An Introduction to Legal Reasoning 1–4 (1949)); see also Edward H. Levi, supra, at 2 ("Where case law is considered, and there is no statute, [the 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."). Professor Larry Alexander would characterize the first of these result-based variants as a rule-based model, see supra note 52, albeit one that uses a different "methodolog[y] for identifying the precedent rule." Alexander, supra note 4, at 18.

[60] See infra notes 69–72 and accompanying text.

[61] See supra notes 27–48 and accompanying text.

[62] 517 U.S. 44 (1996).

[63] Id. at 67.

decisions,"[64] such as the Court's "explications of the governing rules of law."[65] Chief Justice Rehnquist's majority opinion in *Seminole Tribe* therefore declared that it was bound by "the oft-repeated understanding of state sovereign immunity"[66] from cases such as *Hans v. Louisiana*,[67] while the dissenters countered that such statements in prior opinions were "unnecessary to the decision" and resulted in an "extension of *Hans*'s holding."[68]

There are also many instances where the Supreme Court has taken the view that it need not follow explicit rules stated in an earlier opinion (Case 1), so long as it decides Case 2 in a way that justifies or explains or reconciles the ultimate result in Case 1 given the facts of Case 1. Professor Michael Dorf, for example, provides an excellent account of Supreme Court decisions on the constitutionality of Congress limiting the President's ability to fire executive officials.[69] Surveying a line of cases reaching back to *Marbury v. Madison*,[70] Dorf finds the Court effectively embracing a "facts-plus-outcomes" approach[71] that leaves future courts free to "substitute[] a different rationale" for the one the earlier decision actually employed,[72] provided the new rationale can justify the earlier decision's ultimate result. Other examples of this logic can be found in areas ranging from abortion,[73] to the Confrontation Clause,[74] to summary judgment,[75] and beyond.[76] These cases reflect an inferential approach to

[64] Id. at 66–67.

[65] Id. at 67 (quoting Cnty. of Allegheny v. ACLU, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)).

[66] Id.

[67] 134 U.S. 1 (1890); see also *Seminole Tribe*, 517 U.S. at 54 (quoting *Hans*, 134 U.S. 1).

[68] *Seminole Tribe*, 517 U.S. at 129–30 (Souter, J., dissenting).

[69] Dorf, supra note 8, at 2009–24.

[70] Id.

[71] See, e.g., id. at 2012 (describing how *Parsons v. United States*, 167 U.S. 324 (1897), adopted a "facts-plus-outcome approach to holdings" with respect to *Marbury*).

[72] Id. at 2022.

[73] See id. at 2007–09, 2030–32 (describing how Chief Justice Rehnquist treated *Roe v. Wade*, 410 U.S. 113 (1973), in his three-Justice opinion in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)).

[74] See Crawford v. Washington, 541 U.S. 36, 60 (2004) (discussing *Ohio v. Roberts*, 448 U.S. 56 (1980)).

[75] See Celotex Corp. v. Catrett, 477 U.S. 317, 325–26 (1986) (explaining away the "language" of *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), in part by noting that the *Adickes* result would have been the same under the *Celotex* approach).

[76] See United States v. Stanley, 483 U.S. 669, 680 (1987) ("It is therefore true that *Chappell* is not strictly controlling, in the sense that no holding can be broader than the facts be-

stare decisis, where the Court is free to disregard a prior decision's explicit rules so long as it complies with an inferential obligation to justify, reconcile, or explain the result of the earlier decision.

Consistent with these examples, the conventional account assumes that a rule-based approach to stare decisis imposes the greatest restraint on future courts, and a result-based approach gives future courts more flexibility.[77] Rules are, by definition, stated at a level of generality that is broader than the facts of the immediate case being decided. To the extent the rule reaches beyond the facts of the case, it purports to restrict how future courts handle other cases as well.[78]

These assumptions might make sense in the context of a true common law system. According to the traditional understanding, "the common law" was an entirely distinct system that "existed independently of, and alongside, various other fields"—including fields governed by codified directives like statutes.[79] Because common-law decisions did not need to interface with an established positive-law framework, courts had unlimited leeway to recast, reconstitute, and reconceptualize prior decisions. Our world, however, is a hybrid system—where judicially made law intersects with and is grounded upon positive-law structures set out in statutes, regulations, or their equivalents.[80] When judicial decisions are mapped onto such a doctrinal structure, that structure can problematically limit the ability of future courts to explain, or justify, or reconcile ostensibly binding results. The *Wal-Mart* and *Iqbal* decisions illustrate

fore the court."), *quoted in* Monaghan, supra note 5, at 764 n.235; see also Monaghan, supra note 77, at 10 n.38 (discussing *California v. United States*, 438 U.S. 645 (1978)).

[77] See, e.g., Greenawalt, supra note 8, at 185 (noting that the future court "is most limited if bound by the rules on which the precedent court relied"); Scalia, supra note 2, at 1179 ("[W]hen, in writing for the majority of the Court, I adopt a general rule . . . I not only constrain lower courts, I constrain myself as well."). Conceivably, inferential obligations might be imposed either *instead of* or *in addition to* an explicit-rule model. That is, we could adopt a model that gives no stare decisis effect to explicitly-stated rules and imposes only inferential obligations. Or we could adopt a model that requires future courts both to follow explicitly-stated rules *and* to apply those rules according to obligations inferred from the facts and result of the precedent-setting case. Indeed, many who support a rule-based approach also argue that future courts should be obligated to reconcile the ultimate results of precedent-setting cases. See infra note 275 and accompanying text.

[78] Scalia, supra note 2, at 1179–80.

[79] John A. Ferejohn & Larry D. Kramer, Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint, 77 N.Y.U. L. Rev. 962, 1027 (2002).

[80] See, e.g., Note, Prosecutorial Power and the Legitimacy of the Military Justice System, 123 Harv. L. Rev. 937, 938 (2013) (describing the civilian criminal justice system as "formed by the intersection of numerous codes, statutes, and judicial decisions").

how inferential stare decisis obligations can be more destabilizing than an approach that merely requires courts to follow explicitly-stated rules.

II. CASE STUDIES: *WAL-MART* AND *IQBAL*

Both *Wal-Mart* and *Iqbal* have been criticized for their potential law-making impact—*Wal-Mart* in the area of class actions[81] and *Iqbal* in the area of pleading standards.[82] But whether these decisions have made "bad law"[83] depends, ultimately, on what the ground rules are for deciding what is binding about a judicial decision. The role of inferential stare decisis is particularly crucial, because there was a significant disconnect between what the Court *said* about "what the law is"[84] and the result the Court ultimately reached in applying that law.

A. Wal-Mart Stores, Inc. v. Dukes

Wal-Mart was an employment discrimination class action. The class as initially defined included all women who worked for Wal-Mart at any time since December 1998, which encompassed approximately 1.5 million members.[85] The class claims challenged Wal-Mart's pay and promotion policies under Title VII of the 1964 Civil Rights Act, and sought injunctive and declaratory relief, punitive damages, and backpay.[86] The issue before the Supreme Court was whether the class action could be certified under Rule 23 of the Federal Rules of Civil Procedure. By a five-to-four vote, the Supreme Court concluded that the class action in *Wal-Mart* could not be certified because it did not satisfy Rule 23(a)(2),

[81] E.g., Mary Kay Kane, The Supreme Court's Recent Class Action Jurisprudence: Gazing into a Crystal Ball, 16 Lewis & Clark L. Rev. 1015, 1036–46 (2012); Arthur R. Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N.Y.U. L. Rev. 286, 319–20 (2013); A. Benjamin Spencer, Class Actions, Heightened Commonality, and Declining Access to Justice, 93 B.U. L. Rev. 441 (2013).

[82] E.g., Robert G. Bone, Plausibility Pleading Revisited and Revised: A Comment on *Ashcroft v. Iqbal*, 85 Notre Dame L. Rev. 849 (2010); Kevin M. Clermont & Stephen C. Yeazell, Inventing Tests, Destabilizing Systems, 95 Iowa L. Rev. 821 (2010); Arthur R. Miller, From *Conley* to *Twombly* to *Iqbal*: A Double Play on the Federal Rules of Civil Procedure, 60 Duke L.J. 1 (2010).

[83] See infra note 398 (quoting N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting)).

[84] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[85] Wal-Mart Stores v. Dukes, 131 S. Ct. 2541, 2547, 2549 (2011).

[86] Id. at 2547–48.

which requires that "there are questions of law or fact common to the class."[87]

Justice Scalia's majority opinion explained that the requirement of a common question of law or fact is satisfied by the existence of "even a single common question."[88] That common question must be one that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[89] The common question must "generate common answers apt to drive the resolution of the litigation."[90]

Although these precise articulations of what Rule 23(a)(2) requires are new to the pages of the Supreme Court Reporter, they are not inherently controversial and certainly do not require a restrictive approach. Justice Scalia is correct that a question is not a "common question" if it is not capable of classwide resolution. Otherwise, "Should I get relief from Wal-Mart?" would qualify as a common question that would unify every employee, supplier, customer, or government agency who might possibly have a claim against Wal-Mart for any reason. And if the question is not "central to [the] validity" of the class members' claims, then it is hard to see how the question is—in fact—"common to the class."[91] A question that is merely peripheral to the validity of class members' claims would not seem to be part of their claim at all.

The problem with Justice Scalia's *Wal-Mart* opinion is not, therefore, the explicit rules he articulated for deciding whether Rule 23(a)(2) is satisfied.[92] The problem is that the class action in *Wal-Mart* seemed to sat-

[87] Fed. R. Civ. P. 23(a)(2); see *Wal-Mart*, 131 S. Ct. at 2556–57.

[88] *Wal-Mart*, 131 S. Ct. at 2556 (brackets omitted) (quoting Richard A. Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L. Rev. 149, 176 n.110 (2003)).

[89] Id. at 2551.

[90] Id. (emphasis omitted) (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009)).

[91] This does not mean that the issue must be central to the validity of *every* claim by *every* class member. Some class members might have additional theories of liability—or even claims about entirely different issues. See Fed. R. Civ. P. 18(a) ("A party asserting a claim . . . may join, as independent or alternative claims, as many claims as it has against an opposing party."). In *Wal-Mart*, however, every class member had a claim based on the theory that Wal-Mart's policy of giving unfettered discretion to local supervisors in the context of a corporate culture that fosters gender stereotypes violated Title VII. See infra notes 94–96 and accompanying text.

[92] In this Part, my analysis is confined to the rules that Justice Scalia stated explicitly. Other aspects of Justice Scalia's reasoning are discussed infra notes 336–49 and accompanying text.

isfy that rule quite easily, and yet the majority concluded otherwise.[93] The plaintiffs' theory of liability was that it violated Title VII for Wal-Mart to give unfettered discretion to local supervisors in the context of a corporate culture that fosters gender stereotypes.[94] And Justice Scalia acknowledged that "we have recognized that, 'in appropriate cases,' giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since 'an employer's undisciplined system of subjective decisionmaking can have precisely the same effects as a system pervaded by impermissible intentional discrimination.'"[95] Whether Wal-Mart's combination of discretion and a culture of stereotyping did, in fact, violate Title VII would seem to be the quintessential resolution-driving common question.[96] Every single plaintiff brought a claim that was based on that theory. If that theory of Title VII liability failed, then those claims would disappear.

Justice Scalia, however, emphasized that any given class member's entitlement to individualized relief (such as backpay) would depend on questions of how individual managers actually exercised their discretion vis-à-vis each plaintiff.[97] And he is correct that there would be *some* individualized questions—for example, questions about causation (the causal link between Wal-Mart's Title VII violation and how any given class member was treated by her manager) or the precise remedy (for example, the amount of backpay, if any, due to any given class member). But the presence of some individualized questions does not—and logically cannot—foreclose the conclusion that there is at least *one* question of law or fact common to the class. If there is a rule that explains this leap, Justice Scalia did not say what it is.

B. Ashcroft v. Iqbal

Mr. Iqbal was a Pakistani man whom federal officials had detained in New York City during the weeks following the September 11th at-

[93] *Wal-Mart*, 131 S. Ct. at 2556–57.

[94] Id. at 2548.

[95] Id. at 2554 (brackets omitted) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990–91 (1988)).

[96] See id. at 2567 (Ginsburg, J., dissenting) ("A finding that Wal-Mart's pay and promotions practices in fact violate the law would be the first step in the usual order of proof for plaintiffs seeking individual remedies for company-wide discrimination.").

[97] See id. at 2554 (majority opinion) ("[D]emonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's.").

tacks.[98] Designated as a "person 'of high interest'" in the September 11th investigation, he alleged that he had been held under harsh and highly restrictive conditions of confinement at the Administrative Maximum Special Housing Unit ("ADMAX SHU") of the Metropolitan Detention Center in Brooklyn.[99] Seeking damages under *Bivens v. Six Unknown Federal Narcotics Agents*,[100] Mr. Iqbal challenged numerous aspects of his detention and named many government officials as defendants.[101] The only claims before the Supreme Court were Mr. Iqbal's claims against former Attorney General John Ashcroft and FBI Director Robert Mueller.[102] These claims were based on a theory that Ashcroft and Mueller had "adopted an unconstitutional policy that subjected [Iqbal] to harsh conditions of confinement on account of his race, religion, or national origin."[103]

In a five-to-four decision, the Supreme Court held that Mr. Iqbal's claims against Ashcroft and Mueller did not satisfy the pleading standard set forth in the Federal Rules of Civil Procedure.[104] *Iqbal*'s approach to pleading built upon a 2007 Supreme Court decision, *Bell Atlantic Corp. v. Twombly*,[105] which declared that a complaint must "state a claim to relief that is *plausible* on its face."[106] In *Iqbal*, the majority found that no discriminatory motive was "plausibly suggest[ed]" by the facts that Ashcroft and Mueller had approved the policy of holding post-September 11th detainees in highly restrictive conditions of confinement until the FBI cleared them, and that the FBI—under Mueller's direction—had detained thousands of Arab Muslim men as part of the Sep-

[98] Ashcroft v. Iqbal, 556 U.S. 662, 666–67 (2009).
[99] Id. at 667–68.
[100] 403 U.S. 388 (1971).
[101] *Iqbal*, 556 U.S. at 668.
[102] Id. at 668–69.
[103] Id. at 666.
[104] Id.
[105] 550 U.S. 544 (2007).
[106] *Iqbal*, 556 U.S. at 678 (emphasis added) (quoting *Twombly*, 550 U.S. at 570). The staying power of *Twombly*'s approach was less than certain until *Iqbal* formally embraced it two years later. Some courts believed *Twombly*'s plausibility framework was relevant only "in the highly complex context of an antitrust conspiracy case," Kersenbrock v. Stoneman Cattle Co., No. 07-1044-MLB, 2007 WL 2219288, at *3 n.2 (D. Kan. July 30, 2007), a view that arguably found support in *Erickson v. Pardus*, 551 U.S. 89 (2007), a per curiam opinion the Court issued just two weeks after *Twombly*. *Erickson* reversed the lower court's dismissal of a prisoner's Eighth Amendment claim based on improper medical treatment without any plausibility inquiry. See id. at 93–94.

tember 11th investigation.[107] Although Justice Kennedy acknowledged that those allegations were "consistent with" purposeful discrimination by Ashcroft and Mueller, he concluded that, "given more likely explanations, they do not plausibly establish this purpose."[108] Justice Kennedy reasoned that "the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts,"[109] noting that "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims."[110]

Much of the scholarly commentary and critique of *Iqbal* has targeted this plausibility requirement and the way the Court applied it.[111] But *Iqbal*'s doctrinal structure has another feature that is equally crucial—and perhaps even more so—to how pleading sufficiency is ultimately evaluated. *Iqbal* explicitly recognized that a federal court should disregard allegations in a complaint that are "conclusory" when examining whether the complaint may survive the motion-to-dismiss phase.[112] Mr. Iqbal's complaint had, after all, explicitly alleged that Ashcroft and Mueller had acted with discriminatory purpose.[113] But the *Iqbal* majority refused to accept that allegation as true. As Justice Kennedy put it: "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice";[114] allegations that "are no more than conclusions . . . are not entitled to the assumption of truth."[115] The only reason the Court had to inquire whether other allegations "plausibly suggest[ed]"[116] discriminatory intent in *Iqbal* was because the complaint's allegation on this issue was deemed conclusory.[117]

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[107] *Iqbal*, 556 U.S. at 681.
[108] Id.
[109] Id. at 682.
[110] Id.
[111] See, e.g., authorities cited supra note 82.
[112] See Adam N. Steinman, The Pleading Problem, 62 Stan. L. Rev. 1293, 1315–20 (2010).
[113] See infra note 136 (quoting paragraph ninety-six of the complaint).
[114] *Iqbal*, 556 U.S. at 678.
[115] Id. at 679.
[116] Id. at 681.
[117] See Steinman, supra note 112, at 1315 ("Plausibility came into play only because the *Iqbal* majority . . . excised from the complaint the allegation of Ashcroft's and Mueller's discriminatory motive."). The same was true in *Twombly*. See id. at 1315–16.

