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Transtemporal Separation of Powers in the Law of Precedent

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Judicial power consists in “jurisdiction,” the authority to speak (dictio) the law (ius).¹ As Chief Justice Marshall articulated the judge’s role, it is “the province and duty of the judicial department to say what the law is.”² In defining the judiciary’s “province,” Marshall metaphorically staked out a territory in which courts may govern. Within that territory, courts speak the law with authority, resolving disputes and binding other actors.

The metaphor of a judicial “province” carries with it the implication of boundaries to the judge’s authority. Courts may speak the law authoritatively only within limits fixed by the Constitution and other legal constraints. Two borders have historically proved especially important in defining judicial power. First, courts may not issue rulings on their own initiative.³ They address legal issues only in the course of resolving cases brought to them by others.⁴ Second, in resolving litigated disputes, courts may only properly speak the “law,”⁵ employing sources and modes of reasoning recognized as “legal.” Judges lack the freedom of legislators to pursue unguided policy preferences.⁶

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¹ See III OXFORD LATIN DICTIONARY 538 (1971) (first definition of “dictio” as “[t]he action of speaking”); IV id., at 984 (identifying “iurisdicio” as combination of “iuris (gen. sg. of IVS) + DICTIO”); id. (first definition of “ius” as “[t]hat which is sanctioned or ordained, law”).

² Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

³ See Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973) (“[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation’s laws.”).

⁴ Rebecca Schoff, Note, Deciding on Doctrine: Anti-Miscegenation Statutes and the Development of Equal Protection Analysis, 95 VA. L. REV. 627, 652 (2009) (“Courts, unlike legislatures, must wait for appropriate cases to come before them and may only react to the issues presented in them.”).

⁵ See Marbury, 5 U.S. (1 Cranch) at 165 (“If some [executive] acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.”); Keene Corp. v. U.S., 508 U.S. 200, 217 (1993) (dismissing petitioner’s “policy arguments” as directed to “the wrong forum”).

⁶ See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921) (“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He
The power of courts to “say what the law is” must be harmonized with the legitimate law-speaking powers of other governmental actors. After all, one might just as properly say that it is “the province and duty of the [legislative] department” to “say what the law is,” though at a higher level of generality than courts. The “executive department” can similarly be thought to speak the law when it issues regulations or resolves administrative proceedings.

Structural provisions of the Constitution and separation of powers principles allocate the law-speaking power among legislators, courts and executive officials. Congress may enact legislation, provided it follows Article I procedures. However, courts or executive agencies generally must apply the statute to particular disputes. The prohibition on legislative vetoes bars Congress from case-by-case application of a statute unless it satisfies the demanding constitutional process for passing new legislation. At the same time, the authority of judicial and executive officials to speak the law in resolving statutory disputes can be superseded if Congress amends the underlying statute.

Even in the unique context of constitutional law, care must be exercised to discern the sometimes subtle boundaries between legitimate law-speaking by judges and other governmental actors. The “political question” doctrine, for instance, recognizes that some constitutional questions lie outside the judicial province, falling within the domain of the political

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7 See U.S. Const., art. I, § 7 (procedure for legislature to enact “a Law”).
8 See 5 U.S.C. §§ 553-54 (procedures for administrative rule making and adjudication).
9 See supra note 7.
branches. More controversially, “departmentalists” would accord some level of autonomy in constitutional interpretation to executive and legislative officials, even on issues previously addressed by the courts. This article addresses the law of precedent, including the doctrine of *stare decisis*, the distinction between holding and *dicta*, and associated principles governing the extent to which judicial resolution of a legal issue binds later courts. The analysis begins with an observation: rules of precedent serve as a mechanism for allocating the power to proclaim the law. Here the concern is not distribution of power among branches of the federal government. Rather, the law of precedent allocates power among courts of the past, present and future. *Stare decisis* and subsidiary principles regulate the extent to which judges can explicate legal rules in a way that resolves not only the case before the court, but also later cases involving litigants and facts as yet unknown. The law of precedent, then, involves a *transtemporal* application of separation of powers principles, allocating power among judges serving at different points in time.

The rule of *stare decisis* treats precedent as a constraint on successor judges. A later judge does not write on a blank slate, but must harmonize her decisions with the work of those who previously held either the same

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12 See Nixon v. U.S. 506 U.S. 224, 240 (1993) (political question doctrine concerns “whether the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of” some governmental power).

13 See, e.g., Steven G. Calabresi, *Caesarism, Departmentalism and Professor Paulsen*, 83 MINN. L. REV. 1421, 1421 (1999) (affirming that “the text, structure, and history of our Constitution do not give the power to interpret or enforce that document to any one branch of our national government, including the federal courts”).

14 Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 654 (1995) (“Precedential constraint permits courts to influence outcomes in future cases that they may now only dimly perceive.”).

15 The law of precedent is not the only context in which separation of powers principles impact the temporal reach of those who control a branch of government. For instance, while legislative initiatives may limit options available to successors, establishing financial or legal obligations that future legislatures will be required to respect, it has traditionally been understood that “one legislature may not bind the legislative authority of its successors.” United States v. Winstar Corp., 518 U.S. 839, 872 (1996); see, e.g., John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 CARDOZO L. REV. 543, 570 (2005) (“If a previous majority imposed a supermajority confirmation rule by legislative rule, the subsequent majority could repeal the rule by a majority.”).

16 See James Boyd White, *What’s an Opinion For?*, 62 U. CHI. L. REV. 1363, 1367 (1995) (law involves “the invocation of the authority of prior texts to shape and constrain what may be done in the present”); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 (2001) (“The doctrine of stare decisis would indeed be no doctrine at all if courts were free to overrule a past decision simply because they would have reached a different decision as an original matter”; goes on to argue court should not be bound by demonstrably erroneous precedent).
office or a superior office in the judicial hierarchy.\textsuperscript{17} From this feature of predecendal reasoning flows the familiar list of values served by\textit{stare decisis}, such as promoting the rule of law and protecting reliance. When respected, rules of precedent advance stability in the law, reducing the potential for arbitrary or unpredictable action by later judges.

Without minimizing these benefits of presumptive adherence to precedent, this article emphasizes a significant countervailing theme, one clearly present in the case law, but seldom highlighted in the academic literature. Just as the law of precedent gives earlier judges a check on the power of those who come behind, the doctrine sometimes allows later judges to minimize the predecendal effect of earlier decisions, providing a counterbalancing check on their predecessors.\textsuperscript{18} The law of precedent, as applied by the United States Supreme Court, empowers sitting judges to police overreach in previous opinions and to diminish the impact of rulings issued in the absence of time-honored decision making practices. This power conferred on later judges serves a disciplinary function, encouraging precedent-setting courts to remain within the proper scope of their authority and to employ processes calculated to produce thoughtful and defensible opinions.

As we develop this thesis, it will help to have a working understanding of what we mean by the law of precedent. The relevant doctrine centers on the rule of \textit{stare decisis}, the presumption that a legal conclusion in an earlier opinion continues to govern later cases in the same or inferior courts.\textsuperscript{19} \textit{Stare decisis} has not been understood as “an inexorable command” or a “mechanical formula,” but rather as “a principle of policy.”\textsuperscript{20} Subsidiary principles implement and qualify the \textit{stare decisis} presumption, offering guidance regarding when and to what extent a prior ruling merits precedential effect. These subsidiary principles often seem characterized less by bright lines than by consideration of multiple relevant factors.\textsuperscript{21}


\textsuperscript{18} If earlier judges establish the garden of precedent, later judges tend it, nurturing some plants, pruning others and tearing out those that seem sickly or misplaced.


\textsuperscript{21} See, e.g., Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854-55 (1992) (plurality opinion) (“[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to
Since the rule of *stare decisis* attaches only to a court’s previous holdings, the distinction between holding and *dicta* lies at the heart of the law of precedent.\(^{22}\) In the quest to honor prior holdings, ambiguities can arise regarding the *scope* of an earlier ruling.\(^{23}\) Judges often possess a degree of leeway in determining how narrowly or broadly a previous opinion should be read.\(^{24}\) Circumstances may also influence the precedential *weight* accorded a prior holding.\(^{25}\) The strength of the presumption that an earlier legal conclusion should be followed in later litigation can vary with the conditions under which it was announced.

This article contends that the subsidiary principles implementing the rule of *stare decisis* often empower later judges to counter overreaching and less-than-careful decision making by earlier courts. Applying the distinction between holding and *dicta*, a court can limit the scope of an opinion in which prior judges ambitiously addressed issues unnecessary for resolution of the earlier case.\(^{26}\) Likewise, the Supreme Court has used the law of precedent as a means to review the decision making process associated with a prior opinion. When the Court has issued a ruling based on substandard briefing or truncated deliberations, or when it has failed to adequately explain the grounds for an opinion, later Justices have felt free to deny or minimize the precedential effect of the earlier decision.\(^{27}\) The full weight of *stare decisis* attaches only when the precedent-setting court sticks to the task of resolving the case before it, on the basis of plenary briefing and argument, resulting in a reasoned opinion that cogently defends the court’s conclusions on the issues addressed.

Just as the general rule of *stare decisis* allocates power to speak the law, the authority of later judges to ignore *dicta* and to evaluate the quality of predecessors’ decision making processes effectively allocates law-speaking power over time, checking the influence of the precedent-setting court. Authorizing later courts to discount *dicta* creates an incentive for judicial restraint and disables ambitious judges from imposing their will in

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\(^{23}\) See, e.g., *infra* notes 113-30 and accompanying text.

\(^{24}\) See CARDOZO, supra note 6, at 49 (1921) (“Sometimes the extension of a precedent goes to the limit of its logic. Sometimes it does not go so far. Sometimes by a process of analogy it is carried even farther. That is a tool which no system of jurisprudence has been able to discard.”).

\(^{25}\) See, e.g., *infra* notes 131-44 and accompanying text.

\(^{26}\) See *infra* notes 104-30 and accompanying text.

\(^{27}\) See *infra* notes 131-95 and accompanying text.
hypothetically-imagined future cases. Allowing later courts to disregard or
narrowly construe decisions that were poorly briefed or inadequately
explained promotes careful and thoughtful decision making. Thus, the
pursuit of stability inherent in the doctrine of *stare decisis* is qualified by
countervailing goals, such as encouraging judicial self-restraint and
promoting thorough, well-informed consideration of legal issues.

This article will describe and defend the law of precedent’s backward-
looking limitations on *stare decisis* and consider possible implications for
several issues likely to come before the Supreme Court in future litigation.
Section I considers three widely-accepted expectations regarding the role
and operation of courts in our legal system. First, we establish courts to
resolve disputes about the application of law to particular cases.28 Second,
in the course of resolving litigation, we expect courts to conduct an
adequate investigation of the relevant facts and applicable law before
reaching a conclusion, a function facilitated in appellate courts through the
process of briefing, argument and deliberation.29 Third, we ask judges,
particularly at the appellate level, to memorialize their conclusions in the
form of a reasoned opinion explaining the outcome they reach.30

Section II shows how the Supreme Court has employed the law of
precedent to enforce these expectations regarding the role and operation of
courts. The Justices have felt free to ignore legal conclusions in a prior
opinion that can be fairly characterized as *dicta*, meaning that the Court
reached beyond its role of resolving the dispute brought to it by the parties
and opined on questions unnecessary to the outcome.31 When the Court
has resolved an issue without adequate briefing and argument, or with
minimal deliberation, later Justices have sometimes narrowly construed
the resulting holding or afforded it diminished precedential weight.32
Likewise, the Court has considered the absence or inadequacy of an
opinion as a factor affecting both the scope and weight of a prior ruling.33

Section III considers the potential application of these principles to
particular precedents addressing issues likely to come before the Supreme
Court again. Section III.A focuses on *Baker v. Nelson*,34 a summary
disposition in which the Supreme Court dismissed “for want of a
substantial federal question” claims that the traditional definition of

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28 *See infra* notes 48-78 and accompanying text.
29 *See infra* notes 79-91 and accompanying text.
30 *See infra* notes 92-99 and accompanying text.
31 *See infra* notes 104-30 and accompanying text.
32 *See infra* notes 131-52 and accompanying text.
33 *See infra* notes 153-95 and accompanying text.
34 409 U.S. 810 (1972).
marriage violates federal constitutional rights of same-sex couples. Though *Baker* represented a decision on the merits of the constitutional claims asserted, and though the parties provided helpful (if truncated) briefing on the issues in dispute, the lack of extended deliberation and the absence of a written opinion would make it unwise for the Supreme Court to rely on *Baker* as a definitive resolution of these issues in future proceedings. Questions of this gravity should be resolved through an opinion on the merits following plenary briefing and full deliberation. Indeed, I would recommend abandonment of the Court’s case law attributing binding precedential effect to such summary dispositions without opinion, since they seem more akin to a denial of *certiorari* than a decision on the merits of the claims presented.\(^{35}\)

Section III.B considers the liability of government officials occupying supervisory roles based on constitutional violations committed by their subordinates, an issue addressed by the Supreme Court in *Ashcroft v. Iqbal*.\(^{36}\) Since *Iqbal* involved federal officials sued under the federal common law principles of *Bivens v. Six Unknown Federal Narcotics Agents*,\(^{37}\) at the very least, *Iqbal*’s discussion of supervisory liability should be treated as non-binding *dicta* in cases involving statutory claims against state officials under 42 U.S.C. § 1983. More broadly, the *Iqbal* dissent made a reasonable argument that the majority’s discussion of supervisory liability constituted *dicta* even as to the federal officials at bar, since the Court’s analysis of the pleadings would seem to render irrelevant its understanding of the standards for supervisory liability. In any event, to the extent one thinks *Iqbal* included a holding on the liability of supervisory federal officials, the Court could reasonably construe that holding narrowly in future litigation in light of the minimal briefing provided to the *Iqbal* Court on that issue.\(^{38}\)

Section III.C considers the rule that the right to abortion continues until a fetus is viable, *i.e.*, capable of surviving (with medical assistance) outside the womb. Under the principles discussed in Section II, a strong argument can be made that the Supreme Court should not accord binding precedential effect to the viability rule. The Supreme Court first announced the viability rule in *Roe v. Wade*,\(^{39}\) reaffirming the rule in somewhat altered form in *Planned Parenthood of Southeastern Pa. v. Casey*.\(^{40}\) Since *Roe* concerned abortion regulations applicable from the

\(^{35}\) See infra notes 196-211 and accompanying text.

\(^{36}\) 129 S. Ct. 1937 (2009).

\(^{37}\) 403 U.S. 388 (1971).

\(^{38}\) See infra notes 212-57 and accompanying text.

