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August 21, 2008

Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms

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Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms

by Lisa M. Durham Taylor*

Abstract

When the Supreme Court issued its landmark Title VII decision in Burlington Northern & Santa Fe Railway Co v. White, it concluded that the statute’s anti-retaliation provision reaches beyond the workplace to redress non-workplace harms. All of the harms alleged in that case, however, bore a clear and direct relationship to the plaintiff’s employment. As such, the Court’s instruction on that point was unnecessary. The debate over the dictum-holding distinction is rich, but this Article concludes that the Court’s discussion of non-workplace harms in Burlington Northern was indisputably dictum. It is commonplace among the lower federal courts to practice blind adherence to Supreme Court dictum, given the Court’s unique institutional position in the federal judiciary, its limited docket, and the predictive value of its advice. Nevertheless, this Article suggests that closer scrutiny of Supreme Court dicta is not only advisable as a policy matter but perhaps even constitutionally compelled. Thus, this Article proposes a framework for independent case-by-case assessment to determine whether Supreme Court dictum warrants precedential effect. It then proceeds to apply that framework in the context of non-workplace harms to demonstrate that blind adherence to the Court’s overbroad interpretation of the statute is unadvisable, and that courts should instead review each case independently, guided by the relevant body of law and prevailing policy concerns, to determine whether the alleged harm bears a sufficient nexus to the workplace to warrant Title VII relief.
TABLE OF CONTENTS

I. AN INTRODUCTION TO THE PROBLEM................................................................. 3

II. CREATION OF SUPREME COURT DICTA: THE EXAMPLE OF NON-
    WORKPLACE HARM.... ..................................................................................... 6
    A. The Relevant Statutory Provisions and Surrounding Debate. ......................... 7
    B. Adjudication of Non-Workplace Harms in the Lower Courts......................... 10

III. IDENTIFYING THE AMORPHOUS: DEFINITIONS AND THEORIES ON THE
    DICTUM-HOLDING DIVIDE. .............................................................................. 13
    A. Deconstructing Dicta: What It Is, and What It’s Not........................................ 13
    B. Developing the Dicta Doctrine: Supreme Court Pronouncements on the
       Dictum-Holding Divide. .............................................................................. 17
    C. Theorizing Dicta: Frameworks Proposed by Recent Commentators.......... 18
    D. Assessing Burlington Northern’s Dicta: The Definitions and Theories at Work.
       ....................................................................................................................... 21

IV. CARVING A PADDLE WITH WHICH TO NAVIGATE THE CREEK: A
    PROPOSED STANDARD FOR ASSESSMENT OF SUPREME COURT
    DICTUM............................................................................................................ 24
    A. Crafting the Standard. .................................................................................. 24
    B. The Constitutional Underpinnings of the Proposed Standard....................... 31

V. UPON DISREGARDING DICTUM: APPLYING THE PROPOSED STANDARD
    TO ADJUDICATE ALLEGED NON-WORKPLACE HARMs................. 33
    A. The Legal Justification for Disregarding Burlington Northern’s Dictum......... 33
       1. The Plain Statutory Language. ................................................................. 34
       2. The Statutory Context. ...................................................................... 35
    B. The Policy Justification for Disregarding Burlington Northern’s Dictum....... 37
    C. The Appeal of an Independent Inquiry. ......................................................... 41
    D. Case Studies. .......................................................................................... 43

VI. CONCLUSION.................................................................................................... 46
I. AN INTRODUCTION TO THE PROBLEM

When the Supreme Court grants certiorari in a case presenting an issue that has divided the circuit courts, the legal world often awaits the Court’s decision with great anticipation. The hope, for many, is that the Court will resolve the dispute by making a clear statement of the relevant law, upon which lawyers and judges can rely to resolve similar disputes in the future. Indeed, such is the nature of a system founded upon principles of *stare decisis*, as is ours.

Unfortunately, however, life is not always so simple. Sometimes the Court decides cases on grounds other than those presented in the appellate petition, whether due to some change in the factual circumstances underlying the dispute,¹ or because the Court determines that the law requires decision on some other basis,² or for some other legal reason.³ In these situations, judges and lawyers are left to muddle through those future cases without any real guidance from the Supreme Court, and the disagreement and debate continue to fester until another case presenting that issue comes along, and four of the Court’s nine justices determine that it warrants review. These situations are troubling to those members of the legal community who thrive on order and clarity. Even more troubling, though, are the cases wherein the Court *purports* to resolve the dispute, but instead only exacerbates the confusion, whether due to intentional or unintentional lack of clarity in the Court’s holding, its stray remarks made in the process, or otherwise. Perhaps the worst offenders here are those cases in which the Court proclaims to issue a “holding,” when instead its statements are really dicta.

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¹ See, e.g., Bd. of License Comm’rs of the Town of Tiverton v. Pastore, 469 U.S. 238, 239 (1985) (per curiam) (dismissing a Fourth Amendment claim as moot because liquor store in question went out of business); Murphy v. Hunt, 455 U.S. 478, 481 (1982) (per curiam) (holding the constitutionality of denying pretrial bail to an inmate was moot after his conviction); Bd. of Sch. Comm’rs of Indianapolis v. Jacobs, 420 U.S. 128, 129 (1975) (per curiam) (dismissing class action by students as moot because all named plaintiffs had graduated); Defunis v. Odegaard, 416 U.S. 312, 319-320 (1974) (per curiam) (dismissing claim of law student who was denied admission to choice school as moot because plaintiff was one semester away from graduating from the school at issue).

² See, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17-18 (2004) (dismissing the claim of a father, who did not have legal custody of his child, challenging a California law requiring the Pledge of Allegiance be recited in every public elementary school as unconstitutional, because he lacked standing to bring the claim); Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) (holding that a wildlife conservation society lacked standing to seek judicial review of environmental reporting law); Allen v. Wright, 468 U.S. 737, 739-740 (1984) (holding that parents of school aged children did not have standing to bring a nationwide class action challenging IRS policy offering tax exempt status to racially diverse private schools).

³ See, e.g., National Park Hospitality Assn., v. Dept. of Interior, 538 U.S. 803, 805 (2003) (holding that a controversy surrounding the Contract Dispute Act was not yet ripe for adjudication); Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908) (raising the question of jurisdiction sua sponte and dismissing for lack of subject matter jurisdiction); Capron v. Van Noorden, 6 U.S. 126, 127 (1804) (dismissing because the lower court did not have subject matter jurisdiction over the claim).
The Court did just that – mislabeled its own dicta as “holding” – in its recent decision interpreting the anti-retaliation provision of the Title VII of the Civil Rights Act of 1964, *Burlington Northern & Santa Fe Railway Co v. White*. At the heart of the case in *Burlington Northern* was a question about the severity of harm a plaintiff must show in order to establish the adverse-action element of a prima facie case of retaliation. The circuit courts disagreed, sometimes vehemently, about the appropriate standard to apply when assessing the severity of harm alleged by a plaintiff claiming retaliation, with the courts falling into three main camps: those adopting a strict “ultimate employment action” standard; those taking the expansive view that any treatment “reasonably likely to deter” protected activity is actionable; and those falling in the middle, requiring a “material adverse employment action.” This disagreement brewed for years, until the Supreme Court finally granted certiorari in *Burlington Northern*, promising to resolve it. Indeed, the posture of the *Burlington Northern* case made it a good candidate for resolution of the circuit split. The plaintiff, Sheila White, alleged that her employer, defendant Burlington Northern, had retaliated against her after she complained of sexual harassment in violation of Title VII. She alleged two separate adverse employment acts in support of her prima facie case of retaliation: (1) alteration of her job duties by reassigning her from forklift operation to other, “dirtier” and “more arduous” tasks within her job description; and (2) her placement on a 37-day unpaid suspension pending investigation of alleged insubordinance, followed by reinstatement with full back pay.

The harms Sheila White alleged clearly bore a direct relationship to her job. She claimed that Burlington Northern inappropriately altered her duties and suspended her employment. Thus, their work-relatedness was undisputed. Instead, the question in her case was whether the harms she allegedly suffered were sufficiently severe to support her retaliation claim as a matter of law. Indeed, the question presented in *Burlington Northern*’s petition for certiorari – the only question as to which the Supreme Court ultimately granted review – narrowly framed the issue as one focused directly on the requisite severity of harm:

Whether an employer may be held liable for retaliatory discrimination under Title VII for any “*materially adverse change* in the terms of employment” (including a temporary suspension rescinded by the employer with full back pay or an inconvenient reassignment, as the court below held); for any adverse treatment that was “reasonably likely to deter” the plaintiff from engaging in protected activity (as the Ninth Circuit holds); or only for an “*ultimate* employment decision” (as two other courts of appeals hold).

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7 *Burlington Northern*, 546 U.S. at 59.
8 Petition for Writ of Certiorari, at i, *Burlington N. & Santa Fe Ry Co. v. White*, 546 U.S. 1060 (U.S. 2005) (No. 05-259), 2005 WL 2055901. Burlington also sought the Court’s review on a question of
In answer to the question presented, the Court held that “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, ‘which in this context means it well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’” Whether the standard issued by the Court is as judicially administrable as the Court suggests is a matter of some debate, but is beyond the scope of this Article. What is important here, though, is that the Court did not confine its “holding” to this issue. Instead, the Court attempted to reach much further, offering a separate “holding” as to another question that had troubled the lower courts, but did not present itself for resolution in that case. That is, the Court dedicated an entire section of its opinion to deciding whether Title VII’s anti-retaliation provision protects against non-workplace harms. There was no question, however, as to whether the harms alleged by White occurred in the workplace – it was clear that they did.

At this point, I might simply declare that the Court’s conclusions about the anti-retaliation provision’s applicability to non-workplace harms are dicta, and that courts should disregard them. But to do so would substantially oversimplify the situation. First, there is the problem that the Court was apparently quite convinced that its conclusions about non-workplace harms were anything but dicta. The Court stated at the outset that resolution of White’s case would necessitate answering that question, and went on to reach a separate holding that bore directly upon it: “The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.” Non-discerning lawyers and judges may therefore rely upon that statement as the “holding” that it purports to be, thereby perpetuating it as law when, perhaps, it is not. Second, and relatedly, there is the deeper problem of whether, in fact, the Court’s “holding” on this point is indeed dicta or not. The distinction between holding and dicta is often blurry, and commentators have offered varying frames of reference by which the proper categorization might be made. Whether the Court’s discussion of and

the applicable burden of proof on a re-trial that was limited to a claim for punitive damages. See id. The court denied review on this second question. Burlington N. & Santa Fe Ry. Co. v. White, 546 U.S. 1060, 797-98 (U.S. 2005). Burlington Northern, 546 U.S. at 67-68.

Taylor, supra note 5, at 570-91 (arguing that Court’s standard is both vague and impracticable).


Burlington Northern, 546 U.S. at 60-62 (“To [resolve the circuit split] requires us to decide whether Title VII’s anti-retaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace.”).


On the scholarly front, a related development is the revived concern about the traditional distinction between holding and dictum. The Supreme Court and the federal circuits, without erasing the distinction entirely, have moved away from [the] traditional view that
conclusions about non-workplace harms is dicta or not is therefore not only a tricky question, but also one as to which the answer has substantial implications. And finally, there is the problem of how lower courts should approach questions that the Court has purported to resolve by holding, when this deeper analysis shows that its statements were in fact mere dicta.

This Article attempts to resolve those problems by identifying the various theories proposed for pinpointing the dictum-holding divide, and offering a framework for adjudicating subsequent cases in the wake of Supreme Court dicta, using *Burlington Northern’s* discussion of non-workplace harms as an example. It proceeds in four parts. First, in Part II, I will show how some Supreme Court dicta comes to be in the first place by discussing the principal pre-*Burlington Northern* retaliation cases involving alleged non-workplace harms and shedding some light upon how the Supreme Court might have come to address non-workplace harms in the *Burlington Northern* case itself, in light of its facts and procedural posture. In Part III, I will delve more deeply into the question of holding versus dicta and the theories offered to answer it, concluding that the *Burlington Northern* Court’s assertions about non-workplace harms are indisputably dicta. Then, in Part IV, I propose a framework for adjudicating issues on which the Supreme Court has offered instruction in dictum, suggesting that courts should not follow dictum blindly but instead should engage in an independent assessment of the pertinent issue, bearing in mind not only the Supreme Court’s dictum-based instruction but also any relevant statutory language and history and the prevailing policy concerns. I suggest that such an independent inquiry is not only constitutionally motivated but also critical to the foundation of our legal system. Finally, in Part V, I return to the non-workplace harms example to demonstrate how courts should apply the framework crafted in Part IV to adjudicate workplace harms going forward.

II. CREATION OF SUPREME COURT DICTA: THE EXAMPLE OF NON-WORKPLACE HARMS.

Unfortunately, retaliation is a fact of life in the modern workplace. Albeit morally wrong, it is human nature for one accused of discrimination or some other disgraceful conduct, to treat his accuser differently than others. Indeed, it is probably safe to say that retaliation, in varying degrees and taking myriad forms, occurs much more frequently today than discrimination.\(^{15}\) This is somewhat ironic, since the federal anti-discrimination statutes were originally enacted to prevent disparate workplace treatment based mostly on immutable personal traits, and their protections against retaliation were included simply to promote that original goal.\(^{16}\) Given the reality of the

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\(^{15}\) U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION CHARGE STATISTICS (1996-2006), available at http://www.eeoc.gov/stats/charges.html (showing that of the eight possible claims, only racial and sexual discrimination claims were filed more often than Title VII retaliation claims).

modern workplace, though, the importance of a coherent body of law marking as clearly as possible the line between the permissible and the unlawful cannot be understated. Nevertheless, vagueness and discord have flourished.17


The heart of these problems lies at the source of their very existence – the statutory language. Two separate provisions of Title VII18 afford the protections relevant here. The first, what I term the “core substantive provision,” guards against differential treatment of individual employees based on “race, color, religion, sex, or national origin” by making it “an unlawful employment practice for an employer … to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s [protected trait].”19 The second – what I term the “anti-retaliation provision” – similarly protects individual employees against differential treatment.20 The protections, however, arise not from the employee’s inherent personal characteristic or trait, but instead come into play only when an employee engages in certain protected activities:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, .

Robinson v. Shell Oil, 519 U.S. 337, 346 (U.S. 1997) (deciding that the anti-retaliation provision’s “primary purpose” is: “[m]aintaining unfettered access to statutory remedial mechanisms.”); Ford v. Schering-Plough Corp., 145 F.3d 601, 606 (3d Cir. 1998) (“Indeed, the ADA’s accompanying House report states that the purpose of the ADA is ‘to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women.’” (citing H.R.Rep. No. 101-485, 3, at 48 (1990))); Castellano v. N. Y. City, 142 F.3d 58, 69 (2d Cir. 1998) (applying the Robinson court’s reasoning for Title VII’s anti-retaliation provision to ADA retaliation claims); Holt v. JML Indus. Inc., 89 F.3d 1224, 1227 (5th Cir. 1996) (“Congress intended the anti-retaliation provision of the ADEA to enable employees to engage in protected activities without fear of economic retaliation.”).


. . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.21

Similarities abound among these two provisions. Both label the prohibited conduct “an unlawful employment practice.”22 Indeed, each provision broadcasts this language prominently in its title.23 Further, both refer to the key players as “employer,” whose conduct each provision regulates, and “employee,” the beneficiary of each part’s protections.24 Moreover, both use the terms “discriminate against” to describe the acts made unlawful thereby.25 Thus, the two provisions are strikingly similar, and they diverge in only two respects. First, as mentioned above, the core substantive provision offers protection based on one’s personal characteristics or traits (race, color, religion, sex, national origin), while the protections of the anti-retaliation provision apply only when one, regardless of personal trait, engages in certain conduct (i.e., participation or opposition).26 And second, the core substantive provision defines in more detail the kind of acts that it prohibits.27 That is, while the anti-retaliation provision simply makes it unlawful “to discriminate against” protected individuals, the core substantive provision goes further, making it unlawful “to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.”28

Therein lies the source of conflict among the courts that led to the Supreme Court’s decision in Burlington Northern & Santa Fe Railway Co. v. White.29 What, if anything, is the significance of the difference in language between the two provisions? Is the abbreviated language in the anti-retaliation provision, prohibiting only “discriminat[ion] against” protected employees, simply shorthand for the more detailed prohibitions spelled out in its core counterpart? Or is the scope of the core substantive provision, with specific reference to the protected employee’s “compensation, terms, conditions, or privileges of employment,”30 different? If so, how?

