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# The Holding-Dicta Spectrum

Andrew Michaels
*The George Washington University Law School*

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Andrew C. Michaels*

Abstract

The distinction between holding and dictum is often treated under a binary paradigm; either a proposition is binding holding, or unconstraining dictum. But the binary paradigm is too simplistic to adequately model our complex system of precedent. This article suggests an alternative spectrum paradigm where the constraining force of a precedent proposition is inversely correlated with its breadth. This article explains the spectrum approach, compares it with prevailing approaches, and evaluates some cases in light of the spectrum model. The spectrum framework has the potential to facilitate judicial candor and make the concepts of holding and dicta more consistently meaningful.

* Visiting Associate Professor of Law and Frank H. Marks Intellectual Property Fellow, George Washington University Law School. J.D., NYU School of Law, 2010. The author thanks Michael Abramowicz, Robert Brauneis, Rochelle Dreyfuss, Dmitry Karshtedt, Stephen Klein, Pierre Schlag, Ralph Steinhardt, John Whealan, and those who participated in the 2016 IP Scholars Conference. Comments welcome at acmichaels@law.gwu.edu.

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# The Holding-Dicta Spectrum

> "If judges are free, are indeed forced, to decide new cases for which there is no rule, they must at least make a rule as they decide. So far, good. But how wide, or how narrow, is the general rule in this particular case? That is a troublesome matter."[1]

## Introduction

Though rather ubiquitous in our legal system, despite much discussion and debate, the distinction between holding and dicta remains far from clear.[2] There are, however, two propositions that are often taken for granted. The first is that holdings are binding and dicta are not.[3] The second is that if a statement is not holding then it is dictum, and vice versa.[4] These two assumptions set up a binary paradigm; either a proposition is binding holding, or unconstraining dictum, one

[1] KARL N. LLEWELLYN, THE BRAMBLE BUSH 39 (1930).

[2] *See, e.g.*, Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOKLYN L. REV. 219, 219 (2010); *Note, Dictum Revisited*, 4 STAN. L. REV. 509, 512 (1952).

[3] *See, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 957 (2005); Marc McAllister, *Dicta Redefined*, 47 WILLAMETTE L. REV. 161, 165-66 (2011).

[4] *See, e.g.*, Michael C. Dorf, *Dicta & Article III*, 142 U. PA. L. REV. 1997, 2004 (1994) ("we would find consensus for the judgment that everything that is not holding is dictum and everything that is not dictum is holding"); Abramowicz & Stearns, 57 STAN. L. REV. at 961 ("If not a holding, a proposition stated in a case counts as dicta."); Judith M. Stinson, *Teaching the Holding/Dictum Distinction*, 19 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 192, 192 (2011) ("Dictum, on the other hand, is anything that is not a holding.").

or the other. And therein lies a significant part of the problem, for in reality, our system of precedent is more complex than the binary paradigm suggests.[5]

Consider for example a court deciding whether a particular car is allowed in a park, which in explaining its decision, states: "no vehicles are allowed in the park." This statement is of course broader than necessary to decide the case, but nevertheless it is part of the path of reasoning that leads to the judgment. Then, a subsequent court constrained by the precedent of the first court is faced with the question of whether a wheelchair is allowed in the park. Even if we assume that a wheelchair is indisputably a vehicle, it is not hard to imagine the constrained court allowing the wheelchair. The reasons that might have led the precedent court to generalize against vehicles probably are not fully applicable to wheelchairs, and wheelchairs present special countervailing considerations. So the constrained court might narrow the rule against vehicles by creating an exception for mobility aids. This type of narrowing happens all the time.[6]

Was the statement "no vehicles are allowed in the park" a holding? If holdings are binding, then the answer is no, because the hypothetical constrained court did not follow it even though it applied. So does that make the statement

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[5] *See* KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 195 (2013); Shawn Bayern, *Case Interpretation*, 36 FLA. ST. U. L. REV. 125 (2009).

[6] *See, e.g.*, Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L. J. 921, 924 (2016) ("narrowing from below happens all the time"); Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1865 (2014) ("narrowing happens all the time"); KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 15 (Paul Gewirtz ed. & Michael Ansaldi trans., 1989) (written in German in 1928) ("It is common to see a later narrowing of a *ratio* that, in the heat of the moment and of the argument, was too broadly phrased."); *see also*, Part III, *infra*.

dicta? If so, why is it dicta? Because it is broader than necessary to decide the case? At least in the common law context, almost any generalization is broader than necessary to decide the case. [7]

Michael Dorf has distinguished between two types of statements which are sometimes called dicta: asides, and broad statements.[8] A clear example of an aside would be if the precedent court in the hypothetical case above had said "and by the way, no grills in the park either." This is an aside because the question of grills in the park was not before that court. Asides are pure quintessential dicta.[9] The statement "no vehicles in the park" is a broad statement, the second type of potential dicta, as it encompassed the facts before the court – (cars are vehicles) – and would have been part of the path of reasoning that led to the judgment.

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[7] *See* Dictum Revisited, *supra*, 4 STAN. L. REV. at 509; Abramowicz & Stearns, 57 STAN. L. REV. at 1040-41.