\(^{39}\) 410 U.S. 113 (1973).

outset of pregnancy, the viability rule constituted dicta in the context of the Court’s opinion, a point confirmed by the internal deliberations about the case revealed in documents from the files of retired Justices. The reaffirmation of the viability rule in Casey constituted dicta as well, for much the same reason. Moreover, even if the viability rule had represented a holding in Roe or Casey, it would be entitled to diminished precedential weight since in neither case did the Court enjoy the benefit of plenary briefing or argument regarding the duration of abortion rights. Furthermore, neither case offered a reasoned explanation for how the viability rule can be derived from the Constitution. Given that neither Roe’s adoption nor Casey’s reaffirmation of the viability rule represented a holding of the Court, and that the Court has never squarely addressed the issue on the basis of plenary briefing and argument, the Court should not feel bound by the viability rule should the question of the duration of abortion rights arise in future litigation.\footnote{See infra notes 258-88 and accompanying text.}

I. The Parameters and Process of Judicial Decision Making

Anyone familiar with the past few decades of American history can testify to our profound disagreements over the proper role of courts.\footnote{Compare, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997) (defending textualist theory of constitutional interpretation designed to constrain judges), with GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION (2010) (defending theory of fidelity in constitutional interpretation in which judges adapt constitutional text and principles in light of changed social conditions).} But debates about judicial roles and interpretive methods should not obscure the remarkably broad consensus concerning the function we ask courts to perform in our legal system, the decision making processes we want them to employ and the manner in which we expect them to memorialize their decisions. First, we ask courts to resolve disputes among interested parties about the application of law to particular circumstances. Courts generally may not issue legal opinions on their own initiative, but must instead settle disagreements brought to them by others.\footnote{See infra notes 47-77 and accompanying text.} Second, we expect courts to follow established procedures for discovering the facts and investigating the law relevant to a particular case. At the appellate level of the judicial system, the anticipated procedures typically include adversarial briefing, often followed by oral argument, and collaborative deliberation by a multi-member panel.\footnote{See infra notes 79-91 and accompanying text.} Third, especially at the appellate level, we ask courts to explain their decisions in reasoned opinions that justify the announced outcome through analysis of the relevant facts and applicable
A. Courts as Forums for Resolving Disputes

We establish courts so that parties who disagree about the application of law in particular circumstances can ask judicial officers to resolve their dispute. With respect to federal courts, the Constitution assigns this dispute resolution function to judges by granting jurisdiction over certain “cases” and “controversies.” The “case or controversy” limitation has been implemented through the requirement of adverse parties, the rules of standing, and the prohibition on advisory opinions.

The case-specific nature of judicial decision making distinguishes the judicial power to “say what the law is” from the more general rule-making power of a legislative body. Courts may not speak the law until litigants request resolution of a dispute arising from a particular set of facts. Courts generally endeavor to resolve such legal disputes based on pre-existing sources of law, rather than simply imposing the judges’ preferred

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45 Schauer, supra note 14, at 638 (practice of giving reasons for decisions “[c]ommonly associated with appellate argument and appellate opinions”).

46 See infra notes 92-99 and accompanying text; Schauer, supra note 14, at 634 (“To characterize a conclusion as an ipse dixit – a bare assertion unsupported by reasons – is no compliment.”).

47 See U.S. v. Raines, 362 U.S. 17, 20 (1960) (courts have “power and duty . . . to decide cases and controversies properly before them”).


50 See DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 351-52 (2006) (“a plaintiff must demonstrate standing for each claim he seeks to press”).

51 See United Public Workers of America (CIO) v. Mitchell, 330 U.S. 75, 89 (1947) (“As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.”).

52 Chief Justice Marshall made it clear in Marbury that he had in mind the judiciary’s power to “say what the law is” in this case-specific context. See 5 U.S. (1 Cranch) at 177 (“Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

53 Robert J. Pushaw, Jr., Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?, 84 Notre Dame L. Rev. 1975, 1984 n.42 (2009) (“[C]ourts must wait until parties commence an action and the litigation process has been completed before they can render a judgment applying the law to the facts.”).
outcomes. By contrast, the power of a legislature to speak the law is typically much broader than that of a court. A legislature may set forth a rule of law on its own initiative, even if no person requested the measure or identified concrete circumstances to which it would apply. Legislative officials are not limited to addressing one set of circumstances, but may craft a comprehensive legal regime anticipating a range of variations. A legislature may adopt rules based on the legislators’ values, without drawing on any pre-existing source apart from the legislative power.

In a system premised on popular sovereignty, the distinction between the law-speaking authority of legislatures and courts can be traced to considerations of legitimacy. “[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.” This is particularly true in the federal system, where judges assume office through appointment, rather than election, and enjoy constitutional protection against political accountability. Insulation from the political process can be an advantage when one seeks principled enforcement of legal and constitutional norms. It can be a disadvantage,

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54 See Brian Z. Tamanaha, The Distorting Slant in Quantitative Studies of Judging, 50 B.C. L. Rev. 685, 688-89 (2009) (“[J]udges are realists who acknowledge that, in some cases, they make law and are guided by their personal experience and values, but believe that nevertheless, personal views play little if any role in judicial decision making the vast majority of the time.”).


56 See, e.g., Oregon Waste Systems, Inc. v. Dep’t of Environmental Quality, 511 U.S. 93, 110-11 (1994) (Rehnquist, C.J., dissenting) (“[A] State may enact a comprehensive regulatory system to address an environmental problem or a threat to natural resources within the confines of the Commerce Clause.”).

57 Ofer Raban, The Supreme Court’s Endorsement of a Politicized Judiciary: A Philosophical Critique, 8 J. L. & Society 114, 131 (2007) (“Legislators who legislate decide what, in their view, is the best course of action regarding a particular matter. Judges do not decide cases that way.”).


59 See U.S. Const., art. II, § 2; art. III, § 1.

60 David E. Pozen, The Irony of Judicial Elections, 108 Colum. L. Rev. 265, 272 (2008) (judicial independence beneficial “to uphold the rule of law, to check the excesses of the legislature and the executive, and to protect constitutional rights and deep-seated values against majority encroachments”).
however, when establishing rules to govern society, at least if one values the democratic control our political system assumes.61

The broader law-speaking authority of legislative bodies can also be justified in terms of institutional competence.62 A legislature is better positioned than a court to make far-reaching, widely-applicable policy judgments.63 Its many members come from a variety of backgrounds and bring to their legislative deliberations a large pool of collective experience.64 A legislative body possesses the resources to conduct an extensive inquiry into the need for and consequences of particular legal changes.65 It can consider the distinct interests of all who might be impacted by a measure, including those who lack the means to hire an advocate or to speak for themselves. A legislature can also take the time it needs, studying an issue for years or even decades before it acts.66


62 Pierre N. Leval, Judging Under the Constitution: Dicta about Dicta, 81 N.Y.U. L. REV. 1249, 1260-61 (2006) (“The ideal lawmaking body would be designed to undertake a broad, integrated study of the area requiring attention. It would issue public notices so that affected persons could make submissions and participate in hearings. It would seek advice from experts. It would employ a staff to make a detailed, independent study. It would deliberate and wait as long as it considered useful before promulgating a new rule.”).

63 See Josh Benson, The Past Does Not Repeat Itself, but it Rhymes: The Second Coming of the Liberal Anti-Court Movement, 33 LAW & SOC. INQUIRY 1071, 1081 (2008) (describing Cass Sunstein’s view: “Unlike a legislature, which can correct mistakes and draw on expert information, the Court lacks serious policy expertise. This means not only that sweeping rulings are likely to be wrong, but they acquire precedential value that makes them difficult to correct.”).


65 Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980) (“The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot.”); Benson, supra note 63, at 1081 (legislature can “draw on expert information”).

Compared to legislatures, courts are generally in an inferior position when it comes to making broadly-applicable legal pronouncements. A court is typically a much smaller institution than a legislative body, and commands fewer resources. Judges may come from a less diverse range of socioeconomic backgrounds than legislators and typically share the advantages, but also the homogenization, that attends law school training. A court must confine its deliberations to a record compiled by self-interested parties, who often have incentives to offer selective portrayals of the relevant facts. The court may possess little insight into how its ruling might affect those not involved in the litigation and it generally resolves cases under considerable time pressure.

The limitation of court jurisdiction to the task of resolving discrete legal disputes gives rise to the distinction between holding and dictum. A court’s holding carries precedential authority because, by definition, it encompasses those parts of an opinion necessary to the assigned task of resolving the case. When a court articulates the holding of a case, it carries

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67 Leval, supra note 62, at 1260 (“In their structure and manner of operation, courts are poorly equipped to promulgate law, and even more poorly equipped to do so in dictum. When they make law in dictum, the likelihood is high that it will be bad law.”); Woodward v. Commissioner of Social Security, 760 N.E.2d 257, 272 (Mass. 2002) (issue of inheritance by posthumously-conceived children “cr[ies] out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself”).


69 See Sherrilyn Ifill, Judicial Diversity, 13 Green Bag 2d 45, 46-49 (2009) (discussing lack of diversity with respect to gender, race and professional backgrounds); id. at 54 (“All federal judges are lawyers--distinguished ones.”); Vermeule, supra note 64, at http://www.tnr.com/book/review/living-it?page=0,0 (characterizing a court as a “committee of aging lawyers on the bench, with limited information and life experience and no philosophical or penological training”).

70 See, e.g., Pharmaceutical Research & Mfrs. of America v. Walsh, 538 U.S. 644, 687-88 (2003) (appellate review of injunction confined to record before district court); Leval, supra note 62, at 1261 (“Usually, the only input the court receives is from the litigants. The court is barred from researching the facts privately on its own.”).

71 Benson, supra note 63, at 1081 (a court “lacks serious policy expertise”).

72 See, e.g., Margaret Meriwether Cordray & Richard Cordray, The Calendar of the Justices: How the Supreme Court’s Timing Affects Its Decisionmaking, 36 Ariz. St. L.J. 183, 213 (2004) (“The Court’s tradition has long been to issue all of its plenary decisions—those reached after hearing oral argument—prior to rising for the summer recess, which usually begins at the end of June. For cases argued in the April session, therefore, the Court has barely two months to prepare opinions and issue decisions.”); Randy J. Holland, Delaware’s Business Courts, 34 J. CORP. L. 771, 777-78 (2009) (rapid decision making in Delaware appellate courts).

73 See CARDOZO, supra note 6, at 29 (“[T]he thing adjudged comes to us oftentimes swathed in obscuring dicta, which must be stripped off and cast aside.”).
out the function it is authorized to perform—settling the dispute between the parties. Conversely, statements in *dicta* lack authority because they are not required for the court to perform its role of resolving the pending legal dispute. In offering *dicta*, the judge goes beyond the authorized judicial function.

The Supreme Court has argued that a court’s *dicta* are less reliable than its holdings because of the circumstances under which the court speaks. Chief Justice Marshall famously explained the reasons for denying precedential effect to *dicta*:

> 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.

Thus, concerns about a court’s legitimacy in resolving unnecessary issues interrelate with concerns about institutional competence and the quality of the court’s decision making process. The circumstances in which a court is authorized to speak the law are also the circumstances in which it can be expected to do so most reliably and with the greatest forethought.

This does not mean a court necessarily acts improperly when it includes *dicta* in an opinion. A court probably *should* consider how the principles underlying its ruling might apply in light of predictable variations in the facts. Offering guidance for later cases, or highlighting potential distinguishing factors, can be useful for future parties and courts. But the

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75 CARDozo, *supra* note 6, at 29-30 (“I own that it is a good deal of a mystery to me how judges, of all persons in the world, should put their faith in dicta. A brief experience on the bench was enough to reveal to me all sorts of cracks and crevices and loopholes in my own opinions when picked up a few months after delivery, and reread with due contrition.”); Leval, *supra* note 62, at 1255 (“An important aspect of my point is that courts are more likely to exercise flawed, ill-considered judgment, more likely to overlook salutary cautions and contraindications, more likely to pronounce flawed rules, when uttering dicta than when deciding their cases. The practices I discuss impair the quality and reliability of our performance.”).

76 Leval, *supra* note 62, at 1253 (“*Dicta* often serve extremely valuable purposes. They can help clarify a complicated subject. They can assist future courts to reach sensible,
inclusion of *dicta* in an opinion can also be a form of judicial overreaching—an attempt to address unlitigated issues and resolve future disputes beyond the precedent-setting court’s jurisdiction.\(^77\)

**B. Briefing, Argument and Deliberation**

If the legal system’s only goal was resolution of disputes, we could replace judges with coin flips and games of chance (at much lower cost). We invest substantial resources in our legal system because we believe law can play a socially beneficial role in influencing behavior. That belief rests on an assumption that law possesses some degree of determinacy or predictability, arising from the interaction of language, reason and shared interpretive practices. We assume that the plausible outcomes for a particular legal inquiry—outcomes consistent with the language of the law, understood in light of the conventions of legal interpretation and the dictates of reason—fall within a sufficiently narrow range to permit suitably determinate guidance to further the goals that motivated lawmakers. In this light, some judicial opinions will be better than others. Some will be more truthful about the facts or more faithful in applying the relevant legal directives in light of our shared interpretive norms.

In preparing to write a truthful opinion that faithfully applies the law, a judge must undertake an educational process. At a minimum, the educational process required to resolve a case involves investigation of facts relevant to the dispute, typically through compilation of a record at the trial court level or familiarization with relevant portions of the record in an appellate court. In many cases, judges will also need to broaden their familiarity with applicable law through review of pertinent legal directives and precedent interpreting those directives.

Appellate judges, such as the Justices of the United States Supreme Court, could theoretically conduct the factual and legal investigations necessary to their work without the input of the parties, perhaps after minimal guidance as to the issues in dispute. Drawing from centuries of experience, though, our courts have concluded that adversarial briefing and oral argument by lawyers for the parties enhances the educational process necessary for appellate decision making.\(^78\) The Supreme Court places such reliance on the assistance of attorneys that the Justices often refuse to

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\(^{77}\) *Id.* at 1250 (“We judges regularly undertake to promulgate law through utterance of dictum made to look like a holding--in disguise, so to speak. When we do so, we seek to exercise a lawmaking power that we do not rightfully possess.”).