Accordingly, much of *Iqbal*'s threat to the prior pleading regime lies in the notion that conclusory allegations can be disregarded when determining the sufficiency of a complaint.[118] Yet this is not an inherently radical idea. Surely a court need not accept as true a conclusory statement like "the defendant violated the plaintiff's legal rights in a way that entitles the plaintiff to relief," or "the defendant violated the plaintiff's rights under Title VII of the 1964 Civil Rights Act," or "the defendant breached a duty owed to the plaintiff under state law and this breach proximately caused damages to the plaintiff."[119] If such allegations must be accepted as true, then any complaint asserting them has unquestionably "state[d] a claim upon which relief can be granted"[120] and would survive a Rule 12(b)(6) motion. Even under a notice-pleading standard, a court would not need to accept such allegations when ruling on a motion to dismiss.[121]

Indeed, other aspects of the *Twombly* and *Iqbal* opinions indicate continuity with the prior pleading regime, not a departure. *Twombly* (on which *Iqbal* was based) explicitly endorsed *Conley v. Gibson*'s command that Rule 8(a)(2) requires only that the complaint provide the defendant "*fair notice* of what the . . . claim is and the grounds upon which it rests."[122] *Iqbal* did not challenge *Conley*'s fair notice standard either.[123] Likewise, neither *Twombly* nor *Iqbal* call into question the Court's 2002 decision in *Swierkiewicz v. Sorema N.A.*,[124] an exemplar of the lenient,

[118] See id. at 1319 ("Conclusoriness is destructive; it justifies disregarding an allegation. Plausibility is generative; it justifies creating an allegation that is not validly made in the complaint itself (perhaps because it was alleged only in a conclusory manner).").

[119] See id. at 1324 (discussing these examples).

[120] Fed. R. Civ. P. 12(b)(6).

[121] See Steinman, supra note 112, at 1324. Conceptually, the idea that conclusory allegations may be disregarded can be thought of as "cloak[ing] the notice inquiry in different doctrinal garb." Id. at 1325; see also id. ("*Any* approach to pleading that permits a court to disregard allegations that lack some information the court deems necessary can be couched in terms of notice. To say that an allegation is 'conclusory' because it lacks X is no different than saying that 'fair notice' requires the defendant to be informed of X.").

[122] *Twombly*, 550 U.S. at 555 (emphasis added) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

[123] That *Iqbal* did not dispute the fair notice standard is significant, because it is well-established that only the Supreme Court has the "prerogative of overruling its own decisions." Agostini v. Felton, 521 U.S. 203, 237 (1997) (internal quotation marks omitted). Until the Court itself has done so, lower courts continue to be bound by those decisions. See id. at 238; see also Scheiber v. Dolby Labs., Inc., 293 F.3d 1014, 1018 (7th Cir. 2002) (Posner, J.) ("[W]e have no authority to overrule a Supreme Court decision no matter . . . how out of touch with the Supreme Court's current thinking the decision seems.").

[124] 534 U.S. 506 (2002).

notice-pleading approach. *Twombly*, in fact, explicitly relied on *Swierkiewicz*.[125] *Twombly* also stated that "a well-pleaded complaint may proceed even if it appears 'that a recovery is very remote and unlikely.'"[126]

There is one (and only one) instance where either *Twombly* or *Iqbal* departed from the Supreme Court's prior case law. *Twombly* stated that one aspect of the *Conley* opinion had "earned its retirement,"[127] namely *Conley*'s comment that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[128] But *Twombly*'s handling of this language does not undermine the fair-notice standard (which *Twombly* explicitly embraced[129]), or any other aspect of pre-*Twombly* pleading standard. As I have explained in more detail elsewhere,[130] *Twombly* jettisoned only a very problematic, borderline-nonsensical understanding of this phrase—one that would preclude dismissal "whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery."[131] No serious jurist had ever read *Conley* as imposing such a meaningless standard; "[i]f that were truly the test, a complaint that alleged nothing more than 'The planet Earth is round' would survive, because any number of actionable facts *might* be consistent with the Earth being round."[132] Accordingly, *Twombly*'s treatment of *Conley*'s "beyond doubt . . . no set of facts" language cannot sensibly be read to reject any meaningful aspect of the pre-*Twombly* pleading regime.[133]

[125] *Twombly*, 550 U.S. at 555–56 (citing *Swierkiewicz* for the proposition that courts must "assum[e] that all the allegations in the complaint are true (even if doubtful in fact)"); see id. at 563 (citing *Swierkiewicz*, 534 U.S. 506).

[126] Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

[127] Id. at 563.

[128] *Conley*, 355 U.S. at 45–46.

[129] See supra note 122 and accompanying text.

[130] See Steinman, supra note 112, at 1321–22.

[131] *Twombly*, 550 U.S. at 561 (brackets and internal quotation marks omitted).

[132] Steinman, supra note 112, at 1321. More sensibly understood, this language from *Conley* "merely confirmed that speculation about the *provability* of a claim is typically not a proper inquiry at the pleadings phase; provability is relevant only when it appears 'beyond doubt' that the plaintiff cannot prove her claim." Id.

[133] Some lower courts, unfortunately, have mistakenly concluded otherwise. See Steinman, supra note 112, at 1322 & n.167 (criticizing *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009)).

Accordingly, for all the controversy that *Iqbal* has engendered, the explicit rules that *Iqbal* endorsed are not inherently problematic or destabilizing of the Court's long-standing approach to pleading. What is most troubling about *Iqbal* is its ultimate finding that the key allegations in Mr. Iqbal's complaint were conclusory and, therefore, not entitled to an assumption of truth at the pleadings phase.[134] The ostensibly conclusory allegations were:

- Paragraph ninety-six's allegation that Ashcroft and Mueller each "knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to [harsh] conditions of confinement as a matter of policy, solely on account of their religion, race, and/or national origin and for no legitimate penological interest."[135]
- Paragraphs ten and eleven's allegations that Ashcroft "is a principal architect of the policies and practices challenged here" and Mueller "was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here."[136]

The majority gave no explanation for why these allegations were conclusory.[137] That finding is especially perplexing in light of the majority's conclusion (also without explanation) that *other* allegations in the *Iqbal* complaint were "factual" and hence entitled to an assumption of truth.[138] Specifically, the *Iqbal* majority accepted the following allegations:

- Paragraph forty-seven's allegation that "[i]n the months after September 11, 2001, the Federal Bureau of Investigation ('FBI'), under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11."[139]

[134] *Iqbal*, 556 U.S. at 681 ("[T]he allegations are conclusory and not entitled to be assumed true.").

[135] Complaint at 17–18, Elmaghraby v. Ashcroft, 2005 WL 2375202 (S.D.N.Y. 2005) (No. 04 CV 1809); see also *Iqbal*, 556 U.S. at 680 (quoting Complaint, supra, at ¶ 96).

[136] Complaint, supra note 135, at 4–5; see also *Iqbal*, 556 U.S. at 680–81 (quoting Complaint, supra note 135, at ¶¶ 10–11).

[137] See *Iqbal*, 556 U.S. at 681.

[138] Id.; see also Steinman, supra note 112, at 1329 (comparing the allegations that were disregarded in *Iqbal* with the ones that were accepted as true).

[139] Complaint, supra note 135, at 10; see also *Iqbal*, 556 U.S. at 681 (quoting Complaint, supra note 135, at ¶ 47).

- Paragraph sixty-nine's allegation that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001."[140]

Furthermore, *Iqbal*'s rejection of the allegations in paragraphs ten, eleven, and ninety-six is difficult to square with the legal framework that remains in place, including prior Supreme Court decisions that remain good law, and various Forms that are provided in the Federal Rules of Civil Procedure—which the Rules themselves declare "suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."[141] Form 11's model negligence complaint deems it sufficient to allege: "On <date>, at <place>, the defendant negligently drove a motor vehicle against the plaintiff."[142] Form 18's model patent complaint deems it sufficient to allege: "The defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention."[143] In *Swierkiewicz v. Sorema N.A.*,[144] the Supreme Court concluded that it was improper to dismiss an employment discrimination complaint that alleged: "Plaintiff's age and national origin were motivating factors in [the defendant's] decision to terminate his employment."[145] If there is a rule that explains why these allegations pass muster but the ones in *Iqbal* do not, Justice Kennedy did not provide it.[146]

[140] Complaint, supra note 135, at 13–14; see also *Iqbal*, 556 U.S. at 681 (quoting Complaint, supra note 135, at ¶ 69).

[141] Fed. R. Civ. P. 84. The chief drafter of the original Federal Rules of Civil Procedure—Yale Law School Dean and Second Circuit Judge Charles Clark—believed that the sample complaints provided in these forms were "the most important part of the rules" when it comes to illustrating what Rule 8 requires. Charles E. Clark, Pleading Under the Federal Rules, 12 Wyo. L.J. 177, 181 (1958).

[142] Fed. R. Civ. P. Form 11, ¶ 2 (emphasis omitted).

[143] Fed. R. Civ. P. Form 18, ¶ 3 (emphasis omitted).

[144] 534 U.S. 506.

[145] Amended Complaint at ¶ 37, Swierkiewicz v. Sorema N.A., 86 Fair Empl. Prac. Cas. (BNA) 1324 (S.D.N.Y. 2000) (No. 99 Civ. 12272), 2001 WL 34093952, at *27a. The allegations that the Supreme Court deemed sufficient in *Conley* are similar in this regard. See 355 U.S. at 46 (describing the complaint as alleging that the plaintiffs "were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes").

[146] In a previous article, I proposed one way to reconcile *Iqbal* (and *Twombly*) with the pre-*Twombly* pleading regime. See Steinman, supra note 112, at 1334–39. My focus here, by

C. The Problems with Inferential Stare Decisis

If the stare decisis effects of *Wal-Mart* and *Iqbal* are limited to the rules the Court expressly articulated, then they need not constrain future courts in problematic ways. With respect to *Wal-Mart*, Rule 23(a)(2) would remain easy to satisfy in cases where all class members have claims that hinge on finding that a particular policy violates substantive law. That is the logical import of the recognition that even one common question of law or fact is sufficient.[147] But courts would retain considerable flexibility to determine whether a class action is appropriate under other provisions in Rule 23—such as Rule 23(a)(3)'s requirement that the named plaintiffs' claims be "typical of" the class members' claims;[148] Rule 23(a)(4)'s requirement that the named plaintiffs "will fairly and adequately protect the interests of the class";[149] and Rule 23(b)(3)'s requirements that common questions of law or fact "predominate" over individual questions, and that a class action is "superior" to individualized adjudication.[150]

As for *Iqbal*, the notion that courts may disregard conclusory allegations at the pleadings phase can be applied congruently with—and no more stringently than—the requirement that the complaint must provide "fair notice" of what the claim is and the grounds upon which it rests.[151] Accordingly, courts could apply *Iqbal*'s framework consistently with the Forms in the Federal Rules of Civil Procedure, as well as earlier Supreme Court decisions that remain good law.

But what happens if stare decisis imposes an obligation to decide future cases in ways that justify, reconcile, or explain the ultimate results in *Wal-Mart* and *Iqbal*? Perhaps one could avoid the destabilizing effect of those results by distinguishing *Wal-Mart* and *Iqbal* on their facts. That is a well-known move for any common-law advocate and, indeed, *Wal-Mart* and *Iqbal* were factually quite remarkable. *Wal-Mart* was a nationwide employment discrimination class action comprising 1.5 mil-

contrast, is on whether stare decisis should *require* courts to engage in that sort of reconciliation. See infra Part III.

[147] See supra notes 88–96 and accompanying text.

[148] Fed. R. Civ. P. 23(a)(3).

[149] Fed. R. Civ. P. 23(a)(4).

[150] Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3)'s requirements need not be met for all class actions, but they apply to most class actions seeking monetary damages; the Justices in *Wal-Mart* unanimously agreed that class actions seeking "*individualized* relief (like the backpay at issue here)" must satisfy Rule 23(b)(3). *Wal-Mart*, 131 S. Ct. at 2547.

[151] See supra notes 121–26 and accompanying text.

lion class members against the largest employer in the country.[152] Class members worked at different stores, for different supervisors, in different states, and in different regional districts.[153] *Iqbal* involved an action by a Pakistani man convicted of immigration-document fraud who was seeking monetary damages against the two highest-ranking law enforcement officials in the land—the Attorney General and the FBI Director[154]—based on their efforts on behalf of the federal government to respond to "a national and international security emergency unprecedented in the history of the American Republic."[155]

It is not clear, however, that inferential stare decisis obligations can be avoided by seeking to confine *Wal-Mart* and *Iqbal* to cases presenting equally extraordinary factual situations. One obstacle is that the results of those decisions are tethered to particular aspects of particular Federal Rules of Civil Procedure, which do not necessarily lend themselves to such distinctions. The ultimate result in *Wal-Mart* was the majority's conclusion that the class members' claims shared not even a single common question of law or fact for purposes of Rule 23(a)(2). The things that make *Wal-Mart* remarkable—the size of the class, its nationwide scope, and the size and structure of the corporate defendant—may bear on whether a class action is "superior" or whether common issues "predominate" over individual ones (the Rule 23(b)(3) inquiries).[156] But it is hard to see why they are relevant to whether there is *any* common question of law or fact.[157] Accordingly, a future court that seeks to follow the *Wal-Mart* result might feel bound to take an approach to Rule

[152] *Wal-Mart*, 131 S. Ct. at 2547–48.

[153] See Suzanna Sherry, Hogs Get Slaughtered at the Supreme Court, 2011 Sup. Ct. Rev. 1, 22.

[154] *Iqbal*, 556 U.S. at 666.

[155] Id. at 670 (quoting Ashcroft v. Hasty, 490 F.3d 143, 179 (2d Cir. 2007) (Cabranes, J., concurring)). Indeed, Justice Kennedy noted the burdens that the litigation process would impose on such officials, which are especially acute during a time when they need to respond to such an unparalleled crisis. See id. at 685; see also infra note 330 and accompanying text.

[156] See *Wal-Mart*, 131 S. Ct. at 2561 (Ginsburg, J., dissenting) ("Whether the class the plaintiffs describe meets the specific requirements of Rule 23(b)(3) is not before the Court, and I would reserve that matter for consideration and decision on remand.").

[157] See id. at 2561–62 ("The Court . . . disqualifies the class at the starting gate, holding that the plaintiffs cannot cross the 'commonality' line set by Rule 23(a)(2).").

23(a)(2) that would prevent certification even of class actions that were smaller and more manageable.[158]

Similarly, the potential reasons for distinguishing *Iqbal* on its facts do not necessarily make sense given the Federal Rules' positive-law framework for pleading. Rule 8(a)(2) sets forth a trans substantive pleading standard that sets the bare minimum for all civil actions.[159] It does not provide any basis for treating allegations differently based on the potential for burdensome discovery, national security exigencies, or interference with the activities of government officials.[160] A future court, therefore, may feel obligated to reject any allegation that is similarly conclusory, regardless of the kind of case or factual context in which it arises.[161]

If these distinctions are untenable,[162] what then? Does the *Wal-Mart* result mean that Rule 23(a)(2) is never satisfied if there are *any* individualized questions regarding causation or entitlement to damages among

[158] See, e.g., DL v. District of Columbia, 713 F.3d 120, 126–29 (D.C. Cir. 2013); Valerino v. Holder, 283 F.R.D. 302, 310–17 (E.D. Va. 2012) (applying *Wal-Mart*); Rodriguez v. Nat'l City Bank, 277 F.R.D. 148, 154–55 (E.D. Pa. 2011) (same).

[159] See *Iqbal*, 556 U.S. at 684 (noting that Rule 8 "governs the pleading standard 'in all civil actions and proceedings in the United States district courts'" (quoting Fed. R. Civ. P. 1)).

[160] See supra notes 154–55 and accompanying text.

[161] See, e.g., Lyttle v. United States, 867 F. Supp. 2d 1256, 1294 (M.D. Ga. 2012) (applying *Iqbal*); Aguilar v. ICE, 811 F. Supp. 2d 803, 816 (S.D.N.Y. 2011) (same); Adekoya v. Holder, 751 F. Supp. 2d 688, 695 (S.D.N.Y. 2010) (same); Riley v. Vilsack, 665 F. Supp. 2d 994, 1004 (W.D. Wis. 2009) (same). The *Iqbal* result would have a similar effect even under a pure result-only approach, under which future courts could reject the broader legal principle that allegations may be disregarded when they are conclusory. See supra note 77 (noting that an inferential, result-based approach to stare decisis might operate either instead of or in addition to an explicit-rule model). The Court dismissed Mr. Iqbal's complaint *even though* it explicitly alleged that Ashcroft and Mueller acted with discriminatory animus, and future courts may be hard-pressed to infer a rule that justifies refusing to accept that allegation without also rejecting similar allegations in more run-of-the-mill cases.

[162] I am not arguing that such distinctions are necessarily impossible. See, e.g., OSU Student Alliance v. Ray, 699 F.3d 1053, 1069–73 (9th Cir. 2012) (distinguishing *Iqbal*); Turkmen v. Ashcroft, 915 F. Supp. 2d 314, 345 (E.D.N.Y. 2013) (same); Liberty & Prosperity 1776, Inc. v. Corzine, 720 F. Supp. 2d 622, 628–29 (D.N.J. 2010) (same); Kane, supra note 81, at 1041–44 (describing cases distinguishing *Wal-Mart*). In my view, many of the decisions that distinguish *Wal-Mart* and *Iqbal* are correct in terms of the text, structure, and purpose of the governing Federal Rules. Given the positive-law bases for *Wal-Mart* and *Iqbal*, however, future courts might not view potential grounds for distinguishing the *Wal-Mart* and *Iqbal* results as salient.

class members?[163] Does the *Iqbal* result mean that allegations as to anything one might call an "ultimate fact"[164]—such as the defendant's negligence,[165] the defendant's discriminatory intent,[166] or the fact that the defendant's products "embody the patented invention"[167]—may be disregarded?

These questions are only partly rhetorical. To many, they suggest that the five Justices in the *Wal-Mart* and *Iqbal* majorities (and they are the same five Justices[168]) decided those cases incorrectly. As we are often told, however, the Supreme Court is not final because it is infallible; it is infallible because it is final.[169] Accordingly, one might respond that future courts *should*—as a matter of stare decisis—embrace the more radical views of class certification and pleading that are, arguably, implicit in the *Wal-Mart* and *Iqbal* results. On this view, future courts should read the writing on the wall; everyone knows where the Supreme Court is headed on these issues.

