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Crafting Precedent

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BOOK REVIEW

CRAFTING PRECEDENT

THE LAW OF JUDICIAL PRECEDENT. By Bryan A. Garner et al. St. Paul, Minn.: Thomson Reuters. 2016. Pp. xxvi, 910. $49.95.

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How does the law of judicial precedent work in practice? That is the question at the heart of *The Law of Judicial Precedent*, the first treatise on the subject in more than 100 years. The treatise sets aside more theoretical and familiar questions about whether and why earlier decisions (especially wrong ones) should bind courts in new cases.[1] Instead, it offers an exhaustive how-to guide for practicing lawyers and judges: how to identify relevant precedents, how to weigh them, and how to interpret them. In short, how to apply precedents to new cases.

The treatise's thirteen authors include representatives from several of the federal circuit courts, justices from two state supreme courts, and the U.S. Supreme Court's newest member, Justice Neil Gorsuch.[2] Their coauthor and the project's fountainhead, Bryan Garner, is the editor of *Black's Law Dictionary* and one of the country's leading authorities on legal writing and reasoning.[3] The treatise is not a compendium of chapters written separately by these authors and loosely tied to a common

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*** Law Clerk to the Honorable Paul J. Watford, 2016–2017. In many chambers, judges work closely with their law clerks to resolve cases and draft opinions. In preparing this Review, we drew on our experiences working together in chambers and took a similarly collaborative approach to this project. (Admittedly, three authors for a book review may be excessive, but it seems only fair given our task of reviewing a work by thirteen authors.) For helpful comments and suggestions, we are grateful to Michael Evans, Michael Klarman, Randy Kozel, Eric Nguyen, John Rappaport, Alice Wang, and Esther Yoo, as well as to participants in a faculty workshop at the University of Maine School of Law.

[1] *See infra* section I.A, pp. 545–49.

[2] The judicial authors are Carlos Bea of the Ninth Circuit, Rebecca White Berch of the Supreme Court of Arizona, Neil M. Gorsuch of the U.S. Supreme Court, Harris L Hartz of the Tenth Circuit, Nathan L. Hecht of the Supreme Court of Texas, Brett M. Kavanaugh of the D.C. Circuit, Alex Kozinski of the Ninth Circuit, Sandra L. Lynch of the First Circuit, William H. Pryor Jr. of the Eleventh Circuit, Thomas M. Reavley of the Fifth Circuit, Jeffrey S. Sutton of the Sixth Circuit, and Diane P. Wood of the Seventh Circuit.

[3] In addition to various style and usage manuals, he coauthored two books with Justice Antonin Scalia. *See* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) [hereinafter SCALIA & GARNER, READING LAW].

theme. Rather, the authors worked together on the entire treatise to speak with one voice in an effort to bring unprecedented cohesion to the law of judicial precedent.

That undertaking involved assembling the principles that govern the application of federal, state, international, and foreign precedents in American courts. Because no one has done that since 1912 (p. xiii),[4] the project required research across a vast number of cases and authorities that had not previously been brought together. The result is a distillation of ninety-three "blackletter" principles of judicial precedent (pp. xv–xxvi). For example, the first principle: "Like cases should be decided alike."

This Review takes up the treatise on its own terms as a practice guide for working lawyers and judges (p. 18). Our initial aim is to identify how the treatise can be useful to lawyers and judges by describing its scope and drawing out some of its more salient lessons. Accordingly, in Part I, we provide a roadmap of the types of problems that the treatise addresses and the principles that it identifies for resolving them. Following the treatise's lead, our discussion explores what types of precedents bind which courts and how much weight they should be given. To evaluate the treatise's contribution on that score, we first situate the treatise in the context of the existing literature on precedent and identify some possible limitations inherent in the treatise's project. In particular, it is fair to wonder whether and to what extent our system of precedent, consisting largely of modes of reasoning, can be codified into blackletter rules.

In Part II, we home in on the distinct challenge of interpreting precedent, for which the guiding principles are least susceptible to articulation as blackletter rules. Although the treatise focuses on the reader's task of interpreting an earlier decision, it also reveals how interpretation is really a "dialogue between courts" (p. 73). That is, a future court ultimately decides what an earlier decision means, but the authoring court can facilitate that task by clarifying its decision's reasoning and scope.

We see this central insight as an opening to flip the treatise's perspective and ask how the treatise's insights on the interpretation of precedent can inform the writing of opinions that become precedents. Knowing the challenges future readers will face in reading and applying a case as precedent, what can the judges do at the front end of the process to craft more effective precedent?[5] Part II is organized according to three key steps in the opinion-writing process: refining the question

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[4] *See* HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW (1912).

[5] Professor Jeremy Waldron engages in a similar inquiry, though his is more philosophical in nature. His article explores the respective roles of authoring and interpreting courts in using stare decisis to promote the rule of law. *See* Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 2 (2012).

presented, identifying the governing law, and describing the material facts. At each step, we translate the guidance that the treatise provides for the interpretation process into lessons for authoring courts to consider at the drafting stage.

We hope the lessons on writing precedent will be useful not only to judges and their law clerks but also to advocates. After all, identifying what judges can do to write more effective precedent also sheds light on how advocates can be more helpful in the way they frame the case for the court.

I. PRECEDENT IN PRACTICE

A. From "Why" to "How": A Science of Caselaw?

Perhaps the best way to introduce *The Law of Judicial Precedent* is to point out what it is not: a study of whether precedent should bind judicial decisionmaking and the reasons why or why not. That is telling because much scholarship on precedent has traditionally been interested in the question of *why* earlier decisions bind judges' subsequent decisions (and whether they should at all). To appreciate the treatise's contribution, that question merits some preliminary attention.

Why do American courts defer to precedent? One answer emphasizes fairness. The idea is that similar cases ought to come out the same way; outcomes shouldn't arbitrarily turn on who the decisionmaker is. Scholars also invoke a set of practical reasons justifying the doctrine of binding precedent (pp. 9–12). For example, the doctrine ensures that judicial outcomes are more predictable so that people can figure out what the law is and plan their lives accordingly. Following precedent also helps conserve judicial resources given that it relieves courts from having to decide the legal questions in every case anew.[6]

But those benefits come at a cost. Being bound by earlier decisions means occasionally being bound by wrong decisions, too. The treatise's recurring example of that risk is the Supreme Court's 1922 decision holding that major league baseball does not involve "interstate commerce" and is therefore beyond the scope of federal antitrust legislation (pp. 4, 100, 335–36).[7] As controversial as that precedent strikes the treatise's authors, it nevertheless continues to bind the courts almost a century after it was decided.

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[6] On the practical justifications for precedent, see Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368–72 (1988); and Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597–602 (1987). Not all defenses of precedent, of course, rest on practical grounds. *See, e.g.*, Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1066 (1990) (defending adherence to precedent on the ground that tradition "makes us who we are" by facilitating the development of human culture).

[7] Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

More recent scholarly attention to precedent concerns less the practical reasons for and against the doctrine of binding precedent and more the source and scope of its legal basis. Despite the central role precedent plays in our legal system, the Constitution nowhere mentions it. Is the binding nature of precedent a constitutional mandate, enshrined as part of the "judicial Power" in Article III, or a mere "judicial policy" that Congress might even be able to override by statute (pp. 6–7)?[8] With respect to constitutional decisions, scholarly disagreement over how strong the binding nature of precedent should be often reflects broader differences in approaches to constitutional interpretation.[9] For example, scholars who privilege the constitutional text and original understanding of that text might be more skeptical of precedent when an earlier decision conflicts with the best reading of the text and its original meaning.[10] By contrast, proponents of the view that the Constitution takes on meaning only through the process of interpreting the text over time tend to embrace stronger theories of precedent.[11]

The Law of Judicial Precedent arrives against this scholarly backdrop with an altogether different mission. It seeks to provide "a conventional description of contemporary practice useful to the working lawyer and judge" (p. 18). For judges like the ones who coauthored the treatise and for the lawyers who appear before them, it is axiomatic that precedent binds their work. The question then is *how* does precedent operate in practice? Surprisingly, very little scholarship before this treatise has probed that question systematically, and none in such granular detail, despite its enormous practical importance.[12]

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[8] The treatise compares THE FEDERALIST NO. 78, at 463 (Alexander Hamilton) (Clinton Rossiter ed., 2003), with *Agostini v. Felton*, 521 U.S. 203, 235 (1997). For a defense of the constitutional stature of stare decisis and a discussion of the issue's implications, see generally Richard H. Fallon, Jr., Essay, *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001).

[9] *See* Kurt T. Lash, Essay, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437, 1439 (2007); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005).

[10] *See, e.g.*, Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 258–59 (2005); Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311, 312–13 (2005); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1538 (2000). *But see* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 803–04 (2009); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 272–74 (2005); Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 2–3 (2011).

[11] *See* Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 70–73 (1988); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879, 926–27 (1996).

[12] There are limited exceptions. *See* RICHARD B. CAPPALLI, THE AMERICAN COMMON LAW

The authors describe *The Law of Judicial Precedent* as a "hornbook" containing ninety-three "blackletter" principles that govern when and to what extent an earlier decision is precedential (p. xiii). The volume seeks to revive a tradition from the turn of the twentieth century of hornbooks that treated precedent as a topic capable of systematic study (p. xiii) — as a "science of caselaw" in the words of one of those hornbooks.[13] Thus, to the extent that *The Law of Judicial Precedent* can be said to have a thesis, it is that the law of judicial precedent can be coherently organized according to governing principles.

The project to codify the law of judicial precedent might initially provoke some skepticism. To begin with, principles of precedent often seem more like modes of reasoning rather than firm rules. Modes of reasoning generally require an exercise of discretion to determine the appropriate course of action, whereas that is less often true with firm rules.[14] For example, Principle #7 tells us that "[f]or one decision to be precedent for another, the facts in the two cases need not be identical. But they must be substantially similar, without material difference" (p. 92). That principle is undoubtedly correct. But, as the authors acknowledge, the principle cannot be applied mechanically like a rule. Rather, the principle merely invites a particular mode of analogical reasoning, which involves identifying the relevant points of comparison and the relevant level of generality for the comparison.[15] In this way, from the perspective of guiding courts toward a course of action, there are limits to the utility of offering principles of precedent as blackletter rules.

METHOD (1997) (offering "an account of how American judges . . . create, interpret and apply precedents," *id.* at 3); RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT (2017) (discussing, among other things, the interpretive problem of identifying a precedent's scope and the challenge of weighing a precedent's strength); INTERPRETING PRECEDENTS (D. Neil MacCormick & Robert S. Summers eds., 1997) (comparing how precedent works among various countries). There is a more substantial literature on the specific problem of distinguishing holdings from dicta. *See, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005). Of course, scholars engage in extensive discussions about the interpretation of precedent in particular domains; it's the more systematic analyses of the practice of precedent in general that are less common than one might expect.