\(^{78}\) Teague v. Lane, 489 U.S. 288, 331 (1989) (Brennan, J., dissenting) (quoting Mapp v. Ohio, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting) (recognizing the “aid which adequate briefing and argument lends to the determination of an important issue”)).
adjudicate issues—even issues undeniably relevant to a given dispute—in the absence of adequate briefing and argument. Just as frequently, concurring and dissenting Justices criticize the majority for taking up issues the briefs did not address or treated in a cursory fashion. The

79 See U.S. v. Reading Co., 228 U.S. 158, 160 (1913) (“Upon this issue the transcript is confusing and the briefs inadequate. The court therefore deems it wise, in the exercise of its judgment, to decline any determination of the question upon the present record.”); Kentucky Dep’t of Corrections v. Thompson, 490 U.S. 454, 465 n.5 (1989) (declining to consider whether consent decree could create liberty interest where issue not briefed and argued, not discussed below and unnecessary to decision); Bowen v. Yuckert, 482 U.S. 137, 153 n.11 (1987) (noting dissent resolved issue of vagueness of regulation “[a]lthough the issue was not briefed or argued by the parties”); Aetna Life Ins. Co. v. Lavioe, 475 U.S. 813, 827 n.4 (1986) (“We have confined the opinion to the issues presented by the parties and express no view on the question discussed by the justices who write separately. . . . Because the issue of disqualification of a single member of a multi-member panel arises in a variety of factual contexts, sound judicial practice wisely counsels judges to avoid unnecessary declarations on issues not presented, briefed, or argued.”) (citation omitted); EEOC v. Shell Oil Co., 466 U.S. 54, 66 n.17 (1984) (parties shared assumption about Title VII enforcement question, so “the issue has not been briefed;” Court “loathe to take an analytical path unmarked by the litigants,” especially in complex area of law); Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 637 (1975) (remanding for consideration of issue not considered below and “not briefed and argued fully in this Court”); U.S. Postal Service v. Gregory, 534 U.S. 1, 7 (2001) (“even if the adequacy of [agency’s] method of reviewing prior disciplinary actions were before us, we lack sufficient briefing on its specific functioning in this case”); Cooper Indus., Inc. v. Aviall Services, Inc., 543 U.S. 157, 168-70 (2004) (refusing to resolve issue addressed by dissent where issue had not been resolved below and went “well beyond the scope of the briefing and, indeed, the question presented”); Sherman v. U.S., 356 U.S. 369, 376 (1958) (declining to address issues “without the benefit of argument by the parties”).

80 See Mapp v. Ohio, 367 U.S. 643, 676-77 (1961) (Harlan, J., dissenting) (critiquing the “unwisdom of overruling [Wolf v. Colorado, 338 U.S. 25 (1949)] without full-dress argument”); Sun Oil Co. v. Wortman, 486 U.S. 717, 739 (1988) (Brennan, J., concurring in part and concurring in judgment) (criticizing majority’s “offhand treatment” of issue not briefed or argued); U.S. v. Sharpe, 470 U.S. 675, 700-02 (1985) (majority erred in addressing reasonable suspicion issue “not presented, briefed, or argued by the parties” and not fully reviewed in trial court); Kolstad v. American Dental Ass’n, 527 U.S. 526, 553 (1999) (“The absence of briefing or meaningful argument by the parties makes this Court’s gratuitous decision to volunteer an opinion on this nonissue particularly ill advised.”); R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 398 (1992) (White, J., concurring in the judgment) (“in the present case, the majority casts aside long-established First Amendment doctrine without the benefit of briefing and adopts an untried theory”); Teague v. Lane, 489 U.S. 288, 319-20 (1989) (Stevens, J., concurring in part and concurring in the judgment) (questioning “the propriety of making such an important change in the law without briefing or argument,” but partially agreeing with plurality’s resolution of retroactivity issue); id. at 326 (Brennan, J., dissenting) (“Today a plurality of this Court, without benefit of briefing and oral argument, adopts a novel threshold test for federal review of state criminal convictions on habeas corpus.”); Missouri v. Jenkins, 515 U.S. 70, 138-39, 143-48 (1995) (Souter, J., dissenting) (court should not decide issue not clearly included in questions presented, resulting in lack of notice and inadequate briefing); but see id. at 83-86 (Rehnquist, C.J., majority opinion) (question considered by courts below, fairly included in questions presented and briefed by parties); id. at 103-05 (O’Connor, J., concurring) (question fairly included in one of
significance attributed to briefing and argument in both majority and non-majority opinions demonstrates a recognition that the quality of briefing affects the quality of the Court’s opinions; inadequate briefs can produce poor decisions.\textsuperscript{81}

How exactly might briefing and argument by the parties contribute to the quality of decision making in an appellate court? At the very least, the briefing process will save time and effort for the judges. The parties can identify relevant testimony and exhibits more quickly than an appellate judge. The litigants can also accelerate the search for relevant legal sources, reducing the risk that the court will overlook important precedents and principles that its decision should take into account. The time saved by adversarial briefing can be devoted to higher-order tasks, like thinking through the implications of a particular outcome in light of the court’s larger body of jurisprudence.

Our preference for adversarial briefing and argument, however, does not flow simply from the desire to preserve judicial resources. We are also convinced that allowing each party to present its own case may highlight important considerations the judge might otherwise overlook. The human mind has a natural tendency to begin forming views on an issue based on relatively minimal information. Judges may reach tentative conclusions when they first hear about a case, but those conclusions will often prove untenable in light of a fuller understanding of the dispute. Hearing a party’s position on contested issues can force a judge to question his or her assumptions about the case and take account of information undermining the judge’s initial reaction.

More broadly, adversarial briefing can help overcome the blind spots arising from a judge’s background. Each judge comes to a case from a

\footnotesize{the questions presented and briefed by parties); see also Lackawanna Cty. Dist. Att’y v. Coss, 532 U.S. 394, 410 (2001) (Breyer, J., dissenting) (discussion of one issue premature where related issue not raised and thus “the issue has not been briefed”); cf. U.S. v. New York Tel. Co., 434 U.S. 159, 184 (1977) (rejecting proposition suggested in dicta in prior case, but “not briefed”); Harper v. Virginia Dep’t of Taxation, 509 U.S. 86, 120 (1993) (O’Connor, J., dissenting) (majority should not view prior case articulating rule as determinative on issue of retroactivity where “[t]he absence of briefing, argument, or even mention of the question belies any suggestion that the issue was given thoughtful consideration”).

\textsuperscript{81} The Court made this point recently when it overruled Saucier v. Katz, which had required judges to decide constitutional issues presented by a §1983 or Bivens plaintiff before moving on to consider the question of qualified immunity. 533 U.S. 194 (2001). As one reason for freeing judges to start with the issue of qualified immunity, the Court explained that where “the briefing of constitutional questions is woefully inadequate,” demanding an opinion on the constitutional issue would “create a risk of bad decisionmaking.” Pearson v. Callahan, 129 S.Ct. 808, 820 (2008).}
particularly perspective shaped by the judge’s experiences. A judge needs to see what the dispute looks like from the perspectives of the parties. Getting a different angle on the issues in controversy may help a judge remove the blinders created by his or her background and see more clearly the “practical ramifications” of a particular outcome for those most directly affected. The parties can present their positions in the strongest possible terms and give the best expositions of how their interests will be impacted by the litigation.

Adversarial briefing likewise allows for a thorough sifting of the positions advanced by the contending parties. Many arguments may appear persuasive when considered in isolation. As expressed in the ancient proverb, “The first to present his case seems right, till another comes forward and questions him.” In adversarial litigation, each side has an incentive to highlight omissions and expose flaws in the other side’s position, rounding out the court’s awareness of the relevant facts and law and the strengths and weaknesses of potential legal resolutions.

For cases argued in the United States Supreme Court, the process of briefing and argument structures the dispute in the form of an extended back-and-forth dialogue between the parties. At the initial stage of asking the Court to take the case, there will typically be a petition for certiorari, a brief in response, and sometimes a reply brief. The Court’s decision to grant certiorari is followed by submission of a lengthier Brief of Petitioner, Brief of Respondent and Petitioner’s Reply Brief, with each party potentially supported by multiple amici curiae. The parties get a final opportunity to influence the Court’s thinking through oral presentation of their positions. This extensive course of briefing and argument gives each side multiple opportunities to make their strongest points and highlight weaknesses in the other side’s submissions.

Public oral argument offers additional advantages that can enhance the judicial decision making process, setting a point in time by which the

82 See, e.g., Adam Liptak, At 89, Stevens Contemplates Law, and How to Leave It, N.Y. TIMES, Apr. 3, 2010 (“I’ve confessed to many people that I think my personal experience has had an impact on what I’ve done,’ [Justice Stevens] said. ‘Time and time again, not only for myself but for other people on the court, during discussions of cases you bring up experiences that you are familiar with.”); Ifill, supra note 69, at 55 (judges bring “accumulated knowledge” from their experiences to the resolution of cases).


84 See Mapp v. Ohio, 367 U.S. 643, 676 (1961) (Harlan, J. dissenting) (critiquing majority for reaching out to resolve issue with cursory briefing and no argument; decision may have “untoward practical ramifications” for state criminal justice proceedings).

85 Proverbs 18:17 (NIV).
judges should have read the briefs and developed a basic familiarity with
the issues in dispute. Since the judges do not want to appear unprepared,
the process creates an incentive for attentive reading of the materials
submitted by the litigants. The oral argument gives advocates an
opportunity to respond to particular issues of concern to the decision
makers. Oral argument also shows the public that the judges are personally
engaged in considering the issues presented, and have not simply left
matters in the hands of their law clerks. Finally, in the context of the
Supreme Court, many have noted that the questions asked by the Justices
are often directed to one another, as much as to the parties. The oral
argument begins the process of collaborative deliberation that will lead to
a final opinion.

While briefing and argument initiate the process of judicial education, that
educational process continues through private study and collegial
deliberation. Since the parties’ presentations are driven by an agenda of
prevailing in the litigation, it is important that judges have time to
supplement the parties’ research and engage in more neutral and
dispassionate consideration of the issues in dispute. The judges need to
determine whether the parties have accurately characterized the record and
the case law, to consider issues the parties did not raise and to anticipate
implications of different outcomes for future disputes, where the facts
might differ.

86 James C. Phillips & Edward L. Carter, Source of Information or “Dog and Pony
Show”? Judicial Information Seeking During U.S. Supreme Court Oral Argument, 1963-
Jr., Oral Advocacy and the Re-emergence of a Supreme Court Bar, 30 J. SUP. CT. HIST.
68, 70 (2005) (oral argument “is the organizing point for the entire judicial process. The
judges read the briefs, do the research, and talk to their law clerks to prepare for the
argument. The voting conference is held right after the oral argument--immediately after
it in the court of appeals, shortly after it in the Supreme Court. And without disputing in
any way the dominance of the briefing in the decisional process, it is natural, with the
voting coming so closely on the heels of oral argument, that the discussion at conference
is going to focus on what took place at argument.”).

(discussing responsibility of Justices to supervise law clerks and not give them too much
control over official responsibilities).

88 Id. at 89 (quoting William O. Douglas in PHILLIP J. COOPER, BATTLES ON THE BENCH:
CONFLICT INSIDE THE SUPREME COURT 72 (1995) (“I soon learned that . . . questioning
from the bench was . . . a form of lobbying for votes.”)); id. (quoting WILLIAM H.
REHNQUIST, THE SUPREME COURT 244 (2001) (“A second important function of oral
argument can be gleaned from the fact that it is the only time before conference
discussion of the case later in the week when all of the judges are expected to sit on the
bench and concentrate on one particular case. The judges’ questions, although nominally
directed to the attorney arguing the case, may in fact be for the benefit of their
colleagues.”).
After oral argument, appellate judges typically begin an extended process of continued research and collective deliberation. The development of consensus among a group of judges on a multi-member appellate court may tend to smooth out some of the biases and idiosyncrasies that can lead a single judge to a flawed result.\(^8\) Moreover, multiple judges may challenge one another to consider possibilities an individual judge might overlook.\(^9\) Soon after oral argument in the Supreme Court, the Justices meet for a private conference that facilitates this process of personal study and collaborative deliberation. Each Justice explains his or her tentative views on the proper outcome of an argued case. The conference results in initial opinion assignments, and the process of study and deliberation continues as the Justices circulate and comment on drafts of majority, concurring and dissenting opinions.

In short, in appellate courts such as the United States Supreme Court, briefing and argument play a vital role in enhancing the quality of the decisions issued by judges. Inadequate briefing and argument contribute to inadequate judicial opinions. Good briefing and argument do not guarantee good decisions, but they increase the likelihood that judges will produce thoughtful rulings, truthful about the relevant facts, faithful to the applicable law and useful in accomplishing the goals the legal system seeks to advance.

C. Reasoned Explanation of Judicial Decisions

In addition to educating themselves as to the relevant facts and applicable law, we ask courts to write opinions that explain the legal analysis leading to an announced outcome.\(^9\) Just as briefing, argument and collaborative deliberation tend to enhance the quality of judicial decisions, the process of writing opinions can improve judicial decision making as well. Writing out one’s legal analysis serves as a discipline that can force judges to think

\(^8\) CARDozo, supra note 6, at 177 (“The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements.”).

\(^9\) See Evan Caminker, Sincere and Strategic Voting Norms on Multimember Courts, 97 Mich. L. Rev. 2297, 2310 (1999) (“The process of collective deliberation can improve autonomous decisionmaking. A collegial sharing of ideas brings multiple possibilities and perspectives to each Justice's attention, and increases the likelihood that she will explore all plausible positions. Moreover, each Justice is encouraged to hone and improve her own positions in response to critical peer scrutiny and persuasion.”).

\(^9\) White, supra note 16, at 1366 (1995) (judicial opinion includes “the reasons why the result was reached”).
more carefully and systematically about the issues in dispute. The requirement of written justification forces a judge to move from a gut reaction to a reasoned conclusion. Many judges recognize this benefit of authoring opinions, and will sometimes express only tentative views after oral argument because they want to see if a particular analysis “will write,” i.e., if it can be persuasively developed in the form of a judicial opinion. The writing process forces the court to face important issues and decide whether a particular outcome be explained in a defensible way.

When a court offers persuasive explanations for its decisions, its opinions tend to bolster the court’s legitimacy in the eyes of the public. This matters because the efficacy of courts in fulfilling their functions depends to a large extent on public acquiescence. Courts have only limited capacity to compel submission, so voluntary compliance by the public is critical. Widespread doubt about the legitimacy of the courts would profoundly impact their ability to perform their public functions.

Issuance of written opinions also provides one of the few means of holding courts accountable. As mentioned previously, judges in the federal system are appointed for life and shielded from political retaliation. They may only be impeached for unusually egregious abuses of office. One of the few means available to the public for promoting an indirect form of judicial accountability lies in review and critique of the legal analyses offered in support of their decisions. The transparency afforded by judicial opinions allows the public to express disapproval and criticize judges who reach decisions the public considers poorly reasoned or legally indefensible. A written opinion can also provide insight to political actors who may have means available to respond to a court’s decision.

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92 Schauer, supra note 14, at 657-58 (requirement of giving reasons for decisions can counteract problems like “bias, self-interest, insufficient reflection, or simply excess haste”).

93 Id. at 652 (mentioning phenomenon of judges struggling with opinion before concluding it “won’t write”).

94 Id. at 658 (“[W]hen decisionmakers expect voluntary compliance, or when they expect respect for decisions because the decisions are right rather than because they emanate from an authoritative source, then giving reasons becomes a way to bring the subject of the decision into the enterprise.”).