The discordant answers reached by courts faced with these questions fell into two categories, each representing a separate question of statutory interpretation with respect to the adverse-action element of a prima facie retaliation case. The first – and the one that received the most attention by far – pertained to the severity of harm prohibited by

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21 Id.
23 Id. § 2000e-2(a) (provision entitled “Unlawful employment practices’’); id. § 2000e-3 (provision entitled “Other unlawful employment practices’’).
24 Id. § 2000e-2(a)(1), 2000e-3(a).
25 Id.
26 Id.
27 Id. § 2000e-2(a)(1).
28 Id. § 2000e-3(a).
29 548 U.S. 53 (2006). For further discussion of the Supreme Court’s decision in Burlington Northern, as well as the circuit split that case purports to resolve, see Taylor, supra note 5, at 533.
that part of the statute. Here, courts split into three camps – those treating the anti-retaliation provision as narrower and requiring an “ultimate employment action” to make out a prima facie case;\(^3^1\) those interpreting the anti-retaliation provision as broader and endorsing a “reasonably-likely-to-deter-protected-conduct” standard;\(^3^2\) and those falling in the middle ground, requiring a plaintiff to show a “material adverse action” to support a claim.\(^3^3\) This broad, divisive split among the circuit courts of appeals warranted, and indeed received, substantial attention from courts and commentators alike.\(^3^4\)

It is the second category of discordant statutory interpretation, however, that is the focus of this Article. That is, courts not only disagreed as to the severity of harm required to support a claim under the anti-retaliation provision, but also reached differing conclusions about the scope of the prohibited conduct – specifically, did the anti-

\(^3^1\) See, e.g., Okruhlik v. Univ. of Ark., 395 F.3d 872, 879 (8th Cir. 2005) (“A plaintiff suffers an adverse employment action when the action results in a ‘material employment disadvantage’ such as ‘[t]ermination, reduction in pay or benefits, and changes in employment that significantly affect an employee’s future career prospects,’” (quoting Duncan v. Delta Consol. Indus., 371 F.3d 1020, 1026 (8th Cir. 2004))); Mattern v. Eastman Kodak, 104 F.3d 702, 707 (5th Cir. 1997) (abrogated by Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (“Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions” (quoting Dollis v. Rubin, 77 F.3d 777, 781-782 (5th Cir. 1995))).

\(^3^2\) Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000) (“[A]n action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity.”); 8 OFFICE OF PROGRAM OPERATIONS, U.S. E.E.O.C., E.E.O.C. COMPLIANCE MANUAL § 8-II, at 8-13 (May 20, 1998) (“[A]ny adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.”).

\(^3^3\) Holcomb v. Powell, 433 F.3d 889, 902 (D.C. Cir. 2006) (“Adverse employment actions are not confined to hirings, firings, promotions, or other discrete incidents.” (citing Cones v. Shalala, 199 F.3d 512 at 521 (D.C. Cir. 2000))); Fairbrother v. Morrison, 412 F.3d 39, 56 (2d Cir. 2005) (abrogated by Kessler v. Westchester County Dept. of Social Services, 461 F.3d 199 (2d Cir. 2006)) (“An adverse employment action is a ‘materially adverse change’ in the terms and conditions of employment.” (quoting Blackie v. Me., 75 F.3d 716, 725 (1st Cir. 1996))); Medina v. Income Support Div., 413 F.3d 1131, 1136 (10th Cir. 2005) (holding that an adverse employment action occurs when there’s a “significant change in the employment status.”); Griffin v. Potter, 356 F.3d 824, 829 (7th Cir. 2004) (“An adverse employment action must be materially adverse, not merely an inconvenience or a change in job responsibilities.”); Ford v. General Motors Corp., 305 F.3d 545, 553 (6th Cir. 2002) (“[T]he adverse employment action must be ‘materially adverse’ for the plaintiff to succeed on a Title VII claim.”); Shannon v. BellSouth Telecomm., 292 F.3d 712, 716 (11th Cir. 2002) (deciding that employer conduct that falls short of “ultimate employment decision” may still be actionable if an “employee’s compensation, terms, conditions, or privileges of employment” were “altered”); Marrero v. Goya of P. R., Inc., 304 F.3d 7, 23 (1st Cir. 2002) (“Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer’s act or omission does not elevate that act or omission to the level of a materially adverse employment action.” (quoting Sanders v. N.Y. City Human Res. Admn., 361 F.3d 749, 755)); Von Gunten v. Md., 243 F.3d 858, 866 (4th Cir. 2001) (abrogated by White, 126 S. Ct. 2405 (2006) (holding that a plaintiff must prove an adverse employment action had a significant effect on “terms, conditions, or benefits” of employment); Mondzelewski v. Pathman Stores, Inc., 162 F.3d 778, 787 (3d Cir. 1998) (requiring plaintiff’s to prove they suffered a “materially adverse employment action” in order to support a Title VII retaliation claim).

\(^3^4\) See sources cited supra note 17. See, e.g., Burlington Northern, 126 S. Ct. at 2411 (stating that the Court “granted certiorari to resolve” the circuit split); Ray v. Henderson, 217 F.3d 1234, 1241-42 (observing that a three way circuit split had occurred); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998) (“There is a circuit split on this issue.”). For further discussion of this circuit split and the Supreme Court’s efforts to resolve it in Burlington Northern, see Taylor, supra note 5, at 544-54.
The focus here, as above, was on the statutory language, and specifically the notable absence from the anti-retaliation provision of the qualifying “compensation, terms, conditions, or privileges of employment” language found in the core counterpart. No one doubted that the presence of those qualifiers in the core substantive provision meant that it protected only against harms bearing some relationship to the workplace. Thus, if the abbreviated language of the anti-retaliation provision, simply making it unlawful to “discriminate against” protected employees, is shorthand for the prohibitions detailed in the core counterpart, then the scope of the provisions is likely the same, and neither covers harms unrelated to the workplace. If, however, the absence of those qualifying terms from the anti-retaliation provision means that its scope is different, then a separate analysis is required, and a different conclusion is likely to result.

B. Adjudication of Non-Workplace Harms in the Lower Courts.

Several of the circuit courts took up these questions in the years preceding the Supreme Court’s decision in Burlington Northern. One such notable decision is that of the United States Court of Appeals for the District of Columbia Circuit in Rochon v. Gonzales. Donald Rochon, an FBI agent, claimed that his employer discriminated against him based on his race (black) and retaliated against him for filing a previous Title VII lawsuit, by failing to investigate credible death threats made against him and his wife by a federal prisoner. The district court dismissed Rochon’s claims on the government’s motion pursuant to Federal Rule of Civil Procedure 12(b)(6), holding that Title VII did not reach non-workplace harms of the sort he alleged. The D.C. Circuit, however, disagreed, holding that the anti-retaliation provision prohibits employers from taking materially adverse acts against employees who engage in protected activity, “regardless of whether the alleged retaliatory act is related to the plaintiff’s employment.”

See Rochon v. Gonzales, 438 F.3d 1211, 1220 (D.C. Cir. 2006) (holding that retaliation is actionable “regardless of whether the alleged retaliatory act is related to the plaintiff’s employment.”); Washington v. Ill. Dept. of Revenue, 420 F.3d 658, 660 (7th Cir. 2005) (“Retaliation may take the form of acts outside the workplace.”); Wideman, 141 F.3d at 1456 (“We join the majority of circuits which have addressed the issue and hold that Title VII’s protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions.”); Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996) (determining that malicious prosecution of a former employee is actionable retaliation).

See, e.g. Traylor v. Brown, 295 F. 3d 783, 788 (7th Cir. 2002) (requiring Title VII discrimination plaintiff’s to prove a materially adverse change to the “terms, conditions or privileges of employment); Davis v. Lake Park, Fla., 245 F.3d 1232, 1238 (11th Cir. 2001) (stating that courts have “uniformly” interpreted that the core substantive provision requires a plaintiff to prove an adverse employment action).

438 F.3d 1211 (D.C. Cir. 2006).

Id. at 1213-14.

Id. at 1214; see also Rochon v. Ashcroft, 319 F. Supp.2d 23, 30-32 (D.D.C. 2004) (rejecting plaintiff’s claim that Title VII protected against harms alleged).

Id. at 1219.
The Seventh and Tenth Circuits reached similar conclusions in cases decided before *Rochon*. In *Berry v. Stevinson Chevrolet*, the Tenth Circuit rejected the defendant-employer’s contention that filing false criminal charges against a former employee who complained of discrimination fell beyond the ambit of Title VII’s protections.\(^\text{42}\) The court reasoned that the anti-retaliation provision should be construed liberally because of its remedial nature, and that a liberal construction would necessarily encompass the filing of charges against a former employee because “[a] criminal trial . . . is necessarily public and therefore carries a significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects.”\(^\text{43}\) Likewise, the Seventh Circuit upheld the plaintiff’s allegations as sufficient to support a prima facie case of retaliation in *Aviles v. Cornell Forge Co.*, stating that “the language of the Title VII retaliation provision is broad enough to contemplate circumstances where employers might take actions that are not ostensibly employment related against a current employee in retaliation for that employee asserting his Title VII rights.”\(^\text{44}\) There, the plaintiff claimed that his employer retaliated by filing a false police report that he was “armed and laying in wait outside the plant,” in response to which the police made an immediate arrest.\(^\text{45}\) Thus, the court in *Aviles*, like several others,\(^\text{46}\) followed the trend established in *Berry* of upholding a retaliation claim based upon allegations that the employer filed false criminal charges against the plaintiff.\(^\text{47}\) Moreover, in each of these cases, the court at least hinted, and more often concluded, that the anti-retaliation provision reaches beyond the confines of the employment relationship to encompass non-workplace harms.\(^\text{48}\)

\(^{41}\) 74 F.3d 980 (1996).

\(^{42}\) Id. at 986.

\(^{43}\) Id.

\(^{44}\) 183 F.3d 598, 606 (7th Cir. 1999).

\(^{45}\) Id. A subsequent Seventh Circuit panel agreed that the scope of the retaliation provision was necessarily broad, purporting to clear up any confusion along those lines:

Retaliation may take the form of acts outside the workplace. The state’s Department of Revenue might have audited Washington’s tax returns in response to her complaint to the EEOC, or hired a private detective to search for a disreputable tidbit that could be used to intimidate her into withdrawing the complaint. When the employer’s response does not affect a complainant’s terms and conditions of employment, it is vain to look for an adverse “employment” decision.

Section 2000e-3(a) is “broader” than § 2000e-2(a) in the sense that retaliation may take so many forms, while § 2000e-2(a) is limited to discrimination “with respect to [the worker’s] compensation, terms, conditions, or privileges of employment.”

\(^{46}\) Roberson v. Snow, 404 F.Supp.2d 79, 93-95 (D.D.C. 2005) (finding internal investigations of false claims that led to criminal charges being filed, and a criminal trial, created actionable retaliation); Beckham v. Grand Affair of N.C., Inc., 671 F. Supp. 415, 419 (W.D.N.C. 1987) (holding that plaintiff established a cause of action for retaliation after her former employer had had her arrested for trespass).\(^\text{47}\) *Aviles*, 183 F.3d at 606.

\(^{47}\) *Rochon* v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (holding that a materially adverse action that would dissuade a reasonable employee from making or supporting a discrimination claim is actionable “regardless of whether the alleged retaliatory act is related to the plaintiff’s employment.”); *Robertson*, 404 F.Supp.2d at 93 (“Although these actions are not obvious ‘personnel’ actions, they could have an adverse effect on the plaintiff’s future career prospects, and as such, could be considered adverse personnel actions.”); *Aviles*, 183 F.3d at 606 (“the language of the Title VII retaliation provision is broad enough to contemplate circumstances where employers might take actions that are not ostensibly employment related against a current employee in retaliation for that employee asserting his Title VII
Not all courts agreed. The Third Circuit, for example, reached a different result. In *Nelson v. Upsala College*, the plaintiff contended that her former employer retaliated against her for filing a previously-settled EEOC charge by sending her a letter accusing her of trespass. The alleged trespass occurred when she entered campus grounds after her discharge, in direct violation of the College’s instruction forbidding her from reentering without an express invitation from a member of the college’s administration. The Third Circuit upheld the district court’s dismissal of plaintiff’s retaliation claim on grounds that the college’s requirement of approval before re-entering the campus “had no impact on [the plaintiff’s] actual or proposed employment,” whether there or anywhere else. The court explained that its limitation of the anti-retaliation provision’s coverage to those employer acts that arise out of, relate to, or otherwise touch an employment relationship best comports with Congress’s stated goal in enacting Title VII, “to achieve equality of employment opportunities.” Thus, according to the court, “for Title VII’s protections to apply, there should be some connection between the allegedly retaliatory conduct and an employment relationship. Although the connection with employment need not necessarily be direct, it does not further the purpose of Title VII to apply [the anti-retaliation provision] to conduct unrelated to an employment relationship.”

The Tenth Circuit took a similar approach, distinguishing its earlier decision in *Berry v. Stevinson Chevrolet*, in its 2005 decision in *Dick v. Phone Directories Co., Inc.* There, the plaintiff alleged retaliation in the form of a police report filed by employees. Although similar in that respect to *Berry*, the court nevertheless reached an opposite result, affirming defendant’s summary judgment on grounds that filing a police report did not rise to the level of an actionable adverse employment action because plaintiff did not have to stand trial or suffer any of the kind of public humiliation suffered by the plaintiff in *Berry*. Thus, the court distinguished its holding in *Berry*, reasoning that harms involving accusations of criminal activity constitute actionable Title VII retaliation only when they carry concomitant harm to the plaintiff’s reputation, which itself has a direct bearing on his future employment prospects.

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50. *Id.* at 388.
52. *Id.*
53. 397 F.3d 1256 (10th Cir. 2005).
54. *Id.* at 1262.
55. *Id.* at 1269.
56. *Id.*
Unlike the cases discussed in the preceding paragraphs, the plaintiff in Burlington Northern & Santa Fe Railway Co v. White alleged adverse actions that bore a direct relationship to her employment. As discussed above, Sheila White claimed that after she complained of discrimination, her employer unlawfully assigned her less prestigious job duties and then placed her on a 37-day unpaid suspension pending investigation of alleged insubordinance, after which she was reinstated with full back pay. Burlington Northern never contended that her claims should fail because they were not sufficiently related to employment. Instead, Burlington Northern argued throughout the entire course of the litigation that it was entitled to judgment as a matter of law on White’s retaliation claim because the acts she alleged were not sufficiently adverse to support a prima facie case. Indeed, the requisite degree of harm required to support a retaliation claim is the precise question as to which the Court ultimately granted certiorari. Nevertheless, the Court took up the question of employment-relatedness in its decision, despite the fact that it was not raised by any party and was not presented on the facts of White’s case. In so doing, the Court created more confusion than it resolved not just by issuing an overbroad holding, but by doing so under the guise of, yet without, proper authority. As discussed below, the Court’s remarks about non-workplace harms are dicta, and the lower federal courts should treat them as such.

III. IDENTIFYING THE AMORPHOUS: DEFINITIONS AND THEORIES ON THE DICTUM-HOLDING DIVIDE.


One cannot persuasively label the Court’s statements in Burlington Northern “dicta” without first defining that term. At first blush, this may appear a relatively simple task. Black’s Law Dictionary defines “dictum” as, among other things, “a court’s stating of a legal principle more broadly than is necessary to decide the case,” or “[a]
court’s discussion of points or questions not raised by the record or its suggestion of rules not applicable in the case at bar.” The dictionary also references “obiter dictum” as an alternative term, which it defines 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 (although it may be considered persuasive).” The Burlington Northern Court’s conclusion that the anti-retaliation provision applies outside the workplace easily satisfies these definitions. That is, it was not “necessary” for the Court to decide that the anti-retaliation provision reached non-workplace harms, since none were alleged in that case. Further, that question was “not raised by the record” and the “rule” regarding non-workplace harms that the Court “suggest[ed]” was “not applicable in the case at bar.” But to jump so quickly to the conclusion that the Court’s statements were dicta, based solely on a Black’s Dictionary definition of the term, would be at least hasty, if not wholly improper. Indeed, the very nature of the law is that it is not so black and white as to permit mechanical application of dictionary definitions. Rather, much of the law exists in hues of gray, where the shade is primarily a function of the observer’s perspective. Such is certainly the case with the term “dicta.”