[13] BLACK, *supra* note 4, at vi; *see also* EUGENE WAMBAUGH, THE STUDY OF CASES (3d ed. 1909). *The Law of Judicial Precedent* is particularly indebted to Henry Campbell Black's *Handbook on the Law of Judicial Precedents*. The newer treatise adopts the basic structure and scope of the older treatise. It's unclear why earlier efforts to treat the law of judicial precedent systematically were not picked up again until now. The rise of legal realism and increased skepticism of legal formalism in the first half of the twentieth century may have undermined the perceived coherence of Black's project, for the reasons we discuss below. *Cf. generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960 (1992).

[14] In this way, we are referring to "rules" in the sense of firm rules of decision, as opposed to discretion-conferring standards. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177–78 (1989).

[15] *See* Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 743–49 (1993).

More broadly, the very effort to codify blackletter rules of precedent might imply an unrealistic view of judging in which answers about how to interpret and apply precedent can be looked up and rotely applied to the case at hand. In this regard, Judge Richard Posner forcefully critiqued another effort by Bryan Garner and coauthor Justice Antonin Scalia — in their handbook *Reading Law: The Interpretation of Legal Texts* — to systematize the law in an area that similarly resists codification.[16] Judge Posner is a leading proponent of the view that judges do not and cannot decide cases through the mechanical application of rules, that the exercise of discretion is inevitable, and that the legal system would be better served if judges engaged in such reasoning more openly.[17] He therefore took exception to *Reading Law* for what he considered to be its unrealistic "passive view of the judicial role" and its deceptive claims that textual originalism provides an "'objective' interpretive methodology."[18] Analogously, if the interpretation and application of precedent is a messier process requiring discretion, then a judge's purported reliance on blackletter rules to determine the scope and weight of a given precedent might mask the full set of judgments actually entailed in that process.

We think any initial skepticism about the treatise's project to systematize the law of precedent will prove largely unfounded. On its own terms, the treatise is frankly uninterested in settling the longstanding debate between legal realists and formalists over the extent to which precedent constrains judging. The former emphasize the exercise of discretion involved in applying precedent, characterizing it as a "workbench of tools" for achieving particular results, while the latter view precedents as much more rule-like, in the sense that they can be applied mechanically.[19]

The authors do (rightly) reject the extreme realist view that judicial reliance on precedent merely reflects policy preferences — a position they describe as the "cynical" view of judging (pp. 74–75). But they never go so far to the other extreme as to suggest that most past decisions can be translated into rules and applied mechanically. Instead, their project merely treats many of the principles governing the use of prece-

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[16] *See* SCALIA & GARNER, READING LAW, *supra* note 3; Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), https://newrepublic.com/article/106441/scalia-garner-readingthelaw-textual-originalism [https://perma.cc/C6JT-TQ9T].

[17] *See, e.g.*, RICHARD A. POSNER, HOW JUDGES THINK 9–13 (2008); Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 4–8 (1996).

[18] Posner, *supra* note 16.

[19] KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 91 (1960). *Compare, e.g.*, *id.*, *and* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 142–80 (1921), *with* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 17–19, 25–27 (1989).

dent as rules. And even then, the treatise is transparent about the principles that cannot be readily reduced to firm rules and for which it can offer only general guidance and illustrations. In this way, the authors' description of the principles as "blackletter" means simply that they are "well settled,"[20] without the connotation of a firm legal rule that the term sometimes has.

The authors thus envision judges as engaged in a collective project to develop and elucidate the law in which principles for interpreting and applying precedent do in fact constrain their work, even if discretion must sometimes be exercised to implement those principles. "[M]ost judges who serve in our system of justice," the treatise attests, "sincerely believe that they are following rules that constrain them — and earnestly seek to follow these rules" (p. 75). Our own discussion of writing precedent in Part II is undertaken in the same spirit. After all, if we did not think that later courts would attempt to construe precedent faithfully, there would be little reason for us to encourage authoring courts to work to clarify the scope and reasoning of their decisions — that is, to treat writing precedent as a craft.

B. The Problems and Principles of Precedent

The main contribution of *The Law of Judicial Precedent* is identifying and assembling in one volume the various problems and questions of precedent that practicing lawyers and judges might encounter, as well as guiding principles for resolving them. The principles themselves are not novel. (Nor, with some exceptions, are they so well established as to be irrefutable.) But that is not what we ask of law treatises, which generally seek instead to organize and clarify an area of law for the sake of reference. In that vein, *The Law of Judicial Precedent* provides a framework for organizing the principles of precedent while also buttressing their salience.

The authors distill what they aptly call the "dizzying matrix of doctrines and subdoctrines" governing precedent to ninety-three principles, each of which is discussed in detail (p. 781). The principles are divided into nine sections: "The Nature and Authority of Judicial Precedents," "Weight of Decisions," "Some Practicalities of Stare Decisis," "The Law of the Case," "Federal Doctrine and Practice," "State Law in Federal Court," "State-Law Doctrine and Practice," "Foreign Precedents," and "Arbitrations." For quick reference, the treatise includes an annotated table of contents that lists all of the principles (pp. xv–xxvi) and a glossary of key terms (pp. 785–809).

The treatise defines "precedent" in two ways:

> 1. Something of the same type that has occurred or existed before. 2. An action or official decision that can be used as support for later actions or

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[20] *Blackletter Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

> decisions; esp., a decided case that furnishes a basis for determining later cases involving similar facts or issues. (p. 801)

The treatise primarily has in mind the latter clause of the second definition, and it thus mostly discusses earlier judicial decisions (see pp. 22, 24). But in keeping with the broader definition of precedent, the treatise also occasionally considers nonjudicial decisions by executive actors, legislative bodies, and arbitrators. Whatever the type of precedent considered, the treatise does so almost exclusively from the perspective of federal and state courts in the United States.

The Law of Judicial Precedent can be consulted much like a treatise on, say, the rules of evidence or federal jurisdiction. In many instances, readers will find a relatively clear answer to whatever question is at hand. For example, suppose you're working on a legal issue for which there are two controlling yet irreconcilable earlier decisions of equal authority. Which do you follow? Principle #36 provides an answer. If your case is in a lower court and the jurisdiction's high court issued the two earlier decisions, the treatise tells us, the more recent decision generally controls. However, if the case is before an intermediate appellate court and the two earlier decisions are that court's own precedent, then the earlier case generally controls.[21] Where answers to questions can be guided only by fuzzier general principles — such as the factors that bear on whether a higher court should overrule its own precedent (Principles #47 and #48) — the treatise illustrates the principle through examples and collects competing approaches by different courts. The treatise is also a resource for identifying unresolved issues — for example, whether federal district court decisions are binding on bankruptcy courts (pp. 515–16).

Below, we offer a roadmap of the themes and questions for which lawyers and judges might consult the treatise. Our discussion incorporates the treatise's own topical section divisions, but it primarily tracks the central problems at the core of the treatise that lawyers and judges encounter while working with precedent. In a given case, lawyers and judges must first identify the possible universe of decisions issued by the court or other courts that might have precedential value in the case. Then they must determine the weight that the court should afford to each precedent. Taken together, the scope of the treatise's central inquiry is therefore "what precedents have binding power, and how far they have it" (p. 19).[22]

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[21] In such circumstances, lower courts generally assume that the high court overruled itself, if not explicitly then tacitly. Intermediate appellate courts, by contrast, follow the "'general rule' that 'one panel may not overrule the decision of a prior panel'" and therefore resolve conflicts in favor of earlier decisions (pp. 303–04) (quoting Billiot v. Puckett, 135 F.3d 311, 316 (5th Cir. 1998)). There are exceptions to the rules in both scenarios (pp. 301–05).

[22] The treatise quotes FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 192 (William G. Hammond ed., 3d ed. 1880).

1. "What Precedents Have Binding Power." — The threshold problem encountered in working with precedent is identifying the universe of earlier decisions that are binding on the court. The answer depends on the identity of the interpreting court and the source of the earlier decision. Roughly the second half of the treatise explores this issue, including the sections on the law of the case, federalism, foreign precedents, and arbitration.

At the most intimate scale of a court considering its own earlier decisions within the same litigation, the law of the case doctrine dictates when those earlier decisions govern later stages of the dispute (Principle #52). The treatise sets out the basic parameters of the doctrine — namely, that the earlier decision governs only if it was a final decision that was necessary to resolve the dispute (Principles #53 and #54). The treatise also identifies the circumstances in which an earlier decision may nevertheless be reconsidered, such as when a material fact or controlling legal authority changes (Principle #59). The treatise pays special attention to complications introduced by appeals. Under the mandate rule, any decision made on appeal binds the lower court on remand (Principle #55), and the scope of subsequent appeals is limited to questions not determined or waived in the earlier appeal (Principle #56). Doctrinal wrinkles for which the treatise might be consulted include whether a jurisdictional issue decided in an earlier appeal is the law of the case in a subsequent appeal (yes) and whether the law of a case dismissed without prejudice governs a subsequent action based on a substantially similar complaint (unclear) (pp. 469–71).

At the broader scale of our federal system, principles of federalism govern when federal and state courts are bound by earlier federal and state decisions.

The federal courts follow only federal precedents on questions of federal law, international law, and maritime law, as well as issues related to the scope of their jurisdiction (Principles #64, #65, #67, and #69). That said, they occasionally borrow state rules to supplement federal common law and maritime law (Principles #66 and #69). District courts are bound by decisions of federal law by the courts of appeals in their respective circuits (Principle #60), and neither district courts nor courts of appeals are bound by other courts of equal rank (Principle #62).[23]

Federal courts otherwise follow state precedents on substantive state law in both diversity and federal question cases (Principles #70 and #75). In practice, that means that a federal court adjudicating a state law issue follows the decisions of the state's highest court. In the absence of a controlling decision, the federal court predicts how the high court would

[23] An exception is that a newly formed court of appeals may bind itself to the decisions of the court that previously exercised its jurisdiction. For example, the Eleventh Circuit binds itself to the decisions of the Fifth Circuit predating its split from that circuit, whereas the Tenth Circuit does not do so with respect to the Eighth Circuit's decisions predating their own split (pp. 513–14).

rule on the issue as if the federal court were a lower state court (Principle #73). The treatise also provides guidance on determining which state's law governs in diversity cases (Principle #72), as well as on the process for certifying questions to a state high court (Principle #74).

In turn, state courts follow their own high courts on state law questions and the U.S. Supreme Court on federal questions and when state law is preempted by federal law (Principles #77, #79, and #81). When a state court must resolve a question governed by the law of another state, the other state's precedents are binding (Principle #84). But if a state borrows a statute from another state, the other state's precedents interpreting that statute are merely persuasive authority (Principle #85). Principles of uniformity and comity also guide interstate judicial relations. A state high court facing a novel question of state law should generally aim for uniformity with the other states if there is a trend toward unanimity on the point, although the court is not bound to do so (Principle #83). And even though a state court decides for itself whether another state's law is penal in nature, and hence unenforceable in other states, it might nevertheless enforce the law as a matter of comity (Principle #87).[24]

At the global scale beyond our federal system, a lawyer or judge may need to determine what weight to give to earlier decisions by foreign and international tribunals. The treatise indicates that a foreign decision is not precedential in American courts unless the parties' rights turn on a question of foreign law and the foreign country's own courts treat the decision as precedential (Principle #90). As for international law, earlier decisions by international tribunals are not binding on American courts or even on the tribunals themselves (Principle #91). (In practice, however, international tribunals tend to treat their past decisions as effectively controlling (pp. 763–65).)

