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Although case law plays a crucial role in the American legal system, surprisingly little consensus exists on how to determine the "law" that any given "case" generates. Lawyers, judges, and scholars regularly note the difference between holdings and dicta and between necessary and unnecessary parts of a precedent-setting decision, but such concepts have eluded coherent application in practice. There remains considerable uncertainty about which aspects of a judicial decision impose prospective legal obligations as a matter of stare decisis and to what extent.

This Article develops a counterintuitive, but productive, way to conceptualize case law: the lawmaking content of a judicial decision should be only those decisional rules that the court states explicitly and that can be framed in the form (If P, *then* Q*). Future courts would not, however, be required to reconcile their decisions with other findings, conclusions, or reasons that the precedent-setting court offers. Although these other elements of a judicial decision could remain influential, they would not impose binding obligations as a matter of hierarchical stare decisis.*

This rule-centered approach would allow judicial decisions to clarify the law when such clarifying rules are justified and desirable, but otherwise leave the slate clean for courts to confront unresolved questions in future cases with the full participation of future litigants. As to the concern that judicially announced rules may sweep too broadly, this Article's approach would leave future courts free to develop distinguishing rules in a way that serves many of the same purposes as the conventional understanding of how cases may be distinguished, but that reduces the risk of disingenuous distinctions, enhances rather than muddies case law's clarifying benefits, and avoids conceptual and definitional problems inherent in the current approach. This Article's framework also helps to resolve a host of other difficult puzzles relating to judicial decision-making, including the controversy surrounding unpublished opinions, the stare decisis effect of decisions that lack a majority opinion, and how to identify and resolve tensions within case law.

INTRODUCTION

When a court decides a case, it can do more than simply resolve the dispute between the litigants before it. It can also create binding law.[1] Although lawyers, judges, and academics must constantly consider "case law," surprisingly little consensus exists on how to determine the "law" that any given "case" generates.[2] This is a crucial concern with respect to decisions of the Supreme Court, which sits atop the American judiciary and whose decisions set binding precedents for the entire nation.[3] But it is important for other courts as well. Given the rarity of Supreme Court review,[4] lower appellate courts create precedents that—as to themselves and the trial courts they supervise—are no less binding than a Supreme Court decision.[5] The operation of stare decisis in our hierarchical judicial system means that case law can create binding obligations on future courts that are just as strong as those imposed by statutes or constitutional provisions.

Despite its foundational role in the American legal system, case law has not tended to attract the same level of attention as the interpretation of positive-law sources like statutes or the Constitution.[6] Recent years, however, have witnessed an increase in both judicial and academic interest in the subject.[7] Bryan Garner

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[1] *See* 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.").

[2] *See, e.g.*, KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 14 (Paul Gewirtz ed., Michael Ansaldi trans., 1989); Max Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika*, 33 COLUM. L. REV. 199, 200 (1933); *see also, e.g.*, United States v. Chanthadara, 230 F.3d 1237, 1273 (10th Cir. 2000) ("This argument is foreclosed by binding case law.").

[3] *See, e.g.*, James v. City of Boise, 136 S. Ct. 685, 686 (2016) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law.").

[4] *See, e.g.*, Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 899 (2009) (Roberts, C.J., dissenting) ("The success rate for certiorari petitions before this Court is approximately 1.1% . . . .").

[5] *See infra* notes 49-52 and accompanying text.

[6] *See generally, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

[7] *See, e.g.*, Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 180-82 (2014); Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 63 (2013); Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 925 (2016); Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 801 (2017). For older works on the subject, see generally, e.g., Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989); 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); Pierre N. Leval, *Judging Under the*

and twelve federal judges, including now-Justice Neil Gorsuch, recently published a first-of-its-kind treatise, *The Law of Judicial Precedent*.[8]

Indeed, case law presents unique challenges compared to explicit positive law. With a statute, for example, we can quarrel about whether we should interpret it textually, purposively, or intentionally.[9] But every part of a statute's text makes law.[10] For a judicial decision, by contrast, it is unclear which aspects of that decision impose prospective legal obligations. Although we are familiar with certain concepts—such as the distinction between holdings and dicta, the notion that only necessary parts of an opinion are binding, and the ability of future courts to distinguish earlier case law—these fundamental concepts have eluded coherent application in practice.[11]

This Article's focus is distinct from some of the more prominent scholarly and judicial debates about stare decisis, case law, and judicial precedent, which tend to focus on when a case could or should be overruled.[12] The propriety of overruling binding case law is surely an important question. But that issue is secondary to the threshold question of whether a particular case has generated binding law that would even need to be overruled.[13] Whatever policies and

Constitution: Dicta About Dicta, 81 N.Y.U. L. REV. 1249 (2006); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Roscoe Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1 (1941).

[8] BRYAN A. GARNER, CARLOS BEA, REBECCA WHITE BERCH, NEIL M. GORSUCH, HARRIS L. HARTZ, NATHAN L. HECHT, BRETT M. KAVANAUGH, ALEX KOZINSKI, SANDRA L. LYNCH, WILLIAM H. PRYOR JR., THOMAS M. REAVLEY, JEFFREY S. SUTTON & DIANE P. WOOD, THE LAW OF JUDICIAL PRECEDENT 19 (2016) ("We seek here to elucidate a constellation of doctrines that are sorely in need of elucidation. After all, common-law lawyers and judges habitually behave as if precedents govern their work—though they may not have closely examined how and why this is so." (footnote omitted)).

[9] *See, e.g.*, Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 131-34 (2009).

[10] *See* Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 931 (2013) ("Neither the authority nor the content of *written* law is particularly puzzling. . . . [S]ubject to the need for interpretation, the law consists of the words that the legislature enacted, and those words are law because the legislature enacted them."). This may oversimplify things somewhat; courts have recognized, for example, that a statute's *preamble* "is not an operative part of the statute." Ass'n of Am. R.Rs. v. Costle, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *see also* Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008) ("[A] subchapter heading cannot substitute for the operative text of the statute.").

[11] *See infra* Part II.

[12] *See generally* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006); Monaghan, *supra* note 7; Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000); Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012).

[13] *See* Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1775 (2013) (distinguishing between "what

principles should inform when a court may overrule an earlier case,[14] it would be helpful to have a workable framework for determining precisely what law that earlier case has made[15]—especially when one of the main purposes of stare decisis is to clarify the content of the law and the predictability of legal rulings.[16]

This Article develops a counterintuitive but productive way to conceptualize case law. Under this approach, the lawmaking content of a judicial decision would be only those rules that the precedent-setting court sets forth in deciding the case before it. More specifically, case law's elemental units should be decisional principles that the court explicitly states and can be framed in the form (If *P*, then *Q*). For example, using the Supreme Court's 2005 decision striking down the juvenile death penalty: If a defendant was under the age of eighteen when he committed a crime, then the Constitution forbids imposing the death penalty for that crime.[17] Requiring courts to state binding constraints in this prospectively generalizable form would ensure that any such constraints will be created only when the court makes the conscious, explicit decision to do so.[18]

Giving stare decisis effect to such rules may raise the specter of judges behaving like legislators.[19] Although the charge of "legislating from the bench" is a common rhetorical device, it typically reveals disagreement with the substance of a court's decision rather than with the notion that decisional

aspects of a judicial decision ought to create binding law in the first instance" and "when that binding law might be overruled"); *see also* Kozel, *supra* note 7, at 180-81 (distinguishing between "[w]hether to overrule a dubious precedent" and "whether a given precedent applies to a newly arising dispute").

[14] The answer to that question, of course, can be different for horizontal stare decisis and vertical stare decisis. *See infra* notes 81-84 and accompanying text.

[15] *See* Steinman, *supra* note 13, at 1755 ("The Supreme Court, for example, imposes a special set of 'prudential and pragmatic considerations' before it will overrule a prior holding. Whether the Court must jump through those hoops depends on what law the earlier decision has made." (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 883, 854 (1992))).

[16] *See infra* notes 163-64, 220-24 and accompanying text.

[17] *See infra* notes 131-40 and accompanying text. This Article uses the term "rules" to describe such if-then principles, but the use of that term is not meant to invoke the distinction between "rules" and "standards." *See infra* notes 142-44 and accompanying text. The framework proposed here focuses on whether the principle is stated in a prospectively generalizable form, not whether it tends to yield mechanically predictable answers.

[18] This is not to say that courts would be obligated to declare such rules every time they decide a case. Debates about the relative merits of "minimalism" and "maximalism" in judicial decision-making may inform whether a generalizable rule is justified and desirable. *Compare, e.g.*, Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 28-44 (1996), *with* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 3 (2009). *See also infra* notes 179-81 and accompanying text. This Article's argument is simply that a court that fails to declare a generalizable rule has made a conscious decision not to impose prospectively binding constraints on future courts via stare decisis.

[19] *See infra* notes 217-19 and accompanying text.

principles ought to have stare decisis effect.[20] As a practical matter, our system depends on judicial decisions to clarify the governing rules—so much so that we often criticize judicial decisions that fail to provide meaningful standards precisely for that reason.[21]

There are, however, legitimate concerns about institutional competence with respect to judicially declared rules. To address those, this Article's approach recognizes the ability of a future court—even an inferior court—to distinguish rules set forth in earlier cases. A court may do so, however, only by explicitly articulating its own generalizable rule. That distinguishing rule must incorporate the distinguishing fact from the subsequent case in a way that justifies a conclusion other than that dictated by the initial precedential rule.[22] This framework for distinguishing cases allows future courts flexibility to address particular situations that the precedent-setting court might not have anticipated in formulating the initial rule. Yet it also avoids arbitrary distinctions by requiring the future court to endorse a rule for which the distinguishing fact is relevant. Additionally it resolves some of the unanswered conceptual questions raised by conventional assumptions about when and how to distinguish precedents.[23]

The approach developed here mitigates other problems as well. Recall, for example, the aphorism that "hard cases make bad law."[24] Where that "bad law" is an overly broad rule that overlooks unanticipated considerations, the ability to distinguish those rules as described above gives future courts a solution. An additional concern, however, is that a court confronting a hard case will reach a decision *without* endorsing a generalizable legal principle to support it. The case

[20] *See* Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1069-70 (2006) (arguing that judging would be better without negative rhetoric of "legislat[ing] from the bench"); Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 203 (2007) ("In addition to objecting to how judges render decisions, critics contend that some judicial decisions resemble lawmaking in their content or substance—in other words, they find fault with *what* decisions are."). Like claims of "judicial activism," what constitutes improper legislating from the bench seems to be largely "in the eye of the beholder." *See* STEFANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 1 (2009).

[21] *See, e.g.*, Hall v. Florida, 134 S. Ct. 1986, 2006 (2014) (Alito, J., dissenting) ("The Court provides no guidance . . . ."); Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1437 (2013) (Ginsburg & Breyer, JJ., dissenting) ("The Court's ruling is good for this day and case only."); NASA v. Nelson, 562 U.S. 134, 167 (2011) (Scalia, J., concurring) (arguing that majority opinion "provides no guidance whatsoever for lower courts"); Richard M. Re, *On "A Ticket Good for One Day Only,"* 16 GREEN BAG 2D 155, 161 (2013) (discussing criticisms of decisions that "achieve attractive results, without establishing prospectively binding rules").

[22] *See infra* Section III.C.2.

[23] *See infra* Sections II.B, III.C.

[24] N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting); *see also* Burnham v. Superior Court, 495 U.S. 604, 640 n.* (1990) (Stevens, J., concurring) ("Perhaps the adage about hard cases making bad law should be revised to cover easy cases.").

is hard precisely because a just result (or at least the result the court desires) is difficult to square with any rule that the court is able to articulate. We fear that this situation will make "bad law" because we assume that future courts will be required to infer obligations from the findings, conclusions, or other reasons that the court provided in the course of deciding that "hard case." We assume that future courts must find ways to justify and reconcile the earlier decision even when the precedent-setting court refrained from stating a generalizable rule in the course of that decision. This Article's approach would reject these assumptions. Rather, a decision would impose prospective legal obligations via stare decisis only when the precedent-setting court explicitly and consciously defines those obligations.

This is not to say that everything in a judicial opinion other than explicitly stated rules should be disregarded out of hand. Other aspects of a judicial decision—the court's findings, conclusions, or other justifications or rationales—could still prove to be instructive, enlightening, or valuable going forward. Every word of a judicial opinion has the potential to influence future judicial decision-making in any number of ways and for any number of reasons. American courts routinely cite nonbinding authority, after all, and courts in civil-law systems routinely cite prior judicial decisions despite the lack of formal stare decisis.[25] The approach developed here would accommodate a range of different attitudes toward how much weight to give other aspects of precedential decisions. It would provide, however, a workable method for delineating what is truly binding as a matter of stare decisis and what is merely persuasive or influential.

[25] *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); Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1196-1206 (2006); *see also* Steinman, *supra* note 13, at 1772 (examining how judges often rely on legal material that is not binding, such as dictum or decisions from outside the "relevant jurisdiction"). Of course, the mere fact that particular decisions or aspects of judicial decisions are cited in subsequent judicial decisions does not establish that they are binding. For example, superior courts cite inferior court decisions, even though such decisions are not formally binding. *See* Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 852-53 (2014) (noting that the Supreme Court sometimes cites lower court cases even though "[n]obody would argue that the Supreme Court should be bound, as a formal matter, by lower-court precedents"). The lyrics of Bob Dylan have been cited in nearly one hundred federal and state judicial opinions in the Westlaw database—*Subterranean Homesick Blues* and *The Times They Are A-Changin'* are particularly popular, although *Like a Rollin' Stone* bears the distinction of the only Dylan lyric in a Supreme Court opinion—yet his lyrics are not binding authorities in American courts. *See, e.g.*, Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 301 (2008) (Roberts, C.J., dissenting) ("The absence of any right to the substantive recovery means that respondents cannot benefit from the judgment they seek and thus lack Article III standing. 'When you got nothing, you got nothing to lose.'"); Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 409 (5th Cir. 2015); Robinson v. Wash. Metro. Area Transit Auth., 774 F.3d 33, 39-40 (D.C. Cir. 2014).

To phrase this point slightly differently, this Article's framework does not provide a totalizing theory of how judges must consider prior judicial decisions when adjudicating cases. Within the confines of a rule-centered approach, judges and commentators might pursue a variety of priorities in this regard. Some might believe a judge should act as the "faithful agent" of the precedent-setting court, and should therefore adhere to all aspects of a judicial decision that shed light on the precedent-setting court's preferences.[26] Others might believe that judges must decide every case and issue independently, and that it is therefore an abdication of the judicial role to adhere to dicta or other aspects of precedent-setting decisions that are not formally binding.[27] The framework developed here does not seek to foreclose debate over the "best" way to decide future cases in light of prior judicial decisions—just as there continue to be differing views of the "best" way to interpret statutes or the Constitution.[28] Nor does this Article purport to resolve scholarly debates over the nature of traditional "common law."[29] Rather, it recognizes hierarchical stare decisis as a distinct phenomenon

[26] *See, e.g.*, Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 434 (2007) (recognizing, but questioning, the view that "the sole duty of lower court judges is to act as faithful agents of the Supreme Court"). Related to this view is what has been called the "prediction model" of adjudication. *See* Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 663 (1995) (noting, but challenging, the view that judges should "strive[], in each case, to predict what a majority of the relevant higher court would do").

[27] *See, e.g.*, Kozel, *supra* note 7, at 184 (noting the view that lower courts should "chart[] their own course"); Leval, *supra* note 7, at 1250 (arguing that when judges "accept dictum uttered in a previous opinion as if it were binding law, which governs our subsequent adjudication," they "fail to discharge [their] responsibility to deliberate on and decide the question which needs to be decided"); Eric J. Segall, *The Constitution Means What the Supreme Court Says It Means*, 129 HARV. L. REV. F. 176, 178 (2016) (quoting retired Seventh Circuit Judge Richard Posner as stating: "My approach with judging cases is not to worry initially about doctrine [and] precedent . . . [,] but instead, try to figure out, what is a sensible solution to this problem, and then having found what I think is a sensible solution, without worrying about doctrinal details, I ask 'is this blocked by some kind of authoritative precedent of the Supreme Court'? If it is not blocked, I say fine, let's go with the common sense . . . solution." (alteration in original) (citing Josh Blackman, *Judge Posner on Judging, Birthright Citizenship, and Precedent*, JOSH BLACKMAN'S BLOG (Nov. 6, 2015), http://joshblackman.com/blog/2015/11/06/judge-posner-on-judging-birthright-citizenship-and-precedent/ [https://perma.cc/ K5SE-FYC5])).

[28] *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1909 (2011) ("The Court has never decided with finality what interpretive methodology applies to federal statutes . . . ."); Sunstein, *supra* note 18, at 13 (describing competing approaches to constitutional interpretation and concluding that "the Supreme Court has not made an official choice" among them).

[29] *See, e.g.*, Goodhart, *supra* note 7, at 182 (asserting that under traditional common law reasoning, the "principle" that a case establishes "is not found in the reasons given in the opinion" and "is not found in the rule of law set forth in the opinion").

from the traditional common law process.[30] A method for identifying the *binding* law created by any given precedential decision would provide a crucial foundation within which normative debates about interpretive or decision-making philosophies might operate.

Finally, the framework proposed here helps to resolve and contextualize a host of issues about judicial decision-making with which courts and commentators have wrestled. These include the controversy surrounding unpublished opinions,[31] the problem of lower courts "narrowing" superior court precedent,[32] whether "legislative facts" have stare decisis effect,[33] the extent to which case law may be implicitly overruled,[34] and the stare decisis effect of decisions that lack a majority opinion.[35]

This Article proceeds in five parts. Part I highlights a crucial difference between two kinds of case law that are often lumped together: traditional "common law" (also known as general or customary law) and hierarchical stare decisis. It then explains why hierarchical stare decisis has become the most significant kind of case law as a matter of contemporary practice. Part II describes conceptual and definitional problems with how courts currently identify the lawmaking content of a binding decision. Part III proposes a taxonomy for the various aspects of any given judicial decision and describes how an explicit-rules approach to hierarchical stare decisis would operate. This Part also clarifies when such rules are sufficiently related to the actual dispute to justify giving those rules stare decisis effect and explains how future courts can distinguish judicially declared rules. Part IV responds to potential criticisms of this explicit-rules framework. Part V describes how this Article's framework clarifies other controversial issues related to judicial decision-making.

I. TWO KINDS OF CASE LAW

This Part draws an important distinction between two kinds of case law. Section A contrasts traditional common law—also referred to as general or customary law—and hierarchical stare decisis. Section B uses the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*[36] to illustrate this distinction.

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[30] *See infra* Part I (recognizing the difference between common law—or general or customary law—and hierarchical stare decisis).

[31] *See, e.g.*, Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 759 (2003); David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1671-72 (2005); Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L.J. 621, 623 (2009).

[32] *See* Re, *supra* note 7, at 926.

[33] *See* Larsen, *supra* note 7, at 71-72.

[34] *See, e.g.*, Pintip Hompluem Dunn, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*, 113 YALE L.J. 493, 520 (2003).

[35] *See, e.g.*, Williams, *supra* note 7, at 801.