Perhaps the best approach to assessment of a term like “dicta” is to contrast it with what it is not. As suggested by the Black’s definition of “obiter dictum,” that which is “holding” is not “dictum,” and vice versa. Indeed, the distinction between dictum and holding has attracted recent scholarly attention, and deservedly so. That distinction lies at the core of a judicial system founded upon the doctrine of stare decisis, wherein courts are required to follow prior precedents. Thus, a court’s “holdings” garner future precedential effect, but its “dicta” do not.

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64 Black’s Law Dictionary (8th ed. 2004). The quoted definitions actually appear in the dictionary’s definition of the related term “gratis dictum,” but best reflect what I perceive as the commonly understood meaning of the term “dictum” itself. The primary definitions, by contrast, define “dictum” as “[a] statement of opinion or belief considered authoritative because of the dignity of the person making it . . . [:] [a] familiar rule; a maxim.” Id.

65 Id.


67 See supra notes 7, 9, 11-13 & accompanying text (discussing procedural history of Burlington Northern case and demonstrating that question of non-workplace harms was not presented therein).

68 See Dorf, supra note 14, at 2005 (suggesting that “the term dictum has no fixed meaning” and that the distinction between dictum and holding “is almost entirely malleable”).


70 See Dorf, supra note 14, at 2040-49 (discussing “how to ascertain the rationale of a decision” in order to determine the binding law of an opinion); Abramowitz & Stearns, supra note 14 at 1017-26 (developing and discussing an analytic framework to differentiate between holdings and dictum); Sullivan, supra note 14 at 1152-53 (discussing the recent trend “away from [the] traditional view that only the holding of a case has precedential power.”); Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. REV. 1249, 1253 (2006) (“What is problematic is not the utterance of dicta, but the failure to distinguish between holding and dictum.”); Kent Greenawalt, Reflections on Holding and Dictum, 39 J. LEGAL EDUC. 431 (1989) (attempting “to help clarify what is uncontroversial about the distinction between dictum and holding”).

71 This Article makes the basic assumption that the American judicial system adheres to the doctrine of stare decisis. See Greenawalt, supra note 70, at 431 (asserting that core of distinction between dictum and holding lies in judicial system’s acceptance of principles of stare decisis). For a discussion of scholarship questioning that basic assumption, see Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 STAN. L. REV. 817, 820 (1994). While an exposition on the historical
Not all dicta, however, is treated the same. Rather, notwithstanding that dicta is, by its very nature, comprised of statements that do not constitute the court’s holdings, there is a tendency—one that may be growing—to treat some dicta as binding authority. The degree of respect afforded to such dicta is, in turn, directly proportional to the quantity and quality of discussion it originally received. Thus, the various

 origins and present operation of the doctrine of stare decisis is beyond the scope of this Article, it is nevertheless worth noting here that the world of stare decisis exists into two hemispheres, often labeled “horizontal” and “vertical.” The former refers to the requirement that a court adhere to its own precedents, while the latter invokes the binding effect of a superior court’s decisions on those courts that are hierarchically inferior to it. See Dorf, supra note 14 at 2024-25; see also Caminker, supra note 71 at 822 (employing the term “hierarchical precedent” to refer to vertical stare decisis). Most agree that questions of horizontal stare decisis are more complicated, and thus subject to broader debate, than their vertical counterparts. See Dorf, supra note 14 at 2025 (“While the answer to the question of when must a court follow its own precedents may be extremely complex, questions of vertical stare decisis, that is, questions of a lower court’s obligation to follow the precedents of a higher court, present fewer difficulties.”); Abramowicz & Stearns, supra note 14 at 955 (“Vertical stare decisis is generally considered absolute . . . .”). The vertical axis is most pertinent to this Article, as the question ultimately posed here is the extent to which the district and circuit courts must accept, or not, the Supreme Court’s statements about the scope of the anti-retaliation provision in Burlington Northern. This could ultimately become a question of horizontal stare decisis, but given the strong majority vote in Burlington Northern and the high bar set for overruling cases of statutory interpretation, it is unlikely that this will happen any time soon. See Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 362-63 (2000) (“The policy of stare decisis is at its most powerful in statutory interpretation (which Congress is always free to supersede with new legislation.”) (citation omitted)); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (discussing the binding effect of prior Supreme Court precedents interpreting Title VII, especially in light of fact that Congress has amended Title VII substantially in the meantime without affecting the rule of such precedents).

See Sullivan at 1152 (“[T]here is a growing tendency to hold inferior courts bound not merely by what the higher court did but by what it said.”). See, e.g., United States v. Jiminez-Beltre, 440 F.3d 515, 517 (1st Cir. 2006) (applying Supreme Court “dicta” as binding authority); Oyebanji v. Gonzales, 418 F.3d 260, 265 (3d Cir. 2005) (same); United States v. Marlow, 278 F.3d 581, 588 & n.7 (6th Cir. 2002) (noting that “[a]ppellate courts . . . are obligated to follow Supreme Court dicta, particularly when there is no substantial reason for disregarding it, such as age or subsequent statements undermining its rationale”); Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 557 (8th Cir. 1993) (stating that appellate courts are bound by some Supreme Court dicta); United States v. Gaudin, 28 F.3d 943, 956 (9th Cir. 1994) (“Even if it were dicta, we could not lightly ignore it. . . .” (emphasis in original)); Schwab v. Crosby, 451 F.3d 1308, 1325 (11th Cir. 2006) (“We have previously recognized that ‘dicta from the Supreme Court is not something to be lightly cast aside.’ “); Wynne v. Great Falls, 376 F.3d 292, 298 n.3 (4th Cir. 2004) (“[W]ith inferior courts, like ourselves, . . . carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.”); McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) (“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 . . . .”); Nichol v. Pullman Standard, Inc., 889 F.2d 115, 120 n.8 (7th Cir. 1989) (affording “respect” to Supreme Court dicta and citing other cases doing same). But see Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. REV. 1249, 1249 (2006) (criticizing “increasing failure of courts to distinguish between dictum and holding”).

See McCoy v. Mass. Inst. Of Tech., 950 F.2d 13, 19 (1st Cir. 1991) “in evaluating dicta, [m]uch depends on the character of the dictum. Mere obiter may be entitled to little weight, while a carefully considered statement. . . . though technically dictum, must carry great weight, and may even. . . be regarded as conclusive.” (quoting CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS § 58, at 374 (4th ed. 1983)); Goodson v. United States, 151 F.Supp 416, 420 (D. Minn. 1960) (“Yet while dicta are not conclusive evidence of the law of any state, considered dicta, as distinguished from mere obiter dicta, should not be ignored, and are even entitled to great weight.” (internal citations omitted)); See also Hawks v. Hamill, 288
gradations of dicta might best be envisioned on a spectrum, with the left end comprised of the court’s off-hand remarks and side comments, referred to by some as “obiter dicta,”\textsuperscript{75} and the right-hand end occupied by the court’s reasoned conclusions about the law, often labeled “judicial dicta” or “considered dicta.”\textsuperscript{76} The further a particular statement of dictum falls toward the right end of the spectrum, the more likely it is to garner future precedential effect. Indeed, expanding the spectrum analogy further to the right to encompass, at the far extreme, the court’s “holdings,” is not just appropriate but perhaps even imperative. Envisioning a court’s statements along this spectrum aids one’s understanding that the definitions of each term along the way – from “obiter dictum” to “considered dictum” to “holding” – are nothing if not malleable. Moreover, not only does each term defy precise definition, but the location on the spectrum designated for any given court statement often varies widely, depending upon the identity, perspective, and goals of the person doing the locating.

The categories of dicta, which are loose to begin with, can be subdivided even further. Most importantly, for purposes of this Article, are two sub-categories within the broader grouping of “considered” dictum, or those court statements backed by some degree of reasoning, as opposed to unsupported off-hand remarks. Sometimes the Court will attach a disclaimer to statements that it recognizes as dictum, but will nevertheless issue such statements with great gusto. The virtue of such statements is that the Court recognizes that it is overreaching and forewarns all future readers of that fact. Thus, lawyers and judges are much less likely to rely on those statements as binding law in the future. There is little confusion about the matter – the Court’s statement may constitute persuasive authority, at best, but is not binding. The other sub-category here is more troubling, though. It is comprised of all those unnecessary yet well-reasoned statements the Court makes without disclaiming their future precedential effect. As will be discussed in more detail below, the Court’s assertion in \textit{Burlington Northern} that the anti-retaliation provision of Title VII redresses non-workplace harms falls squarely within this troubling category.


\textsuperscript{76} See Afroyim v. Rusk, 387 U.S. 253, 261-65 (1967) (analyzing extent to which statement in previous case should receive precedential effect and employing terms “judicial dictum” and “obiter dictum” in process); Quinn, supra note 75 at 698 (defining “judicial dicta” as “expressions of law made for the deliberate purpose of guiding future litigation”); Cerro Metal Prods. v. Marshall, 620 F.2d 964, 978 n. 39 (3d Cir. 1980) (noting distinction between judicial dictum and obiter dictum).
B. Developing the Dicta Doctrine: Supreme Court Pronouncements on the Dictum-Holding Divide.

If the discussion in this Article thus far has accomplished nothing else, it should now be apparent that there is little about modern dictum that is clear. Its definition is the subject of great debate, and opinions vary widely about the extent to which courts should afford dicta precedential effect. Moreover, a precise definition of the term and a broadly accepted framework for dealing with dicta seem not only unlikely, but also implausible. Unfortunately, the Supreme Court has not offered much by way of cleaning up this vast wasteland. Nevertheless, several trends emerge from the Court’s scattered statements about dicta.

Supreme Court musings about dicta date back to at least 1821, when Chief Justice John Marshall reasoned that the Court could not give effect to certain statements made in its earlier decision in Marbury v. Madison\(^{77}\) because those statements pertained to matters not presented squarely in that case.\(^{78}\) Justice Marshall’s statement that courts should not afford precedential effect to statements made in dicta is often cited as the Court’s first instruction in that regard:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.\(^{79}\)

This oft-quoted passage suggests at least two things: (1) that the Court recognizes that it will make statements that “go beyond the case” from time to time; and (2) that such statements “may be respected” but are not binding in future lawsuits. This passage therefore lays the groundwork for treatment of dicta as persuasive, but not mandatory, authority.\(^{80}\) It leaves the details of that framework, however, wide open to future shaping.

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\(^{77}\) 1 U.S. (1 Cranch) 137 (1803).

\(^{78}\) Cohens v. Va., 19 U.S. (6 Wheat.) 264, 399-400 (1821).

\(^{79}\) Id.

\(^{80}\) Id. Several other early Supreme Court authorities fell in line with the advice of Justice Marshall in Cohens v. Va. See, e.g., Carroll v. Carroll’s Lessee, 57 U.S. (16 How.) 275, 287 (1853) (citing Cohens and stating that court is not “bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties” and that an opinion’s “weight of reason must depend on what it contains”); Pollock v. Farmers’ Loan & Trust Co., 157 U.S. 429 (1895) (noting that court is not bound by matters beyond scope of question presented in prior precedents), overruled on other grounds by S. C. v. Baker, 485 U.S. 505 (1988). Sullivan v. Iron Silver Mining Co., 109 U.S. 550, 554 (1883) (stating that court should not express its opinion as to interpretation of statute “unless its determination is necessarily involved in adjudication of the case at bar”).
Unfortunately, little such shaping has occurred, at least not directly. Much of the Court’s instruction about dicta amounts to no more than discussion of or reliance upon (albeit sometimes without citation) the principles announced by Justice Marshall in *Cohens* — that “general expressions” must be taken in the context of the case in which they appear, and that those reaching beyond the question presented constitute persuasive authority at best but are not binding.\(^{81}\) The only further refinements of the *Cohens* “maxim” consist of statements that the binding portions of a court’s opinion encompass not just its ultimate conclusions but also the reasoning employed to get there.\(^{82}\) In that vein, the Court might be seen as having narrowed the scope of what it considers “dicta” to some extent, but the parameters nevertheless remain open to debate and thus exceptionally malleable.

**C. Theorizing Dicta: Frameworks Proposed by Recent Commentators**

Many theorists have engaged in the dictum-holding debate over the years, each offering his own formula in an effort to solve the puzzle.\(^{83}\) Early commentary suggested a more formalistic approach to the holding-dictum distinction, with giants such as Karl Llewellyn proposing that the line between the two is quite stark.\(^{84}\) According to Llewellyn, four “rules . . . form the basis of American case law procedure:

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\(^{81}\) *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738, 2762 (2007) (citing *Cohens* as support for Court’s rejection of authority relied upon by dissent on grounds Court is not bound by statements in prior cases if that issue was not involved); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) (“[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.” (citing *Cohens*)); Jama v. Immigration and Customs Enforcement, 435 U.S. 335, 352 n.12 (2005) (dismissing dicta relied upon by dissent because “[d]ictum settles nothing, even in the court that utter[es] it”); McDaniel v. Sanchez, 425 U.S. 130, 141-42 (1981) (rejecting petitioner’s argument premised on footnote in earlier case on grounds it was dicta because issue was not raised by parties and was therefore unnecessary to case); Powell v. McCormack, 395 U.S. 486, 519 n. 30 (1969) (dismissing Respondent’s argument as based on dicta because case relied upon did not address the narrower question presented in present case); In re Permian Basin Area Rate Cases, 390 U.S. 747, 775 (1968) (rejecting argument based on dictum in earlier Supreme court case wherein Court, by way of illustration, made statement about meaning of statute “not even obliquely at issue” in that case); Associated Press v. Nat’l Lab. Rel’ns Bd., 301 U.S. 103, 132 (1937) (“Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances.”); Osaka Shosen Kaisha Line v. United States, 300 U.S. 98, 103 (1937) (rejecting Petition argument based on earlier interpretation of Immigration Act because court there was dealing with different situation, and citing to *Cohens*); Humphrey’s Ex’ v. United States, 295 U.S. 602, 626 (1935) (rejecting government argument premised on Court’s decision in Myers v. United States because parts relied upon went beyond “the narrow point actually decided” there (citing *Cohens*)); Williams v. United States, 289 U.S. 553, 568 (1933) (citing *Cohens* for proposition that “obiter” dicta “may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision”).

\(^{82}\) Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 66-67 (1996) (responding to dissent’s criticism of “attend[ing] to dicta” by clarifying that majority opinion does not rely on “mere obiter dicta” but instead draws upon “rationale” of prior case); Richmond Screw Anchor v. United States, 275 U.S. 371, 340 (1928) (asserting that Court’s rationale in earlier case is “not obiter dictum” but rather forms binding precedent); Eisner v. Macomber, 252 U.S. 189, 202 (1920) (same).

\(^{83}\) *See generally* Abramowicz & Stearns, *supra* note 14 at 1044-65 (describing in detail and critiquing various “dictum” definitions previously proposed).

1. The court must decide the legal dispute that is before it.
2. The court can decide nothing but the legal dispute before it.
3. All cases must be decided based on a rule of law of general applicability (in the relevant state).
4. Everything, but everything, said in an opinion is to be read and understood only in relation to the actual case before the court. \(^{85}\)

With these parameters in place, Llewellyn posits that the “holding” of a case must, by its very nature, be a very narrow proposition: “The holding is no more than the precise point at issue (rarely all issues in a dispute) that the case decided, either for the plaintiff or the defendant. The holding goes so far and no further.” \(^{86}\) By default, then, everything else is “non-essential” and therefore “dictum.” \(^{87}\) Llewellyn’s theory thus proposes a strict interpretation of the term “holding,” confining its parameters to only those parts of the case consisting of the court’s resolution of the legal dispute presented, in light of the relevant rule of law. \(^{88}\) Moreover, only those statements of law that “bear a direct and necessary relation to the actual facts of the case” are entitled to precedential effect. \(^{89}\) In that respect Llewellyn’s definition of “holding” is quite narrow, and admittedly so. \(^{90}\) Llewellyn does recognize that some courts may give precedential effect – albeit of the “second order” – to parts of judicial opinions falling outside of the narrowly-circumscribed “holding.” Even while referring to such propositions as “well-considered dictum,” however, Llewellyn clarifies that most such statements carry scanty weight:

But when the dictum does not deal with the actual case before the court or give a direct grounds for the ratio decidendi but is merely a remark in passing, an example, an excursus the opinion writer allows himself for whatever reason, then it is called obiter dictum and is of little or no value as precedent. It is then not a binding judicial pronouncement, but at most a pertinent expression of opinion – like that, for example, of a legal scholar – which may meet with later approval, thanks to the esteem enjoyed by the opinion writer or to the excellence of its conception or reasoning. \(^{91}\)

British jurist Arthur Goodhart also took a formalistic approach. \(^{92}\) Goodhart suggested a fact-based approach, wherein the judge selects which facts are material, and the “holding” consists of the result of the case, given those facts determined to be material by the judge. \(^{93}\) By corollary, then, any conclusion “based on a fact the existence of which has not been determined by the court, cannot establish a principle [of the case or

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\(^{85}\) Id. at 14.