Finally, the treatise briefly looks at arbitration, which occurs outside the scope of judicial decisionmaking considered above. In arbitration, earlier decisions by courts or other arbitrators have no formal preceden-

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[24] In the more granular detail of the treatise, readers will find all sorts of diversity in how states deal with judicial precedent. For example, lawyers might not often think to consider the precedential stature of the syllabus summarizing a decision at the beginning of a reported decision. But it turns out that syllabi for decisions by the state's highest court are considered binding precedent in Kansas, Ohio, West Virginia, and Minnesota (pp. 151–52). In fact, *only* legal points included in the syllabus are binding in Ohio (p. 152). Or consider the Texas Supreme Court's distinction between "refusing" to review a lower court's decision and "denying" review. Denying review indicates nothing about the merits of the lower court's decision, as is generally true when a higher court declines to review a case. But "refusing" review gives the lower court's decision the same precedential value as if the Texas Supreme Court had issued it (p. 263). In California, a decision of the intermediate appellate court automatically has the precedential value of a decision by a court of last resort until and unless the state's supreme court disavows it (and provided there is no conflict among the decisions of the intermediate court) (p. 307).

tial effect (Principles #92 and #93). The treatise's discussion of arbitration may prompt readers to compare the principles of contract that govern arbitration, in which the parties set the rules for what will bind the arbitrator's decision, with the system of precedent described over the several hundred preceding pages.

The treatise's observation that many fields of arbitration have nonetheless developed their own de facto practices of precedent (pp. 774–78), as is true with international tribunals, raises the question whether precedent could ever really be abandoned in any iterative decisionmaking process.[25] In a sense, then, the discussion of arbitration provokes the broader "why" question that the treatise sets aside as beyond its purview: To what extent is a system of precedent desirable, and is it in fact constitutive of judicial power?

2. "How Far They Have It." — Once a precedent is identified as either binding or persuasive authority according to the principles discussed in the preceding section, a second challenge arises. At that point, a lawyer or judge must determine the weight that the precedent should be given in resolving the case at hand. Much of the first half of the treatise, including the sections "Weight of Decisions" and "Some Practicalities of Stare Decisis," focuses on that challenge.

Of course, how far a precedent governs a given case depends in large part on whether the precedent is binding. If a decision is not binding, then a court will follow it only to the extent that the court finds the decision persuasive (Principle #16). If a precedent is binding, however, it usually but not always means just that (Principle #15): "Lower courts must strictly follow . . . decisions of higher courts in the same jurisdiction" (p. 27). That rule also applies to a three-judge intermediate appellate panel with respect to that court's en banc decisions (p. 37). But higher courts, including intermediate appellate courts sitting en banc, are bound by their own decisions only in a less absolute sense (Principle #3). That is, for the reasons discussed below, "stare decisis isn't a procrustean bed" for higher courts (p. 156).

To begin with, a higher court's earlier decision might not be as precedential as it initially seems. There could be some give in the joints. On that score, Principle #15 offers some practical advice to lawyers and judges who encounter a questionable precedent in a higher court. Study the decision's underlying authorities; doing so may reveal, for example, that the court was in fact focused on a narrower issue and had not intended to speak more broadly to the issue now at hand (p. 157). Scrutinize the extent of explanation offered; the absence of evidence that the earlier court had fully considered the issue diminishes the decision's precedential value (p. 158). Also assess whether the decision is a fledgling or outlier decision that other courts haven't followed (pp. 159–60);

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[25] Similarly, foreign courts in civil law systems are not bound by precedent, but the treatise observes that they have "moved toward common-law methods" over time (p. 17).

if so, the decision may occupy a "doctrinal no-man's land" where the decision controls only in cases with identical facts, as is true with the Supreme Court's major league baseball decision (p. 100).

There is also the possibility that a higher court could overrule its own earlier decision. The treatise's discussion of when to depart from stare decisis turns on practical considerations, rather than grand theory. The authors list several reasons to consider for and against overruling a precedent (Principles #47 and #48). Those reasons seem to boil down, the authors imply, to whether the decision has been acquiesced in and relied upon by the public (pp. 396, 404).[26] For example, decisions that pertain to issues of procedure generally matter more prospectively and thus affect reliance interests less than, say, decisions involving property or contract rights (Principles #41 and #51). A court might therefore have stronger ground to overrule a wrongly decided procedural decision than a decision on a matter of property law. The authors also explain that stare decisis has more force with respect to decisions involving statutory interpretation, as opposed to constitutional decisions, because statutes can be amended more readily than constitutions in response to judicial decisions (Principles #38 and #40). The treatise also identifies factors that should be irrelevant to this inquiry, including hardship in a particular case (Principle #49) and a change in the court's personnel (Principle #50), and factors with uncertain relevance, such as whether the age of an older precedent is a ground for reconsidering it or preserving it (p. 357).

As a practical matter, no precedent will ever be overruled unless that issue is before the appropriate higher court. That means the inquiry into when a higher court might overrule one of its earlier decisions must encompass the procedure by which that question gets before the court. In the context of the federal courts, for example, the treatise explores what makes an issue worthy of review by the Supreme Court (Principle #63) or a court of appeals sitting en banc (Principle #61). Of course, the Supreme Court is interested in resolving lower court splits, and the courts of appeals are similarly attuned to policing intracircuit conflicts. But there's also the more nebulous concept of whether a case presents a sufficiently "important" issue to merit review. The treatise collects relevant considerations on that front (pp. 498–505, 521–29).

That covers the bedrock differences in weight among nonbinding precedents and those that are binding either in an absolute or looser sense. In addition, the treatise furnishes an exhaustive catalog of "weight" factors that bear on whether a court might follow a nonbinding decision or depart from one of its own earlier decisions. In some instances, these factors might also indicate that an apparently strictly binding precedent is not in fact so.

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[26] The treatise cites Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 414 (2010).

Some of the factors correspond to the precedent's age and history. A decision that other courts have repeatedly endorsed is entitled to more weight, whether the decision was a "leading" one that first definitively settled an important legal issue (Principle #17) or merely an "ancient" one that has been consistently followed (Principle #18). Quite naturally, judicial and scholarly approval of a decision generally increases a precedent's weight, whereas criticism lessens it (Principles #25 and #26). If the decision is later overruled, it no longer has any weight, unless it remains binding on federal collateral review of a criminal judgment or because it would otherwise retroactively disturb vested rights (Principle #37). The litigation history of the decision is relevant, too. The absence of oral argument or full briefing may lessen a precedent's weight (Principle #23), as is true if the decision resulted from ex parte, preliminary, or interlocutory proceedings (Principle #24).

The rank and reputation of the court that issued the decision may also matter. Where a court sits within its judicial hierarchy generally corresponds with the precedential value of its decisions (Principles #27 and #29). And a court with a reputation for expertise in a particular subject matter is more likely to speak authoritatively on that subject, such as the Second Circuit on securities law or the D.C. Circuit on administrative law (pp. 245–46). The treatise suggests that the individual reputation of an authoring judge might similarly bear on the decision's perceived persuasive value, at least with respect to judicial giants like Benjamin Cardozo and Learned Hand (Principle #28).

Structural attributes of an opinion can affect a precedent's weight as well. For example, advisory opinions by state high courts are merely persuasive authority (Principle #32).[27] Or consider a per curiam opinion that is not signed by an authoring judge. Any lower court that is bound by a higher court's decision will be equally bound by a per curiam opinion. For other courts, the per curiam opinion's precedential value turns on the extent of its reasoning: A summary opinion is less precedential, whereas a reasoned opinion is treated the same as a signed opinion (Principle #21).[28]

Opinions differ not only in form but also in the level of support they receive from the court's members, and this, too, should be taken into consideration when assessing a decision's precedential value. The more

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[27] An exception to this general rule can be found in the constitutions of Colorado and South Dakota, where advisory opinions by the states' high courts are binding on lower courts (p. 275).

[28] This distinction is necessary, the treatise explains, in light of a change in the purposes of the per curiam form over time (pp. 215–17). In earlier times, the form signaled that the result was obvious, in which case the opinion would be precedential regardless of whether the reasoning was spelled out by the court. The form is still used to resolve easy cases, but it is now also used when members of the court agree as to a result but not on the reasoning. It would thus be a mistake to afford full precedential value to a per curiam opinion unless it's clear that at least a majority of the court agreed on one line of reasoning for reaching that result.

straightforward principles on this score are that unanimous opinions generally carry more weight than split decisions (Principle #19), and that equally divided decisions have no precedential value at all (Principle #22). A trickier problem arises in the context of fragmented courts and resulting plurality opinions. In the federal courts, under *Marks v. United States*,[29] the holding in a fractured decision is the "position taken by those Members who concurred in the judgments on the narrowest grounds."[30] Generally speaking, that means the narrowest common ground on which a majority of the concurring judges agreed, either explicitly or implicitly, is controlling in future cases (Principle #20). The treatise identifies several complications that arise with this rule in practice. What if the concurrence offering the narrowest ground was not *necessary* for the majority because a majority could be formed from judges joining broader opinions (pp. 201–03)? Or what happens when there is no common ground at all among concurring judges because they adopt distinct reasoning such that no analysis could be described as the "logical subset" of any other (p. 205)?[31] If agreement on a point of law can be found only among concurring and dissenting judges who merely apply the legal principle to the facts differently, does that legal principle control in future cases (pp. 206–07)? The treatise is a resource for tracking the disagreement in the federal courts on all of these questions.

One final point about the treatise's consideration of how far a precedent governs in a given case merits mentioning. As we noted above, despite its title, the treatise occasionally considers nonjudicial precedents. In that vein, the treatise's discussion of precedential weight encompasses the extent to which executive and legislative pronouncements might influence judicial decisionmaking (Principles #33 and #34). There is a brief discussion of attorney general opinions as persuasive authority (pp. 277–85). The treatise also sets out the basic doctrine of *Chevron*/*Skidmore* deference to agency interpretations of statutes, without editorializing on the doctrine's merit (pp. 285–89). The treatise takes a slightly more skeptical position on the value of legislative history in statutory interpretation, for which it allows only "some weight" in doubtful cases (p. 290).[32]

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[29] 430 U.S. 188 (1977).

[30] *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

[31] The treatise quotes *United States v. Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013).

[32] The treatise compares SCALIA & GARNER, READING LAW, *supra* note 3, at 369–90 (arguing against the use of legislative history), with ROBERT A. KATZMANN, JUDGING STATUTES 29–54 (2014) (arguing that Justice Scalia and Professor Garner's position "fail[s] to reflect the reality of the legislative process," *id.* at 52).