As it turned out, we did not know where the Court was headed. Two years after deciding *Wal-Mart*, the Supreme Court found that the class action in *Amgen Inc. v. Connecticut Retirement Plans*[170] was properly certified.[171] The majority in *Amgen* concluded that a securities fraud class action could be certified under Rule 23(b)(3) without establishing

[163] See Kane, supra note 81, at 1025 ("[*Wal-Mart*'s] conclusion that plaintiffs had failed to meet their burden of proof under Rule 23(a)(2) raises important questions about what proof might possibly meet the standard.").

[164] Cf., e.g., 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1216 (3d ed. 2004) (noting that Rule 8(a)(2)'s use of the phrase "'claim showing that the pleader is entitled to relief' . . . was intended to avoid the distinctions drawn under the codes among 'evidentiary facts,' 'ultimate facts,' and 'conclusions'").

[165] Cf. Fed. R. Civ. P. Form 11, ¶ 2 (indicating that an allegation "On <date>, at <place>, the defendant negligently drove a motor vehicle against the plaintiff" is sufficient (emphasis omitted)).

[166] Cf. *Swierkiewicz*, 534 U.S. at 514 (concluding that it was improper to dismiss a complaint that alleged "[p]laintiff's age and national origin were motivating factors in [the defendant's] decision to terminate his employment").

[167] Cf. Fed. R. Civ. P. Form 18, ¶ 3 (indicating that an allegation "[t]he defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention" is sufficient (emphasis omitted)).

[168] The majority Justices in both *Wal-Mart* and *Iqbal* were Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito. See *Wal-Mart*, 131 S. Ct. at 2546; *Iqbal*, 556 U.S. at 665.

[169] See Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

[170] 133 S. Ct. 1184 (2013).

[171] Id. at 1194–97.

that the alleged misrepresentations or omissions were material. Materiality was *itself* a question of law or fact common to the class, which in *Amgen* meant that common questions predominated over individualized ones.[172] That conclusion—which makes perfect sense from the standpoint of Rule 23's text and structure—is hard to square with the result in *Wal-Mart*, which found not even a single common question of law or fact even though all of the class members' claims were premised on a theory that it violated Title VII for Wal-Mart to give unfettered discretion to local supervisors in the context of a corporate culture that fosters gender-stereotypes.[173] If the *Wal-Mart* result is prospectively binding as a matter of stare decisis, how can materiality (in *Amgen*) not only count as a common question of law or fact, but also tip the balance toward a finding that common issues predominate over individualized ones?[174]

One could make a similar point about pleading standards. Two years after deciding *Iqbal*, the Supreme Court found that the complaint in *Ma-*

[172] Id. at 1195–96.

[173] See supra notes 94–96 and accompanying text.

[174] Justice Thomas's *Amgen* dissent further highlights the disconnect between *Amgen* and the *Wal-Mart* result; he cites *Wal-Mart* for the proposition that a plaintiff seeking certification "must show that the elements of the claim are susceptible to classwide proof." *Amgen*, 133 S. Ct. at 1210 (Thomas, J., dissenting). This is a bizarre reading of Rule 23. That Rule 23(a)(2) requires only a single common question of law or fact presumes that there may permissibly be some individualized issues. Even Rule 23(b)(3)'s requirement that common issues "*predominate* over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3) (emphasis added), tolerates *some* individualized issues. That said, Justice Thomas's mistaken logic echoes some of the concerns expressed by Justice Scalia in *Wal-Mart*; as discussed supra note 97 and accompanying text, Scalia seemed troubled by the fact that each class member's entitlement to back pay might depend on how particular managers exercised their discretion. But Justice Scalia's *Wal-Mart* opinion never stated such a rule. Nor did he do so in the Court's 5-4 post-*Amgen* decision in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013). Although *Comcast*'s reversal of class certification turned on the conclusion that the amount of damages could not be calculated on a class-wide basis, Justice Scalia's majority opinion was careful to base this on the plaintiff's concession as to that premise: "*The District Court held, and it is uncontested here*, that to meet the predominance requirement respondents had to show . . . that the damages resulting from that injury were measurable 'on a classwide basis' through use of a 'common methodology.'" *Comcast*, 133 S. Ct. at 1430 (emphasis added) (citing 264 F.R.D. 150, 154 (E.D. Pa. 2010)). Justices Ginsburg and Breyer, writing for the four dissenting Justices, emphasize this aspect of Justice Scalia's opinion, and they effectively explain why not even Rule 23(b)(3)'s predominance requirement can be read to "demand[ ] commonality as to all questions." Id. at 1436–37 (Ginsburg & Breyer, JJ., dissenting) (citing 7AA Charles Alan Wright et al., Federal Practice & Procedure § 1778 (3d ed. 2005)).

trixx Initiatives, Inc. v. Siracusano[175] passed muster.[176] And in *Skinner v. Switzer*,[177] the Court found that a mere allegation that "the State's refusal 'to release the biological evidence for testing . . . has deprived [the defendant] of his liberty interests in utilizing state procedures to obtain reversal of his conviction and/or to obtain a pardon or reduction of his sentence'" was sufficient to survive a motion to dismiss for failure to state a claim, reasoning that "Rule 8(a)(2) . . . generally requires only a plausible 'short and plain' statement of the plaintiff's claim."[178]

When viewed through the lens of these more recent developments, *Wal-Mart* and *Iqbal* are best explained by the unique facts of those cases.[179] Legitimately or not, these were "result-oriented decisions designed to terminate at the earliest possible stage lawsuits that struck the majorities as undesirable."[180] They do not manifest a desire (at least not by all five Justices) to change the governing legal standards with respect to Rule 23(a)(2) commonality or Rule 8(a)(2) pleading. The problem—as explained above—is that the factual aspects of those cases that likely motivated the ultimate results do not fit sensibly into the particular issues on which those decisions were based. A judge, therefore, may be reluctant to declare that those facts ought to be relevant to the Federal Rules at issue. Accordingly, she might reasonably conclude that the re-

[175] 131 S. Ct. 1309 (2011).

[176] See id. at 1322–23.

[177] 131 S. Ct. 1289 (2011).

[178] Id. at 1296 (brackets omitted) (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1219 (3d ed. 2004 & Supp. 2010)); see also Richard D. Freer, The Continuing Gloom About Federal Judicial Rulemaking, 107 Nw. U. L. Rev. 447, 465 (2013) (noting that after *Iqbal* "the Court has decided more pleading cases, including *Matrixx Initiatives, Inc. v. Siracusano* and *Skinner v. Switzer*, which may indicate that the sky is not falling" (footnotes omitted)).

[179] See supra notes 152–55 and accompanying text; see also Sherry, supra note 153, at 22 (arguing that the *Wal-Mart* decision may have been a response to "overreaching by lawyers and [lower court] judges" and noting that "[n]o class action of this magnitude had ever been certified"); Steinman, supra note 112, at 1326–27 (suggesting that the Court may have been driven by "the precise facts of *Twombly* and *Iqbal* rather than a broader doctrinal agenda" and that "it would not be surprising that some jurists might lean toward dismissing cases like *Twombly* and *Iqbal* without also wanting to upend pleading standards generally").

[180] Steinman, supra note 112, at 1299. Although this quote was directed at *Twombly* and *Iqbal*, the characterization is equally appropriate for *Wal-Mart*. Indeed, the facts of *Twombly* were remarkable as well. See Steinman, supra note 112, at 1326 (noting that "*Twombly* presented a monstrously large class action" and that the law firm representing the plaintiff class "had been indicted by federal prosecutors just one month before the Supreme Court granted certiorari").

sults of *Wal-Mart* and *Iqbal* should not be distinguished on that basis.[181] This is precisely what gives rise to Justice Holmes's concern that "[g]reat cases like hard cases make bad law."[182]

Thus, *Wal-Mart* and *Iqbal* illustrate the unsatisfying options courts can face under a regime of inferential stare decisis. One option is to require future courts to overread the precedent-setting decision. Future courts must intuit more radical legal changes than *Wal-Mart* and *Iqbal* explicitly embraced—changes that, in fact, are hard to square with subsequent Supreme Court decisions. Another option is to force future courts to embrace distinctions that are difficult to fit with the Rules' text, structure, and purpose. *Iqbal* applies only to cases involving 9/11 or national security. *Wal-Mart* applies only to employment discrimination class actions; or employment discrimination class actions based on the vesting of discretion in lower-court managers; or employment discrimination class actions with more than one million class members.

An alternative, which the next Part of this Article will examine, is simply to abandon the idea of inferential, result-based stare decisis. This is not to say that results alone are of no value whatsoever, or that explicitly-stated rules are the only thing we should care about. The results of past cases may be enlightening, insightful, instructive, helpful, predictive, or otherwise useful for any number of reasons. But future courts should not be obligated as a matter of stare decisis to accept those results as imposing an inferential obligation to approach future cases in ways that are consistent with those results. A better approach is to give binding effect only to the rules stated by the precedent-setting court.

III. WHAT OBLIGATIONS SHOULD STARE DECISIS IMPOSE?

This Part assesses the relative merits of rule-based and result-based stare decisis. Section A seeks to frame the question more precisely, by

[181] One could imagine an approach to stare decisis where future judges may distinguish a binding result even on grounds that they do not believe are relevant to the issue at hand. On that theory, a judge in a securities class action might distinguish *Wal-Mart* simply by saying "*Wal-Mart* was an employment discrimination class action, so I can ignore it." But if there is no requirement that the distinguishing fact be relevant to the particular legal issue, then a future court could just as easily distinguish a prior case based on the first name of the plaintiff, or the day of the week on which a case was filed. Although I argue against any form of result-based stare decisis in Section III.C, result-based stare decisis can be plausibly coherent only if it contains a requirement that the basis for distinguishing an earlier result is relevant to the issue being decided.

[182] N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

exploring what it means to say that law (whether legislatively or judicially generated) is prospectively binding on future courts. Section B evaluates a system that gives stare decisis effect to explicitly stated rules. Section C analyzes inferential approaches to stare decisis, which require future courts to reconcile their decisions with the results of earlier ones.

A. Stare Decisis and the Idea of Binding Law

"Stare decisis" is used as a label for several—arguably distinct—aspects of judicial practice, so I want to be clear about what my focus is in this Article. I am concerned with prior decisions that operate as *binding* law on future courts. I do not mean a judge's use of precedent to justify what she would have done anyway. "[S]tare decisis is not involved if the court 'follows a previous decision . . . because it is the right decision, because it is logical, because it is just.'"[183] To "stand by things decided" means one must stand by those things *even if* one disagrees with them.

But what exactly does it mean to say that some aspect of a judicial decision is binding? This question is more complicated than it might appear at first glance. As I explain below, law that is unquestionably binding can still allow future decisionmakers considerable leeway. And sources that are unquestionably non-binding can still have a very strong influence. These realities are important to keep in mind when assessing what aspects of judicial decisions should be deemed binding as a matter of stare decisis.

1. Binding Law's Flexibility

To say that something is binding law is not to say that it is totalizing or comprehensive. To illustrate the point, consider statutes, which are unquestionably binding on the federal judiciary. Although some have argued otherwise,[184] the law expressed in a binding statute is not necessarily immune from later judicially created exceptions. A classic exam-

[183] Monaghan, supra note 5, at 757 n.187 (quoting Radin, supra note 8, at 200); see also Alexander, supra note 4, at 4 ("I shall focus on those situations . . . in which a subsequent court believes that, though a previous case was decided incorrectly, it must, nevertheless, through operation of the practice of precedent following, decide the case confronting it in a manner that it otherwise believes is incorrect.").

[184] See, e.g., John C. Nagle, Textualism's Exceptions, Issues in Legal Scholarship, Nov. 2002, at 1 ("[T]extualism's exceptions are unprincipled [and] . . . unnecessary . . . .").

ple—on which I will elaborate more below—is equitable tolling of a statute of limitations.[185] Even if a statute of limitations provides no textual exceptions, courts may recognize equitable tolling principles without declaring that the statute is no longer binding.

To some, the lesson to be drawn from the way courts graft non-textual exceptions onto statutes is that the entire idea of binding law is meaningless; the statute is only binding to the extent that the court is willing to follow it, which means that the court is ultimately free to do whatever it wants. As Holmes put it, the law is "nothing more" than "[t]he prophecies of what the courts will do in fact."[186] One can accept this realist notion of judicial behavior, however, without dispensing with the concept of binding law. At a minimum, the fact that a statute is binding on courts requires courts both to *accept* and to *reckon with* that statute. A court cannot say, "I disagree with this statute," and ignore it. A court cannot say, "I don't know *what* to make of this statute," and ignore it. Within these constraints, however, courts retain considerable leeway with respect to how they interpret and apply a statute.

Let's start with an uncontroversial example—the ability of courts to interpret words and phrases in a statute that are ambiguous or otherwise fail to provide a clear answer with respect to certain scenarios.[187] Consider the federal question statute, now codified in 28 U.S.C. § 1331, which gives federal district courts subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."[188] While the judicial branch is unquestionably bound by that statute, it certainly has leeway to determine what kinds of "civil actions" *do* "aris[e] under" federal law. In *Louisville & Nashville Railroad v. Mottley*,[189] for example, the Supreme Court determined that federal question jurisdiction could not be invoked based on federal law defenses to state law causes of action.[190]

[185] See, e.g., Holland v. Florida, 130 S. Ct. 2549, 2560 (2010); see infra notes 197–205 and accompanying text.

[186] Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 461 (1897).

[187] This would include both interpretation and construction of a statutory text. See Lawrence B. Solum, The Interpretation-Construction Distinction, 27 Const. Comment. 95, 96 (2010) (defining "interpretation" as "the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text" and "construction" as "the process that gives a text legal effect (either my translating the linguistic meaning into legal doctrine or by applying or implementing the text)").

[188] 28 U.S.C. § 1331 (2006).

[189] 211 U.S. 149 (1908).

[190] Id. at 152–54.

To depict this phenomenon more formulaically, one might say that the statute establishes the principle: If a civil action arises under federal law, then federal subject matter jurisdiction is proper. (If *P* then *Q*.)[191] In the *Mottley* case, the plaintiffs proposed a subsidiary principle for deciding whether *P* is true: If a federal law issue will arise in connection with a defense to the plaintiff's state law cause of action, then the civil action arises under federal law. The Court rejected that principle, declaring instead:

> If a federal law issue will arise only in connection with a defense to the plaintiff's cause of action, then the civil action does not arise under federal law. (If *O*, then Not-*P*.)[192]

Mottley is a fairly typical example of what courts do when they interpret indeterminate concepts in binding statutory law. However, courts can do considerably more with binding statutes than simply decide whether—and by what subsidiary principles—*P* is true in any given case. For example, although Section 1331 instructs that federal district courts "*shall* have original jurisdiction of *all* civil actions arising under [federal law],"[193] the Supreme Court has developed abstention doctrines that require federal courts *not* to exercise jurisdiction as to civil actions that unquestionably *do* arise under federal law.[194] One such doctrine—known as *Younger* abstention—forbids federal jurisdiction in cases that will interfere with certain pending state court proceedings.[195]

Abstention doctrines confirm that even when courts are bound by a statute, they may develop what one might call distinguishing principles—principles that, as a logical matter, trump the ostensibly binding statutory principle. Section 1331 establishes that: "If a civil action arises under federal law, then subject matter jurisdiction is proper." (If *P* then *Q*.) But the judicially created abstention doctrine establishes that (to paraphrase): "If a federal action would interfere with an ongoing state court proceeding that implicates an important state interest, then the federal

[191] Speaking more precisely, one should say: "For all civil actions, if a civil action arises under federal law, then federal subject matter jurisdiction is proper." A logician would diagram such a proposition $\forall_x(P_x \rightarrow Q_x)$. The case-specific antecedent finding (that this particular civil action arises under federal law) would be P_a, and the case-specific conclusion (that federal subject matter jurisdiction is therefore proper in this particular case) would be Q_a.

[192] See *Mottley*, 211 U.S. at 152.

[193] 28 U.S.C. § 1331 (emphasis added).

[194] See, e.g., Erwin Chemerinsky, Federal Jurisdiction 761 (4th ed. 2003).

[195] See generally id. at 795–836.

court shall not exercise jurisdiction."[196] (If *X* then Not-*Q*.) In the case where abstention is proper, these two rules are in conflict. Both *P* and *X* are true; the first rule dictates the conclusion *Q*, while the second rule dictates the conclusion Not-*Q*. Nonetheless, courts may endorse a distinguishing rule that is logically in conflict with the binding statute.

Equitable tolling of a statute of limitations follows this same structure. A statute of limitations may say, for example: "If three years has elapsed from the time of the plaintiff's injury, then the claim is time-barred." (If *P* then *Q*.) But the judicially created equitable tolling principle says: If the plaintiff "has been pursuing his rights diligently" and "some extraordinary circumstance" prevented him from filing within the limitations period, then the claim is not time-barred.[197] (If *X*, then Not-*Q*.)

To be sure, jurists and scholars may vigorously debate when such distinguishing principles are appropriate. Professor Martin Redish, for example, has criticized abstention doctrines as a "judicial usurpation of legislative authority."[198] As to equitable tolling, this year's decision in *McQuiggin v. Perkins*[199] prompted a strong disagreement over whether the Court should recognize an "equitable exception" to the one-year statute of limitations for federal habeas petitions in cases where there is strong evidence of actual innocence.[200] The majority endorsed such an exception.[201] But Justice Scalia, writing for the four dissenters, responded: "The gaping hole in today's opinion for the Court is its failure to answer the crucial question upon which all else depends: What is the source of the Court's power to fashion what it concedes is an 'exception' to this clear statutory command?"[202] Yet even Justice Scalia conceded that the more traditional form of equitable tolling[203] is perfectly appropriate, because of its historical pedigree[204] and the fact that it "seeks to vindicate what might be considered the genuine intent of the statute."[205]

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[196] See supra notes 194–95.