\(^{86}\) Id.

\(^{87}\) Id.

\(^{88}\) Id.

\(^{89}\) Id. at 13.

\(^{90}\) Id. at 14 (referring to narrow interpretation of “holding” as “strict[] view”).

\(^{91}\) Id. at 14-15.

\(^{92}\) Arthur L. Goodhart, Determining the Ratio Deciendi of a Case, 40 YALE L. J. 161 (1930).

\(^{93}\) Id. at 173, 179.
holding].” 94 Such conclusions are, instead, dictum. 95 Some commentators refer to this as the facts-plus-outcome theory. 96

Perhaps one of the most influential 97 early commentators was Professor Eugene Wambaugh, whose views eventually made their way to print in Black’s Law Dictionary. 98 While Goodhart’s approach centered on material facts, Wambaugh’s approach focused on necessity: “So far as the opinion goes beyond a statement of the proposition of law necessarily involved in the case, the words contained in the opinion, whether they be right or wrong, are not authority of the highest order, but are merely words spoken, dicta, obiter, or obiter dicta.” 99 Thus, any statement in the opinion that is “unnecessary” to the case resolution is dictum.

Dissatisfied with these older, arguably simpler approaches, modern scholars have entered the fray offering various alternatives. One of the first, and most prominent, of such theorists is Professor Michael Dorf. In his 1994 article, Professor Dorf identified and critiqued what he considered the prevailing basis for drawing the holding/dictum distinction, which he termed the “facts-plus-outcome” approach. 100 He then offered his own “rationale-focused” view, founded on principles of preclusion law. 101 According to Dorf, courts should draw on the better-developed body of preclusion law, reflected in the Restatement of Judgments, in order to assess the status – holding or dictum – of a prior court’s assertions. 102 Thus, a court’s statement crosses the line from dictum to holding when it is entitled to preclusive effect, a point relatively well defined in the Restatement: “When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” 103 As such, to perhaps oversimplify but state as succinctly as possible Dorf’s view, an assertion constitutes holding, rather than dictum, when it is essential to the outcome of the case. This is so whether the assertion comprises part of the court’s rationale, or its ultimate conclusion.

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94 Id. at 179.
95 Id.; see also id. at 183 (“A conclusion based on a hypothetical fact is a dictum. By hypothetical fact is meant any fact the existence of which has not been determined or accepted by the judge.”).
96 See Abramowicz & Stearns, supra note 14 at 1052 (“Professor Arthur Goodhart offered a variant on the facts-plus-outcome approach that he saw as producing some predictability.”).
97 See id. (saying that Wambaugh’s definition is “most influential . . . perhaps largely because of its inclusion in Black’s Law Dictionary”).
98 See supra notes 63-65, 69 and accompanying text (discussing Black’s Law Dictionary’s definition of “dictum”).
100 Dorf, supra note 14; see also Sullivan, supra note 14 at 1185 (discussing Dorf’s presentation of “two competing views of what constitutes a holding,” referred to as “facts-plus-outcome” and “rationale-based”); Steinman, supra note 97 at n.104 (same).
101 Dorf, supra note 14 at 2040-49.
102 Id. at 2041-42.
103 Id. at 2041.
Dorf’s proposal did not go unnoticed in the scholarly world, and has evoked not only positive discussion but also authoritative citation in numerous other recent works addressed to the problem of distinguishing dictum from holding. As is often the case, though, with widespread attention also comes criticism. In this case, that criticism came from Professors Michael Abramowicz and Maxwell Stearns, whose quest for an unassailable definition of dictum included critiques of not just Dorf’s proposal but also those of the other commentators discussed here, as well as others. Like their scholarly predecessors, Abramowicz and Stearns also proceeded to offer their own framework, wherein “[a] holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta.” Notably, while the nuances may differ, their approach bears striking similarities to those they criticize as insufficient, and to Dorf’s in particular. Indeed, one could dedicate pages of analysis to a comparison of the various definitions proposed by all of these esteemed scholars, and to further exposition of the virtues and shortcomings of each. Such exposition might add value to the debate, or it might not. As the discussion below will demonstrate, though, it is entirely superfluous to this Article, for no matter which of these theories applies, it is clear that the White Court’s conclusions about the applicability of Title VII’s anti-retaliation provision to non-workplace harms are dicta.

D. Assessing Burlington Northern’s Dicta: The Definitions and Theories at Work.

Just as a thorough critique of the various scholarly theories about dictum is unnecessary to the project at hand, a lengthy consideration of how those theories apply to Burlington Northern is likewise unwarranted. A relatively quick glance at each, in light of the legal and factual posture of the Burlington Northern case, readily reveals that the Court’s holding went too far.

Because each theory of dicta relies in some part on the factual posture of the case, a brief review of the facts of Sheila White’s case is therefore in order. White alleged that her employer, Burlington Northern, unlawfully retaliated against her for complaining about sexual harassment, by altering her job duties and suspending her without pay for 37 days. The jury found in White’s favor, and awarded her $43,500 in compensatory

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104 See, e.g. Sullivan, supra note 14 at 1185; Steinman, supra note 97; Abramowicz & Stearns, supra note 14 at 1045 (referring to Dorf’s work as an “important article”).

105 Abramowicz & Stearns, supra note 14.

106 Id. at 1065.

107 For another view, see Leval, supra note 70 at 1256 (defining “dictum” as “an assertion in a court’s opinion of a proposition of law which does not explain why the court’s judgment goes in favor of the winner” and explaining that “[i]f the court’s judgment and the reasoning which supports it would remain unchanged, regardless of the proposition in question, that proposition plays no role in explaining why the judgment goes for the winner . . . [;] [i]t is superfluous to the decision and is dictum”).

108 See also supra notes 4-13 and accompanying text (discussing Burlington Northern case).

The district court denied Burlington Northern’s motion for judgment as a matter of law, but the court of appeals initially reversed, holding that the adverse employment actions alleged by White failed to support a prima facie case of Title VII retaliation as a matter of law. Specifically, the court determined that Title VII required “a materially adverse change in the terms and conditions of [the plaintiff’s] employment,” and that the employer acts alleged by White failed to meet that standard. The court of appeals reconvened en banc, though, and ultimately upheld the trial court’s determination that White’s allegations were sufficient, albeit under essentially the same material-adverse-action standard.

The Supreme Court then granted certiorari in White’s case, promising to resolve a divisive split among the circuit courts of appeals as to the requisite degree of harm a plaintiff must allege to support a Title VII retaliation claim. The Court’s holding, though, reached further. Rather than confine its decision to resolution of the question presented, the Court also addressed, and purported to issue an express holding, as to another related, but distinct question – whether the anti-retaliation provision protects against non-workplace harms. Specifically, the Court stated: “The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.”

Our question is thusly framed: is the Supreme Court’s statement dicta, given that the only harms alleged by Sheila White indisputably occurred in, and related directly to, her workplace?

First consider Llewellyn. His theory posits that a case’s holding consists of “no more than the precise point at issue … that the case decided” and that only those statements of law that “bear a direct and necessary relationship to the actual facts of the case” carry precedential weight. All else is dicta. The Court’s conclusion that the anti-retaliation provision reaches non-workplace harms clearly falls within the latter category because it bore no relationship whatsoever to the “actual facts of the case,” which involved only job-related harms. As such, it pertains to matters beyond “the precise point at issue” and is therefore dicta.

The same result attends upon application of Goodhart’s facts-plus-outcome theory, under which the holding is the result or outcome given the facts deemed material by the judge. According to Goodhart, the “principle of the case … is to be found in the conclusion reached by the judge on the basis of the material facts and on the exclusion of

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112 Id.
115 Id.
116 Llewellyn, supra note 84 at 14.
117 Id. at 12.
118 Id.
119 Goodhart, supra note 92.
the immaterial ones.”

In White’s case, the “material” facts surely must include the employment actions that she alleged were unlawful. Those alleged unlawful acts – alteration of her job duties and her placement on unpaid suspension – indisputably related directly to her employment. Thus, under Goodhart’s theory, the holding would include any outcome reliant upon those material facts. Because those facts entail only allegations of wrongdoing bearing directly on White’s employment, and no allegations of harm effected outside the workplace, the Court’s assertions about non-workplace harms cannot constitute a “holding” under Goodhart’s theory.

The Court’s assertions about non-workplace harms likewise constitute dicta under Wambaugh’s necessity-based framework. Wambaugh’s theory invites application of a relatively simple test: “if the decision could have been the same with the negation of a proposition, then the proposition was not necessary to the disposition and thus counts as dicta.” The relevant proposition here is the Court’s conclusion that “[t]he scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.” Negating this proposition would not affect the outcome of the case. That is, even if the Court had concluded that the anti-retaliation provision does not extend beyond workplace- or employment-related harms, its ultimate conclusions about the severity of harm required to support a claim, and the sufficiency of White’s allegations under that standard, would not change. Thus, the Court’s assertions about non-workplace harms were “unnecessary,” in Wambaugh’s terms, to the Court’s disposition, and do not comprise any part of its holding.

The result is no different under the modern theories. Without regard to the other elements, the Court’s assertions about non-workplace harms would fail the essentiality part of Dorf’s test. That is, the Court’s conclusion that Title VII’s anti-retaliation provision reaches harms unrelated to employment was not essential to its ultimate decision that the workplace harms alleged by Sheila White were sufficiently egregious to support her prima facie case of retaliation. Indeed, that aspect of the Court’s opinion arguably had no bearing on its final decision at all. Moreover, to apply an essentiality test similar to the dicta theory advocated by Wambaugh, the Court’s judgment would not have changed had the Court reached an opposite conclusion about Title VII’s applicability to non-workplace harms. Its assertions on that point simply had no bearing on the case at all, and thus were dicta. The same is true under the Abramowicz/Stearns model. Under their theory, a holding includes only those propositions that “(1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment.” The Court’s non-workplace-harms conclusion appears to fail both of the latter two elements. It was not based on the facts of the case, as the facts alleged only work-related harms, and it did not lead to the judgment, which focused solely on the sufficiency of White’s alleged harms vis-à-vis their materiality, not their work-relatedness. Thus, no matter how you roll the dice, the result is always the same – the

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120 Id. at 179.
121 Wambaugh, supra note 99, § 11, at 17.
123 See supra notes 100-03 and accompanying text (describing Professor Dorf’s proposed theory).
124 Abramowicz & Stearns, supra note 14 at 1065.
Burlington Northern Court’s assertions about non-workplace harms are dicta and, as discussed below, should mostly be disregarded.

IV. CARVING A PADDLE WITH WHICH TO NAVIGATE THE CREEK: A PROPOSED STANDARD FOR ASSESSMENT OF SUPREME COURT DICTUM.

A. Crafting the Standard.

In light of the complexities surrounding the dictum-holding divide, it should come as no surprise that the treatment courts accord dicta is far from predictable. Considering the Supreme Court’s own instruction about the precedential effect of dicta – i.e., that dicta is not binding – one might expect courts to freely disregard Supreme Court dicta. The general practice of the lower courts does not, however, conform to that expectation. Instead, most courts agree that lower courts should give some degree of respect to Supreme Court dicta if the Court dedicated sufficient consideration to such matters. Such courts are careful to note that statements made in dicta are not binding in a precedential sense, but are nevertheless entitled to “great deference.” Sometimes

125 Cohens v. Va., 19 U.S. (6 Wheat.) 264, 398 (1821) (“It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) (“[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.” (citing Cohens)); Natural Res. Def. Council, Inc. v. United States Forest Serv., No.S-05-02590WBS GGH, slip op. at 18 (E.D.Cal. 2007) (“Statements made by a court, not necessary to the decision, constitute "dictum" and have no binding effect in subsequent cases or on other courts.”) (citing Exp. Group v. Reef Indus., Inc., 54 F.3d 1466, 1472 (9th Cir.1995)); United States v. Crawley, 837 F.2d 291, 292 (7th Cir. 1988) (“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.”); Dible v. Scholl, 410 F.Supp.2d 807, 824 (N.D.Iowa, 2006) (citing to Cohens to define dicta and determining that Supreme Court dicta was not “directly applicable” to the case.).

126 E.g., Schwab v. Crosby, 451 F.3d 1308, 1325-26 (11th Cir. 2006); United States v. Montero-Camargo, 208 F.3d 1122, 1122 n. 17 (9th Cir. 2000) (en banc) (“As we have frequently acknowledged, Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold; accordingly, we do not blandly shrug them off because they were not a holding.”); Nichol v. Pullman Standard, Inc., 889 F.2d 115, 120 n. 8 (7th Cir. 1989) (“This Court should respect considered Supreme Court dicta.”); United States v. Bloom, 149 F.3d 649, 653 (7th Cir. 1998) (“The Supreme Court often articulates positions through language that an unsympathetic audience might dismiss as dictum… and it expects these formulations to be adhered to. The Court can hear only a small portion of all litigated disputes; it uses considered dicta to influence others for which there is no room on the docket”); United States v. Becton, 632 F.2d 1294, 1296 n. 3 (5th Cir. 1980) (“We are not bound by dicta, even of our own court .... Dicta of the Supreme Court are, of course, another matter.”).

127 S.E.C. v. Rocklage, 470 F.3d 1, 7 n. 3 (1st Cir. 2006) (“Even dicta in Supreme Court opinions is looked on with great deference.”); Blasi v. Attorney Gen. of Pa., 120 F.Supp.2d 451, 466 (M.D.P.A. 2000) (“[W]e are required to give [Supreme Court] dictum great deference.”); see also supra note 71 and accompanying text (proposing sliding scale between poles of “obiter dicta” and “holding,” with “considered dicta” falling in the middle, and suggesting that courts might place a particular statement along the scale in accordance with the extent to which that statement supports the court’s desired outcome); see also Laub v. United States Dep’t of Interior, 342 F.3d 1080, 1090 n. 8 (9th Cir. 2003) (“Supreme Court dicta is not to be lightly disregarded”); Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 561 (3d Cir. 2003) (en banc) (“Although the Committee is doubtless correct that the
employing the label “considered dicta,” those courts reason that, absent binding precedent, well-reasoned conclusions of the Supreme Court deserve deference as the best indicators of what the law should be. The Third Circuit recently explained this phenomenon well:

Because the “Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket,” failing to follow those statements could “frustrate the evenhanded administration of justice by giving litigants an outcome other than the one the Supreme Court would be likely to reach were the case heard there.”

The seemingly pervasive practice of treating Supreme Court dicta as binding is palatable when viewed from this perspective. That is, it makes some sense that courts would follow otherwise-non-binding Supreme Court statements in the absence of any other authority, given the Supreme Court’s unique institutional position. The nature of our judicial system is such that the Supreme Court, unlike most other courts, can decide only a limited number of cases each year. Moreover, the Court can (or should) decide only those questions of law that arise in the context of real disputes. Thus, the lower courts frequently face questions of law that the Supreme Court has had no occasion to answer. Arguably, it should be acceptable for the lower courts to follow Supreme Court advice, even in dictum, given the Court’s role as the final arbiter on open questions of federal law and given these strict limitations on its ability to resolve them, notwithstanding their numerosity, variability and complexity.