* * *

The treatise addresses one other major challenge of working with precedent that we have not yet covered: interpreting precedent. Determining the meaning of an earlier decision combines both dimensions of the treatise's inquiry into which precedents bind and how far. That is, the extent to which an earlier decision is "on point" determines in large part whether the decision is precedent for a particular case and, if so, how much weight it should be afforded.

We turn to the principles governing interpretation in the next Part, which expands our focus from the application of precedent to the front-end process of writing precedent.

II. Writing Precedent

The Law of Judicial Precedent treats the interpretation of precedent in its opening section, "The Nature and Authority of Judicial Precedents." The principles governing interpretation describe modes of reasoning and are thus necessarily much less rule-like than many of the principles discussed above. It is with respect to this section, therefore, that readers might be most skeptical of the viability of a codification effort. The authors would likely agree — the blackletter principles they provide here are intended merely to provide general guidance. The treatise does so by breaking down the challenge of interpretation into discrete components, which include identifying the holding of a case, separating holdings from dicta, determining the proper scope of any rule that can be extracted, and analogizing between the facts of cases.

When it comes to interpretation, one of the treatise's central insights is that the challenge belongs as much to the authoring court as it does to future readers. The meaning of a decision turns on what the precise question before the court was, what governing rule was applied, what the relevant facts were, and how the rule was applied to those facts to answer the question. An opinion's future readers must decide those points for themselves. But an authoring court can facilitate that process greatly by clarifying the scope and reasoning of its decision. In short, although future courts get "the last word" on a decision's meaning, what the authoring court writes is always the "starting point" (p. 73).

Accordingly, the treatise's dissection of the interpretation process raises the question of how difficulties in interpreting precedent can be avoided at the front end, when the precedent is written. In other words, what lessons can authoring courts draw from the treatise? We take up that question in this Part.

Although we focus here on opinion writing solely from the perspective of providing better precedential guidance to future courts, we recognize that authoring courts have other objectives, too. For example, a fundamental purpose of the judicial opinion is to explain the decision to

the parties.[33] Opinions may also help educate the broader public about what courts are doing that is relevant to their lives.[34] The characteristics that make opinions effective in these respects may coincide with those that make for effective precedent, but the overlap is not complete.[35] We do not address here how judges should balance the different objectives they face. We suggest only that the task of writing more effective precedent merits greater attention, and we propose ways that authoring courts can do so with the lessons of the treatise in mind.

Turning to those lessons, we consider below the treatise's implications for three key steps in the opinion-writing process: refining the question presented, identifying the governing law, and describing the material facts. There is some artificiality to this breakdown, in that improvements in one dimension may naturally result in improvements in the others, but dividing up the discussion in this way helps to highlight effective practices at a more granular level. Our discussion on each score begins with the treatise's insights from the perspective of interpreting precedent and then works backward from there to draw attention to better drafting practices for authoring courts.

Our focus throughout is on avoiding unintentional lack of clarity. In other words, how can authoring courts take more care to announce clear holdings, indicate the intended scope of their decisions, and so on? We do not suggest that writing effective precedent means tying the hands of future courts as much as possible. As we discuss in the section that concludes this Part, there may be good reasons to write narrowly rather than broadly or to be vague rather than definitive, so as to preserve flexibility for later courts. We suggest some factors that may be useful for authoring courts deciding how much to resolve in a given case, but our primary argument is that courts should make any such choices intentionally after considering the relevant tradeoffs.

A. Refining the Question Presented

A clearly defined question presented lays the foundation for an effective precedent. Usually it is easy enough to say at a high level of generality what a case is about. Did a particular search violate the Fourth Amendment? Is the contract at issue enforceable? But it is also usually true that the court could take a variety of paths to resolve the case, and readers need to know which grounds the court relied on to understand how to apply the opinion as precedent. By properly refining the question presented to identify the precise issue on which the case

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[33] *See* RUGGERO J. ALDISERT, OPINION WRITING 22–24 (3d ed. 2012).

[34] *See* Abner J. Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357, 1365–66 (1988).

[35] For example, in seeking to justify a decision to the parties, a court might be inclined to address all the points raised in the briefs to show that they have been fully considered. But that degree of detail is likely to make it harder for readers seeking to apply the case as precedent to grasp its "vital issues." *Id.* at 1363 (quoting 1 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 8a, at 245 (3d ed. 1940)).

turns, authoring courts can reduce confusion that later readers would have otherwise faced in the interpretation process.

From the standpoint of later readers, knowing exactly what question the authoring court believed it was resolving is the first step to identifying the holding of the case. The treatise defines holdings as "the parts of a decision that focus on the legal questions actually presented to and decided by the court" (p. 44). Identifying the holding is critical because only that aspect of the case constitutes formally binding precedent. Everything else, including other statements of legal propositions, constitutes dicta and does not bind future courts (p. 44).[36]

When an opinion defines the question presented more loosely, it becomes more difficult for readers to "glean what the appellate court actually decided and determine which aspects of the appellate court's written opinion were necessary to its ultimate decision" (p. 53). Perhaps the most basic problem occurs when the authoring court never pinpoints the legal question it is answering. For example, a court that is considering overlapping constitutional and statutory challenges to a particular action might not clearly identify which issue it is analyzing. Likewise, a court analyzing a claim involving multiple elements or a multi-pronged framework may not be precise about the step at which it is deciding the case. Future readers may then have difficulty determining what aspect of the legal framework or which doctrinal element the case serves as precedent for.

Insufficient attention to the question presented can also create confusion about the scope of the rule that can be extracted from the case. In other words, there may be uncertainty about how broadly or narrowly to state the case's holding. How the authoring court itself states the holding is not dispositive, because the underlying reasoning may support a broader or narrower rule, and future courts get to determine for themselves what that reasoning was (p. 89).

To illustrate the scope problem, the treatise gives the example of a hypothetical case in which the result is that "Sylvester, the testator's cat, cannot inherit the $10,000 bequeathed to him" (p. 59). The holding could be stated at various levels of generality. A rule such as "cats cannot inherit money under a will" (p. 59) is probably too narrow because whatever reasons the court would have given "for not allowing cats to inherit seem as if they should apply to other animals as well" (p. 59). A better candidate would be that "animals cannot inherit money under a will" (p. 59) or perhaps that "animals cannot inherit *any* type of property under a will" (p. 60). Conversely, one can imagine even broader rules — "that animals cannot own property, period," or "that animals have no rights at all" — which would go too far because they "probably wouldn't be supported by the court's discussion" (p. 60).

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[36] As we discuss in section D, dicta may be treated as authoritative — including to the point of being effectively binding, even if not formally so — under particular circumstances.

The point of the example is that, regardless of what the court purported to hold, the true holding of the case would depend on what rule the underlying logic supported. Was the reasoning directed at cats or at all animals? Was it directed at money or at any type of property? Was it directed at the act of inheritance or at property ownership in general? The scope of the holding depends on the level of generality at which the court reasons. It is ultimately up to future courts to make that determination, but authoring courts can reduce confusion about what they intended to decide by refining the question presented to clarify the level of generality at which the facts will be analyzed.

Related to the task of assessing scope is the problem of determining what reasoning in the opinion actually matters for reaching the result. This, of course, is the challenge of distinguishing the holding from dicta, and it too can be made harder when the court does not clearly identify the precise issue being decided. When a court's reasoning is cast at varying levels of generality and is difficult to decipher, the "true" holding of the case may be open to legitimate debate. But a more precise statement of the question presented at least helps readers discern what reasoning the court itself thought was necessary to its decision, as opposed to what it considered dicta. And the authoring court's own view of the holding is the starting point for interpretation, even if it's not determinative (p. 73).[37]

Consider the case of *Toll v. Moreno*,[38] involving a public university's policy of charging lower tuition for "in-state" students. The Supreme Court began its opinion by stating: "The question in this case is whether the University's in-state policy is invalid under the Supremacy Clause of the Constitution, insofar as the policy categorically denies in-state status to domiciled nonimmigrant aliens who hold G-4 visas."[39] (G-4 visas are issued to employees of certain international organizations, like the World Bank, and their immediate family members.) After summarizing cases involving state discrimination on the basis of alienage, the Court concluded that the cases "stand for the broad principle that 'state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.'"[40]

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[37] At the very least, an interpreting court can have confidence that any reasoning the authoring court believed was necessary to decide the case will have been the product of considered judgment, rather than off-the-cuff musings. That is significant because lower courts will often decide to follow the reasoned statements of higher courts even when those statements may be considered dicta. *See infra* notes 105–06 and accompanying text.

[38] 458 U.S. 1 (1982).

[39] *Id.* at 3.

[40] *Id.* at 12–13 (quoting De Canas v. Bica, 424 U.S. 351, 358 n.6 (1976)).

To discern whether the university's tuition policy imposed "additional burdens not contemplated by Congress," the Court next turned to two pertinent federal laws. First, Congress had made this particular class of aliens eligible to establish domicile in the United States, yet the state was denying them a privilege afforded to others domiciled there.[41] Second, federal law granted G-4 aliens an exemption "from all taxes on their organizational salaries."[42] The Court concluded that "[b]y imposing on those G-4 aliens who are domiciled in Maryland higher tuition and fees than are imposed on other domiciliaries of the State, the University's policy frustrate[d]" the federal objective of using tax benefits to encourage the specified international organizations to base substantial operations in the United States.[43]

In a dissent, then-Justice Rehnquist advanced a narrow reading of the case's holding by contending that the Court had invalidated the university's tuition policy simply on the basis of a conflict between that policy and the two federal laws, and hence under a traditional preemption analysis.[44] Thus, in his view, the broad suggestion that "any state law which discriminates against lawfully admitted aliens is void . . . if Congress did not contemplate such a law" was dictum.[45] That reasoning was unnecessary to the result, he argued, because the Court found a "conflict with federal law, just as traditional pre-emption cases instruct."[46]

Our interest, setting aside the disagreement over the merits, is in the holding/dictum distinction. The ambiguity in the Court's opinion arises from the fact that its analysis at times appeared to apply a broader test under which any state regulation that discriminates on the basis of alienage is invalid if it imposes a "burden not contemplated by Congress," but elsewhere appeared to follow a traditional preemption analysis by relying on a conflict between the university's tuition policy and federal statutes. The inconsistent lines of analysis make it difficult to discern a true holding, but a more precisely stated question presented would have at least clarified the Court's intentions.

The Court's only statement of the question presented was the one quoted above, asking whether the university's in-state policy violated the Supremacy Clause. If the Court had instead specified more clearly that it sought to decide only whether a public university could permissibly charge G-4 aliens a higher amount in tuition, that would have suggested the Court did not view the broader "additional burdens" language as necessary to its decision (because the Court's narrower application of

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[41] *Id.* at 14.

[42] *Id.*

[43] *Id.* at 16.

[44] *Id.* at 32 (Rehnquist, J., dissenting). However, because he found the conflict analysis "quite unconvincing," he dissented. *Id.*

[45] *Id.* at 28.