[197] See, e.g., *Holland*, 130 S. Ct. at 2562.

[198] Martin H. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 Yale L.J. 71, 76 (1984).

[199] 133 S. Ct. 1924 (2013).

[200] See id. at 1928; id. at 1938 (Scalia, J., dissenting).

[201] Id. at 1928 (majority opinion).

[202] Id. at 1937 (Scalia, J., dissenting).

[203] See supra note 197 and accompanying text.

[204] *McQuiggin*, 133 S. Ct. at 1941 (Scalia, J., dissenting) ("[T]he doctrine of equitable tolling is centuries old.").

[205] Id.

Ultimately, then, debates over the propriety and scope of abstention doctrines, or the propriety and scope of equitable tolling doctrines, are not debates over whether the relevant statutes are binding. The debates are over how best to interpret and apply the relevant statutes. Where appropriate, this can include judicially created principles that—as a logical matter—trump the principles stated in the binding statutory text.[206]

At first glance, this approach to binding law may seem to upset the lawmaking hierarchy. This scenario is not uncommon, however. Where an entity that is higher in the lawmaking hierarchy makes a broad rule, an entity that is lower in the hierarchy may craft an exception that narrows the rule. Consider, for example, the hierarchy between a later-enacted statute and an earlier-enacted statute. Ordinarily, a later-enacted statute overrides an earlier statute, which puts the later-in-time legislature higher in the lawmaking hierarchy vis-à-vis the earlier-in-time legislature.[207] This hierarchy falls away, however, under the "general/specific canon" of statutory interpretation.[208] This canon provides that when two statutory provisions conflict, "the specific provision is treated as an exception to the general rule."[209] And it applies even when the superior legislature (the one later in time) enacts a general rule that, as a logical matter, trumps the inferior legislature's more specific provision.[210]

Note that in all of these situations the higher-ranked lawmaker retains the authority to fix incorrect distinctions. Suppose that Congress meant for federal courts to exercise jurisdiction in every statutorily-authorized case; it could statutorily abrogate abstention doctrines. Suppose the legislature meant a limitations period to be inflexible or jurisdictional; it can enact a statute that expressly forbids equitable tolling. Suppose the later-in-time legislature meant for its general provision to override the

[206] See, e.g., William N. Eskridge, Jr., All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806, 101 Colum. L. Rev. 990, 996 (2001) (noting that even at the time of the Founding, judges would "expand[] or narrow[] the words of statutes" when "exercising their judicial power to discover or apply the law"); id. at 1001–06 (discussing "ameliorative power," "suppletive power," and "voidance power").

[207] See Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 185 (2012).

[208] Id.

[209] Id. at 183.

[210] Id. at 185 ("[W]here there is a conflict between a general provision and a specific one, whichever was enacted later might be thought to prevail. But that analysis disregards the principle behind the general/specific canon—namely that the two provisions are not in conflict, but can exist in harmony.").

earlier, more specific provision (and a court using the general/specific canon concludes otherwise). The now-even-later-in-time legislature can enact a statute that explicitly abrogates the more specific provision.

2. Non-Binding Law's Influence

In examining what it means to declare that some piece of law is binding, it is also worth keeping in mind that legal materials can be quite influential even if they are unquestionably *not* binding.[211] Dictum in a judicial opinion—even a Supreme Court opinion—is not formally binding on future courts. Yet such dictum is cited quite frequently.[212] One could make similar points about the tendency of judges to value support from outside the relevant jurisdiction: different circuits or districts, different state courts, even different countries. Even in civil law countries, where there is no formal doctrine of stare decisis, judges often rely on prior judicial decisions[213]—so much so that practitioners have characterized it as a "nearly mandatory rule."[214]

There may be any number of reasons why non-binding aspects of judicial opinions can prove to be influential. Judges may find it inherently desirable to find support in aspects of prior decisions even if they are not bound to do so, and judges may believe their opinions will be better received (by whatever audience) if they can invoke and claim consistency with non-binding aspects of prior decisions. With respect to non-binding aspects of superior court decisions (for example, Supreme Court dicta), judges may view them as good predictors of how those courts will resolve issues in the future, such that following them will increase the likelihood of affirmance.[215] All this said, the use of such content by

[211] See, e.g., Charles A. Sullivan, On Vacation, 43 Hous. L. Rev. 1143, 1196–1206 (2006) (examining how non-binding authorities can be persuasive).

[212] See David Klein & Neal Devins, Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making, 54 Wm. & Mary L. Rev. 2021, 2024–27 (2013).

[213] See, e.g., John Henry Merryman & Rogelio Pérez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America 47 (3d ed. 2007) ("Everybody knows that civil law courts do use precedents.").

[214] See Raj Bhala, The Myth About Stare Decisis and International Trade Law *(Part One of a Trilogy)*, 14 Am. U. Int'l L. Rev. 845, 913 (1999) (internal quotation marks omitted) (citing Jacques Salès, Why Judicial Precedent *Is* a Source of Law in France, 25 Int'l Bus. L. 20, 35 (1997)).

[215] Discussing this phenomenon in stare-decisis-less civil systems, Professors Merryman and Pérez-Perdomo wrote:

> Judges may refer to a precedent because they are impressed by the authority of the prior court, because they are persuaded by its reasoning, because they are too lazy to

judges does not make that content *binding*.[216] The crucial difference is that judges may always—at the end of the day—choose to disregard non-binding content.

3. Lessons for Stare Decisis

These insights about how binding law constrains (and does not constrain) are instructive for examining whether and to what extent judicial decisions should be binding as a matter of stare decisis. To declare that a particular part of a judicial decision is binding is to say that future courts *must* accept and reckon with that part of the decision. A future court does not have the option to disregard that aspect of the decision, either because it disagrees with it or because it is not sure how to make sense of it.

As with statutory law, however, the obligation to accept and reckon with a binding aspect of a judicial decision does not foreclose future courts from distinguishing it. This phenomenon is well known in the common-law stare decisis tradition, which imposes the inferential obligation to justify, explain, or reconcile future decisions with the results of past decisions.[217] The judge in Case 2 looks to a precedent-setting case (Case 1) and justifies reaching a different result by pointing out some salient factual difference between Case 1 and Case 2. But the ability to distinguish is equally available under an explicit-rules approach to stare decisis; future courts could develop distinguishing rules just as courts do vis-à-vis statutes. The basic conceptual structure is the same. The rule declared *A*; but it does not purport to address the scenario *B*. Or more formulaically, the rule in Case 1 declares: If *P* then *Q*. But Case 2 may declare a distinguishing principle: If *X*, then Not-*Q*.[218] And as with the statutory examples,[219] the superior lawmaker retains the ability to correct distinguishing principles that are improper. If the higher court meant for

> think the problem through themselves, because they do not want to risk reversal on appeal, or for a variety of other reasons.

Merryman & Pérez-Perdomo, supra note 213, at 47.

[216] After all, judges might also cite a law review article, speech, novel, op-ed, or poem—no one would contend that such sources are formally binding as a matter of stare decisis. See, e.g., Sullivan, supra note 211, at 1198 (describing judicial citations to the *New York Review of Books* and the *National Review*).

[217] See supra notes 54–59 and accompanying text.

[218] See supra notes 193–97 and accompanying text.

[219] See supra notes 187–97 and accompanying text.

its broad rule to apply without the distinguishing exception, it can reverse the lower court.

The flexibility courts have when confronting binding law shows that future courts will retain significant safety valves even as to aspects of prior judicial decisions that are deemed to be binding. But there is also a lesson in the continued influence of concededly non-binding law.[220] The apparent tendency of courts to seek consistency even with legal sources that are not formally binding indicates that our judicial system will not devolve into anarchy if we candidly declare that certain aspects of judicial decisions that have traditionally been viewed as binding are no longer so.

There is, of course, one aspect of stare decisis that is potentially distinct from the legislative examples above. It is widely accepted that courts can, under certain circumstances, overrule binding precedent. In this regard, there is a difference between horizontal stare decisis (which concerns the extent to which a court is bound by its *own* prior decision) and vertical stare decisis (which concerns the extent to which a court is bound by a *superior* court's prior decision). Horizontal stare decisis permits overruling; the Supreme Court, for example, can overrule its own precedent in certain circumstances.[221] Vertical stare decisis does not permit overruling; a lower federal court cannot overrule a Supreme Court decision,[222] and a federal district court cannot overrule a decision by its own court of appeals.[223]

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[220] See supra Subsection III.A.2.

[221] See supra notes 27–32 and accompanying text; see also Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) ("[I]t is common wisdom that the rule of stare decisis is not an inexorable command . . . ." (internal quotation marks omitted)). The federal courts of appeals can also overrule their own precedents, although it varies from circuit to circuit whether an en banc sitting is required to do so. Compare Cargill v. Turpin, 120 F.3d 1366, 1386 (11th Cir. 1997) ("The law of this circuit is 'emphatic' that only the Supreme Court or this court sitting en banc can judicially overrule a prior panel decision."), with 7th Cir. R. 40(e) (allowing a panel to "adopt[] a position which would overrule a prior decision of this court" as long as "it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted").

[222] Put another way, the power of the Supreme Court to overrule its *own* prior decision does not empower lower courts to disregard that decision. See supra note 123; see also Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko*. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

[223] See, e.g., 18 James Wm. Moore et al., Moore's Federal Practice ¶ 134.02[1][d] & n.26 (Matthew Bender 3d ed. 2008).

Given the focus of this Article—what aspects of a judicial decision ought to create binding law in the first instance—I am cabining the issue of whether and when that binding law might be overruled. Accordingly, I do not treat horizontal and vertical stare decisis differently. That lower courts cannot overrule a higher court decision does not mean that they must attribute broader lawmaking content to higher court decisions than the higher court itself. Indeed, lower courts unquestionably have the ability to distinguish higher court precedents.[224] Even for horizontal stare decisis—for which the later court has the power both to overrule and to distinguish the earlier decision—it is important to identify the earlier decision's lawmaking content. The Supreme Court, for example, imposes a special set of "prudential and pragmatic considerations" before it will overrule a prior holding.[225] Whether the Court must jump through those hoops depends on what law the earlier decision has made. Thus, the need to identify the lawmaking content of an earlier decision is the same for both horizontal and vertical stare decisis; the difference is simply the extent to which the later court has the option to overrule that otherwise binding content.

B. Stare Decisis and Explicit Rules

This Section argues that stare decisis should—in appropriate circumstances—bind future courts to follow explicit rules stated in a precedent-

[224] See, e.g., Greenawalt, supra note 8, at 274 (describing "distinguishing" as "[a]n accepted technique that differs from overruling"); see also Amnon Reichman, The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar, 95 Calif. L. Rev. 1619, 1665 (2007) (noting the possibility that "lower-court judges might distinguish their cases from the higher court's doctrine"); Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 819 (1994) (noting that inferior courts might "free themselves from its fetters by stretching to distinguish the holdings of the higher court").

[225] *Casey*, 505 U.S. at 854 ("[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations . . . ."); see also id. at 854–55 (listing these considerations); id. at 864 (noting that "reexamining prior law" requires a justification stronger than "a present doctrinal disposition to come out differently"). The Supreme Court has also suggested that its willingness to overrule precedent may vary depending on the basis for the decision. See, e.g., John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) ("*[S]tare decisis* in respect to statutory interpretation has special force, for Congress remains free to alter what we have done." (internal quotation marks omitted)); Burnett v. Coronado Oil & Gas Co., 285 U.S. 393, 406–08 (1932) (Brandeis, J., dissenting) ("[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.").

setting court's opinion. My goal is not to propose a comprehensive theory for precisely when and which rules in a judicial opinion are binding via stare decisis. It is merely to show that at least some form of rule-based stare decisis is desirable, in order to allow the judiciary to clarify areas of legal uncertainty when such clarifying rules are appropriate.

One limit on such legislative holdings that I am putting to the side (for the moment) is that, for an explicit rule to be binding, there must be a sufficient nexus between it and the court's ultimate decision. This idea is reflected in the notion that stare decisis obligates future courts to follow only those parts of a judicial opinion that are "necessary" to the court's decision.[226] A court's broad statement of law that has nothing to do with the case before it is the most classic kind of obiter dictum—something said in passing.[227] That said, necessity does not take on its most literal definition in this context. Any case, after all, might conceivably be decided based purely on the totality of its circumstances; accordingly, any "explication[] of the governing rules of law"[228] is never strictly necessary. In practice, then, absolute necessity is not required. The harder question, which I will take up later, is how close a connection between the rule and the ultimate decision ought to be required.[229]

Let me address one other point at the outset. In discussing the potential benefits of rule-based stare decisis, I am not distinguishing between rules and standards.[230] According to that dichotomy, a rule is a directive that "binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts,"[231] and a standard is a directive that "giv[es] the decisionmaker more discretion" by "collaps[ing] deci-

[226] See supra note 33 and accompanying text.

[227] Black's Law Dictionary 1177 (9th ed. 2009).

[228] See supra note 64–65.

[229] Some have suggested that "important" might more accurately describe the required nexus than "necessary." Greenawalt, supra note 8, at 185 ("Although the standard formulation is in terms of 'necessary to the resolution of the case,' in the United States at least 'important in' is substantially more accurate." (footnote omitted)). Cf. Appellate Body Report, Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, ¶ 161, WT/DS161/AB/R (Dec. 11, 2000), available at http://www.wto.org/english/tratop_e/dispu_e/161-169abr_e.pdf ("[T]he term 'necessary' refers, in our view, to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to.'") (interpreting Article XX(d) of the General Agreement on Tariffs and Trade).

[230] See, e.g., Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22 (1992).

[231] Id. at 58.

sionmaking back into the direct application of the background principle or policy to a fact situation."[232] A rule-based approach to stare decisis—as I use that term here—does not hinge on whether the directive invoked by the court is rule-like or standard-like. That is, a court might embrace a flexible "rule" that some might label a standard (say, "unreasonable speed"). Or it might embrace a "rule" that is more mechanically applicable (say, "55 miles per hour").[233]

With these caveats in mind, the key benefit of rule-based stare decisis is captured nicely by this observation from the Supreme Court, which traces back to Justice Brandeis: Stare decisis "reflects a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'"[234] Rule-based stare decisis allows a precedent-setting court to identify "the applicable rule of law," making it more predictable how future courts will handle cases.[235]

Rule-based stare decisis has its critics, however. For some, it smacks of "legislating from the bench." On this view, it is inherently problematic on separation of powers grounds for the judiciary to declare rules that are prospectively binding on the system as a whole (rather than simply on the parties in a particular case).[236] As Professor Michael Moore put it: "It does not fit our picture of how a court should behave to have it issuing either canonical statements or policy programmes like a little legislature. Courts are to decide disputes, not issue edicts."[237]

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[232] Id. at 58–59; see also Greenawalt, supra note 8, at 248–49 (describing a similar distinction between "rules" and "principles").

[233] See, e.g., Frederick Schauer, Opinions as Rules, 62 U. Chi. L. Rev. 1455, 1470 (1995) ("At times it may be appropriate for a court . . . to delineate exactly what primary actors should do. At other times it may be appropriate to set out only broad standards, either as a way of delegating further specification to other bodies, or as a means of delaying further specification until additional cases arise.").

[234] Agostini v. Felton, 521 U.S. 203, 235 (1997) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

[235] See, e.g., Alexander, supra note 4, at 52 (noting that the values of "determinateness and predictability" favor a rule-based model); Hardisty, supra note 8, at 55 ("[A]n appellate court's articulation of the rule of law for which its opinion stands increases the predictability of future court decisions, thereby facilitating decisions whether and how to act, to settle, and to litigate.").

[236] See, e.g., Michael Moore, Precedent, Induction, and Ethical Generalization, *in* Precedent in Law, supra note 8, at 187 (arguing that rule-based stare decisis "is difficult to square" with the "ideal . . . of the separation of power").

[237] Id. See also Schauer, supra note 233, at 1456–58 (noting the critique that "courts that write in quasistatutory language are no longer behaving like courts" but rather are "simply legislating, thus . . . usurping the power of a majoritarian body" (citing, e.g., Robert F. Nagel, The Formulaic Constitution, 84 Mich. L. Rev. 165 (1985))).

The judges-should-not-legislate critique of rule-based stare decisis misses an important point, however. Even if stare decisis were eliminated entirely, judicial "legislation" is likely to continue. Unless positive law sources were absolutely clear and mechanically applicable, judges might develop rules to decide the cases before them.[238] The choice, therefore, is not whether judges will or will not make law. The choice is between (a) having certain aspects of law "settled" by earlier decisions; and (b) retaining a state of affairs where different judges can continue to develop and apply different rules in a less predictable fashion.

Thus, rule-based stare decisis operates as an internal judicial housekeeping measure that limits the lawmaking options courts have going forward. When prior decisions have "sa[id] what the law is,"[239] judges in future cases are confined accordingly. This does not usurp the power of legislative bodies, which retain the authority to override decisional law.[240] Indeed, knowing that a particular "rule" is "settled" as far as the judiciary is concerned might spur legislative action in ways that a more amorphous legal landscape might not.[241]

A more legitimate concern is that the judiciary is—as an institutional matter—not well equipped to generate prospectively binding general

[238] Indeed, such lawmaking might never even find its way into the court's opinion. See Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 28 (1996) ("[W]e can readily imagine a situation in which a judge . . . has decided . . . in favor of a rule . . . but nonetheless refuses to state the rule . . . in public.").