Furthermore, not only is adherence to Supreme Court dictum justifiable because of the Court’s unique institutional position, but it is also sensible for lower federal courts to mind the Court’s instructions – albeit in dictum – to the extent of their substantial predictive value. That is, even if the Court’s statements are not technically binding, they

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128 Galli v. N. J. Meadowlands Commission, 490 F.3d 265, 274 (3d Cir. 2007); see also Wright v. Morris, 111 F.3d 414, 419 (6th Cir. 1997) (cert. denied 118 S.Ct. 263 (1997)) (“We believe that … [dicta] is instructive of the Supreme Court’s views and cannot be dismissed out of hand . . . .”); Alston v. Redman, 34 F.3d 1237, 1246 (3d Cir. 1994) (cert denied) (“[W]e must consider it with deference, given the High Court's paramount position in our ‘three-tier system of federal courts’”) (citing Casey v. Planned Parenthood, 14 F.3d 848, 857 (3d Cir.1994)); see also Abramowicz & Stearns, supra note 14 at 1067 (“Because the Court sits at the apex of numerous pyramically structured jurisdictions and must make and clarify law through a relatively small number of cases, the Court might require greater latitude than other courts in determining the scope of its holdings.”).

129 As exemplified by the Burlington Northern case and discussed more thoroughly below, see infra part V, the Court strays beyond these limits when it issues dictum. For the reasons discussed hereinafter, the Court’s practice in that regard is not advisable, but is nevertheless prevalent.

130 See, e.g., Hein v. Freedom From Religion Found., Inc., 127 S. Ct. 2553, 2572 (2007) (“We need go no further to decide this case. Relying on the provision of the Constitution that limits our role to resolving the “Cases” and “Controversies” before us, we decide only the case at hand.”); Sole v. Wyner, 127 S. Ct. 2188, 2196 (2007) (“We are presented with, and therefore decide, no broader issue in this case.”).
might, at least in some circumstances, offer informed insight as to how the Court might rule if it faced that issue.\textsuperscript{131} To that end, a court faced with an open question of law, as to which the Supreme Court has offered its own view, may believe reversal much less likely if it follows the Court’s instruction, than if it decides the issue differently. The Ninth Circuit has articulated this view:

\begin{quote}
We do not treat considered dicta from the Supreme Court lightly. Rather, we accord it appropriate deference …. As we have frequently acknowledged, Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold; accordingly, we do not blandly shrug them off because they were not a holding.\textsuperscript{132}
\end{quote}

Thus, adherence to Supreme Court dictum is justifiable in some cases, given the Supreme Court’s unique institutional position as well as the substantial predictive value of its advice.

While this practice of following Supreme Court dictum is acceptable, it is not, as discussed below, universally desirable. Indeed, most courts, while suggesting that Supreme Court dictum is “highly persuasive,” nevertheless recognize that dictum should be disregarded in some cases. That is, while some dictum deserves precedential respect, other dictum, for a variety of reasons, does not. Unfortunately, however, the courts have not developed a cohesive, or adequate, measure of this distinction. Instead, the criterion employed to assess whether a particular dictum should be disregarded are scattered, and mostly without instruction.

Some courts, for example, have refused to treat dictum as binding when the statement was not expressed unequivocally.\textsuperscript{133} This circular suggestion adds little to the analysis, as most courts agree that even Supreme Court dictum is not binding unless it is “well considered” to begin with.\textsuperscript{134}

\begin{footnotesize}
\begin{enumerate}
\item United States v. Montero-Camargo, 208 F.3d 1122, 1132 n. 17 (9th Cir. 2000) (en banc).
\item Id. (internal citations omitted); see also, e.g., Wright, 111 F.3d at 419 (“We believe that … [dicta] is instructive of the Supreme Court’s views and cannot be dismissed out of hand . . .
\item De Golia v. Twentieth Century-Fox Film Corp., 140 F.Supp. 316, 317-18 (“But however unequivocally the views of the Supreme Court Justices may have been expressed, such expressions were, as even defendants concede, pure dicta.”); cf.Bangor Hyrdo-Electric Co. v. FERC, 78 F.3d 659, 662 (D.C. Cir. 1996) (“It may be dicta, but Supreme Court dicta tends to have somewhat greater force – particularly when expressed so unequivocally.”); United States v. Dorcley, 454 F.3d 366, 357 (D.C. Cir. 2006) (quoting Bangor for discussion of unequivocally expressed Supreme Court dicta); Sierra Club v. EPA, 322 F.3d 718, 724 (D.C.Cir.2003)
\item Boumediene v. Bush, 476 F.3d 981, 995 (D.C. Cir. 2007) (stating that well-considered dicta of the Supreme Court was binding) (citing Rasul v. Bush, 542 U.S. 466 (2005)); IFC Interconsult AG v. Safeguard Intern. Partners, LLC., 438 F.3d 298, 311 (3d Cir. 2006) (“we pay due homage to the Supreme Court’s well-considered dicta as pharoi that guide our rulings”); see also supra note 71(discussing a sliding scale whereby courts give more respect to considered dicta); Harbury v. Deutch, 233 F.3d 596, 604 (D.C. Cir. 2000) (“firm and considered dicta [of the Supreme Court]…binds this court”); United States v. Oakar, 111 F.3d 146, 153 (D.C.Cir. 1997) (“[C]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.”); United States v. Santana, 6 F.3d 1, 9 (1st
\end{enumerate}
\end{footnotesize}
Other courts suggest that dictum is not binding if not “of recent vintage.” This suggestion is intuitively satisfying if we assume that recency equals, or at least correlates to, accuracy. Such correlation may exist to the extent that decisions made more recently have the benefit of deeper experience to influence their outcomes and may better reflect modern social and political policy formulations. In that respect, it makes sense that we are more comfortable relying upon the Court’s speculations if made recently. However, this, too, adds little to the analysis because the cases provide little to no indication of where the line of “recency” should be drawn. Indeed, a vague indicator, such as this, simply allows courts freer reign to determine, ad hoc, whether a particular dictum warrants precedential treatment or not. Moreover, intuition dictates that recency cannot serve as a definitive proxy for accuracy. Statements made by the Court in dictum 100 years ago may, in some circumstances, warrant greater deference than dictum issued yesterday, if the relevant law otherwise indicates that the “older” dictum is, for one reason or another, more reliable. Thus, while the relative recency of Supreme Court dictum may support a conclusion that it is entitled to precedential weight for some other reason, it likely would not, standing alone, compel that result.

Other criteria, however, provide a more workable starting point for crafting a broader framework. Specifically, the courts suggest that dictum is not binding when there is clear precedent to the contrary and when it is “not enfeebled by any subsequent statement.” Taken together, these statements suggest that Supreme Court dictum is binding only when, and to the extent that, it is consistent with the relevant body of law. For instance, in matters of statutory interpretation (not coincidentally, the pertinent question here), is the dictum consistent with the statutory language and structure as a

Cir. 1993) (“Carefully considered statements of the Supreme Court, even if technically dictum, must be accorded great weight and should be treated as authoritative.”); Dedham Water Co., Inc. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 459 (1st Cir. 1992) (“Be that as it may, courts often, quite properly, give considerable weight to dictum-particularly to dictum that seems considered as opposed to casual.”).  
McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) (suggesting that Supreme Court dictum is not binding if not “of recent vintage”); Gaylor v. United States, 74 F.3d 214, 217 (1996) (“[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court’s outright holdings, particularly when the dicta is recent and not enfeebled by later statements.”); United States v. Serawop, 505 F.3d 1112, 1122 (10th Cir. 2007) (quoting Gaylor for the Circuit’s position on Supreme Court Dicta); Oyebanji v. Gonzales, 418 F.3d 260, 264 (3d Cir. 2005) (quoting McCoy for proposition that Supreme Court dicta is binding if recent and not enfeebled by subsequent holdings); United States v. Nelson, 383 F.3d 1227, 1232 (10th Cir. 2004) (same); see also United States v. Montero-Camargo, 208 F.3d 1122, 1132 (9th Cir. 2000) (rejecting Supreme Court dictum because it was based on outdated demographic data).

Wright v. Morris, 111 F.3d 414, 419 (6th Cir. 1997) (“Where there is no clear precedent to the contrary, we will not simply ignore the [Supreme] Court’s dicta.” (alteration in original)); United States v Marlow, 278 F.3d 581, 587 (6th Cir. 2002) (stating that Supreme Court dicta should be followed “in the absence of any compelling authority to the contrary”); see also Bembenek v. Donohooh, 355 F.Supp.2d 942, 950 (E.D. Wis. 2005) (“and to the extent that Supreme Court cases contain conflicting dicta, a later dictum supersedes an earlier one just as a later statute supersedes an earlier one.”).  
McCoy, 950 F.2d 13, 19 (1st Cir. 1991) (“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...a dictum is of recent vintage and not enfeebled by any subsequent statement.”); Oyebanji v. Gonzales, 418 F.3d 260, 265 (3d Cir. 2005) (quoting McCoy for position on dicta); United States v. Gaudin, 28 F.3d 943, 956 (9th Cir. 1994) (same); United States v. Rosen, 445 F.Supp.2d 602, 639 (E.D.Va. 2006) (same).
whole? Would application of traditional canons of statutory construction compel the same result? Likewise, to the extent that the dictum implicates matters addressed by other case law, is it consistent? Does the dictum meld well into the structure of established binding precedents, or, alternatively does it create inconsistencies or gaps that did not previously exist?

To treat Supreme Court dictum as binding only when it is consistent with the relevant body of law is intuitively satisfying. Practitioners and students of the law alike commonly yearn for consistency and predictability – characteristics that are often lacking in the law but nevertheless emerge from time to time. Indeed, a system founded on principles of stare decisis places a premium on consistency by requiring courts to respect and apply binding precedents, thereby spinning discrete concepts into a seamless web known as “the law.” Thus, a rule that requires courts to assess in each case, in light of the relevant legal framework, whether given Supreme Court dictum deserves precedential respect, makes sense.

A recent case from the Fourth Circuit provides a prime example of a court rejecting Supreme Court dictum on grounds it is inconsistent with the plain language of an applicable statute. In In Re Bateman, the court acknowledged relevant instruction from the Supreme Court, stating “that dicta of the U.S. Supreme Court, although non-binding, should have ‘considerable persuasive value in the inferior courts.” Nevertheless, the court declined to follow the Court’s dictum, reasoning that the plain language of the relevant statute directed otherwise.

Other courts have likewise rejected Supreme Court dicta on grounds that it is contrary to binding case-law precedent. For example, the Ninth Circuit refused to follow a Supreme Court dictum that the Fifth Amendment privilege against self-incrimination is a “fundamental trial right of criminal defendants,” and held that, consistent with binding circuit precedent, the privilege attaches to a coercive interrogation even if it does not lead to prosecution. The court stated: “Where the two are at odds, . . . we are bound to follow our own binding precedent rather than Supreme court dicta.” In other words, where Supreme Court dicta is not consistent with other sources of law that are clearly binding – whether statutory or judicial – a court should disregard that dicta.

Likewise, some courts will disregard Supreme Court dicta when an alternative approach is “more credible,” not just in terms of consistency with applicable law but also in the context of broader policy concerns, including “general fairness.” A collection of recent prisoner cases provides a worthy example of this phenomenon. In Heck v. Humphrey, the Supreme Court held that a state prisoner cannot proceed on a civil

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138 In re Bateman, 515 F.3d 272, 282 (4th Cir. 2008).
139 Id.
141 Id. at n.3; see also Ayala v. United States, 550 F.2d 1196, 1200 (9th Cir. 1977) (rejecting Supreme Court dicta because inconsistent with circuit precedent).
rights claim under 28 U.S.C. § 1983 when its resolution would cast doubt upon the validity of an outstanding criminal conviction or sentence.\textsuperscript{144} Thus, a state prisoner’s claim for damages under § 1983 that “would necessarily imply the invalidity of his conviction or sentence” is cognizable only if he can prove “that the conviction or sentence has already been invalidated” on direct appeal, under an executive order, or in a habeas proceeding under 28 U.S.C. § 2254.\textsuperscript{145} The Court justified its holding based, among other things, on the policy disfavoring prisoners’ collateral attacks on their sentences.\textsuperscript{146} The prisoner in \textit{Heck} could not identify any such favorable termination of the conviction challenged in his § 1983 claim, which, therefore, was dismissed.\textsuperscript{147}

Subsequent prisoner-plaintiffs faced a barrier not present in Heck’s case – the practical inability to challenge their convictions or sentences, whether on appeal, in a habeas proceeding, or otherwise. For example, in \textit{Dible v. Scholl},\textsuperscript{148} William Dible sought damages under § 1983 for deprivation of his due process rights in conjunction with a prison disciplinary proceeding. Shortly after filing his complaint, Dible completed his sentence and was discharged from prison.\textsuperscript{149} Because he was no longer imprisoned, Dible could not seek habeas relief. Nevertheless, the prison officials sought dismissal of Dible’s complaint on grounds he failed to meet the \textit{Heck} standard because he had not alleged, nor could he demonstrate, that the prison disciplinary determination in question “ha[d] been reversed, expunged, declared invalid, or called into question by a federal court’s issuance of a writ of habeas corpus.”\textsuperscript{150} The defendants recognized that Dible’s release precluded him from seeking habeas relief but contended that that \textit{Heck}’s “bright-line rule” still applied.\textsuperscript{151} Indeed, their argument found firm foundation in footnote 10 of the \textit{Heck} Court’s opinion, in which the Court expressly stated its belief that the inability of a prisoner to seek habeas relief because of, \textit{e.g.}, his intervening release, should not relieve him of the favorable-termination requirement: “We think the principle barring collateral attacks – a longstanding and deeply rooted feature of both the common law and our own jurisprudence – is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated.”\textsuperscript{152} The court, however, rejected defendants’ argument, reasoning that it would be impossible for Dible to demonstrate the favorable termination required under \textit{Heck} because, having been released from prison, any habeas petition he might file would be dismissed as moot.\textsuperscript{153} In so doing, the court cast aside as dicta the Supreme Court’s suggestion in \textit{Heck} that its rule should apply to cases brought by former prisoners: “Thus, because habeas unavailability was not before the Court in

\begin{footnotes}
\item[144] \textit{Id.} at 486-87.
\item[145] \textit{Id.}
\item[146] \textit{Id.} at 484-85.
\item[147] \textit{Id.} at 490.
\item[148] 410 F. Supp.2d 807, 809 (N.D. Ia. 2006).
\item[149] \textit{Id.}
\item[150] \textit{Id.} at 811.
\item[151] \textit{Id.} at 812.
\item[152] \textit{Heck}, 512 U.S. at 490 n. 10.
\item[153] \textit{Id.} at 489.
\end{footnotes}
*Heck*, footnote ten was not necessary to the Court’s decision, and consequently is not binding.*154

The rationale offered by the *Dible* court in support of its decision to disregard *Heck*’s instruction as dictum drew upon concerns about not only consistency within the relevant body of law, but also broader policies, including fairness. The court implicated its policy concerns first, recognizing the inherent unfairness in a rule that precludes a person from pursuing a civil rights claim on grounds he cannot establish a factual predicate that it is legally impossible for him to show.155 Relatedly, the court expressed concerns about the illogical implications of the Supreme Court’s proposed rule. Specifically, the court noted that applying the dictum “would create a ‘patent anomaly,’ ” by providing a forum to redress the civil rights claims of current prisoners but not former ones, thereby “creat[ing] the appearance of rewarding those prisoners serving the longest terms of imprisonment.”156 All this, combined with the court’s determination that following the dictum would contravene the relevant statutory language, led the court to disregard it and instead craft a rule to better comport with the relevant body of law and the policy concerns it implicates.157

The net result of these decisions is far from shocking. The basic principles that emerge are rather quite logical: a court faced with a decision that could be persuaded by Supreme Court dicta may consider the dicta in context but nevertheless should engage an independent inquiry into its pertinence, and may be compelled to disregard that dicta when (1) it is not consistent with the relevant body of law; or (2) it implicates broader policy concerns, such as fairness. These logical principles therefore form the foundation of the framework I propose courts employ to assess Supreme Court dicta. In other words, a court deciding a legal question that is unguided by binding precedent but potentially influenced by Supreme Court dicta should follow the dictum’s guidance only if an independent analysis yields its consistency with the relevant body of law and pertinent public policies.