[36] 304 U.S. 64 (1938).

Section C highlights the fundamental tension between these two categories and how, in general, hierarchical stare decisis has become the central focus in contemporary practice.

A. *Common Law v. Hierarchical Stare Decisis*

The term "case law" can refer to different things. One kind of case law might be called "the common law"—or perhaps "general law" or "customary law."[37] For this kind of case law, a given judicial decision does not necessarily create law in and of itself.[38] Rather, judicial decisions are data points that a court uses to determine what "the common law" is.[39] Judicial decisions might not be the only data points. This sort of common law is sometimes said to derive from more general "practice,"[40] or "custom,"[41] or "reason,"[42] which might be ascertained from "external sources"[43] beyond judicial decisions. But this sort of common law or general law does not give any single judicial decision dispositive power to settle the law. Rather, "[t]he requirement [is] that judgments be consistent with the law as a whole, not with specific earlier decisions."[44]

On this understanding of the common law, courts might disregard particular decisions without needing to distinguish or overrule them formally. Courts could simply declare that a particular decision is contrary to the practices, customs, or patterns that give such unwritten law its content. As Blackstone put it, such a

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[37] *See, e.g.*, Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505 (2006) ("The concept of 'general' law refers to rules that are not under the control of any single jurisdiction, but instead reflect principles or practices common to many different jurisdictions."); Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1252 (2017) (defining "general law" as "that unwritten law, including much of the English common law and the customary law of nations, that formed the basis of the American legal system and that continues to govern unusual corners of the system today").

[38] *See* KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 178 (2013) (noting traditional view that "judges did not settle what counted as law for the future" and that "[t]heir decisions were rather evidence of a law that existed").

[39] *See id.*

[40] *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1123 (2017).

[41] *See, e.g.*, William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1519 (1984) (describing the view that there was "a branch of universal commercial law, to be governed by the customs and usages of nations").

[42] *See* Nelson, *supra* note 10, at 935.

[43] *Id.*

[44] NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 49 (2008); *see also* GREENAWALT, *supra* note 38, at 178 (noting that under traditional English common law "[d]ecisions were portrayed as reflecting community customs or common judicial practice"); Nelson, *supra* note 37, at 505 (describing rules of "general law" that "emerge[] from patterns followed across a multitude of jurisdictions," and which constitute "a distillation of general American jurisprudence").

decision need not be declared to be "bad law"; rather, it is "not law" because "it is not the established custom of the realm."[45]

The second kind of case law is hierarchical stare decisis.[46] A court is required to follow individual decisions from courts that are superior to it according to the hierarchical structure of the American judiciary. The rules setting out which courts are "superior" in this hierarchy are fairly straightforward.[47] At the federal level, every Supreme Court merits decision is binding on federal and state courts—at least with respect to issues of federal law.[48] Published circuit court decisions are binding on each district court over which the circuit has appellate jurisdiction,[49] although they are not formally binding on state courts located within the circuit.[50] Decisions by district courts do not have binding stare decisis effect—not even within that particular district.[51] At the state level, decisions of

[45] 1 WILLIAM BLACKSTONE, COMMENTARIES *70.

[46] *See* Baude & Sachs, *supra* note 40, at 1137 ("[S]tare decisis and common law are separate categories.").

[47] "Superior" in this sense might mean literally superior, in that the lawmaking court has the power to review and perhaps reverse the decisions of the law-following court. But in the horizontal stare decisis context, it might mean superior in time—the *earlier* decision is binding on that same court in the future. As discussed *infra* notes 81-84 and accompanying text, horizontal stare decisis is somewhat different in that most courts recognize that they can overrule their own decisions in some circumstances.

[48] *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) (explaining that the Supremacy Clause makes Supreme Court's interpretations of constitutional provisions binding on state courts); *In re* Moore, No. 46, at *33 (Ala. Ct. Judiciary Sept. 30, 2016), http://judicial.alabama.gov/judiciary/COJ46FinalJudgment_09302016.pdf [https://perma.cc/Q2W6-3U6P] ("*Cooper* held that states are bound by the decisions of the United States Supreme Court, *even when a state has not been a party to the case that generated the decision*."). Of course, there are some Supreme Court rulings—such as denials of certiorari—that do not have precedential effect. *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 336 (10th ed. 2013); Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1228-29 (1979).

[49] *See, e.g.*, Langston v. Carraway Methodist Hosps. of Ala., Inc., 840 F. Supp. 854, 864 n.10 (N.D. Ala. 1993) ("It is the law of the Eleventh Circuit that binds this court and, where there is controlling precedent from the circuit, this court is bound to follow it."); Agola v. Hagner, 556 F. Supp. 296, 299 (E.D.N.Y. 1982) ("While we agree with the conclusion in [an Eighth Circuit decision], we are, nonetheless, bound by the decisions of the Second Circuit.").

[50] *See, e.g.*, Feis v. King Cty. Sheriff's Dep't, 267 P.3d 1022, 1034 (Wash. Ct. App. 2011) ("Although the federal district courts in the Ninth Circuit may be bound to follow Ninth Circuit precedent pursuant to the doctrine of *stare decisis*, this court is not obligated to follow Ninth Circuit precedent . . . .").

[51] *See* Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (quoting 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.02[1][d] (3d ed. 2011))).

the state's highest court will generally be binding on all of that state's courts.[52] There are some interesting differences, however, in how state judicial systems handle the stare decisis effect of intermediate state appellate court decisions.[53]

Of course, questions may arise about how to interpret any given decision from a superior court. And courts may need to reconcile binding decisions that seem to point in different directions.[54] But courts face similar challenges with regard to statutes or even constitutional provisions.[55] Hierarchical stare decisis means that decisions by superior courts are binding law, just as statutes and constitutional provisions are binding law.

To further highlight the differences between these two kinds of case law, one might think in terms of inputs and outputs. With respect to common law or general law (the first category), individual judicial decisions do not themselves create binding law. They are simply empirical inputs that courts may consider to determine the general practices, customs, or patterns that give the common law its content.[56] With respect to hierarchical stare decisis (the second category), every judicial decision made by a superior court is a lawmaking output—which has the power to bind future courts just like a statute or constitutional provision.

For the remainder of this Article, I am going to refer to the first type of case law as "common law," but I do so with some trepidation. Courts and commentators often use the term "common law" to refer to both kinds of case law regardless of whether that case law is binding because of hierarchical stare

[52] *See, e.g.*, Nogueira v. Comm'r of Corr., 149 A.3d 983, 984 n.1 (Conn. App. Ct. 2016) ("As an intermediate appellate court, we, of course, are bound by the decisions of our Supreme Court.").

[53] *See, e.g.*, Grisby v. Herzog, 362 P.3d 763, 774 (Wash. Ct. App. 2015) ("When one of our panels concludes that a previous Court of Appeals decision used a faulty legal analysis or has been undermined by some new development in the law, the opinion will usually state simply that the panel 'disagrees with,' 'departs from,' or 'declines to follow' the other opinion.").

[54] *See, e.g.*, *In re* Emp't Discrimination Litig., 198 F.3d 1305, 1319 (11th Cir. 1999) ("Where precedent binding upon this court cannot be reconciled with a subsequent Supreme Court decision, we must defer to the Supreme Court."); Torres v. Edwards, No. 97-cv-00655, 1998 WL 42573, at *1 (S.D.N.Y. Feb. 4, 1998) (attempting "to reconcile the various formulations in the Supreme Court decisions by relating the gravity of the interest asserted to the degree of closure requested"); Loftus v. Se. Pa. Transp. Auth., 843 F. Supp. 981, 984 (E.D. Pa. 1994) ("Though the Court must attempt to reconcile where possible a conflict between the decisions of the Supreme Court and the Third Circuit, it is bound to recognize when a Third Circuit precedent has been squarely overruled by an opinion of the Supreme Court." (citations omitted)).

[55] *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 183-85 (2012) (describing "general/specific canon" of statutory interpretation, which provides that when two statutory provisions conflict, "specific provision is treated as an exception to the general rule"); *id.* at 185 (describing interpretive canon that later-enacted statute overrides earlier statute).

[56] *See supra* notes 37-44 and accompanying text.

decisis or because it reflects the sort of practices, customs, or patterns to which "the common law" sometimes refers.[57]

B. *An Illustration:* Swift*,* Erie*, and Federal Common Law*

The Supreme Court's decision in *Erie* illustrates the distinction between these two kinds of case law. Harry Tompkins sued Erie Railroad in federal court based on diversity jurisdiction, alleging that he had been struck by an open door projecting from one of the cars while he was walking beside railroad tracks in northeastern Pennsylvania.[58] The railroad company argued that its liability was governed by Pennsylvania law and that, according to decisions of the Pennsylvania Supreme Court, Tompkins was a trespasser who could recover only if Erie Railroad had acted with wanton or willful negligence (not mere negligence).[59] Tompkins—invoking the Supreme Court's decision a century earlier in *Swift v. Tyson*[60]—argued that a federal court was not bound by the decisions of the Pennsylvania Supreme Court.[61] Rather, *Swift* allowed a federal court to determine the standard of care based on its independent assessment of "the common law."[62]

In an opinion written by Justice Louis Brandeis, the Supreme Court overruled *Swift*.[63] Borrowing from Justice Stephen Johnson Field, Justice Brandeis rejected the notion that federal courts had the power to ascertain "the general law of the country" and thereby to "brush[] aside the law of a State in conflict with their views."[64] And borrowing from Justice Oliver Wendell Holmes, Justice Brandeis wrote that "[t]he common law so far as it is enforced in a State, whether called common law or not, is not the common law *generally* but the law of that State existing by the authority of that State"; therefore, "the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court)

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[57] One interesting example of this is a concurring opinion by Justice Samuel Alito discussing the duress defense to criminal liability. *See* Dixon v. United States, 548 U.S. 1, 19-20 (2006) (Alito, J., concurring). At one point, he refers to duress as an "established defense at common law" (citing Blackstone, no less). *Id.* at 19 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *30). Sentences later, Justice Alito criticizes Justice Stephen Breyer's proposal on the basis that it would bind future courts by determining, "in the manner of a common-law court," what the best rule is. *Id.* at 20.

[58] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 69 (1938).

[59] *Id.* at 70.

[60] 41 U.S. (16 Pet.) 1, 18 (1842).

[61] *See Erie*, 304 U.S. at 70.

[62] *See id.* at 71 ("[*Swift*] held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the State is—or should be . . . .").

[63] *See id.* at 79-80.

[64] *Id.* at 78 (quoting Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

should utter the last word."[65] On this point, Justice Brandeis might also have included one of Justice Holmes's other famous quips: "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . ."[66]

Although the ultimate upshot of *Erie* had to do with judicial federalism,[67] the jurisprudential basis for *Erie* highlights the difference between the two kinds of case law described in the previous Section. The "common law" is Justice Holmes's "brooding omnipresence"[68]—the "transcendental body of law outside of any particular State."[69] Hierarchical stare decisis, by contrast, is why the Pennsylvania Supreme Court's adoption of a particular standard of care was "the law of that State existing by the authority of that State,"[70] binding on future courts within Pennsylvania.[71]

C. *How Hierarchical Stare Decisis (Mostly) Conquered the Common Law*

Although the two kinds of case law described here potentially overlap—and both might refer as a general matter to interstitial judicial lawmaking—there is a tension that makes it hard for them to coexist within a particular judicial system. In the years before *Erie*, one lawyer observed that "the acceptance and application of the common-law principle of the authority of precedent in a given jurisdiction eats up and destroys the theory that the decisions of the court are only evidence of the law."[72] On this account, "[t]he two principles are entirely inconsistent; if you accept one you cannot have the other."[73]

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[65] *Id.* at 79 (emphasis added) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 534-35 (1928) (Holmes, J., dissenting)).

[66] S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[67] *See generally, e.g.*, EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 211-46 (2000); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Michael Steven Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. 1111 (2011); Suzanna Sherry, *Overruling* Erie*: Nationwide Class Actions and National Common Law*, 156 U. PA. L. REV. 2135 (2008); 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, 255-58 (2008).

[68] *S. Pac.*, 244 U.S. at 222 (Holmes, J., dissenting).

[69] *Erie*, 304 U.S. at 79 (1938) (quoting *Black & White*, 276 U.S. at 534 (Holmes, J., dissenting)).

[70] *Id.*

[71] In *Erie,* the parties disputed whether the Pennsylvania Supreme Court had, in fact, endorsed this standard, and the Supreme Court remanded for the lower federal court to resolve that question. *See id.* at 80.

[72] Herbert Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6, 12 (1910).

[73] *Id.*

The conflict is this: Once the highest court in a judicial system declares the content of "the common law," that content becomes binding on other courts in that system due to hierarchical stare decisis.[74] That binding decision cannot conclusively determine the common law—as discussed above, that is not how the common law works.[75] But it can have the same practical effect if the decision is one that all courts in that judicial system must follow.[76]

In this way, the lawmaking power of a judicial decision that is binding as a matter of stare decisis can, for all intents and purposes, override the inquiry into the practices, customs, and patterns by which the common law is traditionally determined. Once the Pennsylvania Supreme Court declares "the common law" with respect to the duty of care owed to trespassers, its decision becomes binding going forward, effectively preventing Pennsylvania courts from making an independent, empirical assessment of what the practices, customs, and patterns actually are. This reality supports what was initially the outlier view of Justices Field and Holmes and which, over the course of several decades, became the prevailing view declared by Justice Brandeis in *Erie*.[77]

This is not to say that common law forms of argument are irrelevant. Judges may take comfort in knowing that there is (in a loose sense) "precedent" for a given decision, even if they recognize that they are not formally bound by such precedent.[78] In many instances, a thoughtful consideration of the existing

[74] *See, e.g.*, Coon v. Med. Ctr., Inc., 797 S.E.2d 828, 829, 834 (Ga. 2017) (deciding that Georgia courts are bound to follow "the common law as determined by Georgia's courts" and that, if the Georgia Supreme Court changes its view of the common law, that new decision "would apply in future Georgia cases"). With respect to the particular conflict-of-laws question presented in *Coon*, the decision had elements of a pre-*Erie* mindset because it held that "where a claim in a Georgia lawsuit is governed by the common law, and the common law is also in force in the other state [where the injury occurred], as it is in Alabama, the common law as determined by Georgia's courts will control." *Id.* at 829. This notion reflects pre-*Erie* jurisprudence in the sense that choosing Alabama law under the *lex loci delicti* (law of the place where the tort was committed) choice-of-law rule did not entail following Alabama courts' definition of the common law. But it reflects post-*Erie* jurisprudence in the sense that Georgia courts are bound to apply "the common law" as defined by the Georgia courts. One might view cases like *Coon* as showing how the common law and stare decisis can coexist. As a choice-of-law matter, the court follows "the common law," but the state supreme court's understanding of the common law is prospectively binding. Even through this lens, however, hierarchical stare decisis effectively overrides future courts' independent inquiry into the *content* of the common law.

[75] *See supra* notes 37-45 and accompanying text.

[76] *See* GREENAWALT, *supra* note 38, at 183 ("The modern premise is that common law decisions and opinions represent more than mere evidence of the law . . . . [N]o one doubts that particular judicial decisions do themselves carry significant authority.").

[77] *See supra* Section I.B.

[78] *See, e.g.*, MERRYMAN & PÉREZ-PERDOMO, *supra* note 25, at 47 ("Everybody knows that civil law courts do use precedents."); Steinman, *supra* note 13, at 1772 (explaining how courts

practices, customs, and patterns may point the way toward the best resolution of a particular case or a particular legal issue.

In contemporary litigation, however, hierarchical stare decisis is a trump card. When the Supreme Court decides a case, for example, the question to which lower courts and litigants turn is not where that case falls in the broader mosaic of the "common law." Rather, the operating assumption is that this is a superior court speaking, and other courts within its precedential orbit are bound to follow the superior court's decision.[79] The debate going forward is over what it means to follow that case as a matter of stare decisis.[80]

II. PROBLEMS WITH HOW WE IDENTIFY CASE LAW

This Part identifies conceptual and definitional problems with current approaches to determining the stare decisis effect of judicial decisions. The critique is not that we define the lawmaking effect of judicial decisions too broadly or too narrowly. Rather, it is that the contemporary understanding of stare decisis fails to provide satisfactory answers to crucial threshold questions: What are the fundamental elements of a case? How do we identify the various parts of a judicial decision, so that we may then conclude that parts *A* and *C* create binding obligations as a matter of stare decisis, but parts *B* and *D* do not? And how much freedom do future courts have to work around ostensibly binding aspects of a judicial decision?

To be clear, the focus of this Article is not on the question of when a particular case can or should be overruled. Accordingly, the analysis here does not distinguish between horizontal stare decisis (e.g., the Supreme Court's handling of its own precedent) and vertical stare decisis (e.g., lower courts' handling of Supreme Court precedent or district courts' handling of circuit court precedent).

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in civil law systems—which lack a formal doctrine of stare decisis—regularly rely on previous judicial decisions).

[79] *See, e.g.*, Navarro v. Encino Motorcars, LLC, 845 F.3d 925, 935 (9th Cir. 2017) ("[W]e may not disregard the Court's existing, binding precedent.").

[80] Justices on the Supreme Court are keenly aware of this, as illustrated by an exchange between Justice Breyer and counsel for the plaintiffs at oral argument in *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017). *Hernandez* arose out of "a tragic cross-border incident in which a United States Border Patrol agent standing on United States soil shot and killed a Mexican national standing on Mexican soil." *Id.* at 2004. During oral argument, plaintiffs' counsel resisted taking a position on a variety of other hypotheticals where actions taken by government officials in the United States cause injury abroad. *See, e.g.*, Oral Argument at 4, Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (No. 15-118) (Chief Justice Roberts asking "how do you analyze the case of a drone strike in Iraq where the plane in [sic] piloted from Nevada"). Justice Breyer explained that it was important to consider such scenarios because the Court's ultimate decision would have precedential impact beyond its mere resolution of this case: "We [will] write some words. And those words you're delighted with because you win . . . The problem is other people will read those words . . . . So what are the words that we write that enable you to win, which is what you want, and that avoid confusion, uncertainty, or decide these other cases the proper way?" *Id.* at 7-8.

The two are different, to be sure, in terms of the ability to overturn a precedent. Horizontal stare decisis permits a court to overturn its own precedents (in particular circumstances).[81] Vertical stare decisis does not allow a lower court to overturn a superior court's precedents.[82] That lower courts cannot overrule a higher court decision, however, does not mean they must attribute broader lawmaking content to higher court decisions.[83] And the ability to identify an earlier decision's lawmaking content is important for horizontal stare decisis as well. Whether a court must address the sort of "prudential and pragmatic considerations" that justify overruling a prior decision depends on what law the earlier decision made.[84]

With that caveat, this Part describes the prevailing methods for determining which parts of a "case" actually make "law" and highlights the uncertainty and inconsistency inherent in these methods. Section A critiques conventional

[81] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("[I]t is common wisdom that the rule of *stare decisis* is not an 'inexorable command . . . .'" (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-11 (1932) (Brandeis, J., dissenting))). The federal circuit courts can also overrule their own precedents, although it varies from circuit to circuit whether an en banc sitting is required to do so. *See, e.g.*, Steinman, *supra* note 13, at 1774 n.221 (comparing different circuits' approaches to this question).