[239] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[240] Of course, neither federal nor state legislatures may override judicial decisions interpreting the Constitution. Even in the constitutional context, however, a judicial interpretation does not usurp Congress's legislative authority. Congress does not have legislative authority to modify the Constitution. The true "legislative" process vis-à-vis the Constitution is Article V. See U.S. Const. art. V. There is no doubt that the Article V process can override the judiciary's interpretation of the Constitution. See, e.g., U.S. Const. amend. XI (overriding Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)); U.S. Const. amend. XVI (overriding Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895)). This is a separate question from whether, as Michael Paulsen has argued, Congress has the power to negate the stare decisis effect of a judicial decision interpreting the Constitution, and thus to allow future courts to address constitutional questions on a clean precedential slate. See Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?, 109 Yale L.J. 1535 (2000).

[241] One example is *Ledbetter v. Goodyear*, 550 U.S. 618 (2007), which resolved a "disagreement among the Courts of Appeals as to the proper application of the limitations period in Title VII disparate-treatment pay cases." Id. at 623. The ruling prompted Congress to enact the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

rules.[242] For example, appellate judges lack the resources that legislatures and agencies have to research the likely costs, benefits, and ramifications of any given rule.[243] Efforts by judges to do this sort of policy work on their own has proven quite controversial.[244] Moreover, any rules that a judge endorses will be developed in the context of the particular case before her.[245] This may increase the likelihood that the judge will fail to appreciate the full universe of cases that might be affected by a given rule, or otherwise be "overinfluenced" by the facts of the immediate case.[246]

Even accepting these concerns, getting rid of rule-based stare decisis would not eliminate imperfect judicial lawmaking. It would simply enable lots of inconsistent imperfect judicial lawmaking, as described above.[247] As to the problem that judges may do a poor job developing general rules because they do so in the context of particular factual scenarios, the ability of future courts—even inferior courts—to distinguish binding rules is especially important.[248]

The fact is, our system relies on appellate courts to resolve broader legal questions. This is not to say that appellate courts—or even the Supreme Court—should *always* seek to declare prospective, generalizable rules. As Professor Cass Sunstein has pointed out, developing rules entails both error costs (making a bad rule) and decision costs (the resources required to develop a rule).[249] But when a court has considered

[242] E.g., Moore, supra note 236, at 187 (arguing against rule-based stare decisis based on the "ideal . . . of institutional appropriateness").

[243] Id. ("Courts deciding individual cases do not have the information before them (nor the means to get it) either to issue rules in the linguistically precise form of a statute or to give authoritative statements of policy objectives.").

[244] See, e.g., Brianne J. Gorod, The Adversarial Myth: Appellate Court Extra-Record Fact-finding, 61 Duke L.J. 1 (2011); Allison Orr Larsen, Confronting Supreme Court Fact Finding, 98 Va. L. Rev. 1255 (2012).

[245] E.g., Moore, supra note 236, at 187 (noting that judges "do not know precisely what the reach of a rule or goal should be" when they issue such rules in the course of "deciding individual cases"); see also Fredrick Schauer, Do Cases Make Bad Law?, 73 U. Chi. L. Rev. 883, 889–90 (2006) (asking "the troubling question" whether a rule "is better or worse by virtue of it having been initially announced in the context of a concrete dispute that a court is expected to resolve"); but cf. id. at 912 (noting that lawmaking by legislatures is "hardly devoid of its own pathologies").

[246] Schauer, supra note 245, at 894 (describing the "phenomenon of being overinfluenced by proximate examples").

[247] See supra notes 238–40 and accompanying text.

[248] See supra notes 217–19 and accompanying text; infra notes 369–84 and accompanying text.

[249] See, e.g., Sunstein, supra note 238, at 16–19 (describing these concepts).

those costs and made the decision that a given judicially created rule is justified and desirable, making that rule binding via stare decisis is a sensible way to achieve the clarity and predictability that comes with having "the applicable rule of law be settled."[250]

Might we obtain the same benefits with an inferential approach to stare decisis that focuses exclusively on results? I certainly do not mean to suggest that our system will descend into anarchy without explicit-rule stare decisis. Civil law systems, after all, have endured with no stare decisis at all.[251] And empirical studies suggest that courts still pay close attention to mere dicta, which indicates that explicitly declared rules might still have considerable clarifying benefits even if they are deemed, as a formal matter, to be non-binding.[252]

But if we intend to retain some form of binding stare decisis, and one of our goals is to allow the judiciary to settle the applicable rule of law, a result-only approach is likely to be a poorly suited vehicle. Whatever skepticism one might have of judicially declared rules, there are surely some legal issues that the judiciary should be able to resolve in a generalizable way, at least pending further instructions from superior legislative branches. Consider a few basic questions from the realm of judicial procedure. Does a statute of limitations allow an equitable exception or not?[253] Does the basic federal diversity statute require complete diversity or merely minimal diversity?[254] In cases where original jurisdiction is based on diversity, can supplemental jurisdiction apply to claims that fail to meet the required amount in controversy?[255] What standard of review should appellate courts apply to a trial court's ruling on, say, the constitutionality of a punitive damages award,[256] or the propriety of a forum non conveniens dismissal.[257]

It is not clear that a result-only approach will enable appellate courts to resolve these questions. In many instances, the broader legal questions the precedent-setting court must confront—and for which the system

[250] See supra note 234.
[251] See supra notes 213–15 and accompanying text.
[252] See supra note 212 and accompanying text.
[253] See supra notes 197–205 and accompanying text.
[254] See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).
[255] See Exxon Mobil v. Allapattah, 545 U.S. 546 (2005).
[256] See Cooper Indus. v. Leatherman Tool Grp., 532 U.S. 424, 436 (2001) (holding that appellate courts should review the constitutionality of a punitive damages award de novo).
[257] See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981) (holding that appellate courts should review a forum non conveniens dismissal for abuse of discretion).

would benefit from some kind of binding guidance—do not even generate a final "result" from that court. Consider the Supreme Court's recent decisions on equitable tolling of the one-year limitations period imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"): *Holland* (which recognized equitable tolling in cases of extraordinary instances of attorney misconduct[258]) and *McQuiggin* (which recognized equitable tolling based on strong evidence of actual innocence[259]). These cases exemplify the kinds of cases and issues that tend to attract the Supreme Court's attention: lower courts' approaches to a particular legal question diverge, and the Supreme Court grants certiorari for the express purpose of resolving these broader legal questions.[260]

Yet in both *Holland* and *McQuiggin*, the Supreme Court did not decide whether the prisoner's claim was (or was not) time-barred. (The Court certainly did not decide whether the prisoner should be released or receive a new criminal trial.) Rather, the Court described its own view of the principles governing equitable tolling, and then remanded for further consideration.[261] If stare decisis requires only fidelity to results, how would we even define what the binding "result" is in decisions like *Holland* and *McQuiggin*?

It is much more natural to identify the stare decisis effect of such decisions as the *rules* the Supreme Court stated during the course of its decision. In *Holland*, for example, the Court stated that AEDPA's statute of limitations "is subject to equitable tolling in appropriate cases."[262] It also stated that a petitioner is entitled to equitable tolling "if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing."[263] It then rejected as "too rigid" the lower court's view that not even "grossly negligent" conduct by a petitioner's attorney can justify equitable tolling "absent bad faith, dishonesty, divided loyalty, mental

[258] Holland v. Florida, 130 S. Ct. 2549, 2554 (2010).

[259] McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013).

[260] See *Holland*, 130 S. Ct. at 2560; *McQuiggin*, 133 S. Ct. at 1930.

[261] The Supreme Court did give some indication of whether it thought that equitable tolling would be appropriate given the records in *Holland* and *McQuiggin*. The *Holland* Court seemed more sympathetic to equitable tolling on the facts of that case. See *Holland*, 130 S. Ct. at 2564–65. The *McQuiggin* Court seemed more skeptical. See *McQuiggin*, 133 S. Ct. at 1936. But in neither case did the Supreme Court reach a final conclusion on whether tolling was proper in either case.

[262] 130 S. Ct. at 2560.

[263] Id. at 2562 (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).

impairment or so forth on the lawyer's part."[264] The Supreme Court instead declared that "at least sometimes, professional misconduct that fails to meet the Eleventh Circuit's standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling."[265]

In *McQuiggin*, the Court declared that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or, as in this case, expiration of the statute of limitations."[266] It also stated that "tenable actual-innocence gateway pleas are rare: A petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt."[267] And "a federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown."[268] It therefore rejected the view that "habeas petitioners who assert convincing actual-innocence claims must prove diligence to cross a federal court's threshold."[269]

These aspects of the *Holland* and *McQuiggin* decisions should establish, as a matter of law, that (a) equitable tolling of AEDPA's statute of limitations is permissible; (b) equitable tolling based on attorney misconduct does not necessarily require bad faith, divided loyalty, or mental impairment; (c) actual innocence can be a basis for equitable tolling; (d) equitable tolling based on actual innocence is possible even if there is unjustifiable delay by the petitioner; and (e) an unjustifiable delay by the petitioner is relevant to whether the limitations period should be equitably tolled based on actual innocence. It would be strange to conclude that *Holland* and *McQuiggin* do not obligate courts to follow these more general propositions, but rather require only that future courts reconcile their decisions with the ultimate results. As discussed above, it is not even clear what those "results" were given that the Supreme Court in

[264] Id. at 2563 (internal quotation marks omitted).
[265] Id.
[266] 133 S. Ct. at 1928.
[267] Id. (brackets and internal quotation marks omitted).
[268] Id.
[269] Id. at 1935.

both *Holland* and *McQuiggin* remanded both cases for further proceedings to determine whether tolling was, in fact, proper.

To identify the inadequacy of result-only stare decisis is not to reject what one might call the common-law tradition—where the results of previous cases, given the facts of those cases, help to illuminate what the general rule ought to be.[270] Such facts-plus-result data points may indeed be informative. It does not follow, however, that explicit rules are undesirable. Even the most useful mosaic of results in individual cases will not resolve broader legal questions unless *at some point* the judiciary has the ability to declare—in a binding way—the rule that those results support.

C. Beyond Explicit Rules

For the reasons set forth above, stare decisis should be understood—with some limitations[271]—to bind future courts to follow rules that are explicitly stated by the precedent-setting court. Although controversial in theory,[272] this point seems to be fairly well established in practice. Indeed, each of the stare decisis puzzles described at the beginning of this Article begins with the understanding that such rules can indeed be binding.[273]

This Section examines a different question: Should stare decisis also impose what might be called inferential obligations on future courts? As explained above, such obligations flow from the idea that future courts must reconcile their decisions with the mere results of earlier, precedent-setting decisions.[274] These inferential obligations have not been subjected to great academic scrutiny. Even those who argue in favor of rule-based stare decisis (so-called legislative holdings) typically argue that

[270] See, e.g., Llewellyn, supra note 5, § 13 at 20 ("[A] rule of law, having no basis in an opinion's language, can take shape over time; when enough time has passed, its shape will have been fixed, in part by decisions coming after it."); Solum, supra note 28, at 189 (noting "the traditional theory of the *ratio decidendi* . . . which is limited by the legally salient facts of the case that is decided" and stating that "[g]iven this traditional view, case law is slow moving. It takes many decisions to create a general rule.").

[271] See supra notes 226–29 and accompanying text.

[272] See, e.g., supra notes 236–37 and accompanying text.

[273] See supra notes 27–48 and accompanying text. For example, the *Marks* rule (see supra notes 39–46 and accompanying text) makes little sense if future courts are only bound to reconcile results. *Marks* presumes that there is a majority supporting a particular result; it seeks to identify which "rationale explaining the result," Marks v. United States, 430 U.S. 188, 193 (1977), ought to be deemed the Court's binding holding. See supra notes 39–40.

[274] See supra notes 54–60 and accompanying text.

there should *also* be a duty to reconcile results.[275] Yet such inferential obligations are precisely what make *Wal-Mart* and *Iqbal* problematic decisions for stare decisis purposes.

Consider once again Professor Sunstein's work on judicial minimalism, and on the desirability of broad versus narrow rules. Whenever a court declares a rule, it gives rise to potential error costs (making a bad rule) and decision costs (the resources required to develop a rule).[276] The best indication of what the court believed was the proper balance of those costs is the rule that the court actually stated. That explicitly stated rule is not necessarily the final word on the matter, of course. As described earlier, binding rules still leave leeway to future courts—even inferior ones.[277] Lower courts can and should consider whether additional subsidiary or distinguishing rules are justified and desirable.

What is problematic, however, is the idea that future courts are obligated to infer additional unarticulated constraints from the *result* of the precedent-setting decision in and of itself. If so, the precedent-setting decision will necessarily constrain future courts *more* than the rules stated explicitly in the precedent-setting opinion. It is, by definition, upsetting the precedent-setting court's initial calculus of what the optimal rule is in light of potential decision costs and error costs.

Perhaps, though, there are other values that might be served by inferential stare decisis. One potential justification is equality—the idea that like cases should be treated alike.[278] This notion is often invoked as a conceptual driver for stare decisis generally,[279] and to support a result-

[275] See, e.g., Abramowicz & Stearns, supra note 8, at 1026 ("[U]nless the judicial system is willing to invite upon itself claims of complete disingenuousness, a subsequent court will need to reconcile its ruling with the earlier case."). See also Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996) ("[I]t is not only the result but also those portions of the opinion necessary to that result by which we are bound."); 18 James Wm. Moore et al., Moore's Federal Practice § 134.03[1] (Matthew Bender 3d ed. 2008) ("At a minimum, a lower court is required to render decisions that are consistent with the results of prior decisions of a higher court to which the lower court owes allegiance.").

[276] Sunstein, supra note 238, at 16–19 (describing these concepts).

[277] See supra Section III.A.

[278] The maxim is often attributed to Aristotle. See John E. Coons, Consistency, 75 Calif. L. Rev. 59, 59 n.1 (1987) (citing Aristotle, Ethica Nicomachea V.3. 1131a–1131b (W. Ross trans., 1925)).

[279] See, e.g., Llewellyn, supra note 5, § 6 at 5 ("It is almost a sociological necessity, I think, for a precedent system of some sort to arise . . . . [T]here is that remarkable, widespread basic sense of justice which requires that like cases be treated alike.").

based approach in particular.[280] Imposing an obligation to reconcile past results helps to ensure that the later case is treated in a like manner to the earlier case.

But how desirable is equal treatment in and of itself? As legal theorists have argued, equality alone is not something that accomplishes justice in the most meaningful sense; rather, true justice comes from the development of just principles that are applied even-handedly going forward.[281] Unless the result of the precedent-setting case is supported by such principles, following that result might simply mean that we are treating everyone equally badly.[282]

It is possible that imposing a duty on future courts to explain and reconcile past results will get us closer to meaningful—that is, justice-enhancing—equality, by pointing the way toward the just principle that identifies which cases ought to be treated alike. But the fact that we are requiring future courts to infer a justifying principle for the earlier decision means that the precedent-setting court itself did not provide one. To assume that such a principle exists goes further than the precedent-setting court itself was willing to go, and might just as easily lead future courts astray.[283]

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[280] See, e.g., Moore, supra note 236, at 186 ("One of the main values served by following a doctrine of precedent at all is equality, the treating of like cases alike."); id. at 186–87 (arguing against a rule-based approach—or any approach by which the "relevant similarities" for purposes of equality must be "those stated by the precedent court"—because such statements are only "the precedent court's own theory about the morally relevant features").

[281] See, e.g., Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 547 (1982) (arguing that equality is "entirely circular" because it ultimately means only that "people who by a rule should be treated alike should by the rule be treated alike" (brackets and internal quotation marks omitted)); id. at 551 ("To say that a rule should be applied 'equally' or 'consistently' or 'uniformly' means simply that the rule should be applied to the cases to which it applies."); see also Kent Greenawalt, How Empty Is the Idea of Equality?, 83 Colum. L. Rev. 1167, 1169 (1983) ("[I]n the absence of substantive criteria indicating which people are equal for particular purposes and what constitutes equal treatment, the formal principle of equality provides no guidance for how people should be treated.").

[282] See Alexander, supra note 4, at 10 ("To take an extreme example, if most members of a particular group of people have been subjected to grossly unjust treatment—say, slavery or genocide—seeing that the rest of the members are subjected to the same treatment is no less wrong despite its furtherance of 'equality.'"); Westen, supra note 281, at 546 (arguing that equality is "patently absurd" if it "directs people in countless cases to do what they concededly ought not to do").

[283] As discussed supra notes 170–82 and accompanying text, Supreme Court decisions following *Wal-Mart* and *Iqbal* confirm that it was wrong to assume that the Court meant to impose more restrictive approaches to class certification or pleading.

Admittedly, future courts might gain valuable wisdom and insight in *trying* to reconcile past results. But *requiring* future courts to do so—forbidding them from reaching decisions that they cannot reconcile with past results—is a different matter. It does no service to the precedent-setting court itself, because—as explained above—it necessarily upsets the balance initially struck by the precedent-setting court in articulating the governing rules in the way it did. And it could also foreclose what otherwise appears to be the best decisions in future cases.

Put another way, stare decisis should view the decision *not* to state a rule as a conscious choice. Not making a rule may be the best way to minimize error costs and decision costs.[284] And that is precisely why it is a mistake to assume that results alone are reflective of some broader yet unarticulated set of principles that requires future courts to mirror those results as a matter of binding law.