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154 *Dible*, 410 F. Supp.2d at 824. The court in *Dible* was not the first federal court to disregard the suggestion in *Heck* that its favorable-termination prerequisite applied to former prisoners who, by virtue of their release, could not seek habeas relief. See *Nonnette v. Small*, 316 F.3d 872, 877 (9th Cir. 2002) (deciding a §1983 action was not barred even though habeas was unavailable because of plaintiff’s release from prison.); *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001) (concluding that *Heck* did not bar a §1983 claim despite habeas being unavailable.); *Carr v. O’Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999) (declining to follow *Heck* and allowing a released prisoner to bring a §1983 claim.); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 396 n.3 (6th Cir. 1999) (stating that “former prisoners no longer in custody” are now excluded from the favorable termination requirement). Other courts, however, were more reluctant to depart from the Supreme Court’s instruction, notwithstanding its dictum status. See, e.g. *Gilles v. Davis*, 427 F.3d 197, 210 (3d Cir. 2005) (holding that *Heck* applied to bar §1983 claim); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) (quoting *Heck* as providing “unequivocal” language precluding plaintiff’s claim after his release from prison.); *Huey v. Stine*, 230 F.3d 226, 230 (6th Cir. 2000) (barring a §1983 claim under *Heck*’s favorable termination requirement where habeas was unavailable after a prison discipline hearing was decided against him.); *Figueroa v. Riveria*, 147 F.3d 77, 88-81 (1st Cir. 1998) (dismissing a family’s §1983 claim after habeas petition was deemed moot following prisoner’s death.).

155 *Id.* at 825.

156 *Id.*

157 *Id.; see also Batjac Prods., Inc. v. Goodtimes Home Video Corp.*, 160 F.3d 1223, 1233 (9th Cir. 1998) (relying upon policy considerations to justify rejection of Supreme Court dicta in copyright context).
B. The Constitutional Underpinnings of the Proposed Standard.

A standard that necessitates an independent inquiry when dictum might counsel a particular result, and disregarding such dictum when found to be inconsistent with the relevant law and prevailing policy, is at least suggested, and perhaps even compelled, by the United States Constitution.\(^{158}\) This proposition finds constitutional support in at least two interrelated provisions. First, Article III expressly limits the power of the federal judiciary to decision of “Cases” and “Controversies.”\(^{159}\) Second, and more broadly, the governmental structure established by the Constitution, separating and defining distinctly the power of each branch, affirms that the judiciary can do no more than decide cases as they arise.\(^{160}\) The federal judiciary is empowered to declare what the law is, but the power to make law is vested solely in Congress.\(^{161}\)

The constitutional justiciability doctrines reflect these concepts. The Court has repeatedly held that it cannot decide cases in which the controversy is not ripe,\(^{162}\) or is moot,\(^{163}\) or in which one or more of the parties lacks standing.\(^{164}\) Quite relatedly, it is well established that constitutional limitations bar a federal court from issuing an “advisory opinion.”\(^{165}\) One could attach the label “dicta” to a decision violating any one of these principles. That is, when a federal court decides a controversy that is not ripe, its words are mere dicta. Similarly, an attempt to resolve a moot controversy results in nothing but dicta. And if the plaintiff lacks standing to sue, yet the court decides the case anyway, its decision must be dicta. In each of these situations, constitutional limitations prohibit the court from deciding the case. Absent such power, the court’s words cannot be binding and therefore must constitute dicta.

\(^{158}\) See generally Leval, supra note 70 at 1259-60 (stating that Article III limits the power of federal courts to deciding “Cases” and “Controversies” and thereby prohibits federal courts from proclaiming law via dictum). But see Evan Tsen Lee, Deconstitutionalizing Justiciability: The Example of Mootness, 105 HARV. L. REV. 603, 648-49 (1992) (posing that issuing dicta runs afoul of no constitutional mandate or prohibition).

\(^{159}\) U.S. Const. Art. III § 1; Preiser v. Newkirk, 422 U.S. 395, 401 (1975) (“The exercise of judicial power under Article III of the Constitution depends on the existence of a case or controversy.”); Flast v. Cohen, 392 U.S. 83, 95 (1968) (stating that case-or-controversy requirement of Article III limits power of judicial branch vis-à-vis executive and legislative branches, “to assure that the federal courts will not intrude into areas committed to the other branches of the government”); Dorf, supra note 14 at n. 17 (discussing authorities pertinent to limited power of judicial branch).

\(^{160}\) Flast, 392 U.S. at 96-97 (“Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.”); 13 FED. PRACT. & PROC., Juris.2d § 3529.1, at 301 (discussing hybrid constitutional foundations for advisory opinions doctrine).

\(^{161}\) U.S. Const. Art. I § 1, III; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Flast, 392 U.S. 83 (1968).


\(^{164}\) Warth v. Seldin, 422 U.S. 490, 498 (1975); see also Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 121-22 (1998) (Stevens, J., concurring) (suggesting that violation of standing doctrine leads to issuance of non-binding dictum).

\(^{165}\) Flast, 392 U.S. at 96-97 (“[T]he implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions.”); Muskrat v. United States, 219 U.S. 346 (1911).
The doctrine most relevant here is that which prohibits advisory opinions. Indeed, many courts and commentators have likened, and even equated, the issuance of dicta to the issuance of a prohibited advisory opinion.\textsuperscript{166} An advisory opinion is defined as “[a] nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose”\textsuperscript{167} but has been broadly construed to include any court decision not substantially likely to have some effect, or issued in the absence of an actual dispute between the parties.\textsuperscript{168} This definition encompasses most dicta to the extent that dicta, as discussed above, usually arises when a court attempts to adjudicate matters not presented in the controversy before it. In that respect, dicta does stray to some extent from the Black’s definition of the term “advisory opinion,” in that dictum often issues when the parties have not requested that the court decide a certain issue, but it proceeds to do so anyway. Nevertheless, insofar as a court’s decision on a matter unnecessary to resolution of the dispute constitutes dictum,\textsuperscript{169} it is “advisory” in that it constitutes the court’s declaration or interpretation of law on issues it need not decide. As such, the court is simply “advis[ing]” the parties (and others) as to what it believes the law \textit{should} be, but cannot in that respect actually be declaring what the law \textit{is}. To do so would violate constitutional limitations on judicial power.\textsuperscript{170}

Insofar as dicta runs afoul of these constitutional limitations,\textsuperscript{171} then, it is imperative that courts treat it for what it is worth. Supreme Court dictum, whatever its virtues may be,\textsuperscript{172} cannot be afforded precedential effect because it lacks proper

\textsuperscript{166} \textit{Steel Co.}, 523 U.S. at 121-22 (Stevens, J., concurring) (criticizing majority for purporting to decide more than case presented thereby issuing prohibited “advisory opinion” that constitutes “pure dictum”); \textit{Hudson v. United States}, 522 U.S. 93, 112 (1997) (Scalia, J., concurring) (stating that an advisory opinion flowing from the Court’s “desire to reshape the law” lacks legitimate basis and has “the precedential value of pure dictum”); \textit{Centillion Data Sys., Inc. v. American Mgmt. Sys., Inc.}, 138 F. Supp. 2d 1117, 1120 (S.D. Ind.) (using terms “dicta” and “advisory opinion” interchangeably); \textit{Lee}, supra note 158 at 645 (describing advisory opinion as, among other things, “[a]ny opinion, or portion thereof, not truly necessary to the disposition of the case at bar (that is, dicta)’’); \textit{Alan J. Meese, Reinventing Bakke}, supra note 158 at 645 (describing advisory opinion as, among other things, “[a]ny opinion, or portion thereof, not truly necessary to the disposition of the case at bar (that is, dicta)’’).

\textsuperscript{167} Black’s Law Dictionary (8th ed. 2004) advisory opinion.


\textsuperscript{169} \textit{See supra} notes 63-65.

\textsuperscript{170} \textit{See supra} notes 158-70 & accompanying text (discussing constitutional limitations on judicial power relative to issuance of dicta).

\textsuperscript{171} Professor Lee disagrees, at least in part, with this basic premise. \textit{Lee}, supra note 158 at 648-49. He posits that “whether to engage in dicta is a matter for the considered discretion of the court” and therefore dicta is not unconstitutional. \textit{Id}. A detailed debate about the viability of his thesis, however, is beyond the scope of this article.

\textsuperscript{172} \textit{Galli v. New Jersey Meadowlands Commission}, 490 F.3d 265, 274 (3d Cir. 2007) (“Because the “Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket,” failing to follow those statements could “frustrate the evenhanded administration of justice by giving litigants an outcome other than the one the Supreme Court would be likely to reach were the case heard there.” (citing \textit{Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery}, 330 F.3d 548, 561 (3d Cir. 2003) (en banc)); \textit{Oyebanji v. Gonzales}, 418 F.3d 260, 264 (3d Cir. 2005) (“as a lower federal court, we are advised to follow the Supreme Court’s ‘considered dicta.’”)); \textit{Bradley v. Henry}, 428
constitutional foundation. To treat dictum as binding would perpetuate the initial constitutional violation, i.e., deciding matters not presented by the case or controversy before the Court and therefore running afoul of Article III and separation of powers principles. Thus, a court faced with a question potentially guided by Supreme Court dictum should engage in an independent inquiry of the binding statutory and judicial precedents. The court need not completely disregard the Supreme Court’s guidance and may give it due regard as reflective of that Court’s preferred policy, or as persuasive authority. But the court should not follow the Court’s guidance without some other legally justifiable rationale for doing so. Rather than adhere blindly to unconstitutional legal formulations, the court should instead perform the job assigned to it, and decide the case in light of the relevant body of law, taking into account pertinent policy considerations where appropriate.

V. UPON DISREGARDING DICTUM: APPLYING THE PROPOSED STANDARD TO ADJUDICATE ALLEGED NON-WORKPLACE HARMs.

Having established the dictum status of the Burlington Northern Court’s statement that Title VII’s anti-retaliation provision reaches non-workplace harms, and having crafted a framework for subsequent adjudication in the face of pertinent Supreme Court dicta, the task now comes to assessment of the Burlington Northern dictum in light of the proposed standard. The result brings little surprise. The Supreme Court’s Burlington Northern dictum, if interpreted broadly, is inconsistent with a reasonable interpretation of the statutory language in light of well-established canons of statutory construction, and is illogical as a matter of policy. As such, the better approach for courts confronting alleged non-workplace harms is to engage an independent inquiry into whether the alleged harm is one against which Title VII is intended to protect, bearing in mind that Title VII is an employment statute and should be confined to that context in order to prevent dilution of its effectiveness.

A. The Legal Justification for Disregarding Burlington Northern’s Dictum.

Under my proposed standard, assessment of Supreme Court dictum should begin with the relevant body of law. In this case, the relevant body of law consists primarily of the statute itself – Title VII. The rules of statutory interpretation are well established. First, one must determine whether the language of the statute is plain and unambiguous. A court must enforce plain and unambiguous statutory language as

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F.3d 811, 818 (9th Cir. 2005) (“The Constitution lives by such comprehensive commentary from the Supreme Court. We cannot deprive the document of vitality by squeezing great principles into a dustbin labeled dicta.”); Daimler-Chrylser Corp. v. United States, 361 F.3d 1378, 1385 n.2 (Fed. Cir. 2004) (“Notably, even if dicta, we would feel obligated to follow the Supreme Court's explicit and carefully considered statements”).

Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003); Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997); see also 2A Norman J. Singer, Statutes and Statutory Construction § 45:02 at 6-11 (West 6th ed. 2000) (collecting cases to support proposition that “[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.”).
When, however, the statutory language “is capable of being understood by reasonably well-informed persons in two or more different senses,” the court should discern its meaning from the apparent intent of the drafters. The intent inquiry necessitates assessment of three sources: (1) the language of the statute in both the narrow context in which it appears and the broader context of the statute as a whole; (2) the policy goals or purposes that the statute serves, as reflected in its legislative history and/or elsewhere; and (3) the reasonableness of the proposed interpretation in light of practical considerations. The first and second of these inquiries parallel directly the two-step framework established above for assessment of Supreme Court dicta, focusing first upon the law itself and then upon the policies supporting it. The third of these criteria melds well with the second, so that the inquiries under my proposed framework for assessment of dicta and under established canons of statutory construction can be unified for these purposes.

1. The Plain Statutory Language.

It is almost beyond cavil that the language of the anti-retaliation provision is plain and unambiguous with respect to its inapplicability beyond the workplace. The anti-retaliation provision provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The workplace limitation is unmistakable. The added emphasis above highlights the statute’s repeated reference to “employment.” First, the statute labels the conduct it proscribes an “unlawful employment practice.” Second, its protections apply only to “employees” or “applicants for employment,” and constrain only the conduct of “an employer.” As such, the anti-retaliation provision encompasses only those acts taken

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174 Costa, 539 U.S. at 98; Robinson, 519 U.S. at 340; Singer, supra note 173, § 45:02, at 6-11
175 Singer, supra note 173, § 45:02, at 11-12; id. § 45:05, at 25.
176 See Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (referencing “text, structure, purpose and history of the ADEA” as interpretive resources supporting conclusion that ADEA not intended to prohibit employer from favoring older workers over younger ones); Robinson, 519 U.S. at 345 (turning to “broader context provided by other sections of the statute” and statute’s purposes in resolving ambiguity as to meaning of term “employees” in anti-retaliation provision of Title VII); Singer, supra note 173, § 45:13, at 107-08 (identifying as resources of interpretation statutory language and context, legislative history and underlying policy, and “concepts of reasonableness”); see also Taylor, supra note 5 at 571 & nn. 233-37 (discussing this statutory-interpretation framework).
177 42 U.S.C. § 2000e-3(a) (emphasis added).
178 Id.
179 Id.
by employers against employees or applicants that affect employment. It does not
reach any further, and any suggestion that it does defies this plain language. If, for
example, an employer were to set fire to an employee’s house in alleged retaliation for
engaging in protected conduct, the harm suffered, absent some demonstrable impact on
her employment such as a resulting constructive discharge, should not be redressable
under Title VII because it cannot be characterized as an “employment practice.” This,
of course, does not mean that the employee is left without a remedy. The offense carries
with it not only a multitude of civil remedies such as for trespass and damage to property,
but also criminal culpability. The pertinent point here is simply that, by its plain
language, Title VII does not apply—not that the employee cannot recover for her losses.

2. The Statutory Context.

Notwithstanding the plain language confining the statute’s application to the
workplace, one might nevertheless suggest that because the statute does not expressly
require that the harm alleged as an “unlawful employment practice” bear some direct or
indirect relationship to the workplace, it is somehow ambiguous on that point. To do so
would surely require disregarding its repeated references to the employment relationship
and its limited applicability to only employment practices. However, indulging this
argument does not change the result. Indeed, delving further into the canons of statutory
construction to glean the drafters’ intent—as a finding of ambiguity would necessitate—
only bolsters the conclusion that the statute does not reach non-workplace harms.

First, reading the anti-retaliation provision in its context makes even clearer that it
is intended to redress only those harms that occur in the workplace or affect the plaintiff’s
employment. The section of the statute in which the anti-retaliation provision appears
is entitled “[o]ther unlawful employment practices,” and the subchapter is entitled
“[e]qual employment opportunity.” These labels reinforce what the statute itself
makes explicit—i.e., that its protections apply only in the employment setting. Other
related provisions also carry with them the same workplace limitation. Perhaps most
instructive in this regard is what I term the “core substantive provision”—the section of
Title VII that contains its principal protections against discrimination. Found at 42
U.S.C. § 2000e-2, the core substantive provision, in pertinent part, makes it

an unlawful employment practice for an employer . . . to fail or refuse to
hire or to discharge any individual, or otherwise to discriminate against
any individual with respect to his compensation, terms, conditions, or

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practice’ [in the anti-retaliation provision] suggest that the retaliatory conduct must relate to an
employment relationship.”).
181 See Nelson, 51 F.3d at 388 (referencing arson as example of non-workplace harm falling beyond
scope of Title VII).
182 See supra note 176 and accompanying text (outlining criteria for assessment of drafters’ intent).
184 Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) ( “the title of a statute and the
heading of a section are tools available for the resolution of a doubt about the meaning of a statute.”).
privileges of employment, because of such individual’s race, color, religion, sex, or national origin.  