[46] *Id.* at 32.

traditional preemption principles would have sufficed to answer that question). Alternatively, if the Court had stated that the question before it was whether a state may discriminate against lawfully admitted aliens, that would have suggested the Court understood its application of the "additional burdens" test to be necessary to the result. Because the Court left unclear the specific question it was answering, it is not surprising that later courts and commentators have interpreted the case's holding differently.[47]

To sum up the discussion so far, a properly refined question presented can reduce confusion in several key dimensions of the interpretation process: identifying the particular legal question that was answered, understanding the intended scope of the rule that can be extracted from the case, and distinguishing between holding and dictum. Beyond affirmatively identifying the question to be answered, it may also be helpful, as the opinion proceeds, for the court to remind the reader about what is not being decided. Doing so helps not only to simplify the interpretation process for readers, but also to discipline the authoring court. Ideally, the inconsistent lines of reasoning in a case like *Toll* would be spotted at the drafting stage. If the authoring court stays focused on the precise question it is answering, it will be more attuned to when it is venturing into dicta and may well decide that any such unnecessary statements should be excised before they have a chance to confuse readers.[48]

By way of illustration, consider a case in which the court effectively narrowed the issues to be decided while bracketing others that were unnecessary to reach, thus leaving readers a clear sense of how the case could properly be applied as precedent. In *United States v. Gonsalves*,[49] the court was asked to decide whether a warrantless search for drugs in a doctor's office conducted under a state health administrator's statutory inspection authority was permitted as an administrative search under the Fourth Amendment.[50] The first objection of the defendant, Wallace Gonsalves, Jr., was that the actions taken by the administrator,

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[47] Some courts and commentators have cited the very language flagged as dictum by Justice Rehnquist as *Toll*'s holding. *See, e.g.*, LeClerc v. Webb, 419 F.3d 405, 424 (5th Cir. 2005); Carlson v. Reed, 249 F.3d 876, 881 (9th Cir. 2001); Elisha Barron, Recent Development, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 645 (2011); Erin F. Delaney, Note, *In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Laws Regulating Aliens*, 82 N.Y.U. L. REV. 1821, 1832 (2007); *see also Developments in the Law — Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1417 (1983) (quoting this language as evidence that the Court expanded "the previous bases of preemption"). Others have treated *Toll* as a traditional conflict preemption case. *See* Ariz. Dream Act Coal. v. Brewer, 945 F. Supp. 2d 1049, 1058, 1060 (D. Ariz. 2013), *rev'd*, 757 F.3d 1053 (9th Cir. 2014); Doe v. St. Louis Cmty. Coll., No. ED 104574, 2017 WL 2950753, at *13 (Mo. Ct. App. July 11, 2017).

[48] We discuss circumstances in which dicta may be useful in section D below.

[49] 435 F.3d 64 (1st Cir. 2006).

[50] *Id.* at 66–67.

Catherine Cordy, could not satisfy the threshold step for qualifying as an administrative search because "the medical profession should not be treated as a highly regulated enterprise."[51] The court rejected this argument by pointing to the "numerous, longstanding and pervasive" provisions in state law pertaining to the "storage and dispensation" of drugs.[52]

In the course of its analysis, the court helpfully underscored the level of generality at which it was addressing the facts:

> Our focus, therefore, is on the regulation of drugs . . . .
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> . . . .
>
> Whether the practice of medicine in general meets this test is a different question that we need not decide. Nor are we concerned on this appeal with patient records; Cordy's search and seizure was solely directed to misbranded and adulterated drugs held at large in Gonsalves' office. Given the variations in fact patterns and the sensitivity of the subject area, there is good reason to keep our focus narrow and, for the time being, to let the law develop case by case.[53]

This clarification was valuable because Gonsalves himself had framed his argument as concerning the "medical profession" in general. A less careful court might have stated only the general question presented, leaving it to readers to figure out that its reasoning addressed only the regulation of drugs. Or if it had included some reasoning that related to the medical profession in general, readers would then have faced difficulties in trying to distinguish dictum from holding. The passage as written prevents that uncertainty.

As the opinion proceeded, the court continued to identify and set aside issues that were not being addressed:

> The other three conditions for an administrative search are that the scheme serve a substantial government interest, that administrative (warrantless) searches be "necessary," and that the scheme impose alternative safeguards. The first is obviously satisfied and the second is adequately covered by case law explaining the need for random and surprise inspections. Gonsalves does not make a frontal attack on either of these two conditions.[54]

These quick statements were helpful for clearing out the questions that did not require analysis and preventing any confusion about what doctrinal element the ensuing discussion would be covering.

As the court turned to the third additional condition for an administrative search, it again helpfully reformulated the question to be answered to avoid implying a more categorical rule than it intended to create. Gonsalves had raised two separate but related concerns about administrative searches involving individualized suspicion: "Gonsalves'

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[51] *Id.* at 67.
[52] *Id.*
[53] *Id.* (citations omitted).
[54] *Id.* at 68 (citations omitted).

other main attack on Cordy's search and seizure of the vaccines stems from the fact that this search [1] was *not* random but grew out of a specific charge of misconduct and [2] was coordinated as to timing with the Attorney General's search."[55] As to the second concern, the court explained:

> Patently, the Attorney General did not use Cordy as a proxy to conduct his own warrantless search; the Attorney General secured a warrant and had probable cause. That Cordy coordinated the timing of her search with law enforcement authorities, so that neither side tipped off Gonsalves by acting alone, was not an evasion of the limits on either of them.[56]

Here again the court bracketed questions it was not deciding, this time underscoring how different facts not present in this case might have been more troubling. Although there was some coordination between the Attorney General and Cordy, it was permissible to address the concern that Gonsalves might have been tipped off if they had acted separately. Coordination alone was not problematic, but the court was careful not to imply a more blanket ruling. Crucially, by emphasizing that the record did not reflect an effort to allow the Attorney General to circumvent the warrant requirement, the court reserved the question whether coordination of that sort would have been more problematic.

Having dealt with that concern, the court then distilled Gonsalves's objections to the targeted nature of the search into a single remaining issue: "The question, then, is whether Cordy should be prevented from making a warrantless search *because* in this case it was not random and *because* she in fact had good cause to suppose a violation."[57] After considering some potentially conflicting out-of-circuit precedent, the court answered that question in the negative.[58]

A less careful court might have addressed Gonsalves's multifaceted argument in a more sweeping manner, neglecting to parse out the questions that could be reserved because the record in this case did not require their resolution. But this court, by stating the question to be resolved so precisely, made clear that it was holding only that an administrative search is not rendered unlawful solely because it is targeted as opposed to random. Future courts addressing cases involving coordination as a means of circumvention, or other potential abuses of inspection authority, will be free to consider those questions on a clean slate.

B. Identifying the Governing Law

In addition to homing in on the precise question or questions it seeks to answer, an authoring court must also consider how best to describe

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 68–69.

the governing law that applies to the issues at hand. It would be unusual for a court to fail to cite *any* law. The more likely problem is a discussion of legal sources and principles that obscures the key point doing most of the analytical work. Lack of clarity on this dimension, even with a well-stated question presented, can lead to confusion for later readers who need to understand the rationale of a decision in order to extract the proper rule from the case.

As the treatise explains, readers seeking to identify an opinion's holding are interested in not just the outcome of the case at hand, but also the *ratio decidendi*, the Latin phrase that means "reason for deciding" (p. 46). More specifically, the treatise identifies the following key components of the *ratio decidendi*: "(1) it must be a ruling on a point of law; (2) it must be expressly or impliedly given by a judge; (3) it must relate to an issue raised in the litigation; and (4) it must be necessary as a justification for the decision reached" (p. 46).[59] Although some distinguish between the holding and *ratio decidendi*, the treatise generally uses the former term to encompass the latter (p. 46), and we will do the same.

An earlier section of the treatise explains that every opinion can be read as a syllogism consisting of a major premise, minor premise, and conclusion (p. 23). The major premise generally states some proposition of law: "Under specified circumstances, the rights of certain parties are *X* and *Y*" (p. 23). The minor premise makes an assertion about the present case: "In this particular case, the parties are of the kind contemplated by the rule in the major premise and the circumstances are as specified — all other facts being immaterial" (p. 23). And the conclusion states what logically follows from the two premises: "The rights of the parties in this case are *X* and *Y*" (p. 23).

With this model of syllogistic reasoning in mind, authoring courts can aid the interpretive process by clearly identifying the major premises of their underlying syllogisms. There are at least two common ways that the major premise can be obscured. First, courts sometimes overuse boilerplate, meaning the general propositions of law that effectively serve as truisms in a particular context and are reflexively repeated even when they are far removed from the actual issue in the case.[60] Other

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[59] The treatise cites John Bell, *Precedent*, *in* THE NEW OXFORD COMPANION TO LAW 923, 923 (Peter Cane & Joanne Conaghan eds., 2008).

[60] By way of example, consider this passage from a Fourth Amendment case about whether there was probable cause to support a warrantless search of an automobile:

> Pursuant to the automobile exception to the warrant requirement, an officer may search a readily mobile vehicle without a warrant if he has probable cause to believe that the vehicle contains evidence of a crime. We define probable cause as "reasonable grounds for belief, supported by less than *prima facie* proof but more than mere suspicion." United States v. Bennett, 905 F.2d 931, 934 (6th Cir. 1990). Probable cause exists when there is a "'fair probability that contraband or evidence of a crime will be found in a particular

commentators have similarly criticized the unnecessary inclusion of boilerplate as "counterproductive."[61] The concern is that opinions can become bloated with various types of "padding,"[62] such as the "unembarrassed repetition of obvious propositions" or "long quotations from previous cases to demonstrate fidelity to precedent."[63] The potential danger of such "information overload"[64] is that it will "make it more difficult for the writer as well as for the reader to come to grips with the essential questions."[65] In some instances, boilerplate may have the effect not just of obscuring the major premise, but of masking its absence.[66] Courts can avoid these concerns by resisting the temptation to include boilerplate principles and zeroing in on the law that "directly affect[s] the point at issue."[67]

> place.'" United States v. Wright, 16 F.3d 1429, 1437 (6th Cir. 1994) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)). Determining whether probable cause existed at the time of the search is a "'commonsense, practical question' to be judged from the 'totality-of-the-circumstances.'" *Id.* (quoting *Gates*, 462 U.S. at 230). In determining whether probable cause exists, we may not look to events that occurred after the search or to the subjective intent of the officers; instead, we look to the objective facts known to the officers at the time of the search.

Smith v. Thornburg, 136 F.3d 1070, 1074–75 (6th Cir. 1998) (citations omitted).

61 Mikva, *supra* note 34, at 1361.

62 Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1441 (1995).

63 *Id.* at 1430. Judge Posner suggests courts may do this to create an artificial "impression of great thoroughness," *id.* at 1441, with the goal of "sweep[ing] the reader along to a confident conclusion," *id.* at 1442.