[82] *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 237 (1997) (noting that only the Supreme Court has the "prerogative of overruling its own decisions" (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989))); Kozel, *supra* note 7, at 203 ("[T]he American federal system . . . treat[s] vertical precedent as absolutely binding."); Steinman, *supra* note 13, at 1774 ("Vertical stare decisis does not permit overruling; a lower federal court cannot overrule a Supreme Court decision, and a federal district court cannot overrule a decision by its own court of appeals." (footnote omitted)).

[83] One might plausibly argue that courts should view the lawmaking content of a decision differently depending on the relationship of that court to the precedent-setting decision. *See, e.g.*, Kozel, *supra* note 7, at 211 (observing that one may "relax" the "assumption" that "the scope of precedent is defined identically in the vertical and horizontal contexts"). Under the framework proposed here, the binding law generated by any judicial decision would be the same in both the horizontal and vertical contexts—with the only difference being the ability of courts in the context of horizontal stare decisis to overrule their *own* earlier decisions. This Article's framework would not necessarily foreclose the view that a court ought to pay special heed to aspects of superior court decisions that would not qualify as formally binding—based, for example, on a "faithful agent[]" theory or a "prediction model." *See supra* note 26. That view finds support in the attitude expressed by some lower courts that the Supreme Court's "considered dicta" is "almost" as binding as its "outright holdings." McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991). But this Article's framework would not necessarily endorse that view either. *See supra* note 27 (describing the view that judge who accepts dictum from a previous decision as if it were binding law fails to discharge her responsibility to deliberate on and decide the immediate case independently). Rather, these areas of disagreement would be understood as debates over the best way to decide cases *within* the space left by aspects of case law that are truly binding as a matter of stare decisis. *See supra* notes 26-28 and accompanying text.

[84] *Casey*, 505 U.S. at 854-55.

accounts of the difference between holdings and dicta, as well as the notion that stare decisis applies only to portions of a decision that are "necessary" to the court's ruling. Section B addresses other concerns, including the notion that stare decisis creates a "facts-plus-outcome"[85] obligation on future courts, and the lack of conceptual clarity regarding what it means to "distinguish" an ostensibly binding precedent.

A. *Holdings, Dicta, and Necessity*

Perhaps the most common framework for identifying the binding aspects of a judicial decision is the distinction between "holdings" and "dicta."[86] As the Supreme Court has explained: "It is to the holdings of our cases, rather than their dicta, that we must attend . . . ."[87] Although there is a loose sense that dicta are statements that do not support the court's ultimate ruling in the case—and holdings are statements that do support the court's ultimate ruling—this is a difficult line to draw.[88]

Another way courts and commentators have tried to identify which aspects of a judicial opinion are binding on future courts is by inquiring which parts of the opinion are necessary to the decision. That is, future courts are bound by "those portions of the opinion necessary to" the court's result.[89] But what does "necessary" mean in this context? The Court has indicated that necessary portions include the "rationale upon which the Court based the results of its earlier decisions"[90] as well as "explications of the governing rules of law."[91]

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[85] *See* Dorf, *supra* note 7, at 2012.

[86] *See, e.g.*, United States v. Crawley, 837 F.2d 291, 292 (7th Cir. 1988) ("What is at stake in distinguishing holding from dictum is that a dictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject."); Abramowicz & Stearns, *supra* note 7, at 957 (stating that "holdings in prior cases are at least presumptively binding—while dicta is not"); 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."); Leval, *supra* note 7, at 1257 ("To say that a court's statement is a dictum is to say that the statement is not the holding. Holding and dictum are generally thought of as mutually exclusive categories.").

[87] Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379 (1994).

[88] *See* Leval, *supra* note 7, at 1258 ("There is no line demarcating a clear boundary between holding and dictum.").

[89] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996); *Obiter Dictum*, BLACK'S LAW DICTIONARY (10th ed. 2014) (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"); GARNER ET AL., *supra* note 8, at 53 (noting need to "determine which aspects of the appellate court's written opinion were necessary to its ultimate decision, thereby rendering those parts of the opinion its holdings").

[90] *Seminole Tribe*, 517 U.S. at 66-67.

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

Yet the Court has also observed (per Chief Justice John Marshall) that a court's "general expressions . . . are to be taken in connection with the case in which those expressions are used" and that "[i]f they go beyond the case, they . . . ought *not* to control the judgment in a subsequent suit."[92] By definition, however, any generalizable "rule[]"[93] or "rationale"[94] will "go beyond the case"[95] in which it is declared.[96] In other words, such a rule or rationale is never strictly "necessary," because any case might conceivably be decided based purely on the totality of its circumstances—without endorsing a broader rule or rationale.[97]

Assuming that stare decisis applies to portions of an opinion that are broader than logically "necessary" but sufficiently "necessary" to the court's actual reasoning, must we distinguish between different categories of ostensibly "necessary" portions? For example, judges and scholars have disagreed about whether so-called "legislative facts"—factual propositions on which a court relies to support its application or interpretation of the law—ought to have binding force as a matter of stare decisis.[98] Are future courts bound to accept

[92] Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 399 (1821) (emphasis added); *see also* Humphrey's Executor v. United States, 295 U.S. 602, 626 (1935) (distinguishing "the narrow point actually decided" in an earlier case from "expressions" made "[i]n the course of the opinion of the court" that were "beyond the point involved and, therefore, do not come within the rule of *stare decisis*"). For a discussion of the Court's approach to stare decisis in *Humphrey's Executor*, see Dorf, *supra* note 7, at 2018-24.

[93] *Seminole Tribe*, 517 U.S. at 66.

[94] *Id.* at 67 (quoting *Allegheny*, 492 U.S. at 668 (Kennedy, J., concurring in the judgment in part and dissenting in part)).

[95] *Cohens*, 19 U.S. (6 Wheat) at 399.

[96] *See* Alexander, *supra* note 7, at 25 ("Every rule, by virtue of being a rule, decides issues that are broader than the particular facts of the cases in which they are announced." (emphasis omitted)).

[97] *See* DUXBURY, *supra* note 44, at 78 ("Necessity tests, however formulated, provide only inadequate conceptions of the *ratio decidendi*.").

[98] *See* Larsen, *supra* note 7, at 71 (criticizing notion that stare decisis binds future courts to accept truth of such legislative facts). In a Seventh Circuit decision on the constitutionality of Wisconsin's voter identification law, Judge Frank Easterbrook and Judge Richard Posner split on precisely this issue. Judge Easterbrook reasoned that "whether a photo ID requirement promotes public confidence in the electoral system is a 'legislative fact'—a proposition about the state of the world, as opposed to a proposition about these litigants or about a single state." Frank v. Walker, 768 F.3d 744, 750 (7th Cir. 2014). The Seventh Circuit was bound to accept that a photo ID requirement did promote public confidence in elections because "[o]n matters of legislative fact, courts accept the findings of legislatures and judges of the lower courts must accept findings by the Supreme Court." *Id.* Dissenting from the denial of rehearing en banc, Judge Posner responded that Easterbrook's approach "conjures up a fact-free cocoon." Frank v. Walker, 773 F.3d 783, 795 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc). Posner asked: "If the Supreme Court once thought that requiring photo identification increases public confidence in elections, and experience and academic study

such legislative facts insofar as they are part of the "rationale upon which the Court based the results of its earlier decisions"?[99] Or does stare decisis extend only to the legal ruling that those legislative facts are invoked to support?

However one evaluates "necessity" in this context, it is unclear how that concept intersects with the holding-dicta distinction. Presumably "portions of the opinion necessary to" the court's opinion are not merely dicta.[100] If they were, such necessary portions would not be binding. Yet courts sometimes suggest that any part of an opinion that extends beyond "precisely . . . the facts of each case" is dictum.[101] This view has invited some to draw a distinction between "obiter dictum" and "judicial dictum."[102] Obiter dictum "is in the nature of a peripheral, off-the-cuff judicial remark" and is not binding as a matter of stare decisis.[103] Judicial dictum is "an opinion by a court on a question that is directly involved, briefed, and argued by counsel . . . but that is not essential to the decision."[104] Judicial dictum is sometimes said to be "binding precedent"[105] and sometimes said to be "not binding even if it may later be accorded some weight."[106]

since shows that the Court was mistaken, do we do a favor to the Court . . . by making the mistake a premise of our decision?" *Id.*

[99] *Seminole Tribe*, 517 U.S. at 66-67.

[100] *Id.* at 67.

[101] McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) (arguing that lower courts should be "bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings" because "[i]f lower courts felt free to limit Supreme Court opinions *precisely to the facts of each case*, then our system of jurisprudence would be in shambles, with litigants, lawyers, and legislatures left to grope aimlessly for some semblance of reliable guidance" (emphasis added)).

[102] GARNER ET AL., *supra* note 8, at 62 (emphasis omitted).

[103] *Id.*

[104] *Id.* (quoting *Judicial Dictum*, BLACK'S LAW DICTIONARY, *supra* note 89).

[105] *Id.* at 63 (citing United States v. Johnson, 256 F.3d 895, 914 (9th Cir. 2001)); *id.* at 64 (citing United States v. Oshatz, 912 F.2d 534, 540 (2d Cir. 1990)).

[106] *Id.* at 62 (citing *Judicial Dictum*, BLACK'S LAW DICTIONARY, *supra* note 89). Further confusion arises from the fact that courts and commentators sometimes suggest that certain parts of an opinion might be almost, but not fully, binding as a matter of stare decisis. *See, e.g.*, *McCoy*, 950 F.2d at 19 ("We think that federal appellate courts are bound by the Supreme Court's considered dicta *almost as firmly* as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement." (emphasis added)); *see also, e.g.*, LaPierre v. City of Lawrence, 819 F.3d 558, 563-64 (1st Cir. 2016) ("And we have made clear that we 'are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings.'" (quoting Cuevas v. United States, 778 F.3d 267, 272-73 (1st Cir. 2015))). This Article's focus, however, is on identifying those aspects of prior decisions that are truly binding on future courts. As long as a court retains the ability to reject some aspect of a prior judicial decision (as lower courts would when they purport to be "almost" rather than completely bound by Supreme Court dicta), that aspect would fall on the nonbinding side of the line for purposes of this project. As discussed *supra*

For one example of the confusion on this issue, consider how Justice John Paul Stevens's concurring opinion in *Carey v. Musladin*[107] addressed the Supreme Court's decision in *Strickland v. Washington*.[108] *Strickland* was a landmark case that articulated the test for ineffective assistance of counsel claims.[109] Justice Stevens described *Strickland*'s "ultimate *holding*" as simply that the Court "rejected the petitioner's ineffective-assistance claim."[110] It was *Strickland*'s "reasoning . . . (including carefully considered *dicta*)" that "set forth the standards for evaluating such claims."[111] He argued, therefore, that courts should not "discount the importance of such guidance on the ground that it may not have been strictly necessary as an explanation of the Court's specific holding in the case."[112] As Justice Stevens described it, *Strickland*'s declaration of the "standards" governing ineffective-assistance claims was neither the Court's "ultimate holding" nor "strictly necessary as an explanation of the Court's specific holding in the case"; yet those standards must still be followed.[113]

note 25, the mere fact that courts *cite* certain authorities does not mean that those authorities are *binding*. *See also* Kozel, *supra* note 7, at 186 ("A judicial proposition that is treated as persuasive carries no force beyond that which might accrue to an amicus curiae brief or a scholarly treatise.").

[107] 549 U.S. 70, 78 (2006) (Stevens, J., concurring) ("While our ultimate *holding* rejected the petitioner's ineffective-assistance claim, the reasoning in our opinion (including carefully considered *dicta*) set forth the standards for evaluating such claims that have been accepted as 'clearly established law' for over 20 years.").

[108] 466 U.S. 668, 706 (1984) (emphasizing that although "the Court reject[ed] the ineffective-assistance claim in this case," the "standards announced today will go far towards assisting lower federal courts and state courts in discharging their constitutional duty to ensure that every criminal defendant receives the effective assistance of counsel guaranteed by the Sixth Amendment").

[109] *See id.* at 687 (describing the "two components" that govern a "convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence"). Indeed, *Strickland* has proven to be so influential that it is the sixth most cited decision in the history of the Supreme Court. *See* Adam N. Steinman, *The Rise and Fall of Plausibility Pleading*, 69 VAND. L. REV. 333, 390 (2016) (listing hundred most cited Supreme Court decisions in terms of citations by federal courts).

[110] *Carey*, 549 U.S. at 78 (Stevens, J., concurring).

[111] *Id.*

[112] *Id.* at 79.

[113] *See id.* at 78-79 ("Virtually every one of the Court's opinions announcing a new application of a constitutional principle contains some explanatory language that is intended to provide guidance to lawyers and judges in future cases."). Indeed, Justice Stevens argued in *Carey* that *Strickland* should have an even stronger effect than ordinary stare decisis. He urged that *Strickland*'s reasoning—even though not "strictly necessary" to the case's outcome—still created "clearly established law" that justified federal habeas relief under Antiterrorism and Effective Death Penalty Act's deferential standard for reviewing a state court's rejection of a defendant's federal claims. *Id*.

B. *Facts, Outcomes, and Distinctions*

Determining the law-generating content of a judicial decision presents other challenges as well. Consider the conventional assumption that stare decisis at least compels future courts to decide cases consistently with the ultimate result that the earlier court reached in the precedent-setting case.[114] That is, when future courts are confronted with the same facts as those in the precedent-setting case, they must reach the same result that was reached in the precedent-setting case. Professor Michael Dorf has described this as a "facts-plus-outcome" obligation.[115]

Conceptually, even this seemingly modest notion is problematic. First of all, how do future courts assess which "facts" from the precedent-setting case provide the point of comparison for generating the "outcome"? Is it only facts that are explicitly stated in the precedent-setting opinion? Or may future courts attribute facts that appear elsewhere in the record of the precedent-setting case—regardless of whether those facts were emphasized or even mentioned in the precedent-setting opinion? May future courts do their own research and declare that facts that had never been part of the broader record in the precedent-setting case are relevant?

Second, what constraints, if any, exist regarding whether the facts of the future case are similar enough to the precedent-setting case that the future court must reach the same result? Unless such constraints exist, a future court could avoid the ostensibly binding outcome of the precedent-setting case simply by noting that the plaintiff in the later case had a different first name or had filed her case on a different day of the week.[116] Yet an opinion by Justice Antonin Scalia (one of the final opinions he authored) recognized quite candidly that courts may avoid the binding consequence of an earlier decision by pointing to factual differences that are "accurate-in-fact" but "inconsequential-in-

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[114] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not *only* the result . . . by which we are bound." (emphasis added)); 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §134.03[1] (3d ed. 2016) ("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."); Steinman, *supra* note 13, at 1783-84 ("Even those who argue in favor of rule-based stare decisis (so-called legislative holdings) typically argue that there should *also* be a duty to reconcile results.").

[115] Dorf, *supra* note 7, at 2012. To be clear, Professor Dorf used the term to describe an approach where stare decisis would apply *only* to the facts and ultimate outcome of the earlier decision, and would not require future courts to follow any broader principles stated in the precedent-setting decisions. *See id.* at 2011-12. But it is commonly assumed that stare decisis should at least include an obligation to decide future cases consistently with the ultimate results reached in earlier cases. *See supra* note 114.

[116] *See* Steinman, *supra* note 13, at 1766 n.181.

principle."[117] If one accepts this view, it is hard to imagine any case that would ever present exactly the same facts as an earlier one, which would effectively render meaningless the facts-plus-outcome obligation.

Third, how much leeway do future courts have when it comes to characterizing the ultimate "outcome" of the earlier decision for purposes of a "facts-plus-outcome" obligation? Must they accept the precise legal basis that the precedent-setting court gave for the outcome? Or is a future court able to formulate other grounds for the earlier decision—as long as the same side that prevailed would also prevail based on that alternative ground?[118] Suppose, for example, a precedent-setting court ruled against the plaintiff because she failed to establish a violation of her constitutional rights. Could a future court conclude that the same outcome ("Plaintiff loses") could have been justified by the plaintiff's failure to comply with the governing statute of limitations? If so, the court could effectively free itself from an otherwise binding decision on the scope of the constitutional right at issue. Or suppose a court found that personal jurisdiction was valid based on one particular theory; could a future court reconceptualize that decision as being justified by some other theory?[119] If so, it could free itself from an otherwise binding decision regarding the theory the precedent-setting court actually used.

Finally, there is the oft-invoked notion of "distinguishing" a case. It is routine to debate whether earlier decisions can or cannot be distinguished.[120] But what

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[117] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2696 (2015) (Scalia, J., dissenting); *see also* Re, *supra* note 7, at 935 & n.73 (discussing this aspect of Justice Scalia's opinion).

[118] *See, e.g.*, DUXBURY, *supra* note 44, at 107 (noting that judges might "formulate completely fresh justifications" for earlier decision). *But see* Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 385-86 (1964) ("A court's stated and, on its view, necessary basis for deciding does not become dictum because a critic would have decided on another basis.").

[119] This latter example was the subject of an exchange between Justice Scalia and Justice William Brennan in *Burnham v. Superior Court*, 495 U.S. 604, 612-13, 635-36 (1990). In support of his conclusion that the Constitution permits personal jurisdiction based solely on the defendant being served with process in the forum state, Justice Scalia cited a series of state court decisions affirming that proposition. *Id.* at 612-13 (Scalia, J.). Justice Brennan countered that "[m]any of the cases cited in Justice Scalia's opinion involve either announcement of the rule in dictum or situations where factors other than in-state service supported the exercise of jurisdiction." *Id.* at 636 n.10 (Brennan, J., concurring) (citation omitted). Justice Scalia responded:

> Justice Brennan's assertion that some of these cases involved dicta rather than holdings is incorrect. In each case, personal service within the State was the exclusive basis for the judgment that jurisdiction existed, and no other factor was relied upon. Nor is it relevant for present purposes that these holdings might instead have been rested on other available grounds.

Id. at 613 n.2 (Scalia, J.) (citation omitted).

[120] *See, e.g.*, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1795 (2015) ("The principal dissent distinguishes these cases on the sole ground that they involved a tax

exactly does it mean for a later case (Case Two) to distinguish an earlier case (Case One), and how does that process relate to the various inquiries and issues described above? It could mean some or all of the following:

- Because Case One and Case Two involve different "facts," the court in Case Two may reach a different "outcome" than was reached in Case One.[121]
- Aspects of the decision in Case One that otherwise might dictate the same outcome in Case Two were "dicta."[122]
- Aspects of Case One that otherwise might dictate the same outcome in Case Two were not "necessary" parts of the decision in Case One (perhaps because they extended beyond the precise facts of Case One).[123]
- Differences between Case One and Case Two create an independent basis for disregarding Case One, separate from and in addition to the preceding theories.

Perhaps all of these are correct ways to conceptualize the process of distinguishing cases under the conventional approach. Perhaps only some of them are. But there does not seem to be a clear understanding about which lines of argument perform which functions in this context.