96 White, supra note 16, at 1368 (“The criticism of opinions, on all these grounds—rational, political, moral—is an essential part of the activity of law. It is crucial to legal practice, for it is on the basis of such criticism that one will argue for or against the continued authority of a particular opinion or line of opinions.”).
Reasoned opinions explaining judicial outcomes promote the rule of law values underlying the law of precedent.97 The court’s explanation of the principles applied and its analysis of how they interact with the relevant facts can offer guidance as to the possible future application of those principles in later cases.98 In this manner, the publication of judicial opinions provides direction to lawyers, litigants and future courts.

II. The Law of Precedent as a Check on Prior Courts

Discussions of the law of precedent often focus on the presumption against reconsidering prior decisions.99 Considerable advantages flow from presumptive adherence to earlier rulings. Following previous decisions means that like cases will be resolved in like manner, promoting “faith in the even-handed administration of justice” and guarding against “prejudice or favor or even arbitrary whim or fitfulness.”100 Adherence to precedent increases the predictability of legal outcomes and protects those who rely on judicial pronouncements, promoting the rule of law.101 Stare decisis also preserves judicial resources, since “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case.”102

When one focuses principally on the presumption against overruling prior decisions, the law of precedent clearly empowers earlier courts at the expense of those that come later. This article, however, seeks to present a somewhat more nuanced picture of the way the law of precedent operates in practice. A complete discussion of the Supreme Court’s stare decisis jurisprudence must take account of the Court’s willingness to deny precedential effect to dicta and to narrowly construe prior decisions in

97 Schauer, supra note 14, at 654 (can argue for adherence to reasons in earlier opinions for “cross-temporal stability, and for intrainstitutional stability in the face of changing personnel”).

98 White, supra note 16, at 1368 (“[T]he way the opinion is written has large consequences for the future. It deeply affects and shapes the way we think and argue and, in so doing, constitute ourselves through the law.”).


100 CARDOZO, supra note 6, at 34, 112.


102 CARDOZO, supra note 6, at 149.
ways that minimize their impact. Moreover, not all judicial decisions carry equal precedential weight; the Court feels more freedom to reconsider some rulings than others. A more comprehensive picture of the law of precedent shows that the Court balances values such as promoting stability and protecting reliance against countervailing values. While the law of precedent does give precedent-setting courts the capacity to bind their successors, it also arms successor judges with tools to rein in excesses and discourage suboptimal decision making practices by their predecessors.

The first part of this article considered three expectations regarding the role and operation of courts in our legal system: (1) that courts should resolve disputes brought to them by others concerning the application of law to particular circumstances, (2) that courts should render decisions with the benefit of full briefing, argument and deliberation, and (3) that courts should explain the legal analyses supporting the conclusions they reach. We will now examine the Supreme Court’s application of the law of precedent to enforce these expectations. As we will see, the Court narrowly construes prior decisions, accords diminished precedential weight, or denies stare decisis effect altogether when an earlier Court purported to resolve issues not raised by the case before it, when it acted based on inadequate briefing or cursory deliberation, or when it failed to adequately explain the reasoning underlying a legal conclusion.

A.  

**Dicta as Merely Persuasive, Without Binding Effect**

The law of precedent places controlling weight on the distinction between holding and dicta. The only portions of an opinion entitled to binding effect under the rule of stare decisis are those necessary to resolution of the dispute pending before the precedent-setting court. Portions of an opinion that constitute dicta may be considered for their persuasive value, but need not be followed in later litigation.

We saw earlier that the distinction between holding and dicta tracks the court’s jurisdiction as an institution authorized to resolve disputes about the application of law to particular circumstances. Considered as a manifestation of separation of powers doctrine, the holding/dicta distinction allows later courts to remedy overreaching by their judicial predecessors. *Dicta can of course be a legitimate tool of judicial decision making, even for a minimalist court. Courts may use dicta, for*

103 See supra notes 74-78 and accompanying text.
105 See supra Section I.A.
106 Local 144 Nursing Home Pension Fund v. Demisay, 508 U.S. 581, 592 n.5 (1993) (declining to give effect to dicta in prior cases).
instance, to illustrate the limited scope of a particular ruling and alert lawyers, judges and legislators to factual variations that could call for application of different principles.\textsuperscript{107} But \textit{dicta} can also represent an attempt by the precedent-setting court to reach outside the bounds of its authority in an ambitious attempt to articulate law, not just for the pending case, but also to control the outcome in future cases with different facts. The Supreme Court has recognized that \textit{dicta} can “insult” the virtue of judicial restraint, and that a later court “would add injury to insult by according them precedential effect.”\textsuperscript{108} The holding/\textit{dicta} distinction allows a later court to ignore an earlier opinion to the extent the first court exceeded its authority.

The distinction between holding and \textit{dicta} implicates concerns about the institutional competence of courts and the importance of adversarial litigation. Given the typical motivations of parties involved in a lawsuit, there would be little reason to expect extensive briefing and argument on issues unnecessary for resolution of a particular case.\textsuperscript{109} Therefore, an opinion’s \textit{dicta} will often concern issues “not fully debated” in the earlier litigation.\textsuperscript{110} The circumstances surrounding the creation of \textit{dicta} also provide reason to question the precedent-setting court’s deliberative process. As Chief Justice Marshall explained in \textit{Cohens v. Virginia}, while “[t]he question actually before the Court is investigated with care, and considered in its full extent,” other issues are “seldom completely investigated.”\textsuperscript{111}

This brings us to the question of how courts should distinguish holding from \textit{dicta} in the process of interpreting an earlier opinion. Professor Michael Dorf has noted that the Supreme Court lacks a single, uniform

\textsuperscript{107} For instance, in striking down a statute criminalizing consensual homosexual sodomy, the majority in \textit{Lawrence v. Texas}, 539 U.S. 558 (2003), employed \textit{dicta} to identify a number of potentially relevant facts that were not present in the case under review: “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” \textit{Id.} at 578.

\textsuperscript{108} \textit{Demisay}, 508 U.S. at 592 n.5.

\textsuperscript{109} An exception might be ideological litigation, in which an interest group has more interest in advancing a particular agenda than in the material interests at stake in the lawsuit.

\textsuperscript{110} \textit{See Parents Involved in Community Schools}, 551 U.S. at 737 (quoting Central Va. Community College v. Katz, 546 U.S. 356, 363 (2006) (“we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated”).

\textsuperscript{111} \textit{Cohens v. Virginia}, 19 U.S. (6 Wheat) 264, 399-400 (1821).
approach to drawing the holding/*dicta* distinction.\textsuperscript{112} The Court sometimes
views a prior holding narrowly, encompassing only the facts of the earlier
case and the outcome, but in other cases, the Court reads the holding
broadly to encompass both the outcome and the rationale articulated by
the precedent-setting court. Professor Dorf would prefer a policy of
always reading the holding of an opinion to include the court’s rationale,
even when the reasoning would also govern factual scenarios not present
in the case at bar.\textsuperscript{113} The Justices, though, have often narrowly construed
prior opinions in ways that limit the full scope of the earlier Court’s
rationale.

Two examples from recent terms illustrate the point. Consider first the
decision in *Seminole Tribe of Florida v. Florida*, in which the Court
concluded that a statute enacted by Congress under the Article I Indian
Commerce Clause could not abrogate a state’s sovereign immunity.\textsuperscript{114} The
Court’s rationale in *Seminole Tribe* seemingly extended to any legislation
enacted under the Article I powers of Congress: “[t]he Eleventh
Amendment restricts the judicial power under Article III, and Article I
cannot be used to circumvent the constitutional limitations placed upon
federal jurisdiction.”\textsuperscript{115} The majority and dissenting opinions in *Seminole Tribe*
therefore assumed that the holding of the case would also prevent
Congress from abrogating state sovereign immunity based on the Article I
Bankruptcy Clause.\textsuperscript{116} Nevertheless, the Court reached the contrary
conclusion when directly confronted with the Bankruptcy Clause issue in
*Central Va. Community College v. Katz*.\textsuperscript{117} Even though the rationale of
*Seminole Tribe* would seem to encompass all Article I powers, the *Katz*

courts sometimes treat the question whether a particular judicial statement is holding or
dictum as a feature of the facts and outcome of the case, but other times they treat this
question as a feature of the rationale of the prior opinion under analysis”).

\textsuperscript{113} Id. at 2040.

\textsuperscript{114} 517 U.S. 44, 60, 72 (1996).

\textsuperscript{115} Id. at 72-73. See also id. at 65-66 (distinguishing Fitzpatrick v. Bitzer, 427 U.S. 445
(1976), which permitted Congress to abrogate sovereign immunity under section 5 of the
Fourteenth Amendment, because Fourteenth Amendment “operated to alter the pre-
existing balance between state and federal power achieved by Article III and the Eleventh
Amendment”).

\textsuperscript{116} See *Seminole Tribe*, 517 U.S. at 77 & n.1 (Stevens, J., dissenting) (majority “prevents
Congress from providing a federal forum for a broad range of actions against States, from
those sounding in copyright and patent law, to those concerning bankruptcy,
environmental law, and the regulation of our vast national economy”); *Central Va.
“reflected an assumption that the holding in that case would apply to the Bankruptcy
Clause”).

\textsuperscript{117} *Katz*, 546 U.S. at 363.
majority concluded that language about the Bankruptcy Clause in *Seminole Tribe* represented non-binding *dicta.*

To similar effect, consider the Court’s decision in *United States v. Miller,* rejecting a Second Amendment challenge to an indictment for possession of a short-barreled shotgun. The *Miller* Court tied the Second Amendment’s protection of “the right of the people to keep and bear arms” to its recited purpose of maintaining a “well regulated Militia”:

> With obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

The *Miller* Court’s rejection of the Second Amendment claim was based on an insufficient connection between the arms in question and a militia-related function:

> In the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

The scope of *Miller*’s holding became an issue in the later case of *District of Columbia v. Heller,* reviewing the District of Columbia’s ban on handgun possession. A key point of contention in *Heller* was the precedential effect of *Miller,* which the dissenters read for the proposition that the Second Amendment “protects the right to keep and bear arms for certain military purposes, but . . . does not curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons.” The *Heller* majority interpreted *Miller* more narrowly, understanding its holding to encompass only the proposition that the Second Amendment did not protect a particular type of weapon (a short-barreled shotgun), a limited conclusion that could be reconciled with the majority’s view that the

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118 *Id.*
120 U.S. Const., amend. II.
121 *Miller,* 307 U.S. at 178.
122 *Id.*
124 *Id.* at 2823 (Stevens, J., dissenting) (discussing United States v. Miller, 307 U.S. 174 (1939)).
Second Amendment protects an individual’s right to keep and bear certain arms, even when possessed for a non-militia purpose like self-defense.\textsuperscript{125}

Apart from President Obama’s appointees, every recent member of the Supreme Court joined the majority in either \textit{Katz} or \textit{Heller}, even though each opinion arguably construed a prior decision more narrowly than the decision’s rationale would indicate. The majority opinion in \textit{Katz}, authored by Justice Stevens, was also joined by Justices O’Connor, Souter, Ginsburg and Breyer.\textsuperscript{126} The majority opinion in \textit{Heller}, authored by Justice Scalia, was joined by Chief Justice Roberts and Justices Kennedy, Thomas and Alito.\textsuperscript{127} If the practice of narrowly construing prior holdings represents an unprincipled departure from the rule of \textit{stare decisis}, then the charge of unprincipled decision making can be leveled quite broadly, without regard to judicial ideology.

In my view, the respective majorities acted properly in both \textit{Katz} and \textit{Heller} when they narrowly read \textit{Seminole Tribe} and \textit{Miller}.\textsuperscript{128} Each Court’s effort to distinguish holding from \textit{dicta} can be seen as an application of Chief Justice Marshall’s maxim that “general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used,” and “[i]f they go beyond the case, . . . ought not to control the judgment in a subsequent suit when the very point is presented for decision.”\textsuperscript{129} \textit{Seminole Tribe} should not be understood to control the outcome in a case concerning abrogation of state sovereign immunity under the Bankruptcy Clause, even if some language in the opinion could be read to do so. The majority (and the dissent) in \textit{Seminole Tribe} may have assumed that the majority’s reasoning would continue to govern in the context of federal bankruptcy legislation, but it has no real complaint that a later Court chose to consider the question directly on the basis of plenary briefing and argument. An attempt by the \textit{Seminole Tribe} Court to definitively resolve the Bankruptcy Clause issue in a case under the Indian Commerce Clause would have been overreaching.

Similarly, \textit{Miller} should not be understood to control the outcome in a case involving application of the Second Amendment to possession of standard firearms in the home for self-defense, even if some language in the opinion could be read to do so. This is perhaps a closer question than the sovereign immunity example, since \textit{Miller} and \textit{Heller} both involved

\begin{itemize}
\item \textsuperscript{125} \textit{Id.} at 2814.
\item \textsuperscript{126} 546 U.S. at 358.
\item \textsuperscript{127} 128 S. Ct. at 2787.
\item \textsuperscript{128} I am not defending the outcome reached by the majority opinions in \textit{Katz} and \textit{Heller}. I am merely defending each opinion’s treatment of precedent.
\item \textsuperscript{129} Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 399-400 (1821).
\end{itemize}
possession of weapons for non-military use. However, as we will see in the sections that follow, the briefing in *Miller* and the opinion in that case were such that the Court should not be faulted for revisiting the meaning of the Second Amendment in a case presenting full briefing and argument on the merits. The case for narrowly construing a prior holding becomes stronger where the court’s reasoning could reach distinct issues that were not adequately briefed or argued by the parties, or where the justification for the court’s ruling was not adequately explained.

### B. Inadequate Briefing, Argument and Deliberation

A number of Supreme Court opinions identify inadequate briefing and argument as a factor justifying denial of precedential effect to a legal proposition derived from an earlier opinion.\(^{130}\) For example, in *United States v. L.A. Truck Lines, Inc.*, a party had challenged an administrative order on the ground that the examiner’s appointment failed to satisfy the Administrative Procedure Act.\(^{131}\) The government argued that the objection to the examiner’s appointment was untimely, having first been raised in litigation to review the administrative order, rather than the initial agency proceeding.\(^{132}\) The appellee replied that the timeliness question was foreclosed by *Wong Yang Sung v. McGrath*, in which a habeas corpus petitioner had raised the issue of Administrative Procedure Act compliance in challenging an earlier deportation order.\(^{133}\) The Supreme Court refused to treat *Wong Yang Sung* as dispositive on the timeliness question:

> We need not inquire what should have been the result [in *Wong Yang Sung*] had the Government denied or the Court considered whether the objection there sustained was taken in time. The effect of the omission was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point.\(^{134}\)

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\(^{130}\) See, e.g., KVOS, Inc. v. Associated Press, 299 U.S. 269, 279 (1936) (“But in that case the answer did not challenge the jurisdiction, there was no assignment of error raising the question and no argument on the subject was presented to this court.”); Williams v. U.S., 289 U.S. 553, 570 (1933) (“The opinion [in *Miles v. Graham*] contains no mention of the cases supposed to have been disapproved; nor does it show that this Court’s attention was drawn to the question whether that court is a statutory court or a constitutional court. In fact, as appears from the briefs, that question was not mooted.”).