64 Mikva, *supra* note 34, at 1363.

65 Posner, *supra* note 62, at 1446.

66 For an example, again see *Smith v. Thornburg*, 136 F.3d 1070 (6th Cir. 1998). Immediately after the boilerplate passage quoted *supra* in note 60, the court shifted to its factual application:

> We conclude that probable cause existed to search plaintiff's readily mobile vehicle due to the facts known to the officers at the time. Those facts were as follows: (1) an unoccupied expensive car was haphazardly parked at 12:40 a.m. in a high crime area; (2) the engine was running; (3) the headlights were on; (3) [sic] the doors were unlocked; (4) the radio was turned on; (5) stolen vehicles are frequently abandoned with their engines running because the ignitions have been tampered with during the theft process; (6) Green Hills Apartments was known to the officers as a dumping ground for stolen vehicles and an area from which they had recovered many stolen vehicles; (7) the Dodge Stealth is a frequently stolen vehicle; and (8) the unlocked and running car was parked only a few feet from a drug bust and within easy reach of any member of the crowd which gathered. Under these circumstances, the officers had probable cause to believe the Stealth may have been a stolen vehicle and, thus, enter the vehicle to determine whether it had been tampered with or to determine the identity of the owner.

Id. at 1075. When addressing fact-intensive issues like probable cause, more granular rules may not be possible. Nonetheless, shifting so abruptly from generic, high-level principles to the facts and then a conclusion makes it difficult for readers to extract any precedential guidance from a case.

67 Mikva, *supra* note 34, at 1361 (internal quotation marks omitted) (quoting *Two Types of Judicial Opinion*, 60 ALBANY L.J. 76, 77 (1899), *reprinted in* APPELLATE JUDICIAL OPINIONS 200 (Robert A. Leflar ed., 1974)). The treatise highlights a different problem with boilerplate principles that is perhaps even more troubling, though less directly relevant to our point. When boilerplate is not merely cited but actually relied upon, and is divorced from the context in which the principle

A second way opinions can obscure the major premise is by providing lengthy reasoning without a clear analytical payoff. This can take different forms depending on the type of reasoning being employed. For example, when there is relatively little law on point, a court may discuss first principles[68] or policy concerns[69] that would follow if one or the other party prevailed, but never clearly articulate the contours of the new rule it is fashioning. In other cases, when the resolution of the dispute turns primarily on the interpretation of precedent, the court after summarizing applicable authority may simply announce without further explanation that the earlier decisions compel a particular outcome. Readers are then left to infer for themselves what the major premise buried in those case summaries is supposed to be.

The Second Circuit's decision in *Tom Doherty Associates v. Saban Entertainment, Inc.*[70] illustrates how confusion of the latter sort can be avoided. There the court considered whether a publisher could satisfy the irreparable harm requirement to obtain injunctive relief after the defendant took its valuable book properties to other publishing houses.[71] The court summarized several cases, analogous because they involved the threatened inability to sell a particular product, that reached

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at issue was developed, there may be unintended and problematic transformations of the original idea over time (pp. 92–93). As the treatise explains, "[s]ome of the greatest errors of thinking have arisen from the mechanical, unreflective application of old formulations . . . to new situations that are sufficiently discrepant from the old so that the emphasis on likeness is misleading and the neglect of differences leads to unfortunate or foolish consequences" (p. 93) (second alteration in original) (quoting JEROME FRANK, COURTS ON TRIAL 276 (1949)).

[68] *Griswold v. Connecticut*, 381 U.S. 479 (1965), is a famous example of this type. In that case, the Court recognized an unenumerated privacy right based on the "penumbras" of "specific guarantees in the Bill of Rights." *Id.* at 484. The Court concluded that a state contraceptive prohibition impermissibly intruded upon the "zone of privacy" in a "marriage relationship," but it gave little guidance as to how this right should be analyzed in future cases. *Id.* at 485–86; *see also* David B. Cruz, *"The Sexual Freedom Cases"? Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 328–53 (2000) (describing five distinct interpretations of *Griswold*).

[69] For example, in *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994), the Court decided that coercive civil contempt sanctions should sometimes require the protections of criminal proceedings. *Id.* at 833–34. It identified specific reasons for treating the particular sanctions at issue in that case as criminal in nature: The fifty-two-million-dollar million fine was particularly serious, and the sanction, once imposed, could not be "purge[d]," in contrast to a traditional coercive civil contempt that the contemnor could negate by performing a simple, affirmative act. *Id.* at 837. Moreover, the underlying injunction was especially complex and thus "require[d] elaborate and reliable factfinding" to properly adjudicate. *Id.* at 833–34. But the Court, having decided that criminal proceedings were necessary, did not distill its concerns into an operational rule to provide guidance on when the civil/criminal line is crossed in contempt sanctions cases. As a result, later courts drew inconsistent lessons from the decision. At least some decided that criminal proceedings are needed based solely on the severity of the sanction, while others concluded that criminal proceedings are not needed so long as there is at least an initial opportunity to purge the contempt. *See* Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 393, 396–99 (2000).

[70] 60 F.3d 27 (2d Cir. 1995).

[71] *Id.* at 29–32, 37.

opposite conclusions on irreparable harm.[72] The court then offered the following "governing principle" to capture when harm would be considered irreparable:

> Where the availability of a product is essential to the life of the business *or* increases business of the plaintiff beyond sales of that product . . . the damages caused by loss of the product will be far more difficult to quantify than where sales of one of many products is the sole loss. In such cases, injunctive relief is appropriate.[73]

The present case involved the loss of a significant opportunity, as opposed to existing sales, but the court concluded these were "analytically the same" because "loss of prospective goodwill" involves the same sort of unquantifiable harm.[74]

By articulating the key principle to be distilled from the earlier cases, the court made it easier to reconstruct the opinion's syllogism. The major premise was that the irreparable harm requirement is satisfied when "the damages caused by loss of the product" would be particularly difficult to quantify after it takes place. The minor premise was that the loss of prospective goodwill in the present case involved such unquantifiable harm. (The extension of the preexisting rule to the present facts involved reasoning by analogy to the minor premises of past cases, which is the subject of the next section.) Thus, the irreparable harm requirement was satisfied in this case.

A less helpful decision might have summarized existing precedent and then simply declared that the present case was more like the ones in which irreparable harm was deemed satisfied than the ones in which it was not. Readers would then have to determine for themselves what the salient features of those earlier cases were and why they were deemed to be similar in the relevant respects to the facts of *Tom Doherty Associates*. In the absence of guidance, readers might extract a holding different from the one that the authoring court intended. An authoring court can prevent these difficulties by synthesizing the analytical payoff of the precedents it has summarized, thereby ensuring that readers begin with the correct major premise as they work to reconstruct the case's underlying syllogism.

C. Describing the Material Facts

Once the authoring court has identified the governing law, the challenge is to apply the law to the facts of the case in a manner that will provide guidance to future courts deciding similar cases. Of course, sometimes stating the rule tells you all you need to know.[75] A rule

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[72] *Id.* at 37.

[73] *Id.* at 38.

[74] *Id.*

[75] *See* CARDOZO, *supra* note 19, at 164 ("Of the cases that come before the court in which I sit,

providing a strict ten-day deadline with no exceptions, for example, does not require illustration in a factual context to grasp. But often merely knowing what a rule says in the abstract does not resolve a case because we need the particulars in order to give that rule meaning.[76] For example, the rule that a lawful congressional delegation of rulemaking authority to an administrative agency must contain an "intelligible principle" to constrain the agency's decisionmaking does not provide much guidance without offering some sense of what it means to be intelligible.[77] In such cases, courts examine how precedent has applied the rule to previous facts and then determine whether the new facts are analogous. Authoring courts can equip future courts to do this by explaining precisely which facts in the present case trigger the rule at issue, why they matter, and how they matter relative to each other.

The need to reason by analogy increases to the extent that the governing law is structured more as a standard than as a firm rule. Consider a run-of-the-mill negligence case in which a defendant who fails to exercise reasonable care is liable for any resulting harm caused. It's not feasible to articulate the governing law more precisely in a way that would apply to all of the conduct constituting a lack of reasonable care (p. 81). So it is left to authoring courts to fill in the various possible meanings of that standard across negligence cases by identifying a range of fact patterns that match. Those decisions, in turn, serve as precedents to guide the resolution of future disputes that are factually similar.[78] Thus, in cases governed by standards stated at a high level of generality, the parties typically agree on the well-established governing law, and the dispute turns entirely on which side draws more persuasive analogies to past cases.

Reasoning by analogy is also important when the law is to be extended or adapted to a different context or new circumstances. Authoring courts cannot predict the full field of future cases to which their reasoning may later be relevant.[79] For example, a court could not craft a rule that takes into account technology that doesn't yet exist, or anticipate how its decision in a securities case might be relevant to antitrust law. Nor would we want it to try to do so. But when interpreting courts confront cases in which there is no precedent directly on point, we do not assume they are free to write on a blank slate (p. 105). Rather, we

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a majority, I think, could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain.").

[76] *See id.* ("In another and considerable percentage [of cases], the rule of law is certain, and the application alone doubtful.").

[77] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 463 (2001) (quoting Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999)).

[78] Over time, the treatise explains, narrower rules may emerge even if they are not stated explicitly, as "some generic fact situations may occur so often that they provide a good working sense of the law" (p. 81).

[79] *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 893–99 (2006).

expect them to reason by analogy, following the bedrock principle that "[l]ike cases should be decided alike" (p. 21). Clarity in the authoring court's factual discussion facilitates that analogical reasoning process.

To put this discussion in the treatise's terms: If the governing law constitutes the major premise of the syllogism, the application of the law to the facts of the case is the minor premise by which we can reason from the major premise to a conclusion. Recall from our discussion of the governing law above that the major premise of a case provides for a particular result if "specified circumstances" exist (p. 23). The minor premise is the court's assertion of whether those circumstances exist in a particular case (p. 23).

For a more concrete example, consider the following major premise from the negligence case: A defendant who fails to exercise reasonable care is liable for any resulting harm caused. A minor premise in the case might be: The defendant in this particular case failed to exercise reasonable care because of facts *A*, *B*, and *C*. That is, *A*, *B*, and *C* are the facts in the case that constitute one of the specified circumstances (a lack of reasonable care) contemplated by the major premise (p. 97). A future court can then analogize between that case and a later case by determining that the facts *A*, *B*, and *C* in the precedent are sufficiently similar to facts in the later case for the same result to be reached (Principle #9).[80]

The challenge for the authoring court, then, is to articulate the minor premise by explicitly describing which facts matter for the court's application of the governing law and, just as important, why. By doing so, the authoring court is able to refine for future courts what it considers to be the "specified circumstances" contemplated by the governing law (p. 23).

The most basic step the authoring court can take on that score is to clarify which facts fall within the major premise's specified circumstances — that is, what *A*, *B*, and *C* are. But an authoring court can provide greater guidance by also indicating why and how those facts matter. As an illustration of this point, consider an example from the personal jurisdiction context.