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As explained above, the conventional ways courts delineate the binding from the non-binding aspects of judicial decisions have eluded coherent, predictable application in practice. Perhaps, then, it is worth experimenting with a different approach.

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on gross receipts rather than net income. We see no reason why the distinction between gross receipts and net income should matter . . . ."); Stanton v. Sims, 134 S. Ct. 3, 7 (2013) (noting that Court's earlier decision could be "distinguished . . . as a case where the officers were not in hot pursuit of the suspect, had not seen the suspect enter the neighbor's property, and had no real reason to think the suspect was there," while here, "Stanton *was* in hot pursuit of Patrick, he *did* see Patrick enter Sims' property, and he had every reason to believe that Patrick was just beyond Sims' gate"); Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1537 n.3 (2013) (Kagan, J., dissenting) (criticizing majority opinion for "painstakingly distinguish[ing] [earlier] decisions on their individual facts" while "miss[ing] their common take-away"); Am. Tradition P'ship v. Bullock, 132 S. Ct. 2490, 2491 (2012) ("Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.").

[121] *See supra* notes 114-17 and accompanying text (discussing the "facts-plus-outcome" obligation).

[122] *See supra* notes 86-88 and accompanying text (discussing distinction between binding holding and nonbinding dicta).

[123] *See supra* notes 89-91 and accompanying text (discussing obligation to follow parts of opinion that were "necessary" to precedent-setting court's decision).

III. CASE LAW AS EXPLICITLY STATED RULES

This Part develops an approach to stare decisis under which the lawmaking content of a judicial decision would be limited to those decisional rules that the court states explicitly in its opinion. Section A offers a new taxonomy for the various parts of a judicial decision, focusing on the role that syllogisms play in legal reasoning. Section B explains how an explicit-rules approach to stare decisis resolves many of the conceptual and definitional problems identified above. Section C clarifies how future courts might distinguish rules declared in earlier decisions and adds a new component to the stare decisis framework: that courts may be required to determine that one rule takes priority over another rule in the event that they would dictate conflicting outcomes in a particular case. Section D addresses the question of when the precedent-setting court's rule is sufficiently related to the case to justify giving that rule stare decisis effect. Section D also recognizes that stare decisis might apply not only to a court's declaration of a particular rule, but also to a court's rejection of a particular rule.

A. *A New Taxonomy*

The taxonomy proposed here distinguishes between syllogistic elements of a judicial opinion and non-syllogistic elements. The first subsection explains the role that syllogisms play in legal reasoning and identifies the components of syllogistic arguments. The second subsection describes aspects of judicial decisions that fall outside of syllogistic structure.

1. Syllogistic Elements

In its most general form, a syllogism combines a major premise with a minor premise to reach a conclusion.[124] The particular kind of syllogism that characterizes legal reasoning is often called *modus ponens*.[125] The court invokes a rule that can be expressed in the form (If *P*, then *Q*)—what logicians call a conditional statement.[126] Given that principle, the court makes an antecedent finding (*P*),[127] which plugs into the beginning of the conditional statement to generate the conclusion (*Q*).[128] Grounding this structure in more general terms,

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[124] *See* GARNER ET AL., *supra* note 8, at 23; James Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41, 43 & n.15 (1979) (describing "syllogistic form" of deductive legal reasoning that has been noted by many authorities).

[125] *See* IRVING M. COPI ET AL., INTRODUCTION TO LOGIC 318 (14th ed. 2011).

[126] *See id.* at 300.

[127] *See id.*

[128] *See id.* at 318. Speaking somewhat more precisely, a logician would describe the rule as: "For all cases, if *P*, then *Q*." The case-specific antecedent finding (that *P* is true in this particular case) would be P_a, and the case-specific conclusion (*Q* is therefore true in this particular case) would be Q_a. *See* Steinman, *supra* note 13, at 1769 n.191.

the rule (If *P*, then *Q*) is the major premise, the antecedent finding (*P*) is the minor premise, and (*Q*) is the conclusion.[129]

For a very simple example of this general structure, consider *Roper v. Simmons*,[130] the Supreme Court decision holding that sentencing juveniles to death is unconstitutional.[131] The basic syllogism could be understood as follows:

- If a defendant was under the age of eighteen when he committed a crime, then it violates the Eighth and Fourteenth Amendments to impose the death penalty for that crime (If *P*, then *Q*).[132]
- Christopher Simmons was under the age of eighteen when he committed the crime at issue (*P*).[133]
- Therefore, it violated the Eighth and Fourteenth Amendments to impose the death penalty for his crime (*Q*).

The Supreme Court's iconic decision in *Miranda v. Arizona*[134] employs the following syllogism:

- If an individual in custody is not "warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires," then it would violate the Fifth Amendment for evidence obtained as a result of interrogation to be used against him (If *P*, then *Q*).[135]
- Ernesto Miranda was in custody and did not receive these warnings (*P*).[136]
- Therefore, it violated the Fifth Amendment to admit his confession into evidence during his trial (*Q*).

As *Miranda* illustrates, the if-then rule at the heart of a syllogism might itself have multiple parts. (*P*) requires both that the individual was in custody and that the individual did not receive the required warnings. To recognize that the *Miranda* rule has two elements is simply to recognize that one must show two things in order to establish (*P*).[137]

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[129] *See, e.g.*, Hardisty, *supra* note 124, at 43 ("[T]he 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* GARNER ET AL., *supra* note 8, at 23.

[130] 543 U.S. 551 (2005).

[131] *Id.* at 578.

[132] *Id.* ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

[133] *Id.* at 556.

[134] 384 U.S. 436 (1966).

[135] *Id.* at 478-79.

[136] *Id.* at 491-92.

[137] That the required antecedent of a particular rule has multiple parts does not undermine the fundamental if-then structure of the rule. *See, e.g.*, GARNER ET AL., *supra* note 8, at 97 (describing the reasoning of a hypothetical case as appearing to be "if A, B, C, then X");

Finally, consider the Supreme Court's decision in *Ashcroft v. Iqbal*,[138] a case in which Javaid Iqbal sought monetary damages against Attorney General John Ashcroft and FBI Director Robert Mueller based on his detention and treatment by federal officials following the 9/11 attacks.[139] One part of the opinion—where the Court concluded that certain allegations in Javaid Iqbal's complaint could be disregarded at the pleadings phase—employs the following syllogism:

- If an allegation is conclusory, then the court does not need to accept it as true in deciding whether the complaint states a claim upon which relief can be granted (If *P*, then *Q*).[140]
- The allegations in paragraphs ten, eleven, and ninety-six of Javaid Iqbal's complaint are conclusory (*P*).[141]
- Therefore, the allegations in paragraphs ten, eleven, and ninety-six do not need to be accepted as true (*Q*).

This Article uses the shorthand "rule" to refer to the if-then proposition at the core of the court's syllogistic reasoning. As these examples demonstrate, however, a court's if-then rule need not necessarily be a "rule" as that term is used when contrasted with "standards."[142] According to that distinction, a "rule" "binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts,"[143] whereas a "standard" is more open ended and flexible (if not "frustratingly hazy and subjective").[144] When the antecedent of an if-then proposition can be assessed in a determinate, mechanical way (such as whether the defendant was under eighteen when he committed an offense),[145] commentators would call it a rule. But when courts have more flexibility in

JOSEPH RAZ, THE AUTHORITY OF LAW 183 (1979) (describing hypothetical decision as being "based on the rule that whenever *A*, *B*, *C* then *X* should be decided"); Alexander, *supra* note 7, at 19 (describing rules as having "a canonical formulation . . . such as, 'Whenever facts A, B, and C, and not fact D, decide for P'").

[138] 556 U.S. 662 (2009).

[139] *Id.* at 668-69.

[140] *See id.* at 678-79; Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1315-20 (2010).

[141] *See Iqbal*, 556 U.S. at 680-81.

[142] *See, e.g.*, Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1214-15 (2010); *see generally, e.g.*, Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (defining terms "rules" and "standards" and highlighting benefits and shortcomings of each category).

[143] Sullivan, *supra* note 142, at 58.

[144] Shiffrin, *supra* note 142, at 1215 ("For some, its elusiveness represents a necessary cost of its flexibility; for others, its resistance to algorithmic precisification provides sufficient grounds to reject it as overly subjective." (footnote omitted)). On this spectrum, a speed limit of "55 miles per hour" would be paradigmatically rule-like, while a prohibition against "unreasonable speed" would be paradigmatically standard-like. *See* Steinman, *supra* note 13, at 1777 (citing Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1470 (1995)).

[145] *See supra* note 132 and accompanying text.

assessing whether the antecedent is true (such as whether a particular defendant was "in custody"[146] or whether an allegation in a complaint is "conclusory"),[147] commentators would call it a standard. That distinction is not relevant, however, for purposes of the taxonomy developed in this Article. The goal is simply to identify the if-then proposition that the court used in its syllogistic reasoning—regardless of how much flexibility future courts might have in deciding whether the antecedent finding is satisfied in any given case.[148]

2. Non-Syllogistic Elements

Much of what appears in judicial opinions falls outside of the basic syllogistic structure described above. A court will often provide supporting reasons for *why* it has adopted a particular if-then principle to decide the case before it, or reasons for *why* it is making a particular finding (the (*P*) that combines with the if-then rule to generate the conclusion (*Q*)). I am less concerned with providing a precise taxonomy of these non-syllogistic elements because, under the framework developed here, everything outside of the syllogistic core does not create binding obligations as a matter of stare decisis. There are fundamental differences, however, between such supporting reasons and statements that are consciously articulated as generalizable rules.[149] Here are a few illustrations.

In *Roper* (diagrammed above),[150] the Court's opinion striking down the juvenile death penalty observed that, at that time, thirty states prohibited the juvenile death penalty.[151] But the Court did not state a generalizable rule that if

[146] *See supra* note 135 and accompanying text.

[147] *See supra* note 140 and accompanying text.

[148] Sometimes, the major premise in a syllogism might be stated not only as a conditional but also as a biconditional—that is, a "statement[] that take[s] the form *if-and-only-if* rather than *if-then*." Steinman, *supra* note 13, at 1803. The stare decisis effect of biconditionals is discussed *infra* notes 336-39 and accompanying text.

[149] The Court highlights this distinction in *United States v. Stevens*, 559 U.S. 460, 464 (2010), which considered the constitutionality of a statute criminalizing certain depictions of animal cruelty. The government's defense of the statute relied on the position that "[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." *Id.* at 470 (quoting Brief for United States at 8, United States v. Stevens, 559 U.S. 460 (2010) (No. 08-769)). In rejecting that principle, the majority opinion recognized that "this Court has often *described* historically unprotected categories of speech as being 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Id.* (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992)). This kind of reasoning in prior decisions was not binding, however, because "such descriptions are just that—descriptive. They do not set forth *a test that may be applied as a general matter* to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor." *Id.* at 471 (emphasis added).

[150] *See supra* notes 131-32 and accompanying text.

[151] *See* Roper v. Simmons, 543 U.S. 551, 564 (2005).

thirty or more states prohibit a certain category of punishment, then the punishment is unconstitutional. The Court also recognized that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,"[152] but it did not declare a generalizable rule that some particular threshold of susceptibility to peer pressure would compel a certain conclusion about the constitutionality of a particular punishment. And the Court cited several international agreements prohibiting capital punishment for juvenile offenders.[153] It did not, however, state a generalizable rule that U.S. courts were bound to apply such treaties when interpreting the U.S. Constitution.[154]

In *Miranda*, the Court recounted various historical events relating to the privilege against self-incrimination—from the British Star Chamber trials[155] to twentieth-century police interrogation practices.[156] It cited studies on the psychological effects of custodial interrogation[157] and observed that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[158] But the Court did not articulate any generalizable rule that would compel a particular judicial disposition based on the presence of such historical events or psychological insights. All of these reasons supported *Miranda*'s ultimate rule, but they were not themselves components of the Court's syllogistic reasoning.

In other instances, however, it is harder to determine what purpose a court's non-syllogistic reasons serve. Are they meant to support the if-then rule the court uses in its decisional syllogism? Or are they meant to support the particular antecedent finding that combines with the rule to produce the ultimate conclusion? In *Iqbal*, for example, the court expressed concern about the burdens that the discovery process might impose on defendants if a case survives a motion to dismiss.[159] The Court rejected the notion that such burdens might be lessened through a "careful-case-management approach,"[160] and it stated that the costs on governmental defendants like Ashcroft and Mueller are "only magnified when Government officials are charged with responding to . . . a 'national and international security emergency unprecedented in the history of the American

[152] *Id.* at 569.

[153] *See id.* at 576.

[154] *See id.* at 622-23 (Scalia, J., dissenting) (noting that United States either had not ratified or had made reservations to these treaties).

[155] *See* Miranda v. Arizona, 384 U.S. 436, 458-59 (1966).

[156] *See id.* at 445-46 (illustrating the "incommunicado" and at times violent nature of in-custody interrogations from the 1930s until the time of the opinion).

[157] *See id.* at 447-48.

[158] *Id.* at 455.

[159] *See* Ashcroft v. Iqbal, 556 U.S. 662, 685-86 (2008).

[160] *Id.* at 685; *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.").

Republic.'"[161] It was unclear, however, whether these observations supported (1) the Court's embrace of its rule that conclusory allegations need not be accepted as true at the pleading phase; (2) the Court's conclusion that the particular paragraphs in the complaint were, in fact, conclusory; or (3) some other aspect of the Court's decision.[162]

B. *Rules, Syllogistic Reasoning, and Stare Decisis*

The syllogistic structure described in the previous Section may seem somewhat rudimentary. But it provides a starting point for a workable approach to identifying the law that any given case generates. The core of this approach is that stare decisis would require future courts to follow only the if-then rule around which the precedent-setting court based its decision. This Section will highlight some of the advantages of an explicit-rules approach on the way toward clarifying, in Sections C and D, some additional aspects of this Article's proposal. Part IV will respond more directly to possible critiques of an explicit-rules approach.

One advantage of emphasizing syllogistic rules is that any rule that takes the form (If *P*, then *Q*) is one that is consciously stated in prospectively generalizable terms: in all cases where (*P*) is true, the conclusion (*Q*) follows. Thus, this taxonomy for judicial decisions concretely reveals the "governing rules of law"[163] that courts recognize should have stare decisis effect. As Justice Brandeis memorably wrote: "[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right."[164] The taxonomy proposed here identifies which "rule of law" the particular precedent-setting decision has "settled."[165] This approach would employ what is essentially a clear statement rule. If the precedent-setting court wishes to constrain future courts via stare decisis, then it must state the content of that constraint explicitly.[166]

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[161] *Id.* at 685 (quoting Iqbal v. Hasty, 490 F.3d 143, 147-48 (2d Cir. 2007)).

[162] A final non-syllogistic element of a judicial decision might be the background facts of any given case. Insofar as stare decisis imposes a "facts-plus-outcome" obligation, such background facts would be important, regardless of whether they are explicitly used in the court's syllogistic reasoning or are explicitly invoked as supporting reasons for a particular finding or a particular rule. *See supra* notes 115-16 and accompanying text. Under this Article's proposal, however, background facts do not figure into what binding law a case creates as a matter of stare decisis.

[163] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996) (quoting Allegheny v. ACLU, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)).

[164] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

[165] *Id.*

[166] Such clear statement rules are not unusual. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its

To be clear, this Article's approach would not require that the precedent-setting court explicitly use the (If *P*, then *Q*) formulation. In *Roper*, for example, the actual quote from the Court was: "The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."[167] This would qualify as a binding rule, however, because it *can* be articulated in the form (If *P*, then *Q*) and it *was* the major premise in the syllogistic reasoning leading to the conclusion that it was unconstitutional to impose the death penalty on Christopher Simmons.[168] The language of this sort of rule, therefore, is fundamentally different from other statements like "juveniles are susceptible to peer pressure,"[169] or "custodial interrogation is psychologically stressful,"[170] or "courts are bad at managing discovery"[171]—even though such statements might be characterized as supporting the court's decision in a general sense.[172]

The role that if-then rules play in syllogistic reasoning draws out more sharply the distinction between "doctrinal propositions" and "social propositions."[173] As Professor Frederick Schauer explained (describing the work of Professor Melvin Eisenberg):

> Doctrinal propositions include all those "propositions that purport to state legal rules and are found in or easily derived from textual sources that are generally taken to express legal doctrine." Social propositions encompass essentially everything else, including moral propositions like "it is wrong to abandon one's ill parents," policy propositions like "hindering the progress of the automobile industry will decrease the gross national product of the United States," and experiential propositions such as "Williamsburg is prettier than Newark."[174]

It is precisely the fact that a proposition can be stated in if-then form that makes it a doctrinal proposition that "express[es] legal doctrine."[175]

The taxonomy described in Section A also provides a framework for determining that a particular rule is—in the commonly used parlance—

judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.").

[167] Roper v. Simmons, 543 U.S. 551, 578 (2005).

[168] *See supra* notes 131-33 and accompanying text.

[169] *See supra* note 152 and accompanying text (citing *Roper*, 543 U.S. at 569).

[170] *See supra* notes 157-58 and accompanying text (citing Miranda v. Arizona, 384 U.S. 436, 447-48, 455 (1966)).

[171] *See supra* note 160 and accompanying text (citing Ashcroft v. Iqbal, 556 U.S. 662, 685-86 (2008)).

[172] *See* Steinman, *supra* note 13, at 1800 n.350.

[173] MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 1, 14 (1988).

[174] Frederick Schauer, *Is the Common Law Law?*, 77 CALIF. L. REV. 455, 460 (1989) (citations omitted) (quoting EISENBERG, *supra* note 173, at 1).

[175] EISENBERG, *supra* note 173, at 1.

"necessary to" the court's decision.[176] A rule is necessary when the court uses that rule to connect a particular finding to a particular conclusion. There is no need to inquire whether a rule is hypothetically "necessary" in the sense that the court might conceivably have decided the case without using that rule.[177] We need only see that this is, in fact, the rule that the court used in laying out its syllogistic reasoning.

Although the syllogistic structure is important for identifying the decisional rule the court used, the other syllogistic elements—the (*P*) and (*Q*) that form the input and output of the rule—would not create any binding stare decisis obligations under this Article's framework. That is, courts would not be required to infer stare decisis obligations from the mere fact that the court made a particular finding (*P*) or a particular conclusion (*Q*), as they might be required to do under a "facts-plus-outcome" approach.[178] Under this Article's framework, therefore, a court's opportunity to enhance clarity and predictability through hierarchical stare decisis lies in its ability to articulate decisional rules. Naturally, the impact of a syllogistic rule going forward will depend on whether (*P*) is satisfied in future cases. If more guidance on that question is justified and desirable, a court could formulate a rule in the form (If *O*, then *P*), or perhaps (If *O*, then Not-*P*).