The similarities between these two provisions that bear directly on the employment-relatedness question are striking. First, both refer to the prohibited conduct as “an unlawful employment practice.” Thus, as discussed above, the protections do not sweep broadly but rather apply only to those acts that occur in (or are at least peripherally related to) the workplace – i.e., “employment practice[s].” Second, both refer to the principal actor as “employer.” Only one who fits the statutory definition of “employer” may violate its provisions, thereby further confining its application to the employment context.

The Supreme Court, in reaching its dictum conclusion that the anti-retaliation provision encompasses non-workplace harms, disregarded these key similarities and instead focused singularly on qualifiers present in the core substantive provision but absent from its anti-retaliation counterpart. It is true that the core substantive provision elaborates on the prohibited conduct, labeled “discrimination” by both sections, in ways that the anti-retaliation provision does not. Specifically, the core substantive provision makes it unlawful “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,” while the anti-retaliation provision stops shorter, simply making it unlawful “to discriminate.” According to the Court, this difference necessitated the conclusion that the scope of the provisions is different, and that the broader-sweeping anti-retaliation provision therefore reaches beyond the workplace when the core substantive provision, with its limiting language, does not.

Apart from the fact that it is mere dictum, the Court’s conclusion is problematic. Its singular focus on the primary difference between the two provisions blindly and improperly disregards their similarities, which, significantly, are more pertinent to this debate. Congress’s repeated reference to employment and the employment relationship in both provisions is far more instructive on the question of the statute’s application beyond the workplace than is its elaboration, or not, on the forms of discrimination prohibited. That is, the fact that Congress described the relevant conduct as an “employment practice” and limited its application to the employment relationship bears

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186 Id. § 2000e-2(a), 3(a). Indeed, each and every subpart of 42 U.S.C. § 2000e-2 that follows the core substantive provision uses this same language. Id. §§ 2000e-2 (b) (employment agency practices), (c) (labor organization practices), (d) (training programs), (e) (certain businesses and educational institutions), (f) (members of the Communist Party or Communist front organizations), (g) (national security), (h) (seniority or merit system), (i) (businesses extending preferential treatment to Indians), (j) (preferential treatment not given because of existing percentage of employed members protected class), (k) (burden of proof in disparate impact cases), (l) (prohibiting use of discriminatory test scores), (m) (no consideration can be given to protected trait), (n) (resolution of challenges to employment practices).

187 Id.

188 Burlington Northern, 548 U.S. at 61-63.


190 Id. § 2000e-3(a).

directly on its application beyond the workplace. A fair reading would suggest that it does not. The same cannot be said of the language included in the core provision but omitted elsewhere. Whether the prohibited conduct must affect the employee’s “compensation, terms, conditions or privileges of employment” is inconsequential when it is clear that only “employment practice[s]” are covered in the first place. Thus, while the statutory language quite unambiguously limits its application to the workplace, reading that language in its context only solidifies that conclusion.

Indeed, an even broader contextual examination, encompassing Title VII’s remedial provisions, further demonstrates that it is not intended to encompass non-workplace harms and that Burlington Northern’s dictum should not persist. In its original form, Title VII offered only equitable relief (e.g. an injunction against continued discrimination). A plaintiff’s only opportunity for monetary recovery under this regime came in the form of back pay and/or attorney’s fees. Such equitable remedies could afford effective relief only when the alleged harm somehow affects the workplace. Back pay and reinstatement are of no use when the alleged harm lacks any such connection, thus further suggesting that the drafters of Title VII intended to limit its scope in that manner. It was only with the enactment of the Civil Rights Act of 1991 that plaintiffs became eligible for other forms of relief, such as compensatory and punitive damages, that might plausibly apply when the harm is not work related. Nevertheless, Congress made no effort at that time to expand the reach of the statute’s substantive protections beyond the confines of the employment relationship, thus suggesting that was not its intention. As such, the remedial structure further demonstrates that no provision of Title VII is intended to redress non-workplace harms, whether the anti-retaliation provision or otherwise. The relevant body of law, both on its face and placed in context, counsels that courts adjudicating non-workplace harms should not follow the Supreme Court’s Burlington Northern dictum blindly.

B. The Policy Justification for Disregarding Burlington Northern’s Dictum.

At the second stage of the statutory-interpretation and dictum-assessment process, analysis of the policy and/or purpose of the relevant provisions likewise reveals that the anti-retaliation provision should apply only to workplace harms. The purpose of Title VII has remained clear and undisputed since its enactment: achievement of equality in employment opportunities. Courts therefore best serve the statute’s purpose only when they require some nexus between the alleged retaliatory act and an employment relationship. Indeed, the Supreme Court recognized that the statute’s purposes would

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193 Id.
196 See Nelson v. Upsala College, 51 F.3d 383, 387 (1995) (“[I]t does not further the purpose of Title VII to apply [the anti-retaliation provision] to conduct unrelated to an employment relationship.”). See also White, 548 U.S. at 62 (stating that “equality of employment opportunities’ and the elimination of practices that tend to bring about ‘stratified job environments’ would be achieved were all employment-related discrimination miraculously eliminated”).
best be served by elimination of “employment-related discrimination.” When, however, the alleged wrong lacks any connection to an employment relationship, even if inflicted by an employer upon his employee, it cannot affect workplace equality. As such, regulation of conduct unrelated to an employment relationship does not promote the statute’s purpose – equality in employment opportunities.

The Supreme Court failed to accord sufficient weight to the primary purpose underlying Title VII as a whole when it determined, in dictum, that the anti-retaliation provision reaches non-workplace harms. Instead, the Court focused on the purpose of the anti-retaliation as separate and distinct from the core substantive provision. The Court stated that the anti-retaliation provision “seeks to secure the primary objective [of Title VII – workplace quality] by preventing an employer from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of the Act’s guarantees.” Even while recognizing that regulation of workplace conduct is sufficient to achieve the statute’s primary goal, though, the Court determined that furtherance of the anti-retaliation provision’s separate and distinct purpose requires regulation that reaches further:

But one cannot secure the [anti-retaliation provision’s] objective by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the anti-retaliation provision’s objective would not be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace. … A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the anti-retaliation provision’s “primary purpose,” namely, “[m]aintaining unfettered access to statutory remedial mechanisms.”

This narrow view, however, falters in at least two respects. First, it fails to accord sufficient weight to the purpose underlying Title VII as a whole. While the anti-retaliation provision, standing alone, serves the primary goal of maintaining access to the statute’s remedial mechanisms, the remedial mechanisms themselves serve the broader purpose of equal employment opportunity. As discussed above, that broader purpose is best served by a standard that requires some nexus between actionable wrongs and the employment relationship. Thus, viewing the anti-retaliation provision in isolation does

197  Burlington Northern, 548 U.S. at 61.
198  Id. at 63.
199  Id. at 62.
200  Id.
201  Id.
202  Id. at 63 (citations omitted).
203  See Nelson, at 387 (discussing employment-relatedness requirement inherent in anti-retaliation provision); Reed v. Shepard, 939 F.2d 484, 493 (7th Cir. 1991) (stating that anti-retaliation provision requires showing of “employment impairment” (emphasis added)).
not do justice to the statute’s underlying goal; rather, the protections against retaliation must be examined as part of the whole from which they come.

Second, the Court’s narrow focus on the purpose of the anti-retaliation provision in isolation stretches the statute’s protections to their breaking point. To put it bluntly, the Court attempts to make the statute “too big for its britches.” Admittedly, the Court’s suggestion that an employer can effectively retaliate against an employee by inflicting harm unrelated to the workplace is not without foundation. For example, setting fire to an employee’s house because he has complained of discrimination surely constitutes “retaliation” in nearly every sense of the term. Indeed, fear of such arson might even deter some employees from engaging in protected conduct and thereby hamper the goal of “[m]aintaining unfettered access to statutory remedial mechanisms.”204 Nevertheless, it is inappropriate to rely upon Title VII, an employment statute, to remedy these wrongs, absent some demonstrable impact on her employment such as a resulting constructive discharge. In the vast majority of cases, any alleged retaliatory act that meets the threshold of severity to warrant Title VII relief would be actionable under some other body of law.205 For example, in the hypothetical case of the employer setting fire to the employee’s home, the act of arson would invoke not just civil remedies under state tort and property laws, but also criminal sanctions. Likewise, where an employer threatens or actually inflicts bodily harm upon the employee outside the workplace, state tort law generally affords relief, and state criminal law may support prosecution.206

Granted, the remedies afforded in these examples stand in stark contrast to the Title VII remedy in at least one significant respect – unlike claims under Title VII, redressable of right in the federal court system, these state-law claims supply no basis for federal jurisdiction but instead must be heard in state courts.207 Moreover, in those cases suggesting criminal culpability, their pursuit turns upon the discretion of the local prosecutor, who might be thought unduly sympathetic to a major local employer, at least in some circumstances. Indeed, one rationale offered to support the provision of a federal forum for Title VII claims at the outset was elimination of concern over distrust of state judicial systems and public enforcement officials during the 1960s. These concerns are insufficient, however, to support extending Title VII’s reach beyond its intended

204 Id. (citing Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).
205 Nelson, at 388. The Nelson court summarized this point well: We recognize that it might be argued that it is necessary to permit retaliation claims for actions unrelated to an employment relationship so that employees are not discouraged from bringing Title VII claims or assisting in their prosecution. We believe, however, that the possibility that the denial of a retaliation claim for conduct not related to an employment relationship will discourage Title VII activity is slight because serious retaliatory conduct unrelated to an employment relationship will be actionable under state law.
206 See e.g., Reed v. Shepard, 939 F.2d 484, 492-93 (7th Cir. 1991) (affirming directed verdict against employee on retaliation claim based upon allegations that former employer physically attacked, shot at and threatened her).
207 Of course, if the requirements of the diversity statute, 28 U.S.C. § 1332 are met, then the federal forum remains available.
protective sphere – the workplace. First, the argument is somewhat circular because those claims whose relationship to the workplace in insufficient to evoke Title VII protection likely also lack the requisite federal element to make jurisdiction proper in the limited federal forum to begin with. It is an elementary principle of constitutional law that Congress may legislate only pursuant to the powers given it under Article I of the United States Constitution. While there is little debate that Congress properly invoked those powers when enacting Title VII, it did so with express reference to the employment relationship.\textsuperscript{208} Thus, permitting a claim that reaches outside the workplace at least arguably necessitates extending the jurisdictional reach of the court beyond that properly given it by Congress. The absence of a federal remedy in those circumstances is therefore fully justified given the limited jurisdiction of the federal courts in the first place. Moreover, the fact remains that other remedies – properly redressed only in state systems – exist to protect against these wrongs, and, as discussed below,\textsuperscript{209} valid concerns about the strength of Title VII’s intended role counsel against overextending it. Should Congress wish to redress these non-workplace harms with a federal remedy, it may, invoking proper constitutional authority, do so. But it is unnecessary (and indeed, improper) to stretch the statute’s protections beyond the scope of the employment relationship upon which it is founded to encompass all sorts of non-workplace harms, because other laws exist to perform that function.

Furthermore, substantial transaction costs accompany overextension of Title VII’s protections beyond the workplace. The federal dockets are heavily burdened – indeed, some might say overburdened – with employment discrimination lawsuits as it is.\textsuperscript{210} To extend the reach of Title VII even further would only exacerbate that problem by adding to the docket unnecessarily and without justification.

The concern about over-crowded dockets highlights a related policy problem. To stretch the bounds of Title VII beyond the workplace would in essence convert it into a general or catchall tort statute and thereby dilute its effectiveness in its intended sphere. As discussed above, most truly non-workplace harms that warrant relief could be redressed by other laws that apply more directly.\textsuperscript{211} Thus, confining Title VII’s application to its intended sphere – the workplace – would not leave deserving plaintiffs without a remedy. Moreover, attempting to stretch the statute’s reach further could have

\textsuperscript{208} 42 U.S.C. § 2000e-2, 2000e-3; see also id § 2000e (defining operative term “employer” as “a person engaged in an industry affecting commerce” and thereby suggesting invocation of legislative power granted under Commerce Clause).

\textsuperscript{209} See infra notes 210-15 and accompanying text (discussing other policy concerns evoked by overbroad reading of statute).

\textsuperscript{210} Vivian Berger, Michael O. Finkelstein, and Kenneth Cheung, \textit{Summary Judgment Benchmarks For Settling Employment Discrimination Lawsuits}, 23 HOFSTRA LAB. & EMP. L.J. 45, 45 (2005) (“The number of employment discrimination lawsuits rose continuously throughout the last three decades of the twentieth century. In the federal courts, such filings grew 2000%, while the docket as a whole increased a mere 125%.”); Theodore O. Rogers, Jr., \textit{Arbitration of Employment Claims}, 591 PRACTICING LAW INSTITUTE, LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES, Litigation, 811, 870 (1998) (“Nor can it be said that overcrowded court dockets and increasing case delays are soon to be a thing of the past. Court statisticians openly recognize that the delays in court are on the rise due to the increased volume of civil cases in general and employment cases in particular.”).

\textsuperscript{211} See, supra notes 205-09 and accompanying text.
a detrimental effect on its effectiveness in the employment context. Were plaintiffs to seek relief under Title VII for non-workplace harms, it is possible that the statute would become less effective at accomplishing its original goal of equal employment opportunity because broader application might desensitize judges to employment disparities, or cause them to question the veracity of the plaintiff’s allegations given a more widespread and rampant invocation of the statute’s protections.

Finally, interpreting Title VII to reach beyond the workplace is not reasonable (an inquiry begged by the third statutory-interpretation criterion, listed above) because it would afford greater protection to victims of retaliation than victims of discrimination, whom the statute was originally enacted to protect. To illustrate, reconsider the rather unlikely yet quite demonstrative scenario discussed above, in which an employer sets fire to an employee’s house. If that employee has recently complained of discrimination, so as to qualify for protection under the anti-retaliation provision, then applying the Court’s dictum as binding law would afford that employee relief for his property losses under Title VII. If, however, that employee has not engaged in any protected activity, but rather the employer burns his house simply because the employee is black, then Title VII does not apply. As such, the Court’s dictum would elevate the status of employees who engage in protected activity above the status of those the statute was originally designed to protect, and would do nothing to further its primary goal of ensuring equality in the workplace. Such a reading is impractical and implausible, and should not be perpetuated.

C. The Appeal of an Independent Inquiry.

The independent inquiry necessitated upon disregarding Burlington Northern’s pernicious dictum will afford courts sufficient leeway to grant appropriate relief without overstepping the permissible bounds declared by Congress in the language of the statute. Some alleged harms bearing only an indirect relationship to employment may nevertheless be redressable under Title VII, so long as the harm bears a sufficient nexus to the workplace or the employment relationship to warrant Title VII relief.

212 See 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:12, at 82-83, 85 (West 6th ed. 2000) (“It is a ‘well established principle of statutory interpretation that the law favors rational and sensible construction.”); see also Am. Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982) (“Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.”).

213 See supra text accompanying note 176.

214 See White, 548 U.S. at 67 (stating that anti-retaliation provision applies to non-workplace harms).

215 See, e.g., Traylor v. Brown, 295 F. 3d 783, 788 (7th Cir. 2002) (requiring Title VII discrimination plaintiff’s to prove a materially adverse change to the “terms, conditions or privileges of employment); Davis v. Lake Park, Fla., 245 F.3d 1232, 1238 (11th Cir. 2001) (stating that courts have “uniformly” interpreted that the core substantive provision requires a plaintiff to prove an adverse employment action).

216 Two of the principal pre-Burlington Northern non-workplace harm cases, both of which are discussed in the Court’s opinion, provide excellent examples. Rochon v. Gonzales, 438 F.3d 1211, 1213 (D.C. Cir. 2000); Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996). In Rochon, a former FBI agent claimed retaliation when the FBI acted contrary to its stated policy and standard practice by failing to investigate credible death threats against him and his wife made by a federal prisoner with whom the plaintiff dealt while employed. Rochon v. Ashcroft, 319 F. Supp. 2d 23, 27 (D.D.C. 2004) (“In 1993
Admittedly, this proposal is not a black-and-white solution. To suggest that courts engage in an independent workplace-relatedness inquiry without specifying the degree of relatedness required certainly leaves room for differing and inconsistent interpretations. However, the alternative – applying Title VII’s protections no matter whether workplace-related or not – is simply untenable, for all of the reasons discussed above.\textsuperscript{217}

Moreover, casting aside the Burlington Northern dictum would not leave courts to flounder unguided in the abyss. First, the statutory language itself – which the court should, in any event, consult first\textsuperscript{218} – offers some instruction. As discussed above, the anti-retaliation provision applies only when one who claims some present or former employment relationship with another alleges a harm that constitutes a “discriminat[ory]” “employment practice.”\textsuperscript{219} Thus, courts faced with harms at best characterized as bearing an indirect relationship to employment can assess whether the alleged harm falls within the ambit of Title VII’s protections by determining whether it might be construed as a discriminatory employment practice. If so, then it may be covered by Title VII. If not, then it falls beyond the statute’s protections.