\(^{131}\) 344 U.S. 33, 35 (1952).

\(^{132}\) Id.

\(^{133}\) Id. at 37 (discussing *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950)).

\(^{134}\) Id. at 37-38 (emphasis added).
The Court thus indicated that the absence of briefing and argument played some role in the denial of stare decisis effect to Wong Yang Sung on the timeliness issue. The decision did not explain, though, how much importance one should attribute to the lack of briefing in isolation.

If L.A. Truck Lines was the sole relevant authority, one might see poor briefing and argument as merely a cumulative factor in stare decisis analysis, with little independent significance. The Court paired the absence of briefing in Wong Yang Sung with what might be deemed a more important issue: the earlier Court’s failure to discuss the timeliness question. Indeed, L.A. Truck Lines linked its stare decisis analysis to the longstanding principle that the Court “is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio.” Given the obligation to raise jurisdictional issues sua sponte, if a court’s unexplained exercise of jurisdiction does not count as precedent, then a fortiori a decision should not count as binding authority on other points the opinion fails to discuss. As the Court has written elsewhere, “Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been so decided as to constitute precedents.”

Other case law makes clear, however, that lack of full briefing and argument, by itself, diminishes the precedential value of an opinion, even as to issues actually addressed by the Court. A good example is Hohn v. United States, in which the Court concluded that it may assert certiorari jurisdiction to review denial of a certificate of appealability under the Antiterrorism and Effective Death Penalty Act (AEDPA). The Hohn Court had to deal with the stare decisis effect of House v. Mayo, a per curiam decision holding that the Court “lack[ed] statutory certiorari jurisdiction to review refusals to issue certificates of probable cause.” The Supreme Court issues per curiam opinions like House v. Mayo summarily, on the basis of the initial certiorari or appeal briefing, without full briefing and argument on the merits. The Hohn Court acknowledged that the per curiam opinion in House was “in direct conflict” with its

135 Id. at 38 & n.8 (citing United States v. More, 7 U.S. (3 Cranch) 159, 172 (1805) and other cases).
136 Webster v. Fall, 266 U.S. 507, 511 (1925); see Legal Services Corp. v. Velazquez, 531 U.S. 533, 557 (2001) (“Judicial decisions do not stand as binding ‘precedent’ for points that were not raised, not argued, and hence not analyzed.”); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 232 n.6 (1995) (“Of course the unexplained silences of our decisions lack precedential weight.”); see also Lopez v. Monterey County, 525 U.S. 266, 281 (1999) (court not bound by prior assumptions, but routine assumption by courts and parties about statute’s meaning supported that reading).
138 Id. at 251 (discussing House v. Mayo, 324 U.S. 42, 44 (1945) (per curiam)).
decision to exercise jurisdiction, but it declined to follow the earlier ruling. The *Hohn* majority explained that “[w]e have felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument.” Thus, in the absence of “full briefing [and] argument,” the Justices in *Hohn* did not feel bound to follow *House*, under rules of *stare decisis*, even on an issue the *House* Court had directly addressed.

*Hohn* relied on *Gray v. Mississippi*, which acknowledged that “[t]he Court . . . at times has said that summary action . . . does not have the same precedential effect as does a case decided upon full briefing and argument.” Non-majority opinions have likewise recognized this limitation on *stare decisis*. Justice Souter, for instance, has said that “[s]ound judicial decisionmaking requires ‘both a vigorous prosecution and a vigorous defense’ of the issues in dispute . . . and a constitutional rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument.” Justice Brennan criticized the Court’s departure from *stare decisis* in another case because “[n]one of the reasons we have hitherto deemed necessary for departing from the doctrine of *stare decisis* are present,” such as that the rejected decision “proceeded from inadequate briefing or argument.”

The quality of briefing and argument affects not just the weight attributed to a prior decision under *stare decisis* principles, but can also help determine the scope of an earlier precedent. In other words, the Court seems less inclined to treat as part of a case’s holding aspects of the opinion that were not based on plenary briefing. In *Katz*, for instance, in concluding that *Seminole Tribe* should not control abrogation of sovereign immunity under the Bankruptcy Clause, the Court did not feel “bound to follow our *dicta* in a prior case in which the point now at issue was not fully debated.” Having experienced the benefit of “[c]areful study and

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139 *Id.*
140 *Id.* The *Hohn* Court noted that *stare decisis* has “special force” in the area of statutory interpretation, *id.* (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989)), but also that the doctrine’s role is “somewhat reduced” in the context of a procedural rule, *id.* (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995)). It also noted that the rule in *House* had not been consistently followed by the Court. *Id.* at 252 (citing examples).
141 *Id.* (citing *Gray v. Mississippi*, 481 U.S. 648, 651 n.1 (1987)).
144 *Katz*, 546 U.S. at 363.
reflection,” the Katz majority felt free to reconsider the language about bankruptcy cases in the Seminole Tribe opinions.\textsuperscript{145}

The Heller majority was even more explicit about the inadequacy of the Miller briefing as a justification for its narrow reading of that opinion. The available briefing in Miller—which came from only one party—paid little attention to Second Amendment history and, hence, would not support broad conclusions about the amendment’s meaning:

The respondent made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government (reason enough, one would think, not to make that case the beginning and the end of this Court’s consideration of the Second Amendment). The Government’s brief spent two pages discussing English legal sources, concluding “that at least the carrying of weapons without lawful occasion or excuse was always a crime” and that (because of the class-based restrictions and the prohibition on terrorizing people with dangerous or unusual weapons) “the early English law did not guarantee an unrestricted right to bear arms.” It then went on to rely primarily on the discussion of the English right to bear arms in Aymette v. State, 21 Tenn. 154, for the proposition that the only uses of arms protected by the Second Amendment are those that relate to the militia, not self-defense. The final section of the brief recognized that “some courts have said that the right to bear arms includes the right of the individual to have them for the protection of his person and property,” and launched an alternative argument that “weapons which are commonly used by criminals,” such as sawed-off shotguns, are not protected. The Government’s Miller brief thus provided scant discussion of the history of the Second Amendment—and the Court was presented with no counterdiscussion.\textsuperscript{146}

As a result of the substandard briefing, the Miller opinion said nothing “about the history of the Second Amendment.”\textsuperscript{147} Consequently, the opinion could not be read as a definitive resolution of the broader question addressed in Heller about the Second Amendment’s meaning.

We see then that inadequate briefing and argument can interact with the law of precedent in two distinct ways. As in Hohn, inadequate briefing can give a reason for according less weight to the holding of a prior Court. Alternatively, as in Katz and Heller, inadequate briefing can be a reason

\textsuperscript{145} Id.

\textsuperscript{146} 128 S. Ct. at 2814-15 (some citations omitted).

\textsuperscript{147} Id. at 2815.
for reading a prior precedent narrowly, treating the holding as less expansive than it might have been treated with full briefing. Both aspects of the law of precedent make sense in light of the nature of *stare decisis* and the purposes served by briefing and argument in the decision making process. *Stare decisis* offers a short cut, eliminating the need for extended analysis of a legal issue previously resolved by the judiciary. A court can save time and effort by citing legal conclusions from an earlier opinion as settled for purposes of resolving the present litigation. However, requiring courts to rely on the work of their predecessors makes less sense if we have reason to distrust the legal analysis in the earlier opinion. The fact that briefing and argument in the earlier case were inadequate tends to undermine confidence in the legal conclusion reached by the precedent-setting court. Since we believe briefing and argument helps a court reach more reliable conclusions, we put correspondingly less faith in legal conclusions reached without the benefit of full briefing and argument.

To this point, we have not explicitly considered what the Justices mean when they talk about “full” or “adequate” briefing and argument. These concepts are best understood in light of the instrumental purposes served by the process of briefing, argument and deliberation discussed in Part I.B. Briefing and argument educates the Justices, preparing them to resolve legal issues in light of the particular facts and helping ensure an extended period of deliberation. *Heller* and *Hohn* suggest at least two different ways that “inadequate” or less than “full” briefing and argument might undercut these instrumental purposes, impacting the Court’s ability to draft a well-considered opinion. In *Heller*, the concern was whether the parties in the earlier case brought to the Court’s attention the arguments or historical materials relevant to a well-informed decision on the disputed legal question. In a situation like *Hohn*, on the other hand, while there might be a concern about the content of the preliminary briefing, the principal question seems to be whether the Court, in issuing a *per curiam* opinion, allocated adequate time and attention to properly resolve the issues in dispute. Since the Court puts less effort into cases decided summarily, such decisions are less reliable and entitled to diminished precedential weight.

Recognition of the purposes served by briefing and argument can help to assess the importance of briefing quality in determining the precedential weight of a particular opinion. In some cases, other factors may weigh more heavily than substandard briefing in the *stare decisis* analysis. For instance, notwithstanding the inadequate briefs in *Southland Corp. v. Keating*, a majority of the Supreme Court decided on *stare decisis* grounds

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148 CARDozo, supra note 6, at 149 (“[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”).
to adhere to Southland’s conclusion that the Federal Arbitration Act applies in state courts, preempting contrary state law:

Nothing significant has changed in the 10 years subsequent to Southland; no later cases have eroded Southland’s authority; and no unforeseen practical problems have arisen. Moreover, in the interim, private parties have likely written contracts relying upon Southland as authority. Further, Congress, both before and after Southland, has enacted legislation extending, not retracting, the scope of arbitration.\(^{149}\)

With respect to the briefing factor in particular, Justice Breyer noted that the Southland majority had “recognized that the pre-emption issue was a difficult one, and it considered the basic arguments that respondents and amici now raise (even though those issues were not thoroughly briefed at the time).”\(^{150}\) In these circumstances, incomplete briefing in Southland seemed less significant than other stare decisis factors—such as reliance—since the poor briefing did not prevent the Court from giving the preemption issue the attention it deserved and considering the principal arguments for a conclusion contrary to the one reached by the Court.\(^{151}\)

C. Unreasoned or Badly Reasoned Opinions

Just as the Supreme Court has applied the law of precedent to deny or minimize stare decisis effect when a ruling resulted from a substandard decision making process, it has also used the law of precedent to enforce the discipline of careful opinion writing. Here our analysis will divide into three broad categorizations. First, we will see that when the Court has summarily disposed of a case without an opinion, it has read the resulting holding particularly narrowly and has afforded that holding diminished precedential force. In other words, while the Court has recognized some precedential impact for its unexplained summary dispositions, it has treated the absence of an opinion as a reason to significantly limit both the

\(^{149}\) Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 272 (1995) (declining to overrule Southland Corp. v. Keating, 465 U.S. 1 (1984)); see also id. at 283-84 (O’Connor, J., concurring) (acquiescing in erroneous Southland decision based on reliance and other stare decisis considerations); but see id. at 295-96 (Thomas, J., dissenting) (costs of overruling Southland not unacceptable and state court autonomy provides special justification for reconsideration).

\(^{150}\) Allied-Bruce Terminix Cos., 513 U.S. at 272.

\(^{151}\) The fact that this was a statutory case presumably also influenced the Court’s stare decisis calculus, since Congress could have corrected any error in Southland’s analysis through a statutory amendment. Pearson v. Callahan, 129 S. Ct. 808, 816-17 (2008) (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) (“[C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court’s interpretation of its legislation.”)).
scope and the weight of the resulting precedent for *stare decisis* purposes. Second, where an opinion purported to resolve or assumed the answer to a legal question, but the analysis was conclusory or the reasoning scanty, the Court has felt free to revisit the issue in a later case squarely presenting the question. Third, in cases involving a full opinion on the merits of a legal question, the Court has indicated that it is appropriate to reconsider earlier precedent that was “badly reasoned.”

1. **Dispositions Without Opinions**

Before 1988, the Supreme Court operated under a significantly broader mandatory jurisdiction than at present. The Court was required to issue rulings in many appeals that today would simply be avoided through denial of a petition for writ of *certiorari*. Because the volume of such mandatory appeals did not permit full briefing and argument in every case, the Court adopted the practice of summarily affirming many lower court decisions and summarily dismissing others for want of a substantial federal question. These summary affirmances and dismissals were routinely issued without any opinion from the Court explaining its disposition.\(^{152}\)

Though the method of handling these mandatory appeals was comparable in some respects to the current method of handling petitions for *certiorari*, the Court’s summary ruling in such an appeal has been deemed a decision on the merits of the case. State and federal courts therefore needed to know whether the Court’s summary dispositions were entitled to precedential effect under rules of *stare decisis*. The Supreme Court answered in the affirmative in *Hicks v. Miranda*, concluding that a dismissal for want of a substantial federal question constitutes a decision on the merits, and that a lower court therefore erred in disregarding such a ruling when it resolved a case raising related issues.\(^{153}\) The proper course, the Court indicated, would be for the lower court to “ascertain what issues had been properly presented [to the Supreme Court] and declared by this Court to be without substance” and then to decide whether the issues in the two cases “were sufficiently the same” to make the summary dismissal a “controlling precedent.”\(^ {154}\) The Court acknowledged, though, that


\(^{153}\) 422 U.S. 332, 343-44 (1975).

\(^{154}\) *Id.* at 345 n. 14.
“[a]scertaining the reach and content of summary actions may itself present issues of real substance.”

The Court revisited the precedential effect of summary dispositions in Mandel v. Bradley, clarifying that the holding of such a decision must be read narrowly to reject only “the specific challenges presented in the statement of jurisdiction.” Mandel involved a dispute over Maryland’s requirements for ballot access by independent candidates not associated with a major political party. The lower federal court in Mandel had concluded that its decision was controlled by the Supreme Court’s summary affirmance in Tucker v. Salera of a lower court decision striking down Pennsylvania’s ballot access statute. The Supreme Court in Mandel decided that the court below had read Salera too broadly. Summary dispositions “prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.” But while a summary disposition affirms the judgment of the court below, it does not necessarily embrace the lower court’s reasoning. Such a decision should not be read to break new ground, and its “precedential significance” should be “assessed in the light of all of the facts in that case.” Given that there was a significant difference between the statutes in Salera and Mandel—the Pennsylvania statute had a “21-day limitation on signature gathering,” while the Maryland statute contained no such limit—the summary affirmance in Salera could not be read as controlling the outcome in Mandel.

Mandel shows that the absence of an opinion dramatically constricts the scope of the resulting precedent. Under the law of precedent, the courts narrowly construe the holding of a Supreme Court case decided summarily without an accompanying opinion. Other authority indicates that the absence of an opinion greatly minimizes a decision’s precedential weight as well. The Supreme Court has said that “summary affirmances have

155 Id. The Supreme Court concluded that the case was within its jurisdiction notwithstanding the lower court’s failure to take account of the earlier summary dismissal, id. at 345-46, ultimately resolving the case on other grounds, id. at 348-52.