This approach to stare decisis would not require that courts formulate such rules when deciding cases. Scholars have long debated, for example, the relative merits of "minimalism" and "maximalism" in judicial decision-making.[179] On this point, Professor Cass Sunstein has observed that a court contemplating a generalizable rule should consider two kinds of costs. First, the court should consider "decision costs," which include "the costs of reaching judgments" regarding a particular rule.[180] Second, the court should consider "error costs," which include the costs of mistakenly declaring a bad rule.[181] This Article's approach would give courts the ability to make conscious decisions about how best to balance these costs. If a generalizable rule is justified and desirable, then a court may declare that rule and expect that rule to have stare decisis effect. But a court may also conclude that no such generalizable rule is justified in light of the decision costs and error costs. The framework developed here would give effect to that determination as well, because stare decisis would not force future courts to infer binding obligations from other aspects of the court's decision.

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[176] *See supra* notes 89-91 and accompanying text.

[177] *See supra* notes 92-97 and accompanying text.

[178] *See supra* notes 114-15 and accompanying text. An approach that eliminates the obligation to reconcile the facts-plus-outcome data points of prior decisions avoids the conceptual problems inherent in such an approach. *See supra* notes 115-19 and accompanying text.

[179] *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Grove, *supra* note 18; Sunstein, *supra* note 18.

[180] Sunstein, *supra* note 18, at 16-18.

[181] *Id.* at 18-19.

This approach would admittedly leave many aspects of a judicial opinion on the nonbinding side of the ledger. But to say that a court's case-specific findings and conclusions, along with other non-syllogistic reasons the court provides, do not create binding obligations as a matter of stare decisis is not to say that they are entirely insignificant. These other aspects of a judicial opinion may inform the sort of traditional common law reasoning that could remain influential and informative even in a world where binding stare decisis is limited to explicitly stated rules.[182] However, given some of the conceptual problems identified earlier (and for additional reasons discussed in Part IV), these other aspects of precedent-setting decisions should not create binding case law as a matter of hierarchical stare decisis.

C. *Distinguishing Rules*

What would it mean to "distinguish" a prior case under an explicit-rules approach to stare decisis? As proposed here, such distinctions would still be possible. This Section begins by describing how courts distinguish principles declared in Acts of Congress, even when such statutes are superior to judicially made law in the lawmaking hierarchy. This Section then explains how the process of distinguishing prior case law (even from superior courts) may be understood in a similar fashion.

1. How Courts "Distinguish" Statutes

To conceptualize how case distinctions would work under an explicit-rules approach to stare decisis, consider what courts have done with federal statutes. One example is equitable tolling of a statute of limitations.[183] A statute of limitations may command: "If six years has elapsed from the time of the plaintiff's injury, then the claim is time-barred."[184] (If *P*, then *Q*.) But a judicially created equitable tolling principle provides: "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."[185] (If *X*, then Not-*Q*.)

In cases covered by equitable tolling, these two rules are in conflict. (*P*) is true, because the action was filed more than six years after the injury. And (*X*)

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[182] *See supra* note 78 and accompanying text (discussing persuasive value of nonbinding law). These other aspects of judicial opinions may also be relevant to certain attitudes about the best way to decide cases. *See supra* notes 25-28 and accompanying text.

[183] *See* Steinman, *supra* note 13, at 1770.

[184] *See, e.g.*, 41 U.S.C. § 7103(a)(4)(A) (2012) (imposing six-year statute of limitations for presenting claims under Contract Disputes Act of 1978), *described in* Menominee Indian Tribe of Wis. v. United States, 136 S. Ct. 750, 753-54 (2016).

[185] *See, e.g.*, Holland v. Florida, 560 U.S. 631, 649 (2010) ("We have previously made clear that a 'petitioner' is 'entitled to equitable tolling' only 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." (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005))).

is true, because the requirements for equitable tolling are met. Accordingly, the first rule commands the conclusion (*Q*), while the second rule commands the conclusion (Not-*Q*). This conflict is resolved in favor of equitable tolling (Not-*Q*), even though it comes from an inferior legal source—a nonconstitutional judicially created rule rather than a binding statute enacted by Congress.

Some defenses to criminal liability are also instructive.[186] A federal criminal statute may provide: "If a defendant has received a firearm while under indictment for a felony, then she is guilty of a crime."[187] (If *P*, then *Q*.) But the federal court may recognize an uncodified duress defense, which could provide: "If a defendant engaged in criminal conduct under threat of imminent death or bodily injury, then she is not guilty of a crime."[188] (If *X*, then Not-*Q*.)

Of course, there may be strong disagreement over whether such distinguishing principles are appropriate in any given situation.[189] But it cannot be said that the development of such distinguishing rules categorically subverts the lawmaking hierarchy. These examples confirm that distinguishing rules are possible even in situations where they create a logical conflict with an earlier rule, and even where a superior lawmaking institution declares that earlier rule.

2. Distinguishing Case Law

Under the stare decisis framework developed here, one can understand the notion of distinguishing prior judicial decisions in the same way. The binding, law-generating content of any given case would be solely the if-then rule (or rules) at the core of the court's syllogistic reasoning. But even if the precedent-

[186] *See* Baude & Sachs, *supra* note 40, at 1105 (discussing "traditional defenses such as duress, necessity, or self-defense" that "are routinely applied by federal courts"); Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 752-56 (2013) (discussing various uncodified defenses to federal criminal liability).

[187] *See* 18 U.S.C. § 922(n) (2012) ("It shall be unlawful for any person who is under indictment for a crime . . . to . . . receive any firearm or ammunition . . . ."), *discussed in* Dixon v. United States, 548 U.S. 1, 3 (2006).

[188] *See, e.g.*, United States v. Bailey, 444 U.S. 394, 410-11 (1980); *see also Dixon*, 548 U.S. at 13-14 (recognizing duress defense "[e]ven though the Safe Streets Act does not mention the defense of duress"). Abstention doctrines provide another example. *See* Steinman, *supra* note 13, at 1769 ("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.").

[189] *Compare, e.g.*, McQuiggin v. Perkins, 133 S. Ct. 1924, 1928, 1931 (2013) (recognizing "equitable exception" to one-year statute of limitations for federal habeas petitions in cases where there is strong evidence of actual innocence), *with id.* at 1937 (Scalia, J., dissenting) ("What is the source of the Court's power to fashion what it concedes is an 'exception' to this clear statutory command?").

setting decision establishes the rule (If *P*, then *Q*), the later court may declare a distinguishing rule (If *X*, then Not-*Q*).[190]

For example, consider the relationship between the Supreme Court's *Miranda* decision and its decision five years later in *Harris v. New York*,[191] which dealt with the use of a defendant's statements for purposes of impeachment.[192] As discussed earlier, *Miranda*'s reasoning established the following rule:

- If an individual in custody is not given the required warnings prior to questioning, then it would violate the Fifth Amendment for evidence obtained as a result of interrogation to be used against him (If *P*, then *Q*).[193]

Under an explicit-rules framework, this rule is binding on future courts. In *Harris*, however, the Court developed a distinguishing rule:

- If evidence obtained in violation of the *Miranda* rule is used for impeachment purposes, then its use does not violate the defendant's Fifth Amendment rights (If *X*, then Not-*Q*).[194]

Reasonable minds might differ regarding whether this distinguishing rule was justified or desirable.[195] But such distinguishing rules are not fundamentally contrary to the idea of binding rules. As discussed above, courts also employ distinguishing rules in the face of binding statutes. This understanding provides a precise definition of what it means to distinguish a case. It is to articulate a second rule—one that logically compels the opposite conclusion of the first rule—that incorporates an element that had not been included in the first rule.[196]

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[190] When inferior lawmakers develop distinguishing rules—as would occur if a lower court distinguishes a Supreme Court decision—the superior lawmaker retains the ability to correct distinguishing principles that are improper, since the higher court will be able to review that lower court decision on appeal. *See* Steinman, *supra* note 13, at 1773-74 ("If the higher court meant for its broad rule to apply without the distinguishing exception, it can reverse the lower court.").

[191] 401 U.S. 222 (1971).

[192] *See id.* at 226 (holding that defendant's statements, inadmissible under *Miranda* rule, were appropriately used for impeachment purposes).

[193] *See* Miranda v. Arizona, 384 U.S. 436, 478-79 (1966).

[194] *Harris*, 401 U.S. at 222-26. For a discussion of the relationship between *Miranda* and *Harris*, see Re, *supra* note 7, at 933-34.

[195] *See, e.g.*, Alan M. Dershowitz & John Hart Ely, Harris v. New York*: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1199 (1971) (arguing that *Harris* was wrongly decided).

[196] *See* Steinman, *supra* note 13, at 1773-74. For an additional illustration of how judicially declared rules might be distinguished in this way, see *id.* at 1804-06 (discussing relationship between *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)). Recent work by Professors Will Baude and Steve Sachs emphasizes the notion of "defeasible rules"—that is, "prima facie rules that are subject to defeat in particular cases—and often leaving unspecified exactly which cases those are." Baude & Sachs, *supra* note 40, at 1101, 1107 (citing, *e.g.*, Carlos Iván Chesñevar et al., *Logical Models of Argument*, 32 ACM COMPUTING SURVEYS 337, 338 (2000); Neil

This insight regarding distinguishing cases adds one more component to this Article's stare decisis framework. The binding content of case law can also include a court's determination that one rule takes priority over another rule when those rules would dictate conflicting outcomes. The process of distinguishing cases is one example. The court articulating the distinguishing rule is by necessity concluding that the new rule takes priority over the initial rule that is being distinguished (as in the *Miranda-Harris* example).[197] But priority rules might be called upon in other contexts as well.[198]

D. *The Required Nexus Between the "Case" and the "Law"*

Although there are benefits to allowing courts to declare generalizable rules that are binding on future courts via stare decisis, courts do not have freestanding legislative authority. It has long been recognized that for a court to make "case law," some connection must exist between the "case" being decided and the "law" being generated. This has often been cast in terms of whether a particular part of an opinion was "necessary" to the court's decision.[199] As explained earlier, however, that term is a problematic way of operationalizing this point.[200]

Under the approach outlined in this Article, the requisite nexus would be defined as a function of how the precedent-setting court employs the if-then decisional rule in deciding the precedent-setting case. This Section will also introduce the possibility that a court may not only make a binding declaration of "what the law *is*";[201] it may also make a binding declaration of what the law *is not*.

1. Declaring What the Law Is

One situation where the required nexus would exist is where the court uses an if-then rule as part of its syllogistic reasoning, as in the examples above. *Roper*, for example, used the rule forbidding the death penalty for crimes committed as a juvenile to vacate Christopher Simmons's sentence.[202] *Miranda* used the rule

MacCormick, *Defeasibility in Law and Logic*, *in* INFORMATICS AND THE FOUNDATIONS OF LEGAL REASONING 99, 103 (Zenon Bankowski et al. eds., 1995)). This Article's approach to distinguishing explicitly stated rules recognizes that rules stated by prior courts are indeed "defeasible," but the distinguishing court must state its own rule that specifies the category of cases (those where (*X*) is true), *see supra* notes 185, 188, 190, 194 and accompanying text, where that initial rule is "subject to defeat."

[197] *See supra* notes 191-94 and accompanying text.

[198] *See infra* Section V.A (discussing the possibility that a court would have to prioritize between two rules that were independently declared in prior cases and would dictate conflicting conclusions in the now pending case).

[199] *See supra* notes 89-91 and accompanying text.

[200] *See supra* notes 92-113 and accompanying text.

[201] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[202] *See supra* notes 131-33 and accompanying text.

regarding the warnings that must be given before a custodial interrogation to conclude that Ernesto Miranda's Fifth Amendment rights had been violated.[203] And *Iqbal* used the rule regarding conclusory allegations to decide that certain allegations could be disregarded in deciding whether Javaid Iqbal's complaint survived a motion to dismiss.[204]

Given the nature of appellate review, however, the court declaring an if-then rule may not always apply the rule. The Supreme Court, for example, might state a decisional principle (If *P*, then *Q*), but then remand to the lower courts to decide whether (*P*) is true—and hence whether the conclusion (*Q*) should follow. To use a simple example, consider the Supreme Court's decision in *Holland v. Florida*,[205] which addressed whether a habeas petitioner could invoke equitable tolling of the Antiterrorism and Effective Death Penalty Act's one-year limitations period.[206] The lower court had refused to allow equitable tolling, but the Supreme Court reversed and remanded.[207] In doing so, it 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.[208]

In this context, stare decisis should make binding any if-then decisional rule that is the basis for the appellate court's remedy. Where, as in a case like *Holland*, a court remands the case for lower courts to apply the if-then rule, that rule bears a sufficient nexus to the appellate court's decision to justify giving the rule stare decisis effect.[209]

Finally, as mentioned earlier, another component of binding case law can be a court's determination that one rule takes priority over another rule. This could occur, for example, when a court develops a distinguishing rule.[210] Here, too, the decision to prioritize one rule over another must have the requisite nexus to the case the court is deciding. That nexus should exist, and the prioritization decision should be binding, when the rules being prioritized would generate conflicting conclusions in the case before the court.[211]

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[203] *See supra* notes 134-36 and accompanying text.

[204] *See supra* notes 139-41 and accompanying text.

[205] 560 U.S. 631 (2010).

[206] *Id.* at 634-35.

[207] *Id.*

[208] *See id.* at 649, 653-54.

[209] *See* Steinman, *supra* note 13, at 1801 (observing that a court could affirmatively endorse an if-then principle, and then remand to the lower courts to apply that principle).

[210] *See supra* Section III.C.2.

[211] This Article's framework does not propose a solution to three other problems relating to the required nexus between a "case" and its "law": (1) biconditional statements, (2) decisions where the court addresses multiple issues, and (3) interpretive methodology. Those problems are described in more detail *infra* Section V.E.

2. Declaring What the Law Is Not

The clarifying benefits of stare decisis can also be served by allowing courts to reject a particular if-then decisional rule, and thereby to require future courts not to employ that rule to decide future cases. Such a rejection would have a sufficient nexus to the case before the court in a number of situations. A litigant might present a particular rule to support her litigation position. If a court decides against the litigant's position because that rule is not legally correct, then the court's rejection should have stare decisis effect. That is, future courts would violate binding law if they were to invoke that rule going forward. Similarly, a higher court might grant an appellate remedy on the basis that a rule the lower court used is not legally correct. If so, the rejection of the lower court's rule should have stare decisis effect.

For a more concrete example, consider the Supreme Court's decision in *United States v. Alvarez*,[212] in which the defendant had been convicted under the Stolen Valor Act for falsely claiming to have been awarded the Congressional Medal of Honor.[213] In seeking to uphold the conviction before the Supreme Court, the government argued for the following categorical rule: If a statute criminalizes false statements, then a conviction under the statute does not violate the First Amendment because false statements are beyond constitutional protection.[214] If accepted, that principle would have confirmed the government's litigation position (that the defendant's conviction was constitutional). But the Court rejected that principle and found that the defendant's conviction violated the First Amendment.[215] Under this framework, the rejection of that rule would be binding as a matter of stare decisis, meaning that it would be legally incorrect for future courts to use that rule as a basis for future decisions.

IV. POTENTIAL CRITICISMS OF RULE-CENTERED STARE DECISIS

This Part addresses several possible critiques of the approach to stare decisis described in Part III. Section A addresses criticisms that this Article's proposal would give decisions too much stare decisis effect by making explicitly stated generalizable rules binding on future courts. Section B addresses criticisms that this proposal gives decisions too little stare decisis effect, both by denying stare decisis effect to aspects of a judicial decision other than those explicitly declared rules and by allowing future courts too much leeway in distinguishing earlier case law.

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[212] 132 S. Ct. 2537 (2012).

[213] *Id.* at 2542.

[214] *See id.* at 2545.

[215] *See id.* ("The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.").

A. *Too Much Stare Decisis?*

To some, an approach that allows a judicial decision to declare binding, generalizable rules would define the scope of stare decisis too broadly.[216] This critique posits that when courts "write in quasistatutory language," they "are no longer behaving like courts"; they are "usurping the power of a majoritarian body."[217] One commentator observed: "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."[218] Rather, courts should "decide disputes, not issue edicts."[219]

These perspectives merit consideration. But to adopt an approach to stare decisis that denies courts the ability to declare prospectively binding rules would come at the expense of another goal of stare decisis: to provide greater clarity and predictability in future cases. Stare decisis's underlying premise that "it is important that the applicable rule of law be settled" is directly opposed to the view that courts may never declare what the "applicable rule of law" is in a binding way.[220]

On this point, the Supreme Court has repeatedly emphasized that its main purpose is not simply to decide disputes; rather, "certiorari jurisdiction exists to clarify the law."[221] As Justice Scalia put it, "we are not, and for well over a century have not been, a court of error correction."[222] Although the Court performs this law-clarification function in the context of particular cases presenting particular claims of error by the courts below, our system looks to the Court to "settle[]" the "applicable rule of law."[223] The stare decisis effect of a Supreme Court decision is what makes the rule "settled." Indeed, it is common to criticize judicial decisions when they fail to articulate more generalizable standards that will guide courts going forward.[224]

A related critique of allowing courts to declare binding generalizable rules is that judges may not be institutionally equipped to gather the information needed

[216] *See supra* notes 19-20 and accompanying text (discussing the "legislating from the bench" critique).

[217] Schauer, *supra* note 144, at 1457-58 (recognizing but not endorsing this critique).

[218] Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, *in* PRECEDENT IN LAW 183, 187 (Laurence Goldstein ed., 1987); *see also* Kozel, *supra* note 7, at 219 ("By speaking in terms of a 'judicial power' that extends to 'Cases' and 'Controversies,' Article III arguably suggests that deference should be withheld from judicial hypothesizing and perhaps even rulemaking." (footnotes omitted)).

[219] Moore, *supra* note 218, at 187.

[220] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

[221] City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1774 (2015).

[222] *Id.* at 1780 (Scalia, J., dissenting).

[223] *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting).

[224] *See supra* note 21 and accompanying text (citing sources that criticize judicial decisions that fail to articulate generalizable standards).

to make such rules.[225] Although this is a legitimate point, it is one that judges should take into account in deciding (1) whether to declare a generalizable rule in the course of resolving a particular case, and (2) if so, precisely what that rule should be. This was a key insight of Professor Sunstein's work on judicial minimalism—to identify the considerations that should inform whether and to what extent a more minimalist or more maximalist ruling is justified.[226]

Of course, we should be wary of how accurately a precedent-setting court will balance these considerations in deciding whether to declare a generalizable rule in any given case. That is why it is important to have a clear understanding of how future courts can distinguish prior case law. This Article's approach to distinguishing cases mitigates the valid institutional critiques that one might lodge against judicially declared rules. Rules that are overbroad, reaching situations that the precedent-setting court might not have contemplated, can be distinguished—even when the initial rule the precedent-setting court declared would, as a logical matter, compel a contrary result.[227] This framework gives courts the power to clarify open questions without denying future courts the flexibility to develop distinguishing principles to address unaccounted-for situations.

B. *Not Enough Stare Decisis?*

This Section responds to possible criticisms that this Article's proposal would give decisions too little stare decisis effect. It first considers the critique that this approach would give future courts too much freedom to distinguish earlier cases. It then considers the argument that stare decisis should extend beyond explicitly stated rules—to case-specific findings and conclusions and other non-syllogistic reasons.