In addition to serving an equality value, one might argue that imposing inferential obligations on future courts will incentivize better decisions by the precedent-setting court. If a judge knows that future courts will be required to reconcile their rulings with the precedent-setting one, the judge may think twice before rendering a result-driven decision that cannot be reconciled in a desirable way. Consider *Iqbal*, which bears the hallmarks of precisely such a result-driven decision. Perhaps inferential stare decisis would encourage judges (and Justices) to apply pleading standards more even-handedly, notwithstanding the particularly fraught facts of Mr. Iqbal's case. If a judge opts to treat Mr. Iqbal more strictly than he would otherwise treat a plaintiff with a more conventional claim, he will be obligated to apply that same strict approach to a basic auto-accident case,[285] a slip-and-fall case,[286] or a run-of-the-mill employment discrimination case.[287]

The problem, of course, is that judges might not respond to that incentive as eagerly as we hope. *Iqbal* and *Wal-Mart* are prime examples. The Justices in the majority showed remarkably little awareness of how their conclusion in those cases would apply in other situations. Indeed, as ex-

[284] See supra note 249 and accompanying text (citing Sunstein, supra note 238, at 16–19).

[285] Cf. Fed. R. Civ. P. Form 11 (providing a sufficient complaint for an automobile accident case).

[286] Cf. Branham v. Dolgencorp, Inc., No. 6:09-CV-00037, 2009 WL 2604447, at *2 (W.D. Va. Aug. 24, 2009) (rejecting allegation of negligence as "conclusory" in a case where a customer at the defendant's store slipped and fell).

[287] See supra notes 124–25, 144–45 and accompanying text (discussing Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 514 (2002)).

plained earlier, later Supreme Court decisions suggest more lenient approaches to pleading and class certification.[288] To speculate that inferential stare decisis will encourage better decisionmaking is just that—speculation. *Iqbal* and *Wal-Mart* suggest precisely the opposite.[289]

Accordingly, the potential benefits of equality and consistency, and of incentivizing better decisionmaking by the precedent-setting court, are weak justifications for imposing inferential stare decisis obligations. There is also an additional downside that has received fairly little attention in debates about stare decisis—the participatory interests of future litigants. This concern comes into particularly sharp relief when one considers stare decisis' cousin, preclusion.

In the context of preclusion, the Supreme Court has been quite hostile to the idea that future litigants should be bound by earlier litigation in which they did not participate. An excellent recent example is *Taylor v. Sturgell*.[290] Mr. Taylor sought to use the Freedom of Information Act ("FOIA") to obtain documents relating to an antique Fairchild aircraft that were in the possession of the Federal Aviation Administration ("FAA").[291] The lower courts had found that Taylor's suit was barred by res judicata because another antique aircraft enthusiast, Mr. Herrick, had unsuccessfully tried to obtain the same documents.[292] Herrick's suit had ended when the Tenth Circuit concluded that the documents were protected from FOIA disclosure by the statutory protection for trade secrets.[293]

[288] See supra notes 170–82 and accompanying text.

[289] Speculation about how a given interpretive rule will affect the ex ante behavior of lawmakers occurs in other contexts as well. See, e.g., Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 911 (2013) ("Many scholars and judges have argued that judicial interpretive practice has a salutary, 'teaching' effect on legislative drafting . . . ."); id. at 917 ("[T]extualists argue that a text-centric approach will spur Congress to draft statutes more carefully . . . ."). There are costs, however, if lawmakers fail to respond as anticipated. See, e.g., Adam N. Steinman, "Less" is "More"? Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act's Appellate Deadline Riddle, 92 Iowa L. Rev. 1183, 1228 (2007) (arguing that when Congress makes a drafting mistake with serious practical consequences "a different question moves to the fore: should the general public be forced to pay for Congress's mistake . . . ?").

[290] 553 U.S. 880 (2008).

[291] See id. at 885.

[292] Id. at 888.

[293] Id. at 887.

The Supreme Court unanimously found that res judicata did not preclude Taylor from seeking the same documents under FOIA. It reasoned:

> A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the "deep-rooted historic tradition that everyone should have his own day in court."[294]

The Supreme Court made a similar point in *Smith v. Bayer Corporation*,[295] a case where a federal court sought to block a West Virginia state court from certifying a class action on the grounds that the federal court had already denied certification of a class that "mirrored" the one being pursued in West Virginia.[296] The Supreme Court concluded that the injunction was barred by the Anti-Injunction Act, because it ran afoul of a "basic premise of preclusion law: A court's judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions."[297] The plaintiff who was seeking class certification in West Virginia was *not* one of the plaintiffs who sought class certification in the federal action.[298] Although she would have been a member of the federal class had it been certified, the federal court refused to certify the class.[299] Accordingly, she could not be bound by the federal court's decision.[300]

Thus, preclusion doctrine confirms the importance of future parties' participatory interests—their ability to litigate on a clean slate. These values are paramount even though non-party preclusion might serve the goals of (1) treating past and future litigants consistently, and (2) incentivizing courts to consider how their rulings might affect future litigants when deciding cases. Stare decisis has the potential to infringe those participatory interests just as significantly.[301]

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[294] Id. at 892–93 (quoting Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996)). Although the Court recognized some narrow exceptions to "the rule against nonparty preclusion," id. at 893–95, none of them applied in *Taylor*.

[295] 131 S. Ct. 2368 (2011).

[296] Id. at 2377.

[297] Id. at 2379.

[298] Id.

[299] Id. at 2380.

[300] See id. at 2380–81; see also id. at 2380 ("We made essentially these same points in *Taylor v. Sturgell* just a few Terms ago.").

[301] See Greenawalt, supra note 8, at 198–99 (noting that "the equality principle has less force when replication of a mistaken decision will deprive a competing party of what she

To be sure, a rule-based approach to stare decisis can also infringe the participatory interests of future litigants. If a party today were to argue that federal courts should be able to declare their own rules of federal common law in diversity cases, he would be bound as a matter of stare decisis by the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*.[302] Where the precedent-setting court declares such a rule, however, it is based on a conscious, generalizable decision that the "applicable rule of law be settled" even at the risk of it not being "settled right."[303] And even in that situation, the ability of future courts—even lower courts—to distinguish rules provides a check against overly broad rules that may have failed to anticipate a future scenario.[304]

All this is to recognize that judges are not infallible, even when (as with Supreme Court Justices) they are final.[305] That quality of finality can be valuable for ensuring "that the applicable rule of law be settled"[306] in cases where the benefits of doing so outweigh the costs of continued uncertainty. This is especially so when the Justices on the Supreme Court can benefit from the perspective of all the lower courts that have confronted the issue as it has percolated up through the system. But it is hard to see why mere finality (unaccompanied by genuine infallibility) makes the Supreme Court better at reaching a particular end result once the Court gets to the point where it has exhausted its supply of rules.[307] This is precisely where future courts should be able to say: *I do*

deserves (or would deserve had her case arisen by itself)," such as when "[t]he party who stands to lose if the precedent is followed would deserve to win if the case had arisen independently").

[302] 304 U.S. 64 (1938). Indeed, the Supreme Court has recognized that stare decisis could effectively prevent relitigation of certain legal questions by non-parties in subsequent cases. See *Taylor*, 553 U.S. at 903–04 (noting the possibility that "*stare decisis* will allow courts swiftly to dispose of repetitive suits brought in the same circuit" but also recognizing that there would be cases for which "*stare decisis* is not dispositive").

[303] See supra note 234.

[304] In the *Erie* context, one might view the Supreme Court's recognition of what has been called "classic federal common law" or "substantive federal common law" as distinguishing *Erie*'s principle in cases where a uniquely federal interest justifies federal common law. See Adam N. Steinman, What Is the *Erie* Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?), 84 Notre Dame L. Rev. 245, 306–07, 322–25 (2008) (describing, for example, *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988)).

[305] See supra note 169.

[306] See supra note 234.

[307] In terms of institutional design, the jurists that possess the most sweeping stare decisis power—Supreme Court Justices—may have inherent *disadvantages* when it comes to reaching ultimate results. Because the Court almost invariably acts as an appellate court, it typically cannot avail itself of fact-finding and evidence-gathering mechanisms that might aid it in

not know what to make of the result of this precedent-setting case. I am going to make the best decision I can within the landscape of rules that have been established. But I am not going to force myself to infer a rule that was never stated or slavishly seek consistency with a result that was not itself explained by an explicitly-stated principle.

For all these reasons, our system should dispense with the idea that results, in and of themselves, generate binding precedent via stare decisis. Only explicitly stated rules can create prospectively binding law. Justice Scalia, in fact, alluded to this distinction in his essay *The Rule of Law as a Law of Rules*:

> [W]hen, in writing for the majority of the Court, I adopt a general rule, and say, 'This is the basis of our decision,' I not only constrain lower courts, I constrain myself as well . . . . But *when all those legal rules have been exhausted* and have yielded no answer, we call what remains to be decided a question of fact—which means . . . that *there is no single 'right' answer. It could go either way*.[308]

When future courts find themselves trying to glean binding prospective law from the mere *result* of a prior decision, they are at a point where the "legal rules have been exhausted."[309] The result reached by the precedent-setting court is, in essence, a factual issue, for which "there is no single 'right' answer"—one that "could go either way."[310] It

reaching the right result in any given case. Accordingly, cases tend to reach the Court in a fairly fixed procedural and factual posture. If Justices wish strongly to dispose of a case in a particular way, they may overlook that posture in order to accomplish that goal. *Wal-Mart* could be an example of that. The *Wal-Mart* class may have been vulnerable with respect to Rule 23(b)(3)'s predominance and superiority requirements, see supra note 156 and accompanying text, but there was no lower court ruling on Rule 23(b)(3) to review. In that scenario, a district court could have addressed the Rule 23(b)(3) issues directly. But the Supreme Court—which lacked that option—decided the case on the far more questionable basis of Rule 23(a)(2), perhaps because it did not want to remand the case for further proceedings and then wait for months if not years for the case to return. See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2549 & n.3 (2011) (noting in 2011 that the district court decision being reviewed was issued in 2004).

[308] Scalia, supra note 2, at 1179–81 (emphasis added). Justice Scalia made these observations to support the point that appellate judges should be reluctant to dictate a particular result if they are unable to provide a rule mandating that result. His logic with respect to that ex ante question—how and whether appellate judges should decide cases—is also instructive with respect to stare decisis's ex post question: how we decide what "law" has been made by that decision.

[309] Id. at 1181.

[310] Id.; see also Coons, supra note 278, at 63 (envisioning a situation where "[t]he rule itself makes neither treatment superior to the other").

follows that the result itself should not make binding law, leaving future courts free to operate within the existing legal boundaries until some new law comes into being, whether by courts or by other lawmaking bodies.[311]

This view can also make sense of the frustrating yet all-too-frequent scenario where results from the same court—often in close chronological proximity—seem impossible to reconcile. Although a very restrictive approach to Rule 23 seemed implicit in the *Wal-Mart* majority's conclusion, the *Amgen* decision two years later suggested a more tolerant approach.[312] As to pleading standards, the same could be said of the Court's post-*Iqbal* decisions in *Matrixx* and *Skinner*.[313] Some might compare these decisions and accuse the Court of giving us conflicting legal directives. But perhaps it is more accurate to say that these cases' results occupy that space where the rules specified by the Court have been exhausted.[314] Many cases can simply "go either way," and which-

[311] See Leval, supra note 8, at 1252 (arguing that a court has "a duty to decide the case in accordance with law" and that "[i]f the established law was inconclusive, the court was obligated in the discharge of its constitutional duties to adjudicate the question—to wrestle with the issue and reach its own conclusion"); see also id. at 1250 (arguing that when "we accept dictum uttered in a previous opinion as if it were binding law . . . we fail to discharge our responsibility to deliberate on and decide the question which needs to be decided").

[312] See supra notes 170–74 and accompanying text.

[313] See supra notes 175–78 and accompanying text.

[314] Accordingly, this approach allows difficult-to-reconcile results to coexist without forcing courts to inquire whether later decisions have implicitly overruled earlier ones. One might otherwise argue (for example) that *Amgen* has implicitly overruled *Wal-Mart* with respect to class actions. Of course, some might also say that *Comcast* has implicitly overruled *Amgen* (and thereby implicitly reinvigorated *Wal-Mart*?), although *Comcast*'s precedential impact is muddied by the fact that *Comcast* was based on a crucial concession by the plaintiffs. See supra note 174. As for pleading, one might say that *Skinner* and *Matrixx* have implicitly overruled *Iqbal*. See supra notes 175–78 and accompanying text. But at other points in time, one might have said that *Twombly* implicitly overruled *Swierkiewicz*; that *Erickson* implicitly overruled *Twombly* (and thereby implicitly reinvigorated *Swierkiewicz*?); and that *Iqbal* implicitly overruled *Erickson*, reinvigorated *Twombly*, and re-overruled *Swierkiewicz*. See supra notes 106, 144–45 and accompanying text. Moreover, the notion that precedent can be implicitly overruled is at best unnecessary and at worst problematic. The Supreme Court, in fact, has instructed lower courts that they should not conclude for themselves that any Supreme Court decision has been implicitly overruled, see supra note 123, although lower courts continue to do so. See supra note 133 and accompanying text. As for the Supreme Court itself, there is no need for it to overrule its own decisions implicitly, because it has the power to do so *explicitly*. Nothing is gained by allowing the Supreme Court to declare (in Case Three) that Case Two has implicitly overruled Case One; the Court already has the power in Case Three to overrule Case One. That Case One and Case Two are in tension may strengthen the argument in Case Three that Case One should be overruled. See, e.g., *Agostini*, 521 U.S. at 236 ("*[S]tare decisis* may yield where a prior decision's underpin-

ever lawyer, judge, or Justice makes the most persuasive argument will prevail. Although we might wish as an institutional matter that the Supreme Court would provide greater clarity by generating more rules,[315] we gain very little—and can lose quite a lot—if we require courts to find prospectively binding law in places where it does not exist.

IV. SAYING WHAT THE LAW IS

For the reasons set out above, the best approach to stare decisis should focus on the rules that are explicitly articulated by the precedent-setting court. The mere results—in and of themselves—should not bind future courts to reconcile their decisions with those results, or to infer unstated rules from them. But how do we know a "rule" when we see it? Put another way, which statements in a judicial opinion reflect the sort of consciously generalizable rules that warrant making them binding as a matter of stare decisis? And what about other parts of judicial opinions—language that is surely part of the court's reasoning, but does not constitute a prospective rule or even an ultimate result? Is there a more systematic way to categorize the many different aspects of a judicial decision, and thereby to determine which parts can qualify as binding via stare decisis and which cannot? This Part sets forth one way to think about the content of judicial opinions more broadly, building on the earlier insights about rules and results.

A. The Building Blocks of Judicial Reasoning

At its most basic level, legal reasoning can be mapped out using a kind of syllogism.[316] A court invokes a legal principle that can be expressed in the form (*If P then Q*)—what logicians call a conditional statement.[317] Given that principle, the court makes an antecedent finding

nings have been eroded, by subsequent decisions of this Court." (brackets and internal quotation marks omitted) (citing United States v. Gaudin, 515 U.S. 506, 521 (1995))). But there is no reason to indulge the fiction that Case Two did the overruling, albeit implicitly.

[315] See, e.g., Cass R Sunstein, Problems with Minimalism, 58 Stan. L. Rev. 1899, 1913 (2006) (noting that minimalist decisions that avoid declaring rules "do not promote predictability and impose high decisional burdens on fallible actors at later stages").

[316] See Hardisty, supra note 8, at 43 n.15 ("The syllogistic form of the basic legal method has been noted by many authorities.").

[317] See Irving M. Copi et al., Introduction to Logic 300–01 (14th ed. 2011).

(*P*), which plugs into the beginning of the conditional statement to generate the conclusion (*Q*).[318]

The basic structure in *Iqbal* (as to the finding that Mr. Iqbal's allegations should be disregarded as conclusory) was as follows:

- If an allegation is conclusory, then it does not need to be accepted as true in deciding whether the complaint states a claim upon which relief can be granted.[319] (If *P* then *Q*.)
- The allegations in paragraphs 10, 11, and 96 are conclusory. (*P*)
- Therefore, the allegations in paragraphs 10, 11, and 96 do not need to be accepted as true.[320] (*Q*)

Under the framework proposed here, the first statement (If *P* then *Q*) could bind future courts as a matter of stare decisis.[321] But the statements (*P*) and (*Q*) themselves would not. That is, future courts would not be hamstrung in their definition or application of the rule simply because the *Iqbal* majority found that the key allegations in Mr. Iqbal's complaint were conclusory and should not be accepted as true. Accordingly, stare decisis does not compel future courts to engage in a post-hoc ra-

[318] This sort of reasoning is sometimes described with slightly different terminology. See, e.g., Hardisty, supra note 8, at 43 ("[T]he process of adjudication involves the three steps of (1) a determination of the law, (2) a determination of the facts, and (3) an application of the law to the facts."); id. (describing this process of adjudication as "a deductive argument" where "the formulation of law is the major premise; the formulation of facts is the minor premise; and the result of the application of the law to the facts is the conclusion"); see also Alexander, supra note 4, at 19 (describing rules as having "a canonical formulation . . . such as, 'Whenever facts A, B, and C, and not fact D, decide for P'").

[319] See supra notes 112–15 and accompanying text.

[320] As alluded to supra note 191, a more precise statement of the logical relationship here would be: "For all allegations, if an allegation is conclusory, then it does not need to be accepted as true," which a logician would diagram $\forall_x(P_x \rightarrow Q_x)$. The case-specific antecedent finding in *Iqbal* (that the allegations in paragraphs 10, 11, and 96 are conclusory) would be P_a, and the case-specific conclusion in *Iqbal* (that those allegations do not need to be accepted as true) would be Q_a.