Admittedly, the language of the statute will not answer every question. Some will remain “too close to call.” Thus, courts engaging in this independent inquiry may also benefit from review of the more expansive and better developed body of case law interpreting the core provision when applying its anti-retaliation counterpart.\textsuperscript{220} The

and 1994, plaintiff assisted the FBI in gaining the cooperation of the ex-wife of a recently convicted organized crime figure, Ronald Tabas. When Tabas learned that his ex-wife was cooperating with the FBI to seize his assets, Tabas issued verbal and written death threats against plaintiff and plaintiff’s wife.” (internal citations omitted)). The FBI’s failure to investigate those death threats is plausibly classified as an “employment practice” insofar as the circumstances giving rise to need for such an investigation came about only because of the plaintiff’s former employment. Moreover, had the plaintiff remained employed at the time the death threats were received, the FBI’s duty to investigate would likely have been undisputed. Because the plaintiff came into contact with the prisoner who threatened him only as a result of his (albeit former) employment with the FBI, the requisite connection was present to afford Title VII relief. In Berry, the United States Court of Appeals for the Tenth Circuit held that the anti-retaliation provision of Title VII encompassed the filing of false criminal charges by an employer against its former employee. 74 F.3d at 986. Indeed, while the Supreme Court treated Berry as a non-workplace harm case, the Tenth Circuit expressly recognized and even relied upon the connection between the alleged harm and the plaintiff’s employment in reaching its conclusion. \textit{Id.} The harm alleged by the \textit{Berry} plaintiff was connected to the workplace in at least two ways: first, the plaintiff committed the acts that allegedly supported criminal penalties during his employment; and second, as the court stated, “retaliatory prosecution can have an adverse impact on future employment opportunities” due to the concomitant damage to the employee’s reputation and employability. \textit{Id.} at 883-84, 86. Given the nexus between the workplace and the alleged harm in both of these cases, I suggest that neither would be decided differently under the framework I propose.\textsuperscript{217}

See supra part V (explaining why interpreting title VII to include non-workplace harms is unnecessary and makes preventing employment discrimination virtually unattainable).

\textsuperscript{218} See Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (using plain language, purpose, history and structure of the ADEA as interpretive tools to clarify textual ambiguities); Robinson v. Shell Oil, 519 U.S. 337 (1997) (looking to context in other areas of Title VII to resolve ambiguities).

\textsuperscript{219} See Taylor, supra note 5 at 571 (offering proposal and justification for interpreting the anti-retaliation provision consistent with the core substantive provision).
workplace limitation in cases alleging harms redressable under Title VII’s core substantive provision is clearer and better defined, likely due to the statutory language requiring that the alleged harm affect the employee’s “compensation, terms, conditions or privileges of employment.” The absence of these qualifiers from the anti-retaliation provision, however, does not render cases interpreting the core provision irrelevant. Indeed, setting aside this singular distinction, the core substantive provision and its anti-retaliation counterpart are otherwise nearly identical. Both provisions declare certain discriminatory employment practices unlawful. Thus, whether harms alleged under the core provision must directly affect an employee’s compensation, terms, conditions, or privileges of employment or not, is in many respects inconsequential here – harms alleged under both provisions still must affect employment. Given the employment-relatedness requirement inherent in both provisions, then, case law assessing whether a harm is sufficiently related to employment to warrant relief under the core provision is at least persuasive with respect to claims under its anti-retaliation counterpart.

Lastly, courts engaging in the requisite independent assessment of non-workplace harms under the anti-retaliation provision would be guided by the statute’s underlying and primary purpose – ensuring workplace equality. Any decision affecting the statute’s coverage should serve this important goal. Thus, any alleged harm that fosters inequality in the workplace (so long as it is sufficiently adverse), even one that bears only an indirect or peripheral relationship to employment, may fall within the scope of the anti-retaliation provision and warrant its protection. By contrast, a harm that does not effect workplace inequality does not.

D. Case Studies.

A survey of cases decided since the Supreme Court issued its pernicious dicta reveals that courts are indeed readily falling prey to the lure of blind adherence to the Court’s dictum, rather than engaging in the independent assessment that this Article suggests. A prime example of this phenomenon occurred in Walsh v. Irvin Stern’s Costumes. In addition to other claims of discrimination, Plaintiff Walsh alleged that her employer retaliated against her by threatening, via telephone and U.S. mail, to make false allegations of criminal theft to local law enforcement authorities, unless she withdrew her discrimination lawsuit. The court initially dismissed her retaliation claim, citing well-established Third Circuit precedent requiring that the alleged retaliation “must

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221 42 U.S.C. § 2000e(2); see, e.g. Traylor v. Brown, 295 F. 3d 783, 788 (7th Cir. 2002) (requiring Title VII discrimination plaintiffs to prove a materially adverse change to the “terms, conditions or privileges of employment); Davis v. Lake Park, Fla., 245 F.3d 1232, 1238 (11th Cir. 2001) (stating that courts have “uniformly” interpreted that the core substantive provision requires a plaintiff to prove an adverse employment action).

222 See supra notes 186 to 187 and accompanying text (discussing similarities between core substantive provision and anti-retaliation provision).


224 Whether the harm alleged is sufficiently adverse to warrant Title VII relief is a question that lies beyond the scope of this article. That question, of course, was the central one presented in Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006), and is also the topic of a different article. Taylor, supra note 5 at 571.

affect the plaintiff’s current or future employment – e.g., it must ‘alter [ ] the employee’s compensation, terms, conditions, or privileges of employment, deprive [] him or her of employment opportunities, or adversely affect[] his [or her] status as an employee.’” 226 After the Supreme Court’s decision in Burlington Northern, though, the plaintiff requested that the court reconsider its dismissal of her retaliation claim, and the court thereupon reinstated it. 227 In so doing, the court paid no regard to the fact that the Court’s decision that an alleged retaliatory harm need not affect employment was dictum. Instead, the court focused exclusively on the Burlington Northern Court’s broader holding that the alleged harm must have been “materially adverse to a reasonable employee” such that it “might dissuade a reasonable worker from making or supporting a charge of discrimination.” 228 The court held that plaintiff’s allegations met this revised materiality standard, and that their reinstatement was therefore appropriate.

Had the Walsh court engaged in the independent inquiry suggested here, though, the outcome might have been different. The court was apparently quite convinced upon initial review of plaintiff’s claims that the alleged threats bore no relationship to her job and would have no effect on her current or future employment. 229 Indeed, it would be a stretch, to say the least, to characterize the alleged threat of criminal charges as an “employment practice,” at least on the facts provided in the court’s slim opinion. Moreover, it is difficult to imagine how regulation of such conduct might affect the ultimate goal of workplace equality that Title VII is intended to promote. While filing false criminal allegations should not be condoned, its regulation under a statute aimed at workplace equality simply does not make sense. One affected by such a wrong may find redress in other civil rights laws, or in state statutes regulating malicious prosecution, but should confine her claims under Title VII to those that affect her employment. As such, the court’s decision in Walsh that Title VII may encompass these harms, tainted as it is by the court’s blind adherence to questionable Supreme Court dictum, stretches the bounds of Title VII too far. Instead of following the Court’s dictum blindly, the Walsh court should have engaged in its own independent inquiry into the redressability of the alleged wrongs under a statute aimed at workplace equality.

Other courts have likewise adhered blindly to the Supreme Court’s dictum, but with less striking results. For instance, in Boeser v. Sharp, the court relied directly upon the Court’s statement in Burlington Northern that Title VII’s anti-retaliation provision “extends beyond workplace-related or employment-related retaliatory acts and harm” to reverse its earlier determination that a letter threatening recovery of attorneys fees could not support a retaliation claim because it did not affect the plaintiff’s employment status. 230 The court did not acknowledge the dictum status of that instruction and engaged in no independent inquiry whatsoever on that point. 231 Instead, the court simply

226 Id. at *1 (citing Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997)).
227 Id. at *2.
228 Id. (citing Burlington Northern & Santa Fe Ry. v. White, 126 S. Ct. 2405, 2409, 2410, 2415 (2006)).
231 Id.
stated that the Supreme Court’s instruction – which, notably, it termed “holding” – necessitated reversal of its earlier determination that Title VII did not cover the alleged harm.\textsuperscript{232} The court’s determination on that point did not, however, affect the ultimate outcome. That is, regardless of the outcome had the court engaged in an independent inquiry of the alleged harm’s work-relatedness, the ultimate disposition would not have changed because the court went on to conclude that the harms alleged were not sufficiently severe to support a claim.\textsuperscript{233} This determination alone would have supported the defendant’s motion for summary judgment, notwithstanding the court’s assessment of the alleged harm’s work-relatedness.\textsuperscript{234}

In other cases, the court’s blind adherence to the Supreme Court’s dictum did not affect the outcome because the harms alleged bore at least an indirect relationship to the plaintiff’s workplace or employment. In Persichitte v. Board of Trustees of the University of Northern Colorado, the court denied defendant’s motion for summary judgment on plaintiff’s retaliation claim in which she alleged that the defendant university had, among other things, contacted her new employer to accuse her of improper conduct while in the university’s employ and to inform the new employer of the initiation of an ethics inquiry.\textsuperscript{235} The court pointed out that Burlington Northern extended the reach of Title VII’s anti-retaliation provision beyond actions affecting “the terms, conditions, or privileges of employment or future employment opportunities,” but did not address the work-relatedness of the alleged harms, one way or another. Instead, the court determined that the alleged harms met the threshold level of severity required under Burlington Northern and denied summary judgment on those grounds, without regard to whether the harms affected the workplace. In this case, however, unlike in the Walsh case discussed above, the court’s disregard for the dictum status of Burlington Northern’s non-workplace instruction, probably did not affect the outcome. The harms alleged – contacting a new employer with allegations of improper conduct – bear directly upon the plaintiff’s employability and employment prospects and therefore could readily be construed as an “employment practice.” As such, the court’s failure to acknowledge the Burlington Northern dictum was probably without consequence.

The same is probably true of the court’s reversal of defendant’s summary judgment on plaintiff’s retaliation claim in Moore v. City of Philadelphia.\textsuperscript{236} The three white police-officer plaintiffs in that case alleged a plethora of retaliatory harms after they complained about their supervisors’ treatment of other black officers.\textsuperscript{237} Many of these harms bore a direct relationship to the plaintiffs’ employment, such as less desirable work assignments and job transfers, poor performance evaluations, and physical assaults

\textsuperscript{232} Id.
\textsuperscript{233} Id. at **2-3.
\textsuperscript{234} Id. See also McDonald v. Gonzales, 2007 WL 951445, at **9-11 (N.D.N.Y. Mar. 27, 2007) (failing, in light of Burlington Northern dictum, to assess work-relatedness of harms alleged in support of retaliation claim – issuance of erroneous tax forms and grouping of reported income so as to increase tax liability – but holding that alleged harms were insufficient to support claim in any event).
\textsuperscript{236} 461 F.3d 331 (3d Cir. 2006).
\textsuperscript{237} Id. at 338-340.
at the workplace. The work-relatedness of at least one of the alleged harms, though—a supervisor’s intervention in one plaintiff’s legal battle for custody of his child—is more questionable. Yet, while the court specifically referenced the *Burlington Northern* dictum (yet failing to acknowledge it as such), the court never considered the work-relatedness of any of the harms alleged but rather assessed each alleged harm with regard only to its materiality. Thus, when it considered the alleged intervention in plaintiff’s custody battle, the court never acknowledged that the alleged harm might not affect the workplace and therefore fall beyond Title VII’s reach. Instead, the court characterized this allegation as part of a “pattern of harassment” that “might dissuade a reasonable worker from bringing or supporting a charge of discrimination,” thereby grouping this allegation with other harms that bore a more direct relationship to the workplace, and finding it sufficiently severe to be actionable as such. Accordingly, the court’s failure to address the work-relatedness of this singular alleged harm, in the face of numerous other harms directly affecting the plaintiff’s employment, was without consequence.

In sum, several clear trends emerge from these post-*Burlington Northern* cases. First, no court faced with an alleged harm bearing little to no relationship to the workplace has acknowledged that the Supreme Court’s instruction on non-workplace harms was dicta. Instead, each such court has recited plainly the court’s determination on that point, and has applied it as binding law. As discussed above, courts should not engage in such blind adherence to Supreme Court dictum when the law favors a different result. Such blind adherence carries with it the risk of reaching what would otherwise be an erroneous decision, as evidenced by at least one of the post-*Burlington Northern* cases. The occurrence of such potentially erroneous outcomes directly attributable to blind reliance upon dictum is troubling. Yet, at least so far, no such widespread trend has emerged. Instead, it appears that the decisions of many courts addressing harms bearing only an indirect relationship to the workplace are not affected by reliance upon the Court’s dictum, because the outcome is often determined by some other sub-issue. Indeed, given that a plaintiff must cross a number of hurdles in order to establish a viable retaliation claim, the prevalence of cases that turn on the work-relatedness of the alleged harms is likely to remain low. Nevertheless, just because the cases are not commonplace does not mean that they do not deserve proper attention and treatment. And proper attention and treatment requires an independent assessment of whether the law invoked affords recovery for the alleged harm—not blind adherence to dictum.

VI. CONCLUSION

While the Supreme Court stated unequivocally and early in its existence that its dictum is not binding, a faulty trend has developed among the lower courts to follow Supreme Court dictum blindly in the absence of other directly binding precedent. The

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238 Id. at 339.
239 Id. at 346-49.
240 Id. at 348-49.
241 Id.
242 See Walsh v. Irvin Stern’s Costumes, No. 05-2515, 2006 WL 2380379 (E.D. Pa. Aug. 15, 2006) (relying directly upon dictum to reinstate retaliation claim based on allegation that defendant threatened to accuse plaintiff of theft and seek criminal charges against her).
error of such courts’ ways is neither unjustified nor surprising, yet it should not persist. The very underpinnings of our judicial system, founded upon principles of stare decisis and a constitutionally-compelled separation of powers among the three branches of federal government, demand that courts delve a bit more deeply before adhering blindly to Supreme Court dictum. Indeed, the better approach for a court to take when faced with pertinent Supreme Court dictum is to engage in an independent assessment of that dictum, focused on the relevant body of law and prevailing policy concerns, to determine whether the dictum warrants adoption or not.

Courts confronting claims of retaliation under Title VII after the Supreme Court’s 2006 decision in *Burlington Northern* have the opportunity to depart from the recent trend toward blind adherence to dictum and instead engage in the independent assessment that this Article proposes and the Constitution arguably compels. It is clear that the harms Sheila White alleged in that case bore a direct relationship to her job, so it was entirely unnecessary for the Court even to consider, much less decide, whether Title VII’s anti-retaliation provision encompasses non-workplace harms. As such, the Court’s statement that it does was indisputably dictum. Blind adherence to this dictum, while in some respects appealing, does not do justice to the statute’s language, its purpose, or the broader policies it serves. Title VII’s goal of workplace equality is a worthy one, and is not to be taken lightly. But expanding the reach of Title VII beyond the workplace bounds is not the best, nor is it even an appropriate means of attaining that goal. Instead, courts should engage in an independent inquiry in each case to determine whether the harm alleged bears a sufficient nexus to the employment relationship or the workplace to warrant Title VII relief. This inquiry may be guided by the language of the statute itself, by the case law interpreting the core substantive provision, or by a broader-based assessment of whether affording relief under the circumstances would promote the statute’s primary purpose of workplace equality. Undertaking such an independent inquiry would allow for applications that are more consistent with the statutory language and better serve its purposes than would blind adherence to the Court’s relatively unguided, out-of-context assertion that Title VII’s anti-retaliation provision is essentially unbounded. The lower courts should not perpetuate the Court’s errant and pernicious dictum but instead should assess each case independently in light of the statute’s demands.