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[225] *See, e.g.*, RAZ, *supra* note 137, at 188 (noting that judges "do not enjoy the research and drafting facilities generally available to legislators"); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 4 (2011) (noting that "appellate courts often look outside the record the parties develop before the trial court, turning instead to their own independent research and to amicus briefs, even though the resulting factual findings will not have been thoroughly tested by the adversarial process"); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1263 (2012) (criticizing "the prevalence of in-house fact gathering at the U.S. Supreme Court"); Moore, *supra* note 218, at 187 (arguing against certain approaches to stare decisis based on the "ideal . . . of institutional appropriateness" and the fact that "[c]ourts deciding individual cases do not have the information before them (nor the means to get it)" to generate prospectively binding obligations that would affect future courts in future cases); Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 143-44 (2008) (noting the challenge of developing "a clear and workable framework for regulating judicial research that both allows judges access to necessary information and comports with the fundamental requirements of due process").

[226] *See* Sunstein, *supra* note 18, at 16-19.

[227] *See supra* Section III.C.2.

1. Too Much Freedom to Distinguish

As explained in the preceding Section, the ability to distinguish precedential rules is an important safety valve given the legitimate concerns about what is, for all intents and purposes, legislating by the judiciary. Yet one might take the opposite position: to recognize the ability of future courts to craft distinguishing rules makes it too easy for them to undermine binding case law. This argument parallels critiques of judicially created exceptions to statutory rules, which, absent constitutional concerns, are ostensibly superior in the lawmaking hierarchy to judge-made law.[228]

Whether it is optimal to permit such distinguishing rules (in either context) ultimately depends on how much faith one has in the foresight and capacity of the "superior" lawmaker. Should we assume that the legislature or the precedent-setting court—in declaring the rule (If *P*, then *Q*)—adequately accounted for the full universe of situations where (*P*) is true, and thus meant the rule to apply without exceptions? Or should we treat such a rule as "defeasible,"[229] and thereby empower future courts—in cases litigated by future litigants—to consider whether particular circumstances might justify a distinguishing rule?

This Article's approach rejects the view that future courts must apply judicially declared rules without any mechanism for developing exceptions. Institutional concerns about the judiciary's lawmaking capacity undermine the view that rules stated in a judicial opinion should be categorically viewed as the final and complete word regarding every case where (*P*) is true. Yet this Article's approach would also clarify the precise means by which a judicially declared rule may be distinguished—only by explicitly declaring a distinguishing rule.[230] On balance, this is an improvement over the current system, which lacks a clear articulation of what it means to "distinguish" prior case law,[231] and which has at times recognized that courts have considerable leeway to distinguish binding precedents even on unprincipled grounds.[232] Of course, it would leave space for differing views on precisely when such distinguishing rules are appropriate—either in particular cases or as a more general matter. As with other issues, then, this Article's approach provides a framework for identifying the law-generating content of a given case and the permissible moves courts might make within that law, without prejudging ongoing debates over the "best" way to decide future cases in light of prior judicial decisions.[233]

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[228] *See supra* Section III.C.1.

[229] *See supra* note 196.

[230] *See supra* Section III.C.2.

[231] *See supra* Section II.B.

[232] *See supra* note 117 and accompanying text (discussing the view that courts may avoid an earlier decision by pointing to factual differences that are "accurate-in-fact" but "inconsequential-in-principle").

[233] *See supra* notes 26-28 and accompanying text.

2. Too Much Freedom to Ignore Facts, Outcomes, and Other Reasons

This Article's approach might also be criticized for allowing courts to disregard aspects of precedent-setting decisions other than explicitly declared rules. It could be argued that future courts should be required to reconcile their decisions with the facts-plus-outcome data point established in the precedent-setting decision. It could also be argued that future courts must decide cases consistently with reasons offered by the precedent-setting court even when those reasons do not take the form of explicitly stated, generalizable rules.

One rationale for expanding the elements of judicial decisions that create binding obligations is consistency—or phrased slightly differently, equality. The notion that "[l]ike cases should be treated alike"—which dates back at least as far as Aristotle[234]—is often invoked as a conceptual driver for stare decisis.[235] One could argue that requiring consistency not only with the precedent-setting court's explicitly stated, generalizable rules but also with its other findings, conclusions, or non-syllogistic reasons would maximize the extent to which "like cases" would be "treated alike."[236] To evaluate this argument, one must assess not only the value of equality and consistency in and of itself, but also the extent to which consistency for consistency's sake might undermine other values.

Scholars have recognized that an equality rationale alone may be insufficient to achieve truly just outcomes.[237] Rather, justice requires just principles that determine (1) who are "like" enough to be "treated alike," and (2) what that just treatment is.[238] When the precedent-setting court explicitly articulates these

[234] 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)).

[235] *See, e.g.*, GREENAWALT, *supra* note 38, at 184 (noting that one basis "for a doctrine of precedent . . . is that people should be treated equally and, thus, those in comparable positions should receive the same treatment, even if an initial decision about treatment was somewhat misguided"); Coons, *supra* note 234, at 98-99 ("When we treat like cases alike, we do so not because some arbitrary definition of a rule gives us no choice . . . but, quite independently, because we think it is the right thing to do.").

[236] *See* Coons, *supra* note 234, at 59.

[237] *See, e.g.*, 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."); Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2038 (1996) (arguing that "deontological theories of adjudicative consistency are wrong"); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547-48 (1982) (arguing that equality is "a simple tautology").

[238] *See* Westen, *supra* note 237, at 547 (arguing that equality is "entirely '[c]ircular'" because it ultimately means only that "people who by a rule should be treated alike should by the rule be treated alike" (alteration in original) (quoting Don Locke, *The Trivializability of Universalizability*, 77 PHIL. REV. 25, 25 (1968))); *id.* at 551 ("To say that a rule should be

principles, this Article's proposal would give those principles stare decisis effect. To extend stare decisis beyond those explicitly stated, generalizable rules, however, is to impose obligations with regard to matters for which the court was unable to articulate such a principle. And without such a principle, equality might simply mean that parties are equally subjected to *injustice*. As Professor Larry Alexander argued: "[I]f 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.'"[239]

Furthermore, there is a fundamental tension between, on the one hand, fostering equality and consistency between past and future litigants and, on the other hand, protecting the participatory interests of those future litigants.[240] In the context of preclusion law, the Supreme Court has expressed concern that too broad an approach to preclusion could mean that litigants will be bound by what happened in litigation to which they were not parties.[241] Although applying preclusion might serve the goals of treating past and future litigants consistently, "[t]he application of claim and issue preclusion to nonparties . . . runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'"[242]

Hierarchical stare decisis can create a similar problem insofar as it would mandate that future litigants are bound by an earlier decision in which they had no opportunity to participate.[243] Admittedly, this is also the case when stare

applied 'equally' or 'consistently' or 'uniformly' means simply that the rule should be applied to the cases to which it applies.").

[239] Alexander, *supra* note 7, at 10; *see also* Peters, *supra* note 237, at 2036 ("What good can come of a rule that prescribes consistency even at the expense of justice?").

[240] *See, e.g.*, 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, 312 (2013) (describing "the due process underpinnings of the day-in-court principle"); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 274-89 (2004) (describing the "value of participation" as "essential for the normative legitimacy of adjudication processes").

[241] *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 892 (2008) ("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."); *see also* Smith v. Bayer Corp., 564 U.S. 299, 313 (2011) ("We have repeatedly 'emphasize[d] the fundamental nature of the general rule' that only parties can be bound by prior judgments . . . ." (quoting *Taylor*, 553 U.S. at 898)).

[242] *Taylor*, 553 U.S. at 892-93 (quoting Richards v. Jefferson Cty., 517 U.S. 793, 798 (1996)). Accordingly, in situations where absent parties might face preclusive effects, the justice system insists on a host of specialized procedures to protect those interests. In any class action, for example, the court must make an explicit finding that the class representatives "will fairly and adequately protect the interests of the [absent class members]." FED. R. CIV. P. 23(a)(4).

[243] *See* Steinman, *supra* note 13, at 1789 (pointing out that modern litigant would be bound by decision in 1938 Supreme Court case).

decisis effect is given to an earlier decision's explicitly stated, generalizable rules. In that situation, however, the precedent-setting court has consciously determined that "the applicable rule of law" should be "settled" in a generalizable way.[244] And even then, future litigants may invoke the authority of lower courts to distinguish such rules—as discussed above[245]—when their situation is one that the precedent-setting court might not have anticipated in formulating the initial rule.

Even if one accepts the view that goals of consistency and equal treatment should take precedence over other considerations, practical concerns would remain. As described earlier, the seemingly modest notion of a "facts-plus-outcomes" obligation can be quite problematic in practice.[246] How, for example, do future courts identify the full universe of facts that comprise the earlier case? Further, should it be permissible to avoid the facts-plus-outcome obligation by pointing to factual differences that are—in Justice Scalia's words—"accurate-in-fact" but "inconsequential-in-principle"?[247]

Efforts to infer obligations from aspects of judicial decisions other than explicitly stated rules are sometimes framed in terms of what the judges in the precedent-setting case "meant" or "intended,"[248] or as a prediction of how those same judges (should they sit on a superior court) will act in the future.[249] This endeavor, however, carries with it significant risks of error or misattribution. A facts-plus-outcome obligation, for example, assumes that the precedent-setting court meant to impose the rule that "if these facts are present, then the court must reach this outcome"—even when the court has not stated that rule explicitly. If that is indeed the rule that the precedent-setting court believes is justified and desirable, this Article's framework gives it the ability to declare it. A facts-plus-outcome obligation, however, effectively overrides the court's decision not to articulate such a rule.[250] It is one thing for a court to recognize that a prior case fails to resolve a particular question and to deploy whatever tools and

[244] *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

[245] *See supra* Section III.C.2.

[246] *See supra* notes 116-19 and accompanying text.

[247] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2696 (2015) (Scalia, J., dissenting).

[248] *See, e.g.*, United States v. Olivares-Rangel, 458 F.3d 1104, 1111 (10th Cir. 2006) ("We do not believe the Supreme Court intended *Lopez-Mendoza* to be given such a reading."); Campbell v. Clinton, 203 F.3d 19, 22 (D.C. Cir. 2000) (noting that court heard "extensive argument . . . as to exactly what the Supreme Court meant by a claim that a legislator's vote was completely 'nullified'" and that it was "not readily apparent what the Supreme Court meant by that word").

[249] *See, e.g.*, Dorf, *supra* note 26, at 654-55 (describing "a prediction-based model of law" but arguing that "the prediction approach undermines the rule of law").

[250] *See supra* notes 180-81 and accompanying text (observing that the decision to declare a rule should be informed by potential decision costs and error costs).

philosophies are available to best answer it. It is quite another to mistakenly read a prior case as having answered a question in a particular way when the prior case did not actually do so.

This is of more than merely academic concern. Some of the problematic consequences of the Supreme Court's recent decisions on civil procedure may be traced to misperceptions of what obligations those decisions actually impose on courts going forward. In the *Iqbal* decision, the generalizable rules the Court stated were not inherently controversial.[251] What proved to be so destabilizing was the Court's ultimate conclusion that the key allegations in Iqbal's complaint did not need to be accepted on their face at the pleading phase.[252] That conclusion was very difficult to square with well-established aspects of the federal pleading standard, even though the Court provided no explanation for why Iqbal's allegations were so "conclusory" that they could be disregarded.[253]

The same might be said for the non-syllogistic elements of a court's decision. As explained earlier, these are the reasons a court provides for adopting a particular if-then principle to decide the case before it, or for making a particular finding (the (*P*) that combines with the if-then rule to generate the conclusion (*Q*)).[254] By assumption, however, the court has not declared any generalizable rule that makes those reasons part of a generalizable test that drives a particular

[251] *See* Steinman, *supra* note 13, at 1756-58 (observing that "the notion that conclusory allegations can be disregarded when determining the sufficiency of a complaint . . . is not an inherently radical idea" and that "the explicit rules that *Iqbal* endorsed are not inherently problematic or destabilizing of the Court's long-standing approach to pleading"); *id.* at 1760 ("[T]he 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."); Steinman, *supra* note 109, at 354-55 (arguing that *Iqbal*'s "plausibility" inquiry might be interpreted to "perform a number of functions that do not invite the troubling consequences that would flow from a more restrictive reading").

[252] *See* Steinman, *supra* note 13, at 1758 ("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.").

[253] *Id.* at 1759 ("*Iqbal*'s rejection of the allegations . . . is difficult to square with the legal framework that remains in place, including prior Supreme Court decisions that remain good law . . . . 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."). Another example of this dynamic is *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011), which addressed Rule 23(a)(2)'s requirement that a class action may only be certified if "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). What was so puzzling and destabilizing about the majority's reasoning in that case was not the Court's articulation of the general principles governing Rule 23(a)(2)'s common-question requirement, but rather the Court's ultimate conclusion that the class action in that case did not present "any common question." *Wal-Mart*, 564 U.S. at 359; *see also* Steinman, *supra* note 13, at 1751-53, 1760-66.

[254] *See supra* Section III.A.2 (discussing non-syllogistic elements of judicial opinions).

outcome. If such a generalizable rule were justified and desirable, then the court could state such a rule explicitly and that rule would have stare decisis effect.

In the *Iqbal* decision, for example, the Court justified its decision in part by emphasizing the burdens of pretrial discovery on defendants in civil cases and questioning the ability of judges to mitigate those burdens after the pleadings phase by managing the discovery process.[255] *Iqbal* did not articulate, however, any if-then principle that either makes discovery costs a factor in the pleading analysis or requires courts to give special consideration to discovery burdens going forward. In *Roper*, the Court cited several international agreements prohibiting capital punishment for juvenile offenders.[256] Yet the Court did not impose a generalizable rule that the content of such treaties dictated a particular conclusion regarding the constitutional claims in that case. The fact that the discovery process can impose costs on litigants does not mean that all procedural decisions should be driven exclusively by the need to reduce those costs. The fact that international treaties would forbid a particular government action does not mean that all constitutional decisions must mirror the content of such treaties.

This is the core shortcoming with any attempt to give binding effect to aspects of a decision other than explicitly declared rules: future courts, by necessity, will be guessing about how those components are binding as a matter of stare decisis. A treatise on judicial precedent written by federal judges instructs that "if you're not quite sure about what the opinion really means, you may want to question just how binding this precedent should be."[257] Perhaps, however, we need to rethink which parts of a judicial opinion should be binding in the first place. One way to avoid uncertainty about what an opinion "really means" is to reject the notion that future courts must infer concrete obligations from aspects of an opinion that are not explicitly stated, generalizable decisional rules.[258] Indeed, this approach is arguably more faithful to the precedent-setting court itself. It takes seriously the idea that courts make conscious decisions about what prospective obligations are justified and desirable, and it refuses to impose stare decisis obligations beyond those that the precedent-setting court explicitly articulated.

Speaking more generally, to extract binding obligations from aspects of decisions other than explicitly stated rules risks both *unintended* stare decisis and *unearned* stare decisis. With respect to pleading standards, for example, the *Iqbal* decision has had a significant empirical effect on courts and litigants.[259] Yet the decision itself may have been motivated simply by a result-driven desire

[255] *See supra* notes 160-62 and accompanying text.

[256] *See supra* note 153 and accompanying text.

[257] GARNER ET AL., *supra* note 8, at 156.

[258] *See* Steinman, *supra* note 13, at 1784 (criticizing "the idea that future courts are obligated to infer additional unarticulated constraints from the result of the precedent-setting decision in and of itself" (emphasis omitted)).

[259] *See* Steinman, *supra* note 109, at 349-50.

to end a particular lawsuit that sought monetary damages from the two highest-ranking federal law enforcement officials based on their response to "a national and international security emergency unprecedented in the history of the American Republic."[260]

Ideally, the Justices in the *Iqbal* majority, recognizing the future stare decisis effect of their decision, would have applied the federal pleading standard more evenhandedly; they would have known that their treatment of the *Iqbal* complaint would be applied prospectively to plaintiffs with less controversial claims.[261] Yet, that did not happen. The Court dismissed Iqbal's complaint, and many lower courts inferred that *Iqbal* compelled a newly restrictive pleading standard[262]—even though the general rules the Court articulated could have fit into a more lenient, notice-pleading approach.[263] This is unintended stare decisis in a nutshell; it is bad enough that Iqbal himself suffered from a problematic application of pleading standards, but to compound the prospective effects of that decision via stare decisis only makes things worse.[264] Indeed, imposing a stricter pleading standard across the board does not appear to have been what the Justices in the *Iqbal* majority were seeking to accomplish (or at least not all of them).[265]

The problem of unearned stare decisis flows from the fact that many contentious issues have a strong ideological valence. Continuing with the example of pleading standards, judges may have preferences regarding how easy it should be for private parties to access judicial remedies for violations of substantive law.[266] Painting with an admittedly broad brush, the conventional

[260] Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) (quoting Iqbal v. Hasty, 490 F.3d 143, 147-48 (2d Cir. 2007)); *see also* Steinman, *supra* note 140, at 1299 (calling *Iqbal* a "result-oriented decision[] designed to terminate at the earliest possible stage" a lawsuit that the majority found "undesirable").

[261] *See* Steinman, *supra* note 13, at 1786.

[262] *See* Steinman, *supra* note 109, at 349-50.

[263] *See id.* at 351-55 (reconciling *Iqbal* with notice pleading).

[264] This concern mirrors those described in the earlier discussion of stare decisis and the values of equality and consistency. *See supra* notes 237-39 and accompanying text.

[265] More recent Supreme Court decisions on pleading—which were joined by at least some of the Justices in the *Iqbal* majority—reflect an approach that is consistent with a more lenient, notice-pleading paradigm. *See* Steinman, *supra* note 109, at 367-80 (citing, *e.g.*, Johnson v. City of Shelby, 135 S. Ct. 346 (2014)).

[266] *See* STEPHEN BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 135-38 (2017) (describing importance of pleading standards to private enforcement of substantive law); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1604 (2014) (same); *id.* at 1606-12 (describing different Justices' voting records on issues relating to private enforcement).

wisdom is that conservative judges prefer less access to courts and progressive judges prefer more access.[267]

On this account, a hypothetical conservative judge in a precedent-setting case on pleading standards may be inclined to rule in favor of the defendant, regardless of whether that judge has a generalizable principle that justifies why that complaint in that particular case should be dismissed. Perversely, extending stare decisis beyond explicitly stated rules can give such an unprincipled decision even more sweeping precedential effect. Future courts will be obligated to decide future cases consistent with that facts-plus-outcome data point, or with other reasons that the court was unable to distill into an acceptable generalizable principle—even if the true driver for the decision was little more than a general preference that access to courts should be more difficult.[268]

For these reasons, there are significant downsides to an approach to stare decisis that imposes obligations on future courts with respect to the "facts-plus-outcome" data points of earlier decisions, or to the various reasons a court provides in the course of its opinion that are not stated explicitly as generalizable rules. But this is not to say that these other aspects of precedent-setting decisions are completely worthless. Lawyers, judges, and scholars would surely continue to invoke them for their persuasive value. It can strengthen one's case to say: "I am arguing for position *X*, and here is how the result reached in an earlier case is consistent with that position." Or: "You are arguing for position *Y*, and here is how that position conflicts with the reasons invoked by the court in an earlier case." These aspects of judicial decisions might be precedential in a looser, nonbinding sense—giving comfort to decision makers that a particular decision is consistent with prior cases.[269] Recognizing the force of such arguments, however, is different than insisting that those aspects of prior decisions generate binding case law.