In *McGee v. International Life Insurance Co.*,[81] the Supreme Court applied the recently established "minimum contacts" test to a suit in which the defendant insurance company's only contact with the forum

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[80] Or a future court could identify a material fact, *D*, in the precedent that is not present in the later case. It may then distinguish the precedent by recharacterizing the precedent's minor premise as: The defendant in that particular case failed to exercise reasonable care because of *A*, *B*, *C*, *and D* (Principle #8). As we noted above and will explore further below, later courts have the final say in interpreting a precedent's meaning, but the choices made by authoring courts guide that interpretation.

[81] 355 U.S. 220 (1957).

state of California was the single policy at issue in the case.[82] After citing some general principles and a recent trend toward expanding the scope of personal jurisdiction, the Court concluded:

> [W]e think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died.[83]

Such a summary in the analysis phase of the opinion at least makes clear which facts mattered; earlier-recited background facts that were not reiterated were presumably not relevant to the analysis. But in simply restating a string of facts, the Court provided no guidance on whether all of those facts were needed to reach its conclusion, whether any might have been independently sufficient, or whether some were more important than others. Nor did the *McGee* Court explain why each of the restated facts was legally significant — how they contributed to creating a "substantial connection" with California — so that readers could better understand how to distinguish from or analogize to the case in a future dispute involving similar but not identical facts. Those questions fell entirely to later courts to answer.

As it turned out, the Supreme Court itself took up those issues later that same Term in *Hanson v. Denckla*.[84] There the Court faced a similar scenario in which the defendants had no contact with the forum state of Florida except a single contract — in this instance a trust agreement — that was the basis of the dispute.[85] In examining whether the outcome was controlled by *McGee*, the Court characterized the earlier case as having involved two key facts: the solicitation of a California resident for the agreement at issue and the mailing of insurance premiums from that state until the insured had died.[86] The Court then explained why the absence of anything analogous to the first of those two facts made this case distinguishable from *McGee*:

> [T]his action involves the validity of an agreement that was entered without any connection with the forum State. The agreement was executed in Delaware by a trust company incorporated in that State and a settlor domiciled in Pennsylvania. The first relationship Florida had to the agreement

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[82] *Id.* at 222.

[83] *Id.* at 223 (citations omitted). The Court also went on to address California's "manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." *Id.* This relates to what would later become the reasonableness prong of personal jurisdiction analysis, and not to minimum contacts. We omit it here to keep the illustration relatively simple.

[84] 357 U.S. 235 (1958).

[85] *Id.* at 251–52.

[86] *Id.*

> was years later when the settlor became domiciled there, and the trustee remitted the trust income to her in that State. From Florida Mrs. Donner carried on several bits of trust administration that may be compared to the mailing of premiums in *McGee*. But the record discloses no instance in which the *trustee* performed any acts in Florida that bear the same relationship to the agreement as the solicitation in *McGee*. Consequently, this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida.[87]

Because *McGee* left unclear the relative significance of the facts highlighted in its analysis and why they mattered, the *Hanson* Court had substantial discretion on these points. The Court decided that the initial solicitation, as opposed to any ongoing administrative communication, was the true linchpin.

The *Hanson* Court then went on to explain *why* solicitation should be the key fact in cases of this type:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[88]

Thus, to help explain why the absence of solicitation was significant, *Hanson* created an important distinction between purposeful contact by the defendant and fortuitous contact based on the unilateral activity of other actors. This elaborated rationale not only helps future readers understand how to apply *Hanson* to factually similar cases involving contracts, but also facilitates analogical reasoning between *Hanson* and other cases involving borderline contacts with the forum.[89]

None of this discussion about the importance of clarifying the case's operative facts is meant to suggest that authoring courts should avoid including additional facts for context. Opinions almost always include more facts than are needed to resolve the case, and that is not necessarily a problem. For example, contextual facts help authoring courts recount cases as stories, and a story is often more compelling to readers because it makes it easier for them to view the problems in the case from the

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[87] *Id.* at 252 (footnote omitted).

[88] *Id.* at 253.

[89] Over time, the concept of purposeful availment was invoked more broadly and eventually became its own gloss on the "minimum contacts" test. Thus, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court determined that a car dealer and distributor were not subject to personal jurisdiction in Oklahoma, *id.* at 295, because the car they sold in New York reached Oklahoma through the unilateral activity of the buyer, *id.* at 298. The situation there was very different, but the analogy to *Hanson* is that the sellers, like the trustee in *Hanson*, never engaged in *purposeful* contact with the forum state. *Id.*

perspectives of the litigants.[90] Difficulties arise only when it becomes unclear which facts are actually driving the court's reasoning and why they are significant (pp. 80–81). In most cases, the court will recite facts initially in a background section and reiterate the ones that really matter later in the discussion. But when the facts are simply restated without analysis and followed by a legal conclusion, readers are left to divine on their own why those facts fall within the specified circumstances contemplated by the governing law.[91]

D. Deciding How Much to Resolve

Our focus in the preceding sections was on clarity: how an authoring court can reduce confusion about the precise question it's answering, the rule it's creating or extracting from preexisting authorities, and the specific facts it's relying on to reason from that rule to an answer to the question. At each step, though, the authoring court must first make a choice about how much it wants to resolve and how much it wants to reserve for future courts.[92]

In identifying the precise question to be answered, for example, the court can frame the issue at different levels of generality. In the *Gonsalves* case discussed above, the court opted to analyze whether the drug industry specifically was "highly regulated,"[93] but it could have addressed that issue with respect to the medical profession more generally.

Likewise, when identifying the governing law, the court has discretion about how strictly or loosely it chooses to articulate the rule it is creating or extracting from preexisting authorities. In *Tom Doherty Associates*, the court was able to synthesize a fairly granular rule across cases for what constituted irreparable harm,[94] but in other settings a court might prefer to identify only a more general principle and to let future courts refine the rule as it's applied to additional sets of facts.[95]

Finally, when deciding how much to say about material facts, the court has discretion about how definitive it wants to be in determining

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[90] *See* Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV. 1477, 1516–17 (1995).

[91] For an additional example of the recitation of facts without much analysis, see *supra* note 66.

[92] On the nature of this problem with respect to the levels of generality at which courts characterize constitutional rights, see generally Michael Coenen, *Characterizing Constitutional Inputs*, 67 DUKE L.J. (forthcoming 2018); and Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

[93] United States v. Gonsalves, 435 F.3d 64, 67 (1st Cir. 2006).

[94] Tom Doherty Assocs. v. Saban Entm't, Inc., 60 F.3d 27, 37–39 (2d Cir. 1995).

[95] We previously identified *Griswold v. Connecticut*, 381 U.S. 479 (1965), as an example of a case in which no clear rule was articulated. *See supra* note 68. Given the relative novelty of the privacy right at issue, the Court's vague pronouncement in that case may have been prudent.

which facts matter and why.[96] In *McGee*, the Court opted not to say whether the three key facts establishing minimum contacts with the forum state were independently sufficient or whether all were necessary to satisfy due process. Although that choice engendered uncertainty for readers, an authoring court might sometimes deliberately choose such a cautious approach to allow future courts to determine which facts in the case should be considered critical and for what reasons.[97]

As an initial matter, it's worth observing that a court does not pitch the breadth of its decision on a blank slate. Far from it. The authoring court may decide only the legal questions actually presented to it (Principle #4). The federal courts, for example, are limited by Article III of the Constitution to resolving actual cases and controversies.[98] Issues not actually presented by the case are left to future courts to resolve on another day. In this way, each judicial decision is only one small part of a much larger process in which the underlying legal problem is refined and resolved by different courts over time. No authoring court need think that its job is to solve the problem once and for all.

At the same time, as the examples above indicate, decisions about the scope of the questions presented and how broadly to describe the rules and facts in answering them are inescapable in writing opinions. If authoring courts simply wrote every opinion as narrowly as possible, each opinion would be limited to its precise facts and thus offer very little precedential guidance to future litigants and courts (p. 59).[99]

In considering whether to resolve more or less in a given case, authoring courts may find it helpful to think about their role in the larger collective project we highlighted earlier.[100] That perspective leads to

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[96] Resolving less at this step might often look the same as a lack of clarity. In other words, a court that chooses not to say exactly which facts matter is also providing less guidance to future readers seeking to analogize to or distinguish from the case. To minimize confusion, authoring courts should be explicit about their choice to leave a question open: If a court is not prepared to say whether two key facts are both necessary to the outcome of the case, it should simply say so. *See, e.g.*, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2346 (2014) ("Although the threat of Commission proceedings is a substantial one, *we need not decide* whether that threat standing alone gives rise to an Article III injury. The burdensome Commission proceedings here are backed by the additional threat of criminal prosecution. We conclude that the combination of those two threats suffices to create an Article III injury under the circumstances of this case." (emphasis added)).

[97] Justice Black, the author of the majority opinion in *McGee*, *see* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 221 (1957), dissented in *Hanson*, which suggests that he might have chosen to provide greater guidance in *McGee* if he had anticipated how it would later be interpreted, *see* Hanson v. Denckla, 357 U.S. 235, 256–58 (1958) (Black, J., dissenting).

[98] U.S. CONST. art. III, § 2, cl. 1.

[99] As others have observed, the articulation of general rules also promotes the rule of law by showing that courts are deciding cases based on neutral principles rather than on an ad hoc basis. *See* Scalia, *supra* note 14, at 1177–79; Waldron, *supra* note 5, at 20 ("This, I believe, is a primary obligation that [a judge] has under the rule of law — to derive her particular decisions from an identified and articulated general norm.").

[100] *See supra* p. 549.

approaching questions of scope by asking what would be most useful to later courts (and the litigants before them) in the process of developing the law. If an authoring court lacks confidence that it has clear guidance to offer future courts, writing more narrowly will avoid leading future courts astray while preserving flexibility for them.[101] Indeed, because a court often cannot foresee how a broader ruling will impact the full field of future cases to which the rule will apply,[102] there is much virtue in restraint. But at times there may be good reason to depart from a strict minimalist approach when an authoring court can provide clear guidance to future courts on a legal issue that has been litigated by the parties and fully considered by the court. However an authoring court resolves this question in a given case, the court should be intentional about its decision and recognize what is at stake in the tradeoff.

At first glance, one might object that it doesn't really matter how the authoring court frames its decision because "the later court always gets the last word" (p. 73). True, as we emphasized earlier,[103] the authoring court's words will serve as the starting point. But later courts will ultimately decide for themselves how to interpret and apply a precedent. A later court may determine, for example, that certain propositions in an opinion were dicta and therefore not binding, or that a broadly stated principle should be read in light of the narrow factual context actually before the court (which means, in effect, that any broader implications are treated as dicta) (pp. 102–03).[104]

But even while emphasizing the second court's final say in the process, the treatise makes clear that broad statements and dicta have a significant role to play in developing the law. That is particularly true of judicial dicta — meaning statements that were not strictly necessary to the result but were the product of apparent consideration[105] — as

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101 *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME (1999). Incremental decisionmaking also captures accumulated input from a broader set of judges with different backgrounds and experiences, which often results in better decisions. *See id.* at 3–23.

102 *See* Schauer, *supra* note 79, at 893–99.

103 *See supra* p. 557.