157 Id. at 175 (discussing Tucker v. Salera, 424 U.S. 959, aff’g 399 F. Supp. 1258 (E.D. Pa. 1975)).

158 Id. at 176.

159 Id. (quoting Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring) (“When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached.”)).

160 Id. at 176-77.

161 Id. at 177.
considerably less precedential value than an opinion on the merits."\textsuperscript{162} Thus, "upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established."\textsuperscript{163} For instance, in \textit{Usery v. Turner Elkhorn Mining Co.}, the Court, "having heard oral argument and entertained full briefing," decided to give plenary consideration to issues that had already been resolved through summary affirmance in an earlier case.\textsuperscript{164}

The diminished precedential force of rulings issued without opinion can be seen in \textit{Edelman v. Jordan},\textsuperscript{165} which held that the Eleventh Amendment bars retroactive monetary relief in an action against a state official where the award would be paid from state funds.\textsuperscript{166} While the Court thought this result consistent with some of its earlier precedent, it also had to overrule four previous decisions approving such retroactive relief. In \textit{Shapiro v. Thompson}, an Eleventh Amendment objection to retroactive relief had been presented in a case subject to oral argument, though the Court "while affirming the judgment, did not in its opinion refer to or substantively treat the Eleventh Amendment argument."\textsuperscript{167} In three other cases, the Court had summarily affirmed awards of retroactive relief "notwithstanding Eleventh Amendment contentions made by state officers who were appealing from the District Court judgment."\textsuperscript{168} The \textit{Edelman} Court decided it was not bound to follow these four earlier rulings:

This case . . . is the first opportunity the Court has taken to fully explore and treat the Eleventh Amendment aspects of such relief in a written opinion. \textit{Shapiro v. Thompson} and these three summary affirmances obviously are of precedential value in support of the contention that the Eleventh Amendment does not bar the relief awarded by the District Court in this case. Equally obviously, they are not of the same precedential value as would

\begin{itemize}
\item \textsuperscript{163} \textit{Id.} at 181 (quoting Fusari v. Steinberg, 419 U.S. 379, 392 (1975) (Burger, C.J., concurring)).
\item \textsuperscript{165} \textit{415 U.S.} 651, 670-71 (1974).
\item \textsuperscript{166} \textit{Id.} at 668-69.
\item \textsuperscript{167} \textit{Id.} at 670 (discussing Shapiro v. Thompson, 394 U.S. 618 (1969)).
\end{itemize}
be an opinion of this Court treating the question on the merits. Since we deal with a constitutional question, we are less constrained by the principle of *stare decisis* than we are in other areas of the law. Having now had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument, we disapprove the Eleventh Amendment holdings of those cases to the extent that they are inconsistent with our holding today.  

Cases like *Usery* and *Edelman* not only show the reduced precedential impact of decisions rendered without an opinion, but also reinforce the point made in the previous section, that the absence of plenary briefing and argument counts against the weight of a precedent for *stare decisis* purposes.  

The *stare decisis* treatment of summary dispositions highlights some of the competing values underlying the law of precedent. To the extent the rule of *stare decisis* seeks to promote the rule of law, preserve judicial resources, ensure that like cases receive like treatment and protect reliance on prior judicial rulings, one can see why the Court would treat such summary dispositions as precedents. At the same time, the fact that a ruling without opinion incurs significantly less respect than a plenary opinion issued after full briefing and argument shows that these are only some of the values at stake in the law of precedent. The values supporting treatment as precedent must be balanced against competing values, and such precedents will often yield in the face of a judicial desire to give a legal question more careful consideration in light of adversarial briefing.

### 2. Conclusory or Cursory Opinions

It is not just in the context of summary dispositions that the values promoted by the discipline of writing careful judicial opinions can trump other values served by the rule of *stare decisis*. We saw earlier that the majority in *Heller v. District of Columbia* adopted a narrow reading of the holding in *United States v. Miller*, in part because the briefing in *Miller* was inadequate to allow broad pronouncements about the meaning of the Second Amendment. The Court’s restricted reading of *Miller* was also premised on the sparse analysis offered in the opinion:

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169 *Id.* at 670-71.

170 *See supra* Part II.B.

171 CARDOZO, supra note 6, at 34 (“Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts.”).
It is particularly wrongheaded to read *Miller* for more than what it said, because the case did not even purport to be a thorough examination of the Second Amendment. Justice Stevens claims that the opinion reached its conclusion “[a]fter reviewing many of the same sources that are discussed at greater length by the Court today.” Not many, which was not entirely the Court’s fault. . . . The Government’s *Miller* brief . . . provided scant discussion of the history of the Second Amendment—and the Court was presented with no counterdiscussion. As for the text of the Court’s opinion itself, that discusses none of the history of the Second Amendment. It assumes from the prologue that the Amendment was designed to preserve the militia (which we do not dispute), and then reviews some historical materials dealing with the nature of the militia, and in particular with the nature of the arms their members were expected to possess. Not a word (not a word) about the history of the Second Amendment. This is the mighty rock upon which the dissent rests its case.172

In discounting the reliance prior courts had supposedly placed on the earlier decision, the *Heller* majority responded, “If so, they overread *Miller.*”173 The majority thus suggested that any courts that relied on *Miller* as a definitive exposition of the Second Amendment had treated *dicta* as holding and placed “erroneous reliance upon an uncontested and virtually unreasoned case.”174 *Heller* illustrates that the scope of a holding can be restricted under the law of precedent, even though the opinion contains broad language, if it dealt with the issues in a cursory fashion reflecting incomplete consideration or a failure to grapple with the complexities presented.

Incomplete analysis of an issue can affect not only a precedent’s scope, but also its weight. In this vein, the Court has felt free to revisit a legal question where the answer has been assumed in prior cases, but never “squarely addressed.”175 For instance, in *Brecht v. Abrahamson*, the Court considered the appropriate harmless error standard to apply when a habeas petitioner claimed that the prosecution had improperly commented on the defendant’s failure to testify in violation of the Fifth Amendment privilege against self-incrimination. In at least four prior habeas corpus cases raising such a claim, the Court had employed the same harmless error standard.

172 *Heller*, 128 S. Ct. at 2814-15 (some citations omitted).
173 *Id.* at 2815 n.24.
174 *Id.*
applied on direct review. The petitioner argued that the Court was “bound by these habeas cases, by way of stare decisis,” so that it could not adopt a less stringent harmless error standard in his case. The majority responded that “since we have never squarely addressed the issue, and have at most assumed the applicability of the [direct review] standard on habeas, we are free to address the issue on the merits.”

A more revealing case illustrating the diminished precedential weight of a cursory or incomplete analysis is Copperweld Corp. v. Independence Tube Corp., an antitrust case concluding that a parent corporation cannot conspire with its wholly-owned subsidiary. The Court in Copperweld faced a number of prior decisions recognizing an “intra-enterprise conspiracy doctrine,” pursuant to which “liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership.” Surveying the prior cases, the majority stated:

In no case has the Court considered the merits of the intra-enterprise conspiracy doctrine in depth. Indeed, the concept arose from a far narrower rule. Although the Court has expressed approval of the doctrine on a number of occasions, a finding of intra-enterprise conspiracy was in all but perhaps one instance unnecessary to the result.

The Court acknowledged one prior case, involving two wholly-owned subsidiaries of the same parent, in which application of the intra-enterprise conspiracy doctrine had apparently been necessary to the outcome. That opinion “offhandedly dismissed” the argument that parents and wholly-owned subsidiaries could not conspire with one another and “failed to confront the anomalies an intra-enterprise doctrine entails.” Given that the cases had “never explored or analyzed in detail the justifications for such a rule,” the Court felt free to re-examine the doctrine in the context of a parent and a wholly-owned subsidiary.

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177 Id. at 630-31.
178 Id. at 631.
180 Id. at 759.
181 Id. at 760.
182 Id. at 763-64 (discussing Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951)).
183 Id.
184 Id. at 766-67
a legal conclusion under the principle of *stare decisis* depends in part on the effort the court has put into the process of defending its outcome.

It makes sense that incomplete or superficial analysis would affect the weight and scope of a precedent for *stare decisis* purposes. As we suggested above, written opinions are intended to improve the quality of judicial decision making, to promote judicial accountability and to build public confidence in the judicial system. When a court’s opinion is cursory or simplistic, failing to grapple with complexities of an issue or consider possible counterarguments, we have less reason for confidence that the court did the work necessary to reach a reliable conclusion and therefore less reason to defer to the court’s decision.

### 3. Badly Reasoned Opinions

In addition to cases where the reasoning was cursory or sparse, the Court has also said that it is appropriate to reconsider a precedent that was “badly reasoned.” The Court has repeatedly cited *Smith v. Allwright* in support of this principle. In *Smith*, the Court overruled *Grovey v. Townsend*, which approved the Texas Democratic Party’s practice of holding whites-only primary elections. *Grovey* followed earlier decisions striking down as unconstitutional a Texas statute that permitted only whites to vote in the Democratic Party primary and a later statute that allowed the party’s state executive committee to determine primary voter eligibility. In *Grovey*, by contrast, the Court upheld a resolution adopted by the state Democratic Party convention, limiting party membership and deliberation to only white citizens. Even on the assumption that selection as the Democratic Party candidate was tantamount to prevailing in the general election, the *Grovey* Court thought it important not to “confuse the privilege of membership in a party with the right to vote for one who is to hold a public office.” According to the Court, the state was constitutionally bound to preserve the voting rights of African-American citizens, but party membership was a private matter with which “the state need have no concern.”

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186 *Payne*, 501 U.S. at 827; *International Business Machines Corp.*, 517 U.S. at 856; *Seminole Tribe*, 517 U.S. at 63.


190 *Id.* at 55.

191 *Id.*
The Supreme Court revisited the Texas all-white primary system in *Smith v. Allwright*, concluding that the close connection between the primary and the general election meant that the Fifteenth Amendment applied to the former as well as the latter:

When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment.\(^{192}\)

The *Smith* Court concluded that the principle of *stare decisis* did not bind it to follow *Grovey*: “In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent.”\(^{193}\)

The Court has not explained its suggestion that *Smith* shows the overruling of a “badly reasoned” precedent,\(^{194}\) but the thought process is not hard to envision. The *Grovey* Court’s conclusion that the discrimination practiced against African-American citizens was purely a private matter of party membership ignored the larger pattern of state support for such discrimination. The scheme reviewed in *Grovey* followed earlier state-supported attempts to exclude non-whites from the electoral process. When viewed in light of the larger historical context, the arrangement reviewed by the *Grovey* Court can be recognized as one more in a series of collusive attempts by the State of Texas and the Democratic Party to violate the Fifteenth Amendment. Adhering to *Grovey* in light of Texas’ continuing lawlessness could have done more to undermine the rule of law than altering a myopic constitutional conclusion reached by the Court in an earlier opinion.

\(^{192}\) *Smith*, 321 U.S. at 664.

\(^{193}\) *Id.* at 664-66.

\(^{194}\) *See supra* text accompanying notes 186-87.
III. Application to Future Supreme Court Cases

We have seen that the Supreme Court uses the law of precedent to police decision making by previous Courts. The Court often denies precedential effect to *dicta* that overreaches or goes beyond the issues in the earlier case. It also narrowly construes prior holdings or accords diminished precedential weight where the precedent-setting Court acted without plenary briefing and argument or failed to offer an adequate explanation for a legal conclusion. In this section of the article, we consider the potential application of these principles in the context of three issues likely to come before the Supreme Court: (1) the constitutionality of laws excluding same-sex couples from the definition of “marriage,” (2) the scope of supervisory liability for constitutional violations by subordinates, and (3) state regulation of abortion prior to fetal viability.

A. *Baker v. Nelson* and Same-Sex Marriage

A number of cases in recent years have involved state or federal constitutional challenges to laws defining “marriage” in terms of male-female relationships. Federal constitutional challenges often invoke the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court first addressed the status of same-sex marriage under the United States Constitution in its 1972 summary disposition in *Baker v. Nelson*. Two males in *Baker* challenged a Minnesota court clerk’s refusal to issue a marriage license. The Minnesota Supreme Court ruled that Minnesota law did not authorize marriage by persons of the same sex and that denial of the marriage license did not violate federal constitutional rights. The same-sex couple then took an appeal to the United States Supreme Court, invoking the Court’s mandatory jurisdiction. The Jurisdictional Statement presented three questions:

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195 See, e.g., Jesse McKinley, *Closing Arguments in Marriage Trial*, N.Y. TIMES, at A15 (June 17, 2010).


197 409 U.S. 810 (1972).


199 *Id.* at 185-87.

1. Whether appellee’s refusal to sanctify appellants’ marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment.

2. Whether appellee’s refusal, pursuant to Minnesota marriage statutes, to sanctify appellants’ marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment.

3. Whether appellee’s refusal to sanctify appellants’ marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments.\(^{201}\)

In response to a motion filed by the court clerk,\(^{202}\) and the Court dismissed the appeal without a written opinion “for want of a substantial federal question.”\(^{203}\)

A recurring issue in litigation concerning same-sex marriage has been the precedential effect of the Court’s summary dismissal in *Baker*. As noted previously, the Court has taken the position that a summary disposition constitutes a decision on the merits and should generally be treated as binding precedent on issues raised by the jurisdictional statement and necessarily resolved in disposing of the appeal.\(^{204}\) Consequently, a number of lower courts have viewed *Baker* as conclusively rejecting claims seeking to establish a right to same-sex marriage under the United States Constitution.\(^{205}\) Other courts have declined to treat *Baker* as dispositive,

\(^{201}\) *Id.* at 3.

\(^{202}\) See *Baker* v. Nelson, Appellee’s Motion to Dismiss Appeal and Brief (Mar. 10, 1972).


\(^{204}\) See *supra* notes 153-56 and accompanying text.

either on the theory that the issues differed in the two lawsuits, or that the intervening decision in *Lawrence v. Texas* altered the relevant analysis.

If the United States Supreme Court were again asked to address the constitutionality of the traditional definition of marriage in a future case, one option would be to resolve the issue on the basis of *stare decisis*, citing *Baker* for the proposition that traditional marriage laws do not violate equal protection principles or fundamental rights guaranteed by the Fourteenth Amendment. Such a decision would serve many of the values underlying the law of precedent. It would preserve stability in the law, foreclosing the potentially destabilizing impact of a decision fundamentally restructuring an important social institution. It would protect reliance interests of governmental bodies that enacted spousal benefits legislation or employers who entered contractual commitments in light of *Baker*’s affirmation of traditional marriage rules.