Moreover, it is possible that other aspects of precedent-setting decisions might, in the common law tradition,[270] be instructive evidence of what the law is or ought to be. They might also be significant under certain philosophies

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[267] *See* Burbank & Farhang, *supra* note 266, at 1607-08 ("Dividing the Justices into conservatives and liberals . . . demonstrates that it again effectively predicts whether a Justice is above or below the median ratio of pro-private enforcement votes in Federal Rules cases."). *But cf.* Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1433 (2013) (distinguishing between "social conservatives" and libertarians, who are "conservative in business").

[268] With respect to multi-member courts (like the Supreme Court), the lack of an explicitly articulated rule may reflect the fact that the proponent of a particular rule could not garner a majority to support it.

[269] *See, e.g.*, Steinman, *supra* note 13, at 1772 (noting that "[j]udges 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 nonbinding aspects of prior decisions").

[270] *See supra* Section I.A (distinguishing "common law" variant of case law from hierarchical stare decisis).

regarding the best way to decide cases.[271] But they might not. In denying stare decisis effect to everything that is not an explicitly stated, generalizable rule, this Article's approach would simply leave the slate clean for future litigants and future courts.

3. Some Thoughts on Qualified Immunity and Habeas Corpus

In most instances, reducing the extent to which prior decisions are binding in future cases is more empowering to the litigants and judges in those future cases. To say that there is no binding obligation to follow certain kinds of reasons expressed in prior decisions, or to reconcile decisions with the facts-plus-outcome data points of prior decisions, does not prevent future courts from acting consistently with those prior decisions. Yet it gives future courts the freedom to decide cases independently of those aspects of prior decisions, and it gives future litigants the freedom to argue that those aspects of prior decisions are incorrect.

Thus, an approach to stare decisis that clearly places certain aspects of prior decisions in the nonbinding category can only increase the universe of permissible approaches in a given future case.[272] Normatively, greater leeway is arguably a good thing:

> 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.[273]

There are some situations, however, where it might matter whether a particular rule or result in a given case is compelled by earlier precedent, as opposed to being simply the correct rule or result based on the court's independent assessment. Two crucial examples of this 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 the federal claim "was contrary to, or involved an unreasonable application of, clearly established

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[271] *See supra* notes 26-28 and accompanying text.

[272] As I have written elsewhere:

> 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.

Steinman, *supra* note 13, at 1807.

[273] *Id.*

Federal law, as determined by the Supreme Court of the United States."[274] Qualified immunity shields government officials from liability for damages unless the official violated a right that was "clearly established at the time of the challenged conduct."[275] In both situations, it is not enough that the current court would find that the state court's or the government official's conduct violated 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. On this view, reducing the extent to which earlier decisions "clearly establish" the content of federal law could make it very difficult for a habeas petitioner or civil rights plaintiff to overcome deferential habeas review or qualified immunity.

This concern, however, 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*."[276] And qualified immunity can be overcome only if a "*reasonable* official would understand that what he is doing violates [the clearly established] right."[277] In a world where hierarchical stare decisis followed the approach developed in this Article, the reasonableness inquiry required by qualified immunity and the habeas statute would play a more important role. Although this Article's proposal could make it harder in some instances to show that conduct by a state court or government official violated "clearly established" law, there would still be room to argue that the state court's decision was an "unreasonable" application of that law, or that no "reasonable" official could conclude that his conduct violated the clearly established right.[278]

V. ADDITIONAL BENEFITS OF AN EXPLICIT-RULES APPROACH TO STARE DECISIS

This Part explains how this Article's approach to stare decisis would help to resolve several long-standing puzzles relating to judicial decision-making. Section A addresses the problem of tensions within case law, including questions regarding the process of overruling, distinguishing, and narrowing earlier

[274] 28 U.S.C. § 2254(d)(1) (2012).

[275] *E.g.*, Reichle v. Howards, 566 U.S. 658, 664 (2012) (citing Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011)).

[276] 28 U.S.C. § 2254(d)(1) (emphasis added).

[277] Anderson v. Creighton, 483 U.S. 635, 640 (1987) (emphasis added).

[278] "While reasonableness review entails some deference to the earlier decision maker, it is not a blank check." Steinman, *supra* note 13, at 1808. In many areas of law, judicial inquiries into "reasonableness" give courts considerable authority to second-guess decisions that are supposedly being reviewed only for whether they are reasonable. *See id.* at 1808-09 (describing judicial consideration—in the context of motions for summary judgment and motions for judgment as a matter of law—of whether a particular jury verdict was, or would be, "reasonable" on a given evidentiary record (citing FED. R. CIV. P. 50(a)(1), 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986))).

decisions. Section B explains how this Article's framework would clarify persistent uncertainty regarding the stare decisis effect of non-majority opinions—including the so-called *Marks* rule.[279] Section C discusses questions scholars have raised about the stare decisis effect of what are known as "legislative facts." Section D considers the controversy surrounding unpublished appellate court opinions, and describes how this Article's approach would make it unnecessary for courts to declare certain opinions to be non-precedential. And Section E identifies some additional open questions about stare decisis regarding biconditionals, decisions that address multiple issues, and interpretive methodology. Although this Article does not propose a definitive answer to these questions, this Article's framework would provide a foundation for addressing them going forward.

A. *Tensions Within Case Law*

How to conceptualize tensions between judicial decisions is a difficult question, which has different implications depending on whether it arises in the context of vertical stare decisis (a lower court creating tension with a higher court decision) or horizontal stare decisis (a court creating tension with its own decision). At least in the horizontal context, courts have some ability to overrule earlier decisions.[280] It might not always be clear, however, when a particular decision in Case Two would require overruling Case One.[281]

Under the framework developed here, a court would need to overrule an earlier decision only in the following situations:

- Case One established the rule (If *P*, then *Q*). Case Two wishes to establish that (If *P*, then *Q*) is legally incorrect.[282] Case Two would have to explicitly overrule Case One.
- Case One established that the rule (If *P*, then *Q*) is legally incorrect. Case Two wishes to establish (If *P*, then *Q*) as a correct rule. Case Two would have to explicitly overrule Case One.
- Case One established that, in the event of a conflict, the rule (If *X*, then Not-*Q*) takes priority over the rule (If *P*, then *Q*). Case Two wishes to establish that (If *P*, then *Q*) takes priority over (If *X*, then Not-*Q*). Case Two would have to explicitly overrule Case One.

Because these situations would require an explicit overrule, these moves would only be available with respect to horizontal stare decisis. A lower court

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[279] *See* Marks v. United States, 430 U.S. 188, 193 (1977) (discussed *infra* notes 305-06 and accompanying text).

[280] *See supra* note 81 and accompanying text (discussing ability of courts to overturn their own decisions).

[281] *See* Steinman, *supra* note 13, at 1755 (noting that whether overruling is necessary "depends on what law the earlier decision has made").

[282] As discussed *supra* Section III.D.2, stare decisis should allow a court to declare that a particular if-then rule is not the law—in other words, that future courts must not employ that rule to decide future cases.

could not make any of the three moves described above vis-à-vis the decision of a higher court. Even in the horizontal context, of course, there may be significant disagreement about whether sufficient grounds exist to overrule an earlier decision. The Supreme Court has identified various "prudential and pragmatic considerations" that should inform whether case law ought to be overruled.[283] Put simply, "reexamining the prior law" requires a justification stronger than "a present doctrinal disposition to come out differently."[284] As a threshold matter, however, it is helpful to have a clear understanding of when such overruling is even necessary. This Article's framework would provide that understanding.

What about implicit overrules? Briefly stated, an implicit overrule occurs when two cases are in such tension that a court should conclude that the latter case implicitly overruled the earlier one.[285] More precisely, the implicit-overrule scenario necessarily involves three cases: Case Three must decide whether it is no longer bound by Case One because Case Two implicitly overruled Case One. Whether the court in Case Three *should* have the power to declare such an implicit overrule is controversial.[286] Indeed, the Supreme Court has instructed lower courts that they should never conclude for themselves that the Court has implicitly overruled one of its earlier decisions.[287]

This Article's approach would eliminate the need to inquire whether an implicit overrule has occurred. Suppose Case One established Rule One and Case Two established Rule Two. The court in Case Three would not need to decide whether Case Two implicitly overruled Case One. It would only need to address an open question regarding which rule takes priority when Rule One and Rule Two dictate opposing conclusions in a particular case. Even a lower court might be required to make that priority determination, although appellate review would allow the precedent-setting higher court to decide whether the lower court ranked the rules properly.

In the context of horizontal stare decisis (say, Case One and Case Two are Supreme Court cases, and the Supreme Court is now deciding Case Three), additional options may be available. The Supreme Court might decide that

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[283] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

[284] *Id.* at 864 (declining to overrule prior holding "[b]ecause neither the factual underpinnings of [the prior case]'s central holding nor [the Court's] understanding of it has changed").

[285] *See, e.g.*, Steinman, *supra* note 109, at 359-63 (describing courts that have examined whether *Iqbal* implicitly overruled *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), with respect to federal pleading standards).

[286] *See, e.g.*, Dunn, *supra* note 34, at 520-25 ("This act of implicit overruling relieves the Court of responsibility at every point in the process."); Christopher J. Peters, *Under-the-Table Overruling*, 54 WAYNE L. REV. 1067, 1072 (2008) ("What makes these decisions troubling, however, is not that [the Supreme Court] changed doctrine, but that they did so without admitting it.").

[287] *See* Agostini v. Felton, 521 U.S. 203, 237 (1997) (rejecting the view that "other courts should conclude our more recent cases have, by implication, overruled an earlier precedent").

having Rule One and Rule Two coexist is not justified or desirable. Indeed, the tension between Rule One and Rule Two may strengthen the argument that Case One (and Rule One) should be overruled.[288] At this point, however, the Supreme Court can do so explicitly—it can decide in Case Three to overrule Case One, by declaring (as discussed above) that Rule One is not the law. Because the Court in Case Three can overrule Case One explicitly, there is no need to declare that Case Two had overruled Case One implicitly.

Many of the instances where courts discuss implicit overrules do not involve tensions between explicitly stated rules. Rather, we ask whether Case Two has implicitly overruled Case One because we cannot reconcile those decisions on facts-plus-outcomes grounds; that is, we cannot understand how Case One found P_1 and Case Two found Not-P_2.[289] Or we see tensions in the non-syllogistic reasons provided in Case One and Case Two.[290] Because those aspects of judicial decisions would not have binding stare decisis effect under this Article's framework, there would be no need to address whether an implicit overrule has occurred. The law is left open for future courts to decide future cases with the full participation of future litigants and to consider whether to declare (or to reject) any generalizable rules.

This Article's approach to stare decisis would also resolve a concern that has arisen in scholarly attempts to conceptualize the process of distinguishing cases. It is often said that when a court distinguishes an earlier case, it is amending or modifying the rule stated in the earlier case. Considering the relationship between *Miranda* and *Harris*,[291] Professor Richard Re wrote that *Harris* "interpreted *Miranda* so that it prohibited only the use of certain statements in the prosecution's affirmative case," and therefore "narrowed *Miranda*'s broad statement."[292] A treatise on judicial precedent describes the process of distinguishing cases more formulaically: "[I]f the reasoning in a former case

[288] *See, e.g.*, *id.* at 236 ("[*S*]*tare decisis* may yield where a prior decision's 'underpinnings [have been] eroded, by subsequent decisions of this Court.'" (alteration in original) (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995))).

[289] *See supra* note 128 (explaining the nomenclature that the case-specific finding that *P* is true in that case is P_a).

[290] *See* Steinman, *supra* note 13, at 1791 n.314 (describing how apparent inconsistencies between Supreme Court cases on class certification and pleading might give rise to arguments that later cases have implicitly overruled earlier ones).

[291] *See supra* notes 191-94 and accompanying text.

[292] Re, *supra* note 7, at 933-34. Re's recent work draws a distinction between distinguishing and narrowing precedent. *See id.* at 928-29. On Re's account, Court Two distinguishes Case One when Court Two's decision contrary to the result in Case One is the "best" reading of Case One. *See id.* Court Two narrows Case One when Court Two's decision contrary to the result in Case One is consistent with a "reasonable" (but not the "best") reading of Case One. *Id.* at 927-28.

might once have appeared to be 'if A, B, C, then X,' a later court may provide that the rule should now be 'if A, B, C, *and* D, then X.'"[293]

One problem with this conventional understanding is that it risks conflating distinguishing cases and overruling cases. Even an inferior court may distinguish a higher court precedent. Yet if distinguishing involves a lower court reaching up the judicial hierarchy to change the higher court's rule, it makes the process of distinguishing look a lot like an overrule (albeit a partial one) by the lower court. The conventional wisdom may evade this charge by saying that the rule of the original case was dicta—it was not "necessary" in that it was stated more broadly than was needed to decide the precedent-setting case.[294] This line of argument proves too much, however—as discussed above, it undermines the notion that *any* judicially declared rule can be binding as a matter of stare decisis.[295]

This Article's approach offers a way out of this thicket. As developed earlier, courts may distinguish the rule declared by an earlier precedent (If *P*, then *Q*) by declaring a distinguishing rule (If *X*, then Not-*Q*).[296] This does not purport to change the initial rule. It simply provides a new rule to deal with the specific situation (*X*).[297] While the logical consequence is ultimately the same for the case where the distinction is made, this approach conceptualizes the process more cleanly. We need not label *Miranda*'s stated rule as "dicta"[298] (or as not "necessary" to the Court's decision).[299] We need not conclude that *Harris* "overruled" *Miranda*—either implicitly or explicitly.[300] Nor do we need to declare that *Harris* revised the "rule" of *Miranda*. *Miranda*'s rule is still *Miranda*'s rule; *Harris*'s rule is *Harris*'s rule. *Harris* simply establishes that in cases where the two rules generate conflicting conclusions, the *Harris* rule takes priority.

Accordingly, this Article's framework simplifies how we think about resolving potential tensions between cases. In the context of horizontal stare decisis, a court may explicitly overrule an earlier decision—either by declaring Case One's rule to be incorrect, by adopting a rule that Case One had declared

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[293] GARNER ET AL., *supra* note 8, at 97; *see also* RAZ, *supra* note 137, at 185 (describing the "power to distinguish" as the power to "change the rule" from "when *A*, *B*, *C*, then *X* . . . into *A*, *B*, *C*, *E*, then *X*"); Alexander, *supra* note 7, at 24 ("If the precedent court declares that in all cases with facts A, B, and C the decision shall be X, then narrowing the rule takes the form of amending it to hold that, for example, in all cases of A, B, C, and not D the decision shall be X.").

[294] *See supra* notes 89-92 and accompanying text.

[295] *See supra* notes 93-97 and accompanying text.

[296] *See supra* Section III.C.2.

[297] Put another way, this approach recognizes that the initial rule is defeasible. *See supra* note 196.

[298] *See supra* notes 100-06 and accompanying text (discussing holding-dicta distinction).

[299] *See supra* notes 89-92 and accompanying text.

[300] *See supra* notes 286-88 and accompanying text.

to be incorrect, or by reversing Case One's earlier finding about the priority between rules. In the context of either horizontal or vertical stare decisis, the court may distinguish cases by declaring distinguishing rules.

B. *Non-Majority Opinions*

Another long-standing puzzle is how to determine the stare decisis effect of decisions that lack a majority opinion. This is a challenge that dates back to the centuries-old tradition of issuing seriatim opinions, where each judge on a multi-member panel wrote a separate opinion in the case.[301] In modern practice, judges strive to generate an "Opinion of the Court" that garners a majority. On the Supreme Court, that means five Justices.[302]

That aspiration is not always achievable, of course. Sometimes decisions fail to generate a majority opinion.[303] For decades, the precedential effect of such decisions has been governed by a rule attributed to *Marks v. United States*:[304] "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* . . . .'"[305] In practice, however, courts applying the *Marks* rule have often found themselves "baffled and divided."[306]

One problem with the *Marks* rule is this: how exactly do we measure which position is the "narrowest"?[307] This Article's approach to stare decisis provides a straightforward way to think about this question. Consider the Supreme

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[301] *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 14 (1985) (discussing how "each Justice delivered his own" opinion in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

[302] *See, e.g.*, Abner Mikva, *The Scope of Equal Protection*, 2002 U. CHI. LEGAL F. 1, 8 ("[A]s the late Justice Brennan used to say, the first rule of the Supreme Court is that you have to be able to count to five."). In cases where the Court does not have its full complement of nine Justices, it is possible for less than five Justices to constitute a majority. *Compare* Mitchell v. Tennessee, 351 F. Supp. 846, 847 (W.D. Tenn. 1972) (criticizing but noting that it was "bound to follow" the "four judges who comprised the Supreme Court majority in the *Fuentes* case" (citing Fuentes v. Shevin, 407 U.S. 67 (1972))), *with* Roofing Wholesale Co. v. Palmer, 502 P.2d 1327, 1330 (Ariz. 1972) (refusing to follow *Fuentes* because it was decided by "less than a clear majority").

[303] *See generally* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011) (three opinions, no majority opinion); Montana v. Englehoff, 518 U.S. 37 (1996) (five opinions, no majority opinion); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (six opinions, no majority opinion).

[304] 430 U.S. 188 (1977).

[305] *Id.* at 193 (emphasis added) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

[306] Nichols v. United States, 511 U.S. 738, 746 (1994); *accord* Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

[307] *See, e.g.*, Williams, *supra* note 7, at 806-07 (describing disagreements over applying *Marks* rule).

Court's decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*[308] One of the key issues in *Shady Grove* was whether it would violate the Rules Enabling Act ("REA") to allow Rule 23 of the Federal Rules of Civil Procedure to permit a class action, despite a provision of New York law that would forbid such a class action had the case been brought in a New York court.[309]

The REA provides that a Federal Rule of Civil Procedure "shall not abridge, enlarge or modify any substantive right."[310] The Court split 5-4, with the majority concluding that applying Rule 23 would not violate the REA.[311] Within that majority, however, Justice Scalia spoke for four Justices regarding the REA's substantive-rights provision and Justice Stevens authored a lone concurring opinion on that issue.[312]

Justice Scalia's plurality opinion used the following rule: If a Federal Rule of Civil Procedure really regulates procedure (*A*), then it is valid under the REA (*X*) (If *A*, then *X*).[313]

Justice Stevens's concurring opinion used the following rule: If a Federal Rule of Civil Procedure both really regulates procedure (*A*) and does not displace a state law that is so intertwined with a state right or remedy that defines the scope of the state-created right (*B*), then it is valid under the REA (*X*) (If both *A* and *B*, then *X*).[314]

All five of the Justices in the majority found that the antecedent conditions of their rules were satisfied, which is why they all agreed that applying Rule 23 was valid (*X*). As for the rules themselves, Justice Stevens's rule is narrower because the universe of cases that would satisfy Justice Stevens's antecedent condition (Both *A* and *B*) is smaller than the universe of cases that would satisfy Justice Scalia's antecedent condition (*A*). That is, cases where both (*A*) and (*B*) are true comprise a subset of all of the cases where (*A*) is true. Thus, Justice

[308] 559 U.S. 393 (2010).