[321] Of course, an if-then principle would *not* be binding via stare decisis where the Court applies that principle based on the parties' concession. See, e.g., Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068–69 n.2 (2013) (noting that "this Court has not yet decided whether the availability of class arbitration is a question of arbitrability" but that "this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures").

tionalization of that finding in *Iqbal*, or to struggle to reconcile their own decisions with it.[322]

If a court wants to generate additional binding law, then it could articulate other principles—for example: (If *O* then *P*). It would then make an antecedent finding (*O*), which combines with the principles (If *O* then *P*) and (If *P* then *Q*), to generate the conclusion (*Q*). That additional rule (If *O* then *P*) would also be binding under a rule-based approach to stare decisis.[323]

This syllogistic structure is helpful even in cases where the precedent-setting Court itself does not reach a conclusive result. Recall *Holland v. Florida*, one of the Supreme Court's recent cases on the tolling of AEDPA's statute of limitations. The lower court in *Holland* had endorsed and applied a rule that: If there is gross negligence on the part of a petitioner's attorney, but not bad faith, dishonesty, divided loyalty, or mental impairment, then equitable tolling of AEDPA's statute of limita-

[322] One could diagram *Wal-Mart* in similar fashion: (1) If the class members' claims do not share at least one common question of law or fact, then the class action does not satisfy Rule 23(a)(2); (2) The class members' claims did not share any common question of law or fact; (3) Therefore, the class action did not satisfy Rule 23(a)(2). See supra notes 87–92 and accompanying text. To reflect some of Justice Scalia's additional language describing Rule 23(a)(2), see supra notes 89–90 and accompanying text, one might refine the *if-then* rule to read: If the class members' claims do not share at least one common question of law or fact that will generate common answers and that is central to the validity of claims that all class members share, then the class action does not satisfy Rule 23(a)(2). It is worth noting, however, that Justice Scalia does not make a precise finding with respect to whether any issues were "central to the validity" of the class members' claims. He never, for example, engages Justice Ginsburg's straightforward analysis showing that the Title VII compliance of Wal-Mart's policies was indeed central to their validity. See *Wal-Mart*, 131 S. Ct. at 2567 (Ginsburg, J., dissenting) ("Wal-Mart's delegation of discretion over pay and promotions is a policy uniform throughout all stores. . . . A system of delegated discretion, *Watson* held, is a practice actionable under Title VII when it produces discriminatory outcomes. A finding that Wal-Mart's pay and promotions practices in fact violate the law would be the first step in the usual order of proof for plaintiffs seeking individual remedies for company-wide discrimination." (citations omitted)). Accordingly, one might view Justice Scalia's "central to the validity" language as lacking stare decisis effect because it was *unnecessary*, insofar as it was not part of the syllogism he ultimately used to decide the case. See infra notes 353–54 and accompanying text (arguing that in order to have stare decisis effect, "a rule must be part of a syllogistic chain that leads to the court's conclusion").

[323] For example, courts might develop further if-then principles that refine what conclusory means for purposes of *Iqbal*. In a previous article, I suggested that one might reconcile the results of *Twombly*, *Iqbal*, and earlier case law by adopting a principle: If an allegation fails to identify the real-world acts or events underlying the plaintiff's claim, then it is conclusory. See Steinman, supra note 112, at 1334–39.

tions based on attorney misconduct is not appropriate.[324] That rejection—which justified the Court's decision to vacate the lower court's decision and remand—should be binding as a matter of stare decisis. Lower courts would be violating binding law if they invoke that principle in future cases.

In addition, *Holland* declared that the lower court should apply the following rule: *If the plaintiff has been pursuing his rights diligently and some extraordinary circumstance prevented him from filing within the limitations period, then the claim is not time-barred.*[325] The Supreme Court did not *itself* apply this if-then rule to the facts of *Holland*, but remanded for the lower court to do so. Insofar as that instruction to the lower court is the content of the Supreme Court's appellate remedy (the remand), it too should be given stare decisis effect. Given the way our system separates trial and appellate functions, such remands are commonplace and—in many circumstances—desirable.[326] Even though *Holland* did not yield a definitive result as to whether the habeas petition in that case was or was not time-barred, stare decisis would bind future courts to accept the if-then principle the Supreme Court explicitly declared, and to reject the if-then principle the Supreme Court explicitly rejected.

B. Beyond Rules and Results: Revisiting Wal-Mart *and* Iqbal

Like all judicial opinions, the *Wal-Mart* and *Iqbal* opinions contain much more than just the basic syllogistic elements I describe here. Opinions often provide interpretive or policy justifications for choosing the particular rules that the court uses to decide the case. Opinions often seek to explain why the antecedent findings are, in fact, true in the case at hand. One could give any number of labels to these parts of an opinion—the court's "reasoning,"[327] or perhaps its "rationales." Such labels are not particularly helpful, however, because they can easily be used to

[324] See Holland v. Florida, 130 S. Ct. 2549, 2562–63 (2010).

[325] See id. at 2562, 2565.

[326] See, e.g., Credit Suisse Sec. (USA) LLC v. Simmonds, 132 S. Ct. 1414, 1421 (2012); J.D.B. v. North Carolina, 131 S. Ct. 2394, 2408 (2011); Little Miami & Columbus & Xenia R.R. Co. v. United States, 108 U.S. 277, 280 (1883).

[327] See, e.g., Monaghan, supra note 5, at 764 (asking whether "the precedent should also include the grounds for the decision—that is, the reasoning or principles behind the rule or standard").

describe nearly any aspect of a judicial opinion. Every word in an opinion is, in some sense, a statement of the court's reasoning or rationale.

The syllogistic framework described in the earlier Section can draw meaningful lines that are also sensible ones. In short, an opinion's reasoning can be binding as a matter of stare decisis only to the extent it states (or rejects) the *if-then* portion of the legal argument. Other aspects of the opinion that support that logical structure do not generate binding law. They may be enlightening. They may be insightful. They may be inspiring. They may be useful for predicting how judges or Justices will decide future issues. But they should not create prospective obligations on future courts via stare decisis.

First, consider *Iqbal*. In *Iqbal*—as well as its predecessor, *Twombly*—the Court expressed concern about the burdens of discovery on defendants in civil cases, as well as skepticism about whether judicial management of the discovery process after the pleadings phase could adequately alleviate those burdens.[328] *Iqbal* explicitly invoked *Twombly*'s "rejection of the careful-case-management approach"[329] and noted how, for governmental defendants like Ashcroft and Mueller, the discovery process can "exact[] heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government"; such costs are "only magnified when Government officials are charged with responding to . . . a national and international security emergency unprecedented in the history of the American Republic."[330]

These aspects of *Iqbal*—although they are surely part of Justice Kennedy's reasoning—do not fit the kind of syllogistic structure I describe here. There is no *if-then* principle that makes discovery costs a factor in the pleading analysis, or that binds courts to give special consideration to discovery burdens going forward. This is not to say that *Iqbal*'s

[328] *Twombly*, for example, was troubled by the possibility that "a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." 550 U.S. 544, 558 (2007) (internal quotation marks omitted); see also id. at 559 (noting the potential discovery expense); id. (noting "the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side" (citation and internal quotation marks omitted)).

[329] Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009); see also id. at 686 ("We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery.").

[330] Id. at 685 (internal quotation marks omitted).

statements about discovery costs ought to be ignored entirely. They may be grounds for criticizing or praising the decision; they may prove influential in future cases; they may even reflect a new "gestalt" when it comes to pleading and civil procedure more generally.[331] But we should not seek to attribute to them some kind of binding lawmaking power via stare decisis. Whatever insights they provide, they do not "say what the law is"[332] in a way that binds future courts.

Parts of Justice Scalia's *Wal-Mart* opinion are similar in this regard. Consider his discussion of *General Telephone Co. of Southwest v. Falcon*,[333] from which he quoted the following passage:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claims.[334]

Justice Scalia wrote that *Falcon* "describes how the commonality issue must be approached,"[335] but he then read *Falcon* as merely "*suggest[ing]* two ways in which that conceptual gap might be bridged": (1) the use of "'a biased testing procedure,'" and (2) "'significant proof that an employer operated under a general policy of discrimination.'"[336] Because no "biased testing procedure" was at issue in *Wal-Mart*, Justice Scalia wrote that the second option "precisely describes respondents' burden in this case."[337] He ultimately concluded that "[b]ecause respondents provide no convincing proof of a company-wide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question."[338]

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[331] Cf. Solum, supra note 34, at 2 (arguing that the Supreme Court's decision in *NFIB* "marks a destabilization of what we can call the 'constitutional gestalt' regarding the meaning and implications of what is referred to as the 'New Deal Settlement'").

[332] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[333] 457 U.S. 147 (1982).

[334] *Wal-Mart*, 131 S. Ct. at 2553 (alteration in original) (quoting *Falcon*, 457 U.S. at 157).

[335] Id. at 2552–53.

[336] Id. at 2553 (emphasis added) (quoting *Falcon*, 457 U.S. at 159 n.15).

[337] Id.

[338] Id. at 2556–57.

Although his discussion of *Falcon* was a significant part of Justice Scalia's reasoning, he does not adopt a rule that a plaintiff must "provide . . . convincing proof of a company-wide discriminatory pay and promotion policy" in order to satisfy Rule 23(a)(2).[339] Justice Scalia stated that *Falcon* had only "suggested" such proof as one way to bridge the so-called "conceptual gap."[340] Justice Scalia seemed to fixate on this aspect of *Falcon* in analyzing the *Wal-Mart* class action, but he never stated a generalizable principle that such proof was always required.

Elsewhere in the *Wal-Mart* opinion, Justice Scalia noted that the effect of manager discretion may have differed among the members of the *Wal-Mart* class, because different managers may have been more or less influenced by gender stereotypes and by *Wal-Mart*'s corporate culture in ways that adversely affected the women they supervised.[341] And in response to the critique by Justice Ginsburg that the majority had conflated Rule 23(a)(2)'s common-question requirement with "Rule 23(b)(3)'s inquiry into whether common questions 'predominate' over individual ones,"[342] Justice Scalia wrote: "We quite agree that for purposes of Rule 23(a)(2) even a single common question will do. We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions predominate, but in order to determine (as Rule 23(a)(2) requires) whether there is even a single common question."[343]

Does this create a rule that the presence of *any* "dissimilarities" among class members is fatal for purposes of Rule 23(a)(2)'s common-question requirement? Does this create a rule that Rule 23(a)(2) can never be satisfied when a defendant's policy or conduct has varying ultimate effects on members of the class? Of course not. The premise that only a *single* common question is sufficient presumes that Rule 23(a)(2) can be satisfied even if some *other* questions are not common.[344] And

[339] Id. at 2556.

[340] Id. at 2553.

[341] Id. ("At his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking."); see also supra note 97.

[342] *Wal-Mart*, 131 S. Ct. at 2556.

[343] Id. (emphasis omitted) (citations and internal quotation marks omitted).

[344] See supra notes 92–97 and accompanying text. Also puzzling is this passage from Justice Scalia's opinion:

> [I]n resolving an individual's Title VII claim, the crux of the inquiry is the reason for a particular employment decision. Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of

indeed, in neither of the passages quoted above does Justice Scalia purport to state a generalizable rule to determine whether a single common question exists.

One might object that this understanding of *Wal-Mart* disregards a lot of what Justice Scalia had to say. And it does. But these parts of the *Wal-Mart* opinion illustrate nicely what happens when (to borrow Justice Scalia's own phrase) "all [the] legal rules have been exhausted."[345] The case "could go either way."[346] In that situation, an advocate or decision-maker will marshal whatever facts and arguments seem persuasive. In these portions of the *Wal-Mart* opinion, Justice Scalia highlighted as many aspects of un-"commonality" as he could, but he refrained from stating a generalizable *if-then* rule that connected those factors to a particular result. What Justice Scalia did was sufficient to carry the day in *Wal-Mart* and to reverse certification of that particular class action. But it should not be sufficient to bind courts in future cases to infer some restrictive, generalizable rule that the Court itself did not explicitly articulate.[347]

> all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.

Wal-Mart, 131 S. Ct. at 2552 (citation and internal quotation marks omitted). Justice Scalia seems to assume that a Title VII claim—whether for monetary or injunctive relief—is available *only* with respect to the ultimate decision about an employee's hiring, firing, promotion, or pay, regardless of whether other practices by the defendant influence, enable, or incentivize those decisions. From the class members' standpoint, Wal-Mart's policy of giving unfettered discretion to local supervisors in the context of a corporate culture that fosters gender-stereotypes was itself an impermissible practice that caused them to be disfavored. Justice Scalia's language, therefore, seems more to endorse a substantively narrow view of Title VII causation than a narrow view of Rule 23(a)(2). See also id. at 2552 n.7 ("In a pattern-or-practice case, the plaintiff tries to establish by a preponderance of the evidence that . . . discrimination was the company's standard operating procedure, the regular rather than the unusual practice." (brackets and internal quotation marks omitted)). The confusion surrounding this language in Justice Scalia's opinion is all the more reason not to force future courts to infer binding obligations from it.

[345] Scalia, supra note 2, at 1181.

[346] Id.; see also supra notes 308–10 and accompanying text.

[347] One could make similar points about Justice Kennedy's reasons for concluding that Mr. Iqbal's complaint—once the direct allegations of discriminatory conduct were disregarded as conclusory—did not plausibly suggest discriminatory intent by Ashcroft and Mueller. See supra notes 106–10 and accompanying text. Justice Kennedy wrote that nondiscriminatory investigative priorities were a "*more likely* explanation[]" for the challenged arrests than purposeful discrimination, *Iqbal*, 556 U.S. at 681 (emphasis added), and that the arrests were "*likely* lawful and justified," id. at 682 (emphasis added). But it should not follow from these comments that—as a matter of law—a plaintiff's claim is implausible whenever the court deems it more "likely" (50.1%?) that the defendant will prevail on the merits. Rather, these

This is where the syllogistic form described in this Part can do meaningful work. It is precisely the fact that a principle *can* be formulated as a conditional *if-then* statement that makes it a rule. That grammatical structure makes rules fundamentally different from other statements that might appear in an opinion. The statement "pleadings that . . . are no more than conclusions, are not entitled to the assumption of truth"[348] can be framed as a conditional statement.[349] Statements like (to paraphrase) "discovery is burdensome" or "these allegations are conclusory" cannot be reduced to that form; the only way they could is if we are forced to infer that some underlying *if-then* rule exists.[350] For all the reasons set forth earlier, stare decisis should not require that sort of inquiry. If a court wants to settle the law further, it can articulate additional rules. When it chooses not to do so, it has simply chosen not to make law—and on balance it is a good thing that judges have that space.

C. The Notion of Necessity

It is often said that stare decisis obligates future courts to follow only those parts of a judicial opinion that are "necessary" to the court's decision.[351] As discussed above, this limitation is not understood to require absolute necessity, but rather a sufficient nexus between the binding language and the court's actual decision in the case before it.[352] Of course, that simply invites the question: how *close* a nexus is required? The framework set out in this Part provides part of the answer. At a minimum, a rule must be part of a syllogistic chain that leads to the court's conclusion.[353] *Iqbal*, for example, used the rule—if an allegation is con-

aspects of the *Iqbal* opinion are best understood as Justice Kennedy's attempt to justify a result once the "legal rules have been exhausted," Scalia, supra note 2, at 1181; they do not purport to state generalizable principles of the sort that should be binding via stare decisis.

[348] *Iqbal*, 556 U.S. at 679.

[349] See supra note 319 and accompanying text.

[350] One could articulate the difference more formulaically. A rule is binding under my approach when a judge writes: "There is a rule, 'If *P* then *Q*.' I find *P*, therefore I conclude *Q*." But no binding rule is created when a judge writes: "I conclude *Q*, because I find *P*"; or when a judge writes (as is often the case with Supreme Court opinions): "I conclude *Q*, in part because (among many other things I have mentioned without specifying their relationship to one another) I find *P*." Much of the troubling language in *Wal-Mart*, see supra notes 335–44 and accompanying text, and *Iqbal*, see supra note 347, fall into the latter category.

[351] See supra note 33 and accompanying text.

[352] See supra notes 226–29 and accompanying text.

[353] See also, e.g., Abramowicz & Stearns, supra note 8, at 1065 (arguing that a necessary condition for a holding is that the proposition be part of the court's "decisional path");

clusory, then it does not need to be accepted as true at the pleadings phase—to decide that certain allegations could be disregarded in deciding whether Mr. Iqbal's complaint survived a motion to dismiss. If such an if-then statement were not part of such a syllogistic chain, then it is classic dicta, and it would not bind future courts as a matter of stare decisis. It is truly "something said in passing,"[354] both colloquially and structurally, and therefore lacks the requisite nexus to the court's decision.

It is also possible that an appellate court would create binding precedent by *rejecting* a proposed if-then statement that was *asserted* to be part of a syllogistic chain. That is the scenario in *Holland* and *McQuiggin*, where the Court rejected certain approaches to equitable tolling and then remanded for further proceedings.[355] Finally, it is possible that—because of the way our system separates appellate and trial functions—a court would affirmatively endorse an if-then principle, and then remand to the lower courts to apply that principle.[356]

There are, however, a number of additional questions that are encompassed by a necessity or nexus requirement, which I will briefly discuss below.[357]

Hardisty, supra note 8, at 59 (recognizing the view that "[t]he rule was necessary to the result in the sense that the court applied the rule to the facts to justify its result").

[354] Black's Law Dictionary 1177 (9th ed. 2009) (entry for "obiter dictum").

[355] See supra notes 258–69 and accompanying text.

[356] See supra notes 325–26 and accompanying text.