In my view, however, the Court should not resolve such a future case based solely on the precedential authority of *Baker v. Nelson*. Notwithstanding the benefits of adherence to precedent, the circumstances surrounding the ruling in *Baker* suggest that the decision does not merit treatment equivalent to a considered decision of the Court. *Baker* was resolved without full briefing and argument. The jurisdictional statement and the appellee’s brief, incorporating by reference the opinion of the Minnesota Supreme Court, offered a competent summary of the constitutional issues. Nevertheless, plenary briefing and argument would have permitted more extensive development of the questions in dispute. More importantly, setting the case for oral argument would have guaranteed extended consideration of the constitutional questions surrounding same-sex marriage over a period of months. Instead, the Court resolved the case through a procedure akin to the process for denying *certiorari*.

The absence of a written opinion in *Baker v. Nelson* offers an additional reason to deny controlling effect to the decision in future Supreme Court

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207 In re Kandu, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004) (*Baker* not binding in part because of potential impact of subsequent Supreme Court decisions, particularly *Lawrence*).

208 See Statement of Jurisdiction, *supra* note 200, at 11-19; Appellee’s Motion to Dismiss Appeal and Brief, *supra* note 202, at 3-7; see also id. at 9-14 (opinion of Minnesota Supreme Court).
proceedings on the issue. Even if the Court had thoroughly considered the constitutional issues raised in *Baker*, it offered no written explanation for the decision dismissing the appeal.\(^{209}\) The Justices thus avoided the disciplinary effect of writing a reasoned opinion and the accountability ensured by internal and external scrutiny of the majority’s explanation for a constitutional ruling. Resolution of an issue with considerable legal and social importance, with significant consequences for the parties and the public, merits more than a one-sentence, unexplained rejection of the arguments advanced.

To argue that the Court should not treat *Baker* as controlling its decision through the force of *stare decisis* does not necessarily mean *Baker* would be irrelevant in future proceedings seeking to establish a right to same-sex marriage. Decisions that do not control the outcome of a case may nevertheless be treated as persuasive authority. Perhaps the Supreme Court’s alacrity in rejecting constitutional arguments for same-sex marriage, less than 40 years ago, might have some bearing on the issue of whether a rational basis exists for laws limiting marriage to opposite sex couples. Or perhaps the decision in *Baker*, coming just five years after *Loving v. Virginia*,\(^ {210}\) offers relatively contemporaneous evidence of how the Court understood the scope and implications of its *Loving* decision. If so, however, these are matters the Court should address in a reasoned opinion, following plenary briefing and extended deliberation, without the constraints of *stare decisis*.

More broadly, our discussion of *Baker* calls into question the principle of *Hicks v. Miranda*, treating summary affirmances and dismissals as binding precedent, entitled to *stare decisis* effect. Applying *stare decisis* in such circumstances prevents lower courts from giving plenary consideration to legal questions resolved in haste by the Supreme Court. The decision to address an issue summarily, without a written opinion, shows that the Court gave the question relatively short shrift. Just as we do not accord precedential weight to the denial of *certiorari*, I think the Court should abandon *Hicks* and deny controlling force to unexplained summary dispositions. Such opinions could be taken into account by lower courts as persuasive authority, but not in a way that constrains plenary reflection on legal arguments treated in a cursory fashion by the Supreme Court. In this instance, the value of allowing thorough consideration of a legal question would seem to outweigh any enhanced legal stability that flows from requiring lower courts to decipher unexplained rulings and treat them as binding authority.

\(^{209}\) *See Baker*, 409 U.S. at 810.

\(^{210}\) 388 U.S. 1 (1967) (invalidating state law prohibiting interracial marriage).
B. Supervisory Liability Under Ashcroft v. Iqbal

Much attention has been paid to the Supreme Court’s recent decision in *Ashcroft v. Iqbal*, a potentially far-reaching opinion on pleading requirements under Federal Rule of Civil Procedure 8. Some observers believe the opinion also set a major precedent on a second issue—the scope of liability for supervisory personnel sued when their subordinates commit constitutional violations. The dissenters in *Iqbal* claimed that the majority had completely eliminated any theory of “supervisory liability,” defined as a supervisor’s legal accountability “under certain conditions, for the wrongdoing of his subordinates.” The principal dissent took particular exception to the majority’s decision “to proceed without briefing and argument” on the supervisory liability question. The dissent also contended that *Iqbal*’s discussion of supervisory liability was unnecessary in that it had no apparent impact on the outcome of the case. This article agrees with the dissent’s suggestion that the majority’s discussion of supervisory liability may constitute *dicta*, given the Court’s analysis of the pleadings. In any event, to the extent there was a holding on the issue of supervisory liability, a later Court could fairly choose to read the *Iqbal* precedent narrowly in light of the minimal briefing on the question.

The *Iqbal* litigation involved claims brought by a Muslim citizen of Pakistan under *Bivens v. Six Unknown Federal Narcotics Agents*. *Iqbal* contended that federal officials violated the Constitution following the

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213 Richard Frankel, *The Failure of Analogy in Conceptualizing Private Entity Liability Under Section 1983*, 78 UMKC L. Rev. 967, 988 (2010) (“Although Iqbal has received significant attention for its potential effect on notice pleading, it also may have significant implications for the doctrine of supervisory employee liability under § 1983 and Bivens.”); Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After Iqbal*, 14 Lewis & Clark L. Rev. 279, 280 (2010) (“Ashcroft v. Iqbal is obviously an extremely important federal pleading decision. But it is significant for another, perhaps less obvious, reason: the Court’s conditioning of supervisory liability under both § 1983 and Bivens—*Iqbal* involved Bivens-type claims—on constitutional violations by supervisors themselves.”).

214 *See*, e.g., *Iqbal*, 129 S. Ct. at 1957 (Souter, J., dissenting).

215 *Id.* at 1958.

216 *Id.*

September 11, 2001 terrorist attacks when they detained him on immigration-related charges, held him in a restrictive form of custody and subjected him to beatings and other mistreatment while investigating whether he had any connection to the terrorists. The Supreme Court’s opinion in *Iqbal* addressed whether the complaint stated a claim against two high-ranking federal officials, Attorney General John Ashcroft and FBI director Robert Mueller, sufficient to survive their assertion of a qualified immunity defense.

The central allegations directed at Ashcroft and Mueller were that they “‘knew of, condoned, and willfully and maliciously agreed to subject [Iqbal]’ to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.’” The majority analyzed Iqbal’s complaint in light of the pleading standards of *Bell Atlantic Corp. v. Twombly*, which requires allegation of facts sufficient to “state a claim to relief that is plausible on its face.” To the extent Iqbal challenged high-level policy decisions made by Ashcroft and Mueller, the majority rejected some of the complaint’s allegations as “conclusory.” The non-conclusory factual allegations, such as the claim that thousands of Arab Muslim men were detained during the September 11 investigation, did not plausibly show a policy of purposeful discrimination under *Twombly*. This was true, the majority believed, because a “more likely” and “obvious” explanation existed for the disproportionate detention of Arab Muslims; given that the hijackers, the leader of al Qaeda and a large segment of the organization were all Arab Muslims, a disparate impact could be expected to flow from a “nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.”

The *Iqbal* majority acknowledged that “[r]espondent’s account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors.” The complaint identified “discrete wrongs—for instance, beatings—by lower level Government actors” that

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218 *Iqbal*, 129 S. Ct. at 1943-44.
219 *Id.* at 1942-43.
220 *Id.* at 1951.
222 *Id.* at 570.
223 129 S. Ct. at 1951.
224 *Id.*
225 *Id.*
226 *Id.* at 1942.
“if true, and if condoned by petitioners, could be the basis for some inference of wrongful intent on petitioners’ part.”

Applying Second Circuit precedent, the Court of Appeals in Iqbal had identified various ways in which supervisory personnel may be held liable under Bivens:

The personal involvement of a supervisor may be established by showing that he (1) directly participated in the violation, (2) failed to remedy the violation after being informed of it by report or appeal, (3) created a policy or custom under which the violation occurred, (4) was grossly negligent in supervising subordinates who committed the violation, or (5) was deliberately indifferent to the rights of others by failing to act on information that constitutional rights were being violated.

In addition to Iqbal’s challenge to the policies implemented by Ashcroft and Mueller, therefore, the majority also had to consider whether the complaint stated a claim that might render those defendants liable based on the unconstitutional acts of subordinate federal officials.

The majority started with respondent’s concession that “Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior.” From there, the majority reasoned that “[b]ecause vicarious liability is inapplicable to Bivens and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” Indeed, the majority thought the term “supervisory liability” a “misnomer”: “Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.” Applying this principle to a discrimination claim, the majority thought allegations that a supervisor knew of discriminatory conduct by his subordinates would not suffice. Discriminatory “purpose rather than knowledge is required.” Accordingly, “petitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic. Yet respondent’s complaint does not contain any factual allegation sufficient to plausibly suggest petitioners’ discriminatory state of mind.”

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227 Id. at 1952.
229 Iqbal, 129 S. Ct. at 1948.
230 Id.
231 Id. at 1949.
232 Id. at 1949.
233 Id at 1952.
The dissenters argued that the majority’s conclusion need not follow from its premises. The majority’s analysis, according to Justice Souter, rests on the assumption that only two outcomes are possible here: *respondeat superior* liability, in which “an employer is subject to liability for torts committed by employees while acting within the scope of their employment,” or no supervisory liability at all. The dichotomy is false. Even if an employer is not liable for the actions of his employee solely because the employee was acting within the scope of employment, there still might be conditions to render a supervisor liable for the conduct of his subordinate.\(^{234}\)

The dissent noted that the lower courts had applied “quite a spectrum of possible tests for supervisory liability,” including some mentioned by the Second Circuit, and complained that “we have received no briefing or argument on the proper scope of supervisory liability, much less the full-dress argument we normally require.”\(^{235}\)

Assume the Supreme Court takes a future case raising the issue of the liability of supervisory federal officials under *Bivens* or supervisory state officials under 42 U.S.C. § 1983. Would the Court be bound by the *Iqbal* opinion and, if so, what legal propositions would the opinion establish? At the very least, the *Iqbal* opinion would seem to constitute *dicta* to the extent it purports to rule on the scope of supervisory liability for state officials under § 1983. While *Bivens* and § 1983 are sometimes interpreted in tandem, the latter is a statutory cause of action while the former has been implied by courts as a matter of federal common law.\(^{236}\) The language or history of § 1983 could compel results on the supervisory liability question at odds with the outcome applicable to federal officials under *Bivens*.\(^{237}\) Consequently, *Iqbal* would seem an inappropriate vehicle for definitive resolution of the supervisory liability issue under § 1983.

With respect to the scope of supervisory liability under *Bivens*, the dissent makes a reasonable case that the *Iqbal* majority’s “conclusion has no bearing on its resolution of the case.”\(^{238}\) A major point of difference between the majority’s analysis and that of some lower courts concerns

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\(^{234}\) *Id.* at 1958 (Souter, J., dissenting) (quoting Restatement (Third) of Agency § 2.04 (2005)); Frankel, *supra* note 213, at 990 (“As the dissent pointed out, there is a significant difference between the traditional form of respondeat superior liability rejected in Monell and the supervisory liability rejected in *Iqbal.*”).

\(^{235}\) *Id.* at 1957-58.

\(^{236}\) See Nahmod, *supra* note 213, at 303 (arguments from language and legislative history of § 1983 would not apply to federal common law action under *Bivens*).

\(^{237}\) See *id.* at 298-303.

\(^{238}\)*Iqbal*, 129 S.Ct. at 1958.
the mental state required to establish the liability of supervisory personnel. The *Iqbal* majority seemed to indicate that a supervisor’s knowledge of unconstitutional discrimination by a subordinate cannot give rise to liability unless the supervisor himself engaged in purposeful discrimination—*i.e.*, unless the supervisor’s response to the subordinate’s discrimination itself violated the Constitution. Some lower courts, on the other hand, including the Second Circuit in this case, have indicated that supervisors may be held liable based on a lesser mental state, such as gross negligence, deliberate indifference or knowledge of unconstitutional activity combined with a failure to respond. As Justice Souter persuasively noted, “[t]he majority says that all of the allegations in the complaint that Ashcroft and Mueller authorized, condoned, or even were aware of their subordinates' discriminatory conduct are ‘conclusory’ and therefore are ‘not entitled to be assumed true.’” Consequently, the majority’s discussion of the mental state required for supervisory liability would seem to have no bearing on the outcome of the case. On this ground, the majority’s discussion of supervisory liability might reasonably be classified as non-binding *dicta*, even with respect to an action under *Bivens*.

Even if one thought *Iqbal*’s discussion of supervisory liability should be read to embrace some holding, there remains the question of how broadly that holding should be read. The dissent’s complaint about the absence of briefing and argument becomes relevant here. If the briefing really was inadequate, a future Court might reasonably apply an analysis like that in *Heller*, where the majority narrowly construed *Miller*’s Second

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239 *Id.* at 1949; see Nahmod, *supra* note 213, at 291.
240 See *supra* text accompanying note 228; Nahmod, *supra* note 213, at 293.
242 See Nahmod, *supra* note 213, at 292 (suggesting dissent was probably “attempting to render as *dicta*” majority’s discussion of supervisory liability).
243 One could take the position, for instance, that the majority’s discussion of supervisory liability, though not outcome determinative, formed a *logically* “necessary” foundation for consideration of the pleading issues the Court took up in *Iqbal*. In order to decide whether the complaint stated a claim against Ashcroft and Mueller, it made sense to first “*tak[e] note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.” *Id.* at 1947. The dissenters believed the petitioners had conceded they could be held liable under a “deliberate indifference” standard, and that this concession should have foreclosed consideration of the supervisory liability question. *Id.* at 1956-57 (Souter, J., dissenting). But the concession hardly counted as a complete resolution of the supervisory liability issue, given other standards that might apply. Apart from the concession, the dissenters acknowledged that “without knowing the elements of a supervisory liability claim, there would be no way to determine whether a plaintiff had made factual allegations amounting to grounds for relief on that claim.” *Id.* at 1956 (Souter, J., dissenting).
Amendment holding because of the one-sided and cursory briefing available to the Court. 244

Examining the parties’ briefs in *Iqbal*, the principal dissent appears to engage in a bit of hyperbole when it claims that “we have received no briefing or argument on the proper scope of supervisory liability.” 245 The Brief of Petitioners included a section of several pages under the heading, “Any Supervisory Liability Permitted Under *Bivens* Must Be Strictly Limited.” 246 The government argued that “[t]he logic of *Bivens* . . . permits high-level federal officials to be held liable only for their direct involvement in constitutional violations, or (at most) their deliberate indifference in the face of information that the rights of others are being violated.” 247 Relying on both precedent and policy arguments, the government critiqued Second Circuit case law seemingly envisioning liability where the supervisor lacked actual knowledge of wrongdoing. 248

However, the dissenter does seem correct that the *Iqbal* Court lacked the benefit of “the full-dress argument we normally require” on the supervisory liability issue. 249 The government’s opening brief spent only a few pages on the standard for supervisory liability. 250 Rather than defending the Second Circuit case law challenged by the government, the respondent merely identified what he characterized as points of agreement with the petitioners:

[I]t is important to note the many areas of agreement among the parties as to the substantive law governing supervisory *Bivens* liability. First, it is undisputed that supervisory *Bivens* liability cannot be established solely on a theory of *respondeat superior.* Second, and relatedly, all agree that a supervisor must take some affirmative act (or legally actionable omission) that contributes to or causes the constitutional violation alleged by a plaintiff. Third, petitioners agree that a supervisor's knowing acquiescence to subordinates' unconstitutional conduct is enough to establish supervisory liability. Finally, if a supervisor takes affirmative

244 *See supra* notes 147-48 and accompanying text.
247 *Id.* at *44.
248 *Id.* at *44-*45.
250 Brief for the Petitioners, *supra* note 246, at 44-47.
steps to create a facially unconstitutional policy, to be applied by subordinates, this too will establish supervisory liability. Based on these purported points of agreement, respondent then sought to show that the complaint stated a claim against petitioners. As a result, the Court did not have the benefit of briefs arguing, for instance, that grossly negligent supervision should constitute a basis for recovery under *Bivens*, or the adoption of a facially constitutional policy that lends itself to unconstitutional application.