[309] *Id.* at 396; *see also* Adam N. Steinman, *Our Class Action Federalism:* Erie *and the Rules Enabling Act After* Shady Grove, 86 NOTRE DAME L. REV. 1131, 1137-43 (2011).

[310] 28 U.S.C. § 2072(b) (2012).

[311] *See Shady Grove*, 559 U.S. at 399.

[312] *See id.* at 416 (Stevens, J., concurring).

[313] *See id.* at 407 (plurality opinion) (citing Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)) (holding that Federal Rule of Civil Procedure "must 'really regulat[e] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them'" (alteration in original)).

[314] *See id.* at 423 (Stevens, J., concurring) ("A federal rule, therefore, cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.").

Stevens's rule (If both *A* and *B*, then *X*) would be the narrowest ground under *Marks*, and that rule would be established as a matter of stare decisis.[315]

Note, however, that adopting Justice Stevens's narrower rule would not necessarily entail rejecting Justice Scalia's broader rule. As explained above, this Article's approach to stare decisis treats adopting rules and rejecting rules as separate lawmaking events.[316] Thus, *Shady Grove* would not establish that Justice Scalia's rule is legally incorrect. In some hypothetical future case where a Federal Rule really regulates procedure but is so intertwined with a state right or remedy that defines the scope of the state-created right (that is, a case where *A* is satisfied but *B* is not), future courts could address on a clean slate whether Justice Scalia's rule is correct.

A similar line of argument could identify the stare decisis effect of decisions where no faction within the majority articulates a rule that is identifiably the "narrowest." Imagine that three of the concurring Justices use the rule (If *A*, then *X*), and two of the Justices use the rule (If *B*, then *X*). Neither of these rules is necessarily narrower than the other, which makes the *Marks* approach unworkable. Both rules, however, logically encompass the rule (If both *A* and *B*, then *X*). And both factions would endorse the legal correctness of that rule—the first would do so because (*A*) would be satisfied, and the second would do so because (*B*) would be satisfied.[317]

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[315] *See, e.g.*, United States v. Robison, 521 F.3d 1319, 1323 (11th Cir. 2008) (recognizing that *Marks* would apply "only in circumstances in which one Supreme Court opinion truly is 'narrower' than another—that is, where it is clear that one opinion would apply in a subset of cases encompassed by a broader opinion"); King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) ("*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions."). To be clear, saying that Justice Stevens's if-then rule is binding law is not to say that the *inverse* of Justice Stevens's rule is binding law. *See* Abramowicz & Stearns, *supra* note 7, at 984 (defining the relationship between a proposition and its inverse). Justice Stevens believed that in a case where (*B*) was not satisfied—because the Federal Rule would displace a state law that is so intertwined with a state right or remedy that it defines the scope of the state-created right—the Federal Rule could *not* be validly applied. More formulaically, Justice Stevens's preferred rule was not only (If both *A* and *B*, then *X*), but also (If either Not-*A* or Not-*B*, then Not-*X*). *See infra* notes 336-37 and accompanying text (discussing "biconditional" rules that include both an if-then proposition and its inverse). Under the framework proposed in this Article, the first of these rules would be established in a case like *Shady Grove*, but the second of these is neither established nor rejected. In the parlance of *Marks*, it is only the first of Justice Stevens's rules (If both *A* and *B*, then *X*) that is "narrowest" as compared to Justice Scalia's rule.

[316] *See supra* Section III.D.

[317] This approach would operate much like the "shared agreement" approach recently proposed by Professor Ryan Williams. *See* Williams, *supra* note 7, at 836-37 (arguing for approach to non-majority opinions that would "look[] to the convergent reasoning of the opinions that were collectively necessary to the precedent case judgment").

As with the *Shady Grove* example, accepting that rule (If both *A* and *B*, then *X*) would not constitute a rejection of any potentially broader rule—including either (If *A*, then *X*) or (If *B*, then *X*).[318] Thus, no binding law would be made with respect to the areas of potential disagreement between the two factions (the cases where (*A*) is true but (*B*) is not, and those where (*B*) is true but (*A*) is not). Future courts, either lower or equal in the judicial hierarchy, would be free to consider whether to accept or reject such alternative rules in future cases.

C. *Legislative Facts*

One aspect of judicial decision-making that has garnered considerable scholarly attention is the proper handling of "legislative facts."[319] These are facts that "do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of law and policy and discretion."[320] Professor Allison Orr Larsen's recent work observes that "[j]udicial opinions are full of these types of generalized facts such as: partial birth abortions are never medically necessary, fleeing from the police in a car leads to fatalities, and violent video games affect the neurological development of a child's brain."[321]

How judges determine such legislative facts has been the focus of significant criticism. Scholars have rightly raised concerns about judges going beyond the evidence and arguments developed during the course of the litigation and basing their decisions on information that has never been tested through the adversarial process.[322] These critiques have prompted the related question of whether a court's acceptance of such legislative facts should be binding on future courts as a matter of stare decisis.[323]

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[318] Likewise, accepting the rule (If both *A* and *B*, then *X*) would not establish the inverse of that rule (If either Not-*A* or Not-*B*, then Not-*X*). *See supra* note 315.

[319] *See, e.g.*, David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 552 (1991) (distinguishing legislative facts from adjudicative facts); Larsen, *supra* note 7, at 71-73; *supra* note 98 (describing disagreement between Judge Posner and Judge Easterbrook regarding legislative facts and stare decisis).

[320] Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 231 n.16 (1985) (quoting 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 12:3, at 413 (2d ed. 1979)); *see also* Larsen, *supra* note 7, at 71 (defining a "legislative fact" as "a generalized fact about the world, as opposed to a 'whodunit' fact relating to the parties before a court in any one case").

[321] Larsen, *supra* note 7, at 71 (footnotes omitted) (citing Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2768-69 (2011) (Breyer, J., dissenting); Sykes v. United States, 131 S. Ct. 2267, 2273 (2011); Gonzales v. Carhart, 550 U.S. 124, 141 (2007)).

[322] *See supra* note 225 (surveying scholarship discussing problems with judicial research and fact gathering beyond the record developed by the litigants).

[323] *See* Larsen, *supra* note 7, at 97-103 (discussing the precedential weight or value that should be given to legislative facts).

Under conventional approaches to stare decisis, legislative facts might indeed be binding insofar as they form part of the "rationale upon which the Court based the results of its earlier decisions."[324] This Article's approach to stare decisis, however, provides a clean way of identifying legislative facts and rendering them nonbinding. Even if a court's decision is informed by the fact that "violent video games affect the neurological development of a child's brain,"[325] or that "hindering the progress of the automobile industry will decrease the gross national product of the United States,"[326] or even that "Williamsburg is prettier than Newark,"[327] those propositions themselves do not state generalizable rules that can be stated in if-then form. Under this Article's approach, therefore, they would not create prospectively binding case law.

This understanding of stare decisis would not resolve the legitimate debate about when judges should be relying on legislative facts based on outside evidence or other questionable authority. That can remain problematic insofar as it leads to errors in developing or applying the governing rules in a particular case. But this Article's approach would at least eliminate uncertainty regarding whether future courts are bound to accept the truth of those legislative facts as a matter of hierarchical stare decisis.

D. *"Unpublished" Opinions*

The vast majority of federal appellate decisions do not have precedential effect.[328] Such decisions are often called "unpublished,"[329] but given that they are readily available through a variety of electronic sources, a more accurate description is non-precedential.[330] However it is labeled, the practice has been controversial for two central reasons. One is the perception that non-precedential decisions receive short shrift in terms of both the appellate process and the depth of attention and analysis judges give them.[331] The other is the deeper institutional

[324] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66-67 (1996).

[325] Larsen, *supra* note 7, at 71 (citing *Sykes*, 131 S. Ct. at 2273).

[326] Schauer, *supra* note 174, at 460.

[327] *Id.*

[328] *See* Weisgerber, *supra* note 31, at 623-24 ("As of September 2007, over 80% of U.S. courts of appeals opinions per year were unpublished.").

[329] *See* sources cited *supra* note 31 (all referring to "unpublished opinions").

[330] *See* Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705, 710-12 (2006).

[331] *See, e.g.*, Vladeck & Gulati, *supra* note 31, at 1680 (noting the critique that "courts have largely abandoned the cornerstones of appellate decision-making: full consideration of all issues raised on appeal, adequate oral argument and briefing opportunities, well-reasoned published dispositions, and direct involvement of Article III judges in every stage of the process").

question of whether judges should ever be able to issue decisions that have no precedential effect.[332]

As to the latter question, federal appellate courts instruct that a decision may be unpublished only if it does not create new law or modify existing law.[333] But if one accepts the conventional view that every "facts-plus-outcome" data point creates a binding obligation as a matter of stare decisis, it is hard to see how any decision can genuinely be one that does not make new law. Every decision has both "facts" and an "outcome," so by necessity every decision would create a binding obligation in future decisions.

One potential feature of this Article's approach to stare decisis is to eliminate the need for courts to designate certain opinions non-precedential. The only part of a decision that creates binding case law would be the if-then principles that the court uses to decide the case. So if the court deciding a case is employing if-then rules that have already been adopted by that court in an earlier decision, that decision is—quite literally—making no new law. There would be no need to declare the decision to be non-precedential. If, on the other hand, the court uses an if-then decisional rule that the court has not yet adopted, then that decision ought to have precedential effect.[334]

Under this framework, courts would have a clear choice. If a court does not want to make new, binding law in a particular case, it would not need the convenient escape of simply declaring an opinion to be non-precedential. Rather, it could avoid making new law by not declaring any new rules in the course of deciding the case. But if the court does declare new rules when deciding the case, it should do so with the understanding that those rules will be binding in future cases.

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[332] *See, e.g.*, Gant, *supra* note 330, at 707 (critiquing the view that appellate court judges should "determine an opinion's precedential authority at the time they issue the opinion, based on their view about whether that opinion has made 'new law' or is otherwise significant"); Weisgerber, *supra* note 31, at 633 ("[T]he Framers of the Constitution envisioned that precedent would serve as a check on 'the judicial power,' thus giving the doctrine of precedent constitutional status . . . ."). The constitutional critique gained momentum from a famous, but ultimately vacated, opinion by Eighth Circuit Judge Richard Arnold, in which he found that the Federal Rule of Appellate Procedure authorizing non-precedential decisions "expand[ed] the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not." Anastasoff v. United States, 223 F.3d 898, 905 (8th Cir.), *vacated on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

[333] *See, e.g.*, 9TH CIR. R. 36-2(a) (providing that an opinion shall be published if it "[e]stablishes, alters, modifies or clarifies a rule of federal law").

[334] A decision should also have precedential effect if it rejects a particular if-then rule in the course of its decision, *see supra* Section III.D.2 (explaining that when a court rejects a particular if-then rule, it "require[s] future courts *not* to employ that rule to decide future cases"), or if it determines the priority of rules that would otherwise require opposing conclusions, *see supra* text accompanying notes 197-98 (discussing priority rules when the outcomes under two different rules conflict).

Even if courts were not willing to give up their ability to label decisions non-precedential, this Article's approach would clarify the appellate courts' publication criteria. When an opinion does declare a new if-then rule in the course of deciding a case, that opinion should be published and should create binding case law with respect to that rule. Only opinions that do not declare (or reject) any new if-then rules should be eligible for non-precedential status.

In considering the ramifications of this Article's approach for the practice of issuing non-precedential decisions, I do not discount the legitimate concerns about the extent to which federal appellate courts have adopted a two-tiered approach to justice, with some cases receiving far less attention than others. Non-precedential decisions are just one component of that troubling trend. But so long as non-precedential decisions remain a part of contemporary appellate practice, it is important to recognize the relationship between the use of non-precedential decisions and the general rules for determining the lawmaking content of appellate decisions.

E. *Some Open Questions*

This Article's approach can also provide a lens for examining some additional questions about the scope of stare decisis: (1) biconditional statements; (2) decisions where the court addresses multiple issues; and (3) interpretive methodology. Each of these issues are variants of the broader question of whether particular parts of an opinion are "necessary" to the court's ultimate decision—or under this Article's framing, whether there is a sufficient nexus between the "case" and the "law" it generates as a matter of stare decisis.[335] This Article's framework does not make definitive proposals for how to handle these three issues, although this framework would be consistent with a range of possible solutions.

Unlike the conditional if-then statements that are the focus of this Article, a biconditional statement "take[s] the form if-and-only-if rather than if-then."[336] Such if-and-only-if statements, however, are simply the combination of "both a conditional statement (If *P* then *Q*) and its inverse (If Not-*P*, then Not-*Q*)."[337] Biconditionals are not uncommon. When courts formulate a test to govern a particular issue, the test is often meant to determine both success and failure.[338]

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[335] *See supra* Section III.D.

[336] Steinman, *supra* note 13, at 1803 (emphasis omitted); *see also* Abramowicz & Stearns, *supra* note 7, at 981-86 (discussing issue of whether biconditional statements should be considered part of a case's holding).

[337] Steinman, *supra* note 13, at 1803 (citing COPI ET AL., *supra* note 125, at 315).

[338] As described above, for example, Justice Stevens's focus in *Shady Grove* on whether a Federal Rule would displace a state law that is so intertwined with a state right or remedy that it defines the scope of the state-created right was crucial for determining both validity and invalidity. *See supra* note 315. Although Justice Stevens's syllogistic reasoning was that applying Federal Rule 23 was valid because it did not displace such a state law, he also reasoned that a rule would be invalid if it did displace such a law. For another example, see

Here is the problem: Suppose that a precedent-setting court (1) declares a biconditional legal rule (If and only if *P*, then *Q*); (2) finds that (*P*) is true; and (3) therefore concludes (*Q*). The principle (If *P*, then *Q*) would certainly qualify as "necessary" under this Article's approach. But arguably the other half of the biconditional (If Not-*P*, then Not-*Q*) was not "necessary" because the court did not actually use that principle to reach its ultimate conclusion. On the other hand, it could be argued that "both halves of a biconditional statement" should be binding insofar as the entire statement reflects the court "trying to offer a comprehensive resolution to the relevant question presented."[339] The framework proposed here could accommodate either view. It could recognize that biconditional statements that are part of the court's syllogistic reasoning are just as binding as conditional statements,[340] or it could limit stare decisis only to the conditional statement that the court uses in its decision.

A second interesting puzzle is determining the stare decisis effect of decisions where the court addresses multiple issues.[341] Suppose that (1) a case presents two distinct issues; (2) the precedent-setting court decides both issues; and (3) the court's resolution of one issue made it so the other issue could not have changed the ultimate result. The Supreme Court's decision in *National Federation of Independent Business v. Sebelius* ("*NFIB*"),[342] which upheld the Affordable Care Act ("ACA"), provides one illustration. Five Justices found that the ACA's individual mandate was authorized by Congress's tax power, and five Justices found that the ACA was not authorized by Congress's commerce power.[343] Even if the commerce power reasoning articulated explicit rules that could qualify as binding under this Article's approach, it could be argued that they lack a sufficient nexus to the Court's ultimate decision because the scope of the commerce power did not change the ultimate conclusion that the individual mandate was constitutional.[344] Alternative holdings—where a court decides multiple issues, either one of which would compel the court's ultimate

Abramowicz & Stearns, *supra* note 7, at 984-85 (using Justice Powell's opinion in *Bakke* to illustrate biconditionals problem).

[339] Abramowicz & Stearns, *supra* note 7, at 1038; *see also id.* at 984-85.

[340] Even if one accepts that both halves of a biconditional statement would be binding when the biconditional is accepted by a *majority* of the precedent-setting court, the rules governing the stare decisis effect of *non-majority* opinions may lead to only one half of a biconditional statement being established. *See supra* note 315 and accompanying text.

[341] *See* Steinman, *supra* note 13, at 1802.

[342] 567 U.S. 519, 588 (2012).

[343] *See* Steinman, *supra* note 13, at 1744-45 (describing breakdown of Justices' votes in *NFIB*).

[344] *See id.* Whether *NFIB* generates any binding case law regarding the Commerce Clause is further complicated by the fact that the five-Justice "majority" on the Commerce Clause issue included the four dissenting Justices. *See id.* at 1745-46. Under the *Marks* rule, *see supra* notes 305-07 and accompanying text, only the reasoning of concurring Justices can count toward the holding.

decision—present another variant of this problem. As a logical matter, any one of those alternative holdings would arguably be unnecessary.[345] This Article's framework leaves open what principles should govern these sorts of multiple-issue scenarios.

A third problem is interpretive methodology. When a court chooses a particular method for interpreting the Constitution (say, originalism) or a statute (say, textualism), in what sense is that choice binding on future courts as a matter of stare decisis? The conventional wisdom is that interpretive methodology is not binding.[346] This view is in tension, however, with the Supreme Court's view that stare decisis requires future courts to follow the "rationale upon which" a precedent-setting decision was "based."[347] Interpretive methodology would surely seem to qualify as part of a court's "rationale" in deciding a particular case.

In terms of this Article's approach, interpretive methodology would typically be a non-syllogistic element of a court's reasoning; the methodology provides the reason for adopting (or rejecting) a particular if-then rule.[348] On the other hand, 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."[349] Rules of interpretive methodology, however, are identifiably distinct because the sole function of such rules is to generate some other rule that is used to decide the issues presented in the case. This distinction would permit drawing a clear line that would—consistently with the conventional wisdom—deny stare decisis effect to rules of interpretive methodology. This Article does not, however, take a position on whether stare decisis should categorically exclude principles of interpretive methodology when those principles are stated as generalizable if-then rules.[350]

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[345] *See id.* at 1802.

[346] *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.").

[347] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66-67 (1996).

[348] *See supra* Section III.A.2.

[349] *See, e.g.*, Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

[350] *See* Steinman, *supra* note 13, at 1801 n.357 (noting that rule-based approach to stare decisis "is flexible enough to accommodate a range of views" regarding interpretive methodology).

CONCLUSION

Case law is a fundamental part of the American legal system. Yet we have lacked a clear understanding about which aspects of a judicial decision impose prospective legal obligations as a matter of stare decisis and to what extent. This Article has developed an approach to this puzzle that focuses on the decisional rules that a court states explicitly and that can be framed in the form (If *P*, then *Q*). This proposal would discard much of the conventional wisdom about stare decisis, including constructs like the distinction between holdings and dicta; the search for "necessary" parts of a judicial opinion; and the presumed need for courts to reconcile their decisions with the precedent-setting court's findings, conclusions, or reasons that are not explicitly stated as generalizable rules. An explicit-rules approach would provide a workable conceptual framework that serves the key goals that stare decisis ought to serve, while identifying more clearly both the lawmaking content of any given decision and a future court's range of permissible moves in light of that decision.