[357] The stare decisis effect of interpretive methodology, see supra notes 47–48 and accompanying text, might also be framed in terms of necessity. It could be argued that even if the *rule* a court uses to decide a case is necessary to its decision, the *interpretive methodology* it uses to justify that rule is conceptually one step removed and, therefore, lacks the required nexus to the ultimate decision. On that view, the interpretive methodology is not *itself* the dispositive rule, but is rather a non-binding reason for adopting a particular rule. See supra Section IV.B (arguing that a court's reasons that do not form part of the syllogistic chain that leads to the court's conclusion should not be viewed as binding via stare decisis). That said, a principle of interpretive methodology might fit this Article's definition of a generalizable rule that can be expressed in *if-then* form. For example: *If the text of a statute is unambiguous, then courts must follow the text*. See, e.g., Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992). I do not take a position on this issue here, but this Article's framework is flexible enough to accommodate a range of views. On one hand, it could support treating methodological rules just like other rules. If a methodological statement can be expressed in *if-then* form, and it is part of a chain leading to a conclusion in the case, then it is entitled to stare decisis effect. On the other hand, the syllogistic structure emphasized here reveals how principles of interpretive methodology are, in some sense, different. More typical rules, as described above, culminate in an ultimate conclusion that disposes of the case, or a particular issue in the case (the (*Q*) at the end of a chain of *if-then* principles). A methodological rule,

1. One Decision, Multiple Issues

Where a case presents multiple discrete issues, there might be several if-then rules (or chains of if-then rules) leading to conclusions on each of those issues. This is one of the stare decisis challenges that *NFIB v. Sebelius* presents: Was the Supreme Court's treatment of Congress's commerce power (by Chief Justice Roberts and the four dissenters) "necessary" given the ultimate conclusion that the Affordable Care Act was justified by the tax power?[358] If not, any rules those Justices articulated in the course of rejecting Congress' commerce-clause authority might not be binding via stare decisis.

A similar issue arises when courts issue alternative holdings. According to the general understanding, when one or more separate rulings *each* support the court's result, all of those rulings have precedential effect.[359] That scenario would have been present in *NFIB*, for example, if the Act had been upheld under *both* the commerce power *and* the tax power. It is a reasonable question whether a decision's stare decisis effect should be different when the conclusion of one syllogism (the Act is a valid exercise of the tax power) makes the conclusion in another syllogism (the Act would not have been a valid exercise of the commerce power) unnecessary.

The framework outlined here does not dictate any particular answer to these scenarios. But it could be supplemented by other principles for identifying when the if-then rules leading to a particular conclusion would lose their stare decisis effect because of other conclusions the court makes in the course of its decision.[360]

however, explains why those *if-then* principles are there in the first place. This distinction might justify treating methodological principles differently for stare decisis purposes.

[358] See supra notes 35–38 and accompanying text.

[359] See, e.g., Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*.").

[360] One thoughtful exploration of these issues comes from Professors Michael Abramowicz and Maxwell Stearns, who have looked at similar problems by inquiring whether the court's analysis is "structured" or "ordered." Abramowicz & Stearns, supra note 8, at 976, 1032–34, 1075–76. They argue that even when a court's decision on one issue proves to be unnecessary given the court's resolution of other issues, stare decisis might still apply depending on whether the issues are structured or ordered in a particular way. Id. at 1075–76.

2. Biconditionals

Another issue that relates to stare decisis's necessity or nexus component is the problem of biconditionals—that is, statements that take the form *if-and-only-if* rather than *if-then*.[361] A biconditional principle includes both a conditional statement (If *P* then *Q*) and its inverse (If Not-*P*, then Not-*Q*).[362] Professors Michael Abramowicz and Maxwell Stearns illustrate this problem using Justice Powell's *Bakke* opinion, which stated not only a rule for finding that an affirmative action program violates the Constitution, but also a rule for finding that an affirmative action program is constitutionally permissible.[363] In a case like *Bakke* (which struck down the University's plan) the half of the biconditional that provides the rule for when a plan *is* permissible is not strictly necessary. Nonetheless, it might have a sufficient nexus to the ultimate decision to qualify as a holding.[364] The framework outlined here could accommodate either approach. If one believes that the "other half" of the biconditional should not be binding, then one could specify that only *if-then* statements have stare decisis effect. Alternatively, the framework here could be adapted to include both *if-then* statements and *if-and-only-if* statements that form part of the syllogistic chain.

3. Is a Rule Unnecessary When It Is Too Broad?

According to one view, future courts should be able to reject a rule as unnecessary (and hence not even binding to begin with) on the grounds that it is broader than "necessary" to decide the case in which it is declared.[365] One problem with this approach is that *every* rule of general applicability will reach, by definition, beyond the precise facts of the precedent-setting case.[366] To impose a strict necessity requirement, then,

[361] See id. at 981–86; Alexander, supra note 4, at 25.

[362] See Copi et al., supra note 317, at 315.

[363] See Abramowicz & Stearns, supra note 8, at 984–85 (discussing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) (Powell, J.)).

[364] See id. at 1039 ("As a general matter, we believe that the inverse statements of holdings generally should count as holdings as well . . . .").

[365] See, e.g., id. at 1059–60 (criticizing this view).

[366] See, e.g., Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2317 (2013) (Kagan, J., dissenting) (arguing that previous Supreme Court decisions "establish what in some quarters is known as a principle" that "by its nature, operates in diverse circumstances—not just the ones that happened to come before the Court").

is the functional equivalent of result-based, inferential stare decisis.[367] Accordingly, such an approach to necessity leaves us with all of the problems of pure, result-based, inferential stare decisis. Not only do courts lose the opportunity to declare binding, clarifying principles (even when justified and desirable), we also invite the perverse over-constraint problems that we see in *Wal-Mart* and *Iqbal*.[368]

Properly understood, a rule-based approach to stare decisis does not need a necessity or nexus requirement to police the potential problem of overly broad rules. As described above, an overly broad rule can be *distinguished* by future courts, provided they articulate distinguishing principles. To illustrate, consider how *Planned Parenthood v. Casey*[369] (via the decisive opinion by Justices O'Connor, Kennedy, and Souter[370]) handled the so-called "rigid trimester framework"[371] from *Roe v. Wade*.[372] To be clear, my goal here is not to argue that *Casey*'s handling of *Roe* was correct; it is rather to show how distinguishing principles are possible even under the rule-based approach urged here.

In declaring that Texas's criminal abortion laws were unconstitutional, *Roe* explicitly endorsed (among others) the following rules: (1) If a state abortion regulation does not, for the stage prior to approximately the end of the first trimester, leave the abortion decision and its effectuation to the medical judgment of the pregnant woman's attending physician, then it violates the Due Process Clause of the Fourteenth Amendment;[373] (2) If a state abortion regulation, for the stage subsequent to approximately the end of the first trimester but before viability, regulates the abortion procedure in ways that are not reasonably related to maternal health, then it violates the Due Process Clause of the Fourteenth Amendment.[374]

In *Casey*, the Court considered the constitutionality of a number of Pennsylvania's abortion regulations. One was an informed consent requirement, which imposed a 24-hour waiting period, during which time a physician must "inform the woman of the nature of the procedure, the

[367] See Abramowicz & Stearns, supra note 8, at 1060 (arguing that this "understanding of necessity . . . is no more than the reconciliation approach in a disguised form").
[368] See supra Section III.C.
[369] 505 U.S. 833 (1992).
[370] Id. at 843–44.
[371] Id. at 873.
[372] 410 U.S. 113 (1973).
[373] Id. at 164.
[374] Id.

health risks of the abortion and of childbirth, and the probable gestational age of the unborn child," and "of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion."[375]

As a logical matter, a pre-viability regulation driven by concerns other than the health of the mother would seem to be unconstitutional under the if-then principles declared in *Roe*.[376] In *Casey*, however, the Court declared a distinguishing principle: If a state regulation does not impose "an undue burden" on a woman's ability to decide whether to have an abortion, then it does not violate the Due Process Clause.[377] Applying this principle, the three decisive Justices in *Casey* upheld Pennsylvania's informed consent requirement.[378]

Reasonable minds might differ, of course, on whether the endorsement of the undue burden test was justified or desirable, and whether Pennsylvania's informed consent requirement imposed such an undue burden. My point is simply that—even under the rule-based approach proposed here—future courts have the ability to deal with explicit rules that are overly broad *without* either (a) formally overturning the precedent-setting case that stated the overly broad rule; or (b) resorting to a purely result-based, inferential approach to stare decisis that has all of the problems detailed above.

Some might respond that this approach would undermine much of the clarity and predictability that make a rule-based approach desirable. As long as Case Two has some distinguishing aspect (*X*), Court Two can evade Court One's precedential rule (If *P* then *Q*) merely by making that distinguishing aspect part of Court Two's distinguishing rule (If *X* then Not-*Q*). The trimester-based if-then principles from *Roe* were the Case One rules; and the finding in *Casey* that the informed consent regulation did not impose an undue burden (*X*) justified declaring a distinguishing rule in Case Two.

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[375] *Casey*, 505 U.S. at 881 (internal quotation marks omitted).

[376] Id. (noting prior decisions had read *Roe*'s "trimester framework[]" as "prohibit[ing] . . . all previability regulations designed to further the State's interest in fetal life").

[377] Id. at 874 ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

[378] Id. at 882–87.

This feature may be more virtue than vice, however. While my approach does allow courts to distinguish earlier precedential decisions, it does so in a way that ratchets up the clarifying benefits of rules rather than ratchets them down. Court Two is obligated to articulate a new rule in order to avoid the logically compelled result of the earlier rule. If Court Two takes its job seriously, it will explain and justify why its distinguishing rule is the right rule, and why Court One's endorsement of a logically contrary rule should not be deemed to foreclose the distinguishing rule.[379] This is precisely what courts do when they develop exceptions—such as equitable tolling—that logically trump binding statutes.[380] Equitable tolling, for example, is justified by the idea that the legislature did not mean to foreclose tolling in certain circumstances even though it enacted a statute that contained no exceptions as a textual matter. Likewise, *Casey*'s undue burden rule was justified by the idea that *Roe*—which involved a criminal prohibition on abortions—did not mean to prejudge regulations such as informed consent rules, even when imposed pre-viability.[381]

There is, moreover, a conceptual clarity to this rule-based approach. When we talk about what "law" a particular case stands for, we mean the law as stated by that case. *Roe*'s rule (the "rigid trimester framework"[382]) is *Roe*'s rule; *Casey*'s rule (the "undue burden"[383] approach) is *Casey*'s rule. By contrast, a more conventional approach engages in a sort of fictitious reattribution (such as *Casey* purporting to redefine *Roe*'s "central holding"[384]) that is unwieldy and unnecessary.

[379] Of course, if Court Two is inferior to Court One (for example, a district court distinguishing a court of appeals or Supreme Court decision), Court Two's distinguishing rule can be challenged and tested up the appellate chain, thus allowing the superior courts to correct an improper distinction.

[380] See supra notes 185–206 and accompanying text.

[381] See *Casey*, 505 U.S. at 877 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."). Again, my point is not to endorse the correctness of this distinguishing rule—only to show that such distinctions are possible even under a rule-based approach.

[382] Id. at 873.

[383] Id. at 879.

[384] Id. (recasting *Roe*'s "central holding" to be "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability"); see also Llewellyn, supra note 5, at 20 (arguing that "a rule of law, having no basis in an opinion's language, can take shape over time" and that "[w]ith luck, the rule in its later-acquired form will always refer back to the original decision; that decision will then become a 'leading case' and the rule will be known by the name of the case").

The upshot is there is no need to use the notion of necessity to empower courts to redefine or reconstitute rules that are explicitly stated and applied by the precedent-setting court. By recognizing that future courts can narrow binding rules by articulating distinguishing rules, the system will have the necessary flexibility without embracing the problematic aspects of inferential stare decisis.

D. A Brief Tangent: Stare Decisis, Habeas Corpus, and Qualified Immunity

In many ways, the approach I outline here gives considerable leeway to future courts vis-à-vis precedent-setting decisions. A court's "results" and "reasons" would not be formally binding via stare decisis, and I would explicitly recognize a lower court's ability to craft distinguishing rules that—as a logical matter—trump a rule endorsed by a precedent-setting court. One benefit of this approach, as alluded to earlier, is that it empowers future litigants by giving them greater ability to litigate the issues that directly impact their cases. Given the decision costs and error costs inherent in any particular judicial opinion, it is better to have the later court confront the relevant issues independently and on their own merits, rather than to seek some kind of cryptic consistency with results or reasons that lack the hallmarks of consciously-made prospective legal principles.[385]

As a general matter, the future litigants themselves suffer no adverse effect under this approach. When a party prevails because the court follows a particular rule, it does not matter whether the court is adopting that rule independently, or the court believes that the rule is compelled by an earlier decision. And it does not matter whether the court reaches its ultimate conclusion independently, or reaches that conclusion because it feels bound to do so by the results or reasons expressed in earlier decisions. This is the nature of the judicial process. Courts can develop and apply rules during the course of litigation, and this development and application is retrospectively imposed on the parties to that litigation—regardless of whether they had been clearly articulated in advance.[386]

[385] See supra Part III.

[386] See, e.g., supra notes 369–78 and accompanying text (discussing how *Casey* endorsed and applied the "undue burden" test to uphold Pennsylvania's informed consent law even though that law would have been unconstitutional under *Roe*'s trimester framework).

There are some exceptions to this general rule, however. Two crucial exceptions are habeas corpus and qualified immunity. To obtain habeas relief from a state court conviction or sentence, a party must show that the state court's handling of his federal claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[387] Qualified immunity—usually in the context of § 1983[388] or *Bivens*[389] actions—"shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct."[390] In both situations, it is not enough that the current court would find the state court's or the government official's conduct to violate federal law.

At first glance, an approach to stare decisis that gives future courts greater leeway would also seem to give greater deference to the courts and officials who benefit from habeas standards and qualified immunity. If we reduce the extent to which earlier decisions "clearly establish" the content of federal law, it could be difficult—if not impossible—for a habeas petitioner or civil rights plaintiff to overcome deferential habeas review or qualified immunity. But this initial reaction overlooks another important aspect of both doctrines. The habeas statute allows relief if the state court's application of clearly established federal law is "*unreasonable*."[391] And qualified immunity applies only if a "*reasonable* official would understand that what he is doing violates [the clearly established] right."[392]

While reasonableness review entails some deference to the earlier decision maker, it is not a blank check. Consider the role reasonableness plays in the relationship between judge and jury in civil cases. In the context of summary judgment[393] (before trial) or judgment as a matter of law[394] (at trial), judges ask whether a reasonable jury could reach a par-

[387] 28 U.S.C. § 2254(d)(1) (2006).
[388] See 42 U.S.C. § 1983 (2006).
[389] See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).
[390] See, e.g., Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012).
[391] 28 U.S.C. § 2254(d)(1) (2006) (emphasis added).
[392] Anderson v. Creighton, 483 U.S. 635, 640 (1987) (emphasis added).
[393] See Fed. R. Civ. P. 56.
[394] See Fed. R. Civ. P. 50(a)–(b).

ticular verdict.[395] That "reasonableness" inquiry has given judges considerable power either to override jury verdicts or to prevent cases from reaching the jury at all.[396]

In making this comparison, my point is not to defend current doctrine on reasonableness review of civil juries, or to argue that reasonableness review for civil juries, habeas corpus, and qualified immunity should be identical. It is merely to show that reasonableness review *can* be employed in a way that still allows meaningful scrutiny of conduct by state courts or government officials in the context of habeas petitions or civil rights claims, even if federal courts adopt an approach to stare decisis under which fewer aspects of the law are clearly established by the prior judicial decisions themselves.[397] If stare decisis principles were clarified along the lines suggested here, the reasonableness inquiry required by qualified immunity and the habeas statute would play a more important role.

CONCLUSION

A century ago, Justice Holmes wrote: "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."[398] He might as well have been talking about *Wal-Mart* and *Iqbal*. The general rules the Court used in these cases did not necessarily give new "shap[e]" to "the law of the future."[399] And the ultimate results may indeed have been driven by the sort of "immediate overwhelming interest" Holmes describes.[400] But decisions like *Wal-Mart* and *Iqbal* will only "make bad law" if stare decisis compels us to

[395] See Fed. R. Civ. P. 50(a)(1) (authorizing judgment as a matter of law); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (defining the summary judgment standard).

[396] See, e.g., Dan M. Kahan, David A. Hoffman & Donald Braman, Whose Eyes Are You Going to Believe? *Scott v. Harris* and the Perils of Cognitive Illiberalism, 122 Harv. L. Rev. 837 (2009) (examining the Supreme Court's application of summary judgment's reasonableness standard in *Scott v. Harris*, 550 U.S. 372 (2007)).

[397] Of course, it is also possible that a court hearing a habeas, § 1983, or *Bivens* action might use the leeway my stare decisis approach affords to reject the federal law claim on the merits. If so, qualified immunity and deferential habeas review do not come into play.

[398] N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

[399] See supra Part II.

[400] See supra notes 152–55, 179–82 and accompanying text.

read them as making bad law. Thus, it is crucial to think carefully about what the ground rules for stare decisis ought to be.

An inferential, result-based approach to stare decisis can exacerbate the problem Holmes identified, insofar as it requires courts to intuit more radical legal changes than the decisions themselves embraced. A better approach is to limit stare decisis to those rules that are explicitly stated by the precedent-setting court. And even when courts declare such rules, their lawmaking effect is cabined by (among other things) a necessity or nexus requirement that links the rule to the court's ultimate decision,[401] and the ability of future courts to distinguish those rules.[402]

In proposing this approach, I do not ignore the potential value of a precedential decision's ultimate result—and other aspects of such decisions—that would be left on stare decisis's cutting-room floor. Every word in a judicial decision has the potential to enlighten, to inspire, or to inform. But only some parts of judicial decisions should be called binding law. It is misguided to view mere results as imposing obligations on future courts as a matter of stare decisis. The most sensible balance is to require future courts to respect judicially stated rules, but not to require absolute fidelity to mere results.

[401] See supra Subsection IV.C.1.
[402] See supra Subsection IV.C.3.