The supervisory liability issue is one on which plenary briefing might assist the Court in reaching a well-considered decision. In determining the scope of a supervisor’s liability under *Bivens*, at least two sources of law interact—the requirements of the Constitution and federal common law. The corresponding statutory issues under § 1983 add another layer of complexity. Particularly since the inadequate briefing in *Iqbal* concerned an issue on which appellate courts have reached differing conclusions, it would be appropriate for a future Court to construe the precedential impact of *Iqbal* narrowly. For instance, the Court could view the case as simply applying well-settled constitutional standards for equal protection liability without resolving whether federal common law might impose prophylactic requirements on supervisors going beyond the requirements of the Constitution. I am not arguing that the Court should necessarily reach a different result than it did in *Iqbal*, but the issue is sufficiently involved that a future Court should view itself as largely unencumbered by the *Iqbal* precedent when parties submit plenary briefing contesting the scope of supervisory liability under *Bivens* or, especially, § 1983.

**C. The Viability Rule of *Roe* and *Casey***

The third issue we will examine under the law of precedent concerns the authority of states to regulate abortion prior to fetal “viability.” The term “viability” refers to a stage in prenatal development when a fetus could

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252 *Id.* at *46-*55.

253 See Nahmad, *supra* note 213, at 303 (Court could have reached different conclusion in *Iqbal* based on federal common law, but instead adopted constitutional approach).

254 *Id.* at 298-303 (discussing relevant language and legislative history of § 1983).

255 *Id.* at 292-93 (“surprising from a process perspective” that majority ruled without briefing and argument and “particularly troubling” because most circuit courts had adopted different approach).

256 See *Iqbal*, 129 S.Ct. at 1949 (“respondent believes a supervisor's mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution”).
potentially survive outside the womb with medical assistance.\textsuperscript{257} The significance of viability for state regulation of abortion traces back to the Supreme Court’s decision in \textit{Roe v. Wade}.\textsuperscript{258} The \textit{Roe} Court indicated that states may only regulate to protect fetal life after the fetus becomes viable.\textsuperscript{259}

Supreme Court decisions since 1989 show a gradual weakening of the significance attributed to fetal viability in the Court’s abortion jurisprudence. In \textit{Webster v. Reproductive Health Services}, even though the trial court found that viability does not occur until 23½ or 24 weeks into pregnancy, a splintered majority upheld a Missouri statute that created a presumption of viability at 20 weeks and required a physician to order additional tests if necessary to make a viability determination.\textsuperscript{260} The controlling plurality opinion in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey} reaffirmed the viability rule in \textit{dicta}, but in a significantly diluted form, with the plurality acknowledging a state interest in protecting fetal life from the outset of the pregnancy and permitting previability regulation that does not create an “undue burden” on abortion rights.\textsuperscript{261} More recently, in \textit{Gonzales v. Carhart}, the Court upheld federal legislation forbidding use of the intact dilation and evacuation method of

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\item[257] 410 U.S. 113, 160 (1973) (discussing “the interim point at which the fetus becomes ‘viable,’ that is, potentially able to live outside the mother’s womb, albeit with artificial aid”).
\item[258] \textit{Id.} at 163-64.
\item[259] \textit{Id.} (“With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.”).
\item[260] 492 U.S. 490, 515 (1989) (plurality opinion) (statute “creates what is essentially a presumption of viability at 20 weeks, which the physician must rebut with tests indicating that the fetus is not viable prior to performing an abortion”). Chief Justice Rehnquist authored a three-Justice plurality opinion rejecting the reading of the statute by the lower courts, which understood it to require testing even if the tests would not be useful to determining viability or would endanger the mother or fetus. \textit{Id.} at 514-15. The plurality thought the viability rule cast doubt on even this restricted reading of the statute, \textit{id.} at 517, but could “not see why the State’s interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability.” \textit{id.} at 519. Justice O’Connor thought the statute, as read by the plurality, could be reconciled with \textit{Roe} and subsequent cases, so that no reconsideration of \textit{Roe} was necessary. \textit{Id.} at 525-31 (O’Connor, J., concurring in part and concurring in the judgment). The fifth vote to sustain the statute came from Justice Scalia, who thought the Court should overrule \textit{Roe} outright. \textit{Id.} at 532-37 (Scalia, J., concurring in part and concurring in the judgment).
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abortion, even though the ban applied prior to fetal viability.\textsuperscript{262} While the majority “assume[d]” the continued applicability of the viability rule,\textsuperscript{263} the principal dissent accused the majority of “blur[ring] the line, firmly drawn in \textit{Casey}, between previability and postviability abortions.”\textsuperscript{264}

The current vitality of the viability rule will presumably be a significant issue in pending litigation over recent Nebraska legislation. Nebraska’s statute forbids “most abortions 20 weeks after conception or later on the theory that a fetus, by that stage in pregnancy, has the capacity to feel pain.”\textsuperscript{265} As suggested by the opinions concerning the 20-week regulation reviewed in \textit{Webster}, some fetuses protected by the Nebraska statute will likely fall short of the current viability threshold.\textsuperscript{266}

If the Supreme Court accepts a case turning on the duration of abortion rights, a strong argument can be made that the Court should not consider itself bound to apply the viability rule as a matter of precedent. The issue of the duration of abortion rights was not before the Court in \textit{Roe}, so the Court’s embrace of the viability rule constituted \textit{dictum}. \textit{Roe} involved a challenge to a Texas statute that prohibited all abortions except those necessary to save the mother’s life.\textsuperscript{267} If the Court concluded (as it did) that a woman has a fundamental right to terminate an unwanted pregnancy, and that the states lack a compelling interest in protecting fetal life at the outset of pregnancy, then the statute would be deemed unconstitutional regardless of how far into pregnancy the right to abortion extends.\textsuperscript{268} The validity of the Texas statute in no sense turned on the question of when in pregnancy a state may regulate to protect fetal life. Consequently, the Court’s articulation of the viability rule constituted \textit{dictum}, unnecessary to resolve the case before the Court.

The Court’s internal deliberations in \textit{Roe} confirm that the viability rule represented an attempt to resolve an issue not presented by the pending litigation. The files of Justice Blackmun and other retired Justices show

\textsuperscript{262} 550 U.S. 124, 147, 168 (2007).
\textsuperscript{263} \textit{Id}. at 146.
\textsuperscript{264} \textit{Id}. at 171 (Ginsburg, J., dissenting).
\textsuperscript{265} Monica Davey, \textit{Nebraska Law Sets Limits on Abortion}, \textsc{N.Y. Times}, Apr. 14, 2010, at A16.
\textsuperscript{266} The viability rule might also become an issue in litigation arising from recent Oklahoma legislation forbidding sex-selective abortions. Drew Zahn, \textit{New Law Bans Picking Baby’s Sex by Abortion}, \textsc{World Net Daily}, May 23, 2009.
\textsuperscript{268} Beck, \textit{Self-Conscious Dicta}, \textit{supra} note 267, at 6-7.
that the viability rule did not make its way into drafts of the *Roe* opinion until the third version circulated to the Court. The first draft would have invalidated the Texas statute on vagueness grounds; the companion opinion in *Doe v. Bolton* would have recognized a constitutional right to abortion, but would not have drawn any line to indicate how long that right lasted.\(^{269}\) The second draft of *Roe* (following reargument of the case) rested its analysis on a constitutional right to abortion, but indicated that this right would last only through the first trimester of pregnancy.\(^{270}\) Justice Blackmun’s cover memorandum accompanying this draft acknowledged that the opinion “contains *dictum*” and that the proposed first-trimester cutoff point “is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.”\(^{271}\) Justice Stewart subsequently commented on this second draft, noting:

> One of my concerns with your opinion as presently written is the specificity of its *dictum*—particularly in its fixing of the end of the first trimester as the critical point for valid state action. I appreciate the inevitability and indeed wisdom of *dicta* in the Court’s opinion, but I wonder about the desirability of the *dicta* being quite so inflexibly “legislative.”\(^{272}\)

The viability rule appeared in the third draft of *Roe*, replacing the first-trimester line drawn in the previous version.\(^{273}\) The fact that the shift from a first-trimester cutoff to a viability cutoff did not change the Court’s analysis of the Texas statute and the description of the second draft’s cutoff point as “*dictum*” show an awareness that the viability rule was unnecessary to the Court’s review of the Texas statute. Indeed, at least two other Justices in the majority made comments to the effect that the *Roe* Court did not need to draw a line with respect to the duration of abortion rights.\(^{274}\)

\(^{269}\) *Id.* at 11-12.

\(^{270}\) *Id.* at 14.

\(^{271}\) *Id.* at 16 (quoting Justice Harry A. Blackmun, *Memorandum to the Conference Re: No. 70-18 – Roe v. Wade* (Nov. 21, 1972) (emphasis added), in Harry A. Blackmun Papers, Library of Congress, Manuscript Division, Box 151, Folder 6 [hereinafter Blackmun Papers]); see also DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 580 (1994).


\(^{274}\) See, *e.g.*, *id.* at 10-11 (Justice Brennan), 15-16 (Justice Powell); see also *id.* at 15 (Justice Powell’s clerk).
Given that the duration of abortion rights was not really at issue in *Roe*, it is perhaps no surprise that the parties failed to brief the question. Those challenging the Texas statute denied that the state possessed a compelling interest in fetal life that would support the legislation as written, but did not speculate about whether a more narrowly drawn statute might further such an interest. The defenders of the statute claimed a compelling state interest in protecting fetal life from the outset of pregnancy. The parties did not address the question of, assuming a right to abortion, how far into pregnancy it extends, and the advocates in oral argument avoided answering such line-drawing questions. The *Roe* Court therefore adopted the viability rule without the benefit of adversarial briefing or argument on the duration of abortion rights.

The Court’s adoption of the viability rule thus came in a case where it was unnecessary to the decision, and the Court lacked briefing and argument to assist in its deliberations on the issue. Probably for these reasons, it has long been understood by scholars that the Court utterly failed to justify the viability rule in the *Roe* opinion. As Professor John Hart Ely explained soon after release of the opinion, the Court’s discussion of viability in *Roe* “seem[ed] to mistake a definition for a syllogism.” Unpacking Ely’s comment, “[t]he Court failed to offer any constitutional principle connecting state regulatory power and the value of developing fetal life that—when combined with the Court’s definition of viability—would entail the conclusion that the state can only prohibit abortion of a viable fetus.” Other scholars have agreed with Ely’s assessment, including Laurence Tribe, who wrote that the *Roe* Court “offers no reason at all for what the Court has held,” and Christopher Eisgruber, who termed the *Roe* Court’s defense of the viability rule “blatantly circular.”

While the *Casey* plurality purported to reaffirm the viability rule, in part on the basis of *stare decisis*, it did not cure the defects in the *Roe* Court’s adoption of viability as the controlling line. To begin with, as in *Roe*, the Pennsylvania regulations at issue in *Casey* applied from the outset of pregnancy. As a consequence, the reaffirmation of the viability rule in *Casey* also represented *dictum*, unnecessary to resolution of the issues.

275 *Id.* at 6.
276 *Id.*
277 *Id.*
before the Court. 281 Casey’s discussion of viability, then, was dicta about dicta. Moreover, the parties in Casey did not brief the Court on potential justifications for or objections to the viability rule. 282

In attempting to justify the viability rule, the Casey plurality opined that viability marks “the independent existence of [a] second life” that “can in reason and all fairness be the object of state protection that now overrules the rights of the woman.” 283 The plurality never explained why independence should be a necessary condition for state protection; why the particular form of hypothetical independence denoted “viability” should be the form that matters, rather than genetic independence (at conception) or independence of movement (at quickening); or how this independent existence requirement can be derived from the Constitution. Consequently, Casey did not rectify Roe’s failure to justify the viability rule in constitutional terms. 285

In short, the viability rule falls into the category of constitutional rules that the Supreme Court has repeatedly invoked, and sometimes even applied, but has never “squarely addressed.” 286 Like the habeas corpus harmless error standard considered in Brecht and the intra-enterprise conspiracy doctrine addressed in Copperweld, 287 the Court should not view the viability rule as binding precedent precluding future examination of the duration of abortion rights on the basis of plenary briefing and argument. To be binding on future Courts, a ruling on a matter of such consequence as the duration of the constitutional right to abortion should be the product of careful deliberation and adequate justification in a case where the ruling matters to the outcome of the litigation. Absent these conditions, the viability rule may be persuasive authority, but it does not warrant treatment as binding precedent entitled to adherence as a matter of stare decisis.


282 Id. at 718 (“since viability was not relevant to the constitutionality of the challenged Pennsylvania regulations, potential justifications for the viability rule played no more than a de minimis role in the parties’ briefs”).

283 505 U.S. at 870.

284 Beck, Gonzales, Casey and the Viability Rule, supra note 279, at 275-76.

285 Id. at 276. The Court’s subsequent opinion in Gonzales, permitting states to afford some legal protection to a previable fetus, makes a plausible constitutional justification for the viability rule even more difficult to envision. Id. at 276-79.

286 See supra notes 176-85 and accompanying text.

287 Brecht, 507 U.S. at 631; Copperweld, 467 U.S. at 766-67.
IV. Conclusion

The judiciary’s power to establish precedent serves important functions, making the law more stable and enhancing its ability to influence conduct. But our system has always distrusted excessive concentrations of power. It is not surprising, then, to find that the power conferred on precedent-setting courts is qualified and limited, and that the law of precedent empowers later judges to ignore or limit the reach of opinions issued under suboptimal decision making conditions. These limitations on the rule of *stare decisis* allow later judges to check the authority of their predecessors and help to confine the precedent-setting power to those situations where it can be exercised most responsibly.