104 For example, the Supreme Court recently invalidated the Stolen Valor Act of 2005, 18 U.S.C. § 704 (2006), which prohibits the making of false statements about military honors. *See* United States v. Alvarez, 567 U.S. 709, 715 (2012). Although earlier cases had broadly suggested that false statements were not entitled to First Amendment protection, those cases all involved "defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation." *Id.* at 719. None of the cases "confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more." *Id.* Thus, the Court interpreted the earlier statements within their factual contexts and treated their more categorical implications as dicta (pp. 56–57).

105 The treatise defines judicial dictum as "an opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision and therefore not binding even if it may later be accorded some weight" (p. 62) (quoting *Dictum*, BLACK'S LAW DICTIONARY, *supra* note 20).

opposed to obiter dicta, which are "peripheral, off-the-cuff judicial remark[s]" (p. 62). Lower courts generally treat the judicial dicta of higher courts as entitled to substantial weight, up to and including treating them as effectively binding (pp. 69–70). Some circuit courts do the same for judicial dicta in their own decisions (pp. 63–64), and even those courts that don't would likely afford such statements persuasive value (pp. 64–65). Thus, when an authoring court resolves more than it needs to, the impact on future courts might be good (useful guidance) or bad (confusion or rigidity), but the choice is not without consequence.[106]

More concretely, there are several factors that a court might consider in choosing whether to resolve more or less in a given case. Our focus is on factors that relate to the courts' shared project of developing the law, in which future courts and the litigants before them might benefit from either greater guidance or greater flexibility depending on the circumstances.[107]

A primary consideration is where the authoring court sits within the judicial hierarchy. Higher courts are called upon to provide greater guidance than lower courts. Appellate courts expending resources on a precedential opinion seek to provide guidance to a greater number of litigants and lower courts in order to justify the use of limited judicial resources in deciding those cases.[108] That consideration is especially

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[106] The treatise suggests that obiter dicta are "seldom considered precedential," though they are "sometimes persuasive" (p. 62). But even obiter dicta of a higher court may be difficult to ignore in practice, since the line between obiter and judicial dicta is no less vexing than the line between holding and dictum. For example, the Supreme Court's suggestions prior to *Alvarez* that false statements are categorically not entitled to constitutional protection arguably fell closer to the obiter dicta side of the spectrum, given that the Court probably did not fully consider the value of false speech as a distinct category when it addressed the more specific issues of defamation, fraud, and the like. *See supra* note 104. But that did not stop lower court judges and litigants from taking those suggestions seriously (pp. 56–57). *See* United States v. Alvarez, 617 F.3d 1198, 1219 (9th Cir. 2010) (Bybee, J., dissenting) (noting the "clarity and consistency of the Supreme Court's insistence that false statements of fact . . . generally fall outside First Amendment protection"), *aff'd*, 567 U.S. 709 (2012). Given the potential for sowing confusion and unwittingly tying the hands of future courts, authoring courts should identify the dicta in their own decisions at the drafting stage and give careful consideration to whether they should be included. *See supra* text accompanying note 48.

[107] Of course, other factors affect the breadth of a court's decision. In particular, precedential decisions are usually issued by multimember courts, which means that the realities of disagreement and the need for compromise can affect the breadth of a decision. For example, members of a panel might think different facts matter to the outcome and compromise by drafting an opinion that includes all of them. Or a panel might describe a legal standard at a high level of generality only because the judges can't agree on what that standard would require more concretely.

[108] In many oral arguments before appellate courts, advocates will resist responding to a hypothetical because (as the judges well know) "that is not this case." But the appellate court often is not interested in simply declaring a winner based on the particular facts of the present case. The purpose of the hypothetical is to help the court fashion a more generally applicable rule. For a recent exchange along these lines, see Transcript of Oral Argument at 4–11, Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (No. 15-118).

true with respect to the U.S. Supreme Court and state supreme courts with discretionary jurisdiction, given that they generally take cases for the express purpose of clarifying the law. Against the preference to provide as much guidance as possible, however, a higher court must weigh the benefits of restraint, such as letting the legal issue percolate in the lower courts, where litigants and judges may further refine the issue and test competing approaches to resolving it.

This tradeoff was openly debated by the Supreme Court last Term in *Maslenjak v. United States*.[109] At issue in the case was a federal statute that makes it a crime to knowingly procure naturalization through unlawful conduct.[110] The immediate question before the Court was whether the unlawful conduct (in this case, lying in a naturalization application) must have contributed to the government's decision to grant naturalization in order for criminal liability to attach.[111] The Court held that it must.[112] Because the district court in the petitioner's criminal case had instructed the jury otherwise, the opinion could have ended there.[113] But what the Court described as an "operational" question remained: How should the causal influence requirement apply in practice?[114]

The majority decided it was worth providing "further guidance" to future prosecutors, defendants, and district courts because it determined that it was "well-positioned" to do so.[115] The parties had fully briefed what causal standard should apply, and the issue had already percolated in (and befuddled) the lower courts, one of which called the "Court's failure to provide clear guidance 'maddening[].'"[116] The Court therefore went on to hold that the causal standard was an objective one (would the lie have affected how a "reasonable government official" applied the naturalization law?[117]), and that lies about facts that would disqualify the applicant from naturalization or "throw investigators off a trail leading to disqualifying facts" would satisfy the standard.[118]

However, Justice Gorsuch, joined by Justice Thomas, wrote separately to say that he would have stopped after resolving the immediate question whether or not a causal requirement applied.[119] In their view, it would have been better to let the operational question percolate longer

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109 137 S. Ct. 1918 (2017).
110 18 U.S.C. § 1425(a) (2012).
111 *Maslenjak*, 137 S. Ct. at 1923–24.
112 *Id.* at 1924.
113 *Id.*
114 *Id.* at 1927.
115 *Id.* at 1927 n.4.
116 *Id.* (alteration in original) (quoting United States v. Latchin, 554 F.3d 709, 713 (7th Cir. 2009)).
117 *Id.* at 1928.
118 *Id.* at 1929.
119 *Id.* at 1931 (Gorsuch, J., concurring in part and concurring in the judgment).

in the lower courts, where the issue's resolution could benefit from "the crucible of adversarial testing" and "the experience of our thoughtful colleagues on the district and circuit benches."[120]

A second consideration is the state of the law at the time of the authoring court's decision. For example, the existing caselaw around an issue may be extensive yet disconnected or not rationalized, such that there are various piecemeal rules, but no general rule. The authoring court might decide that the time has come to synthesize across the cases to offer greater guidance with a more general rule. A well-known example of such synthesis is *MacPherson v. Buick Motor Co.*,[121] a New York products liability case in which Buick negligently manufactured a car that injured the plaintiff when one of its wooden wheels suddenly "crumbled into fragments."[122] Before *MacPherson*, New York common law required a plaintiff to be in contractual privity with the manufacturer to recover in such suits, but that requirement was not met in *MacPherson* because the plaintiff had purchased the car from a dealer, not the manufacturer.[123] However, the privity requirement did not apply with respect to "inherently dangerous" products, and over time courts had separately declared that scaffolding, a building, an elevator, a rope, bottles of aerated water, and even a coffee urn were inherently dangerous.[124] In *MacPherson*, Judge Benjamin Cardozo recognized that the lower courts had essentially gravitated to a new rule altogether, which he announced in the court's decision: There was no privity requirement; a manufacturer could be held liable for anyone foreseeably hurt by its negligence.[125]

Conversely, when there is little or no caselaw in an area, a court might decide to write narrowly (or loosely) to permit later courts to develop the contours of the law more gradually after different theories are developed and tested in future cases.[126] After all, before the time was ripe for Judge Cardozo to synthesize across products liability cases and hold that there was no privity requirement, courts first issued incremental decisions that explored and pushed the boundaries of the "inherently

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120 *Id.*

121 111 N.E. 1050 (N.Y. 1916).

122 *Id.* at 1051.

123 *Id.*

124 DAVID A. STRAUSS, THE LIVING CONSTITUTION 80–82 (2010); *see also MacPherson*, 111 N.E. at 1052.

125 *MacPherson*, 111 N.E. at 1052; STRAUSS, *supra* note 124, at 80–85.

126 Alternatively, in some circumstances the absence of controlling law may in fact spur a court to create a broader framework to provide needed guidance. *See, e.g.*, Shrestha v. Holder, 590 F.3d 1034, 1039–45 (9th Cir. 2010) (engaging in detailed analysis of how the REAL ID Act guides review of adverse credibility determinations "[i]n light of the sparsity of Ninth Circuit precedent construing the REAL ID Act in this context," *id.* at 1040).

dangerous" exception, thereby gradually eroding the privity requirement. Those decisions issued narrow holdings that applied only to the products at issue in the cases, such as a scaffold of a certain height[127] or a coffee urn that was steam driven.[128]

Finally, the authoring court might consider the state of its knowledge about present and future factual circumstances to which its ruling might apply. For example, in a case dealing with nascent technology, the authoring court might be reluctant to speak broadly when it is still unclear what that technology's (or its next generation's) capabilities will ultimately be, how widely it will be adopted, and so on. In *United States v. Knotts*,[129] the Supreme Court held that the use of a beeper to track a criminal suspect's car wasn't a "search" within the meaning of the Fourth Amendment because the suspect lacked a reasonable expectation of privacy in his car's movement on public streets.[130] But the Court carefully reserved judgment on whether the result would change if the surveillance had occurred twenty-four hours a day in a "dragnet" fashion, rather than in a more limited manner.[131] As a result, the Court believed that it was not constrained by *Knotts* when it later confronted a case involving more intrusive GPS surveillance of a suspect's car, which it held to be a search.[132]

As the above considerations and examples show, there will rarely be a single, obviously correct answer as to how narrowly or broadly an authoring court should pitch its opinion in a given case. Saying more might be helpful if doing so will provide clearer guidance to future courts; saying less might be appropriate because it preserves flexibility for future courts without running the risk of leading them astray. The most we can ask of authoring courts is that they make the choice deliberately, aware of its impact on future courts and on the overall process of developing the law through precedent.

CONCLUSION

The Law of Judicial Precedent is the most comprehensive and authoritative text to date on the application and authority of judicial precedent in American courts. We hope we've illuminated how the treatise might be useful for its intended audience of practicing lawyers and judges. Most immediately, the treatise is an invaluable resource for identifying the principles that govern which precedents apply in which courts and what weight those precedents merit. The treatise also puts the challenge of interpreting precedent into sharp relief — a challenge

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127 Devlin v. Smith, 89 N.Y. 470, 478 (N.Y. 1882).
128 Statler v. George A. Ray Mfg. Co., 88 N.E. 1063, 1064 (N.Y. 1909).
129 460 U.S. 276 (1983).
130 *Id.* at 281–82.
131 *Id.* at 283–84.
132 *See* United States v. Jones, 565 U.S. 400, 408–09 (2012).

that belongs as much to the authors of judicial decisions as to their readers. With that in mind, authoring courts can craft more effective precedent by focusing more deliberately on the treatise's insights into the reader's interpretive task.