[8] *See* Dorf, 142 U. PA. L. REV. at 2007 ("Asides – justifiable or not – comprise one category of statements commonly labeled dicta. A second category is somewhat more amorphous. It consists of those elaborations of legal principle broader than the narrowest proposition that can decide the case.").

[9] For identifying this pure dicta which I am calling asides, I recommend the definition of dicta in Abramowicz & Stearns, 57 STAN. L. REV. at 961, as an excellent way of doing so in difficult cases. However, that definition uses a binary paradigm and thus defines everything else as a holding. *See* GREENAWALT, *supra*, at 195 (noting that the Abramowicz and Stearns discussion "proceeds on the premise that the choices, difficult as they may be, are basically either-or, that the arguable instances would not, and should not, be viewed as lying between holding and dicta or as very weak elements of holding or very strong kinds of dicta"). By contrast, this article argues that the propositions that would meet the Abramowicz and Stearns definition of holding (which I am referring to shorthand as "broad statements" or the "path-to-judgment" reasoning) lie along a spectrum where constraining force is inversely proportional to breadth.

While asides are clearly dicta, it is difficult to say whether an overbroad statement is dicta, because how broad is too broad? There is an endless spectrum of how broad such generalizations can be made and there is no simple place to draw the line.[10] But if courts are to provide reasons for their decisions, they must generalize,[11] and if precedent is to stand for anything, at least some generalizations must provide some constraint on subsequent courts.[12]

How then to reconcile these two propositions: (1) overbroad generalizations are not always followed, or can be "narrowed," and (2) some generalizations broader than necessary to decide the case must have some constraining force? This article argues that it is impossible to reconcile these realities with a binary paradigm. It is perhaps something like trying to represent four-dimensional spacetime using three-dimensional Euclidian geometry.

But a more consistent framework can be achieved by positing that statements that are not asides should be treated as a spectrum or scalar. Statements narrowly tailored to the facts have greater constraining force and

[10] *See, e.g.*, Julius Stone, *The Ratio of the Ratio Decidendi*, 22 MOD. L. REV. 597, 614 (1959).

[11] *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 641 (1995) ("to provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself," such that to "provide a reason in a particular case is thus to transcend the very particularity of that case").

[12] *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 577 (1987).

approach the status of binding holding. Broader or more general statements have less constraining force and tend to approach dicta.[13]

Although some broad categorizations are more justifiable than others, an assessment of breadth provides a starting point, or rule of thumb. A next step would be to attempt to find a material distinction from the facts, or a principled way of narrowing the broad statement while remaining consistent with the overall reasoning of the precedent case.[14] This comports with what courts often do when faced with overbroad statements, in accordance with Supreme Court guidance.[15] These inquiries are related because broader propositions encompass more factual variation, with a greater possibility that some such factual differences will be "material" or justify differential treatment under the law.

[13] *See* Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, n.14 (1985) ("Some commentators propose that the breadth of a legal directive is inversely proportional to its strength."); Dictum Revisited, *supra*, 4 STAN. L. REV. at 515 ("When a legal conclusion is stated too broadly it has a weak value as precedent if new facts are different."); *cf.* Pierre N. Leval, *Judging Under The Constitution: Dicta About Dicta*, 81 NYU L. REV. 1249, 1258 n.23 (2006); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 275-76 (1981).

[14] *See* Re, 104 GEORG. L. J. at 936; J. RAZ, THE AUTHORITY OF LAW 187-88 (1979) ("The ratio is binding in its basic rationale and as applying to its original context. Courts can, however, modify its application to different contexts so long as they preserve its fundamental rationale.").

[15] *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399–400 (1821) (Marshall, C.J.); Sterling v. Constantin, 287 U.S. 378, 400 (1932); Bramwell v. U.S. Fid. & Guar. Co., 269 U.S. 483, 489 (1926); Part III, *infra*.

In this article, a "constrained court" is one generally required to follow the precedent of a "precedent court."[16] For example, the Federal Circuit would be constrained by Supreme Court precedent as well as its own precedent. "Constraining force" or "weight" is the extent to which the constrained court is compelled to follow a proposition from a precedential court even if it does not agree with the proposition. In other words, constraining force is the weight a statement should have merely based on the fact that it was endorsed in a precedent decision, regardless of its persuasiveness as applied to the current situation.

This article proceeds as follows. Part I uses hypothetical to illustrate the spectrum framework, and explains how the spectrum approach is consistent with underlying rationales for stare decisis and furthers the value of judicial candor. Part II reviews other approaches to holding and dicta, demonstrating that consistent usage is impossible under the prevailing binary paradigm, and shows that the spectrum model allows for more meaningful discussion. Part III evaluates some examples from caselaw where courts treat precedent in a manner that is difficult to consistently explain under prevailing approaches to holding and dictum, but can be explained using the spectrum.

[16] *See* Larry Alexander, *Constrained By Precedent*, 63 S. CAL. L. REV. 1, 4 (1990).

# I – The Spectrum Explained

## A. Illustration

Consider a hypothetical statute called the "Ratio Decidendi Park Act" that creates a cause of action for anyone whose right to enjoy the park has been unduly burdened, and an appellate court decision that reads as follows:

> The Federal Ratio Decidendi Park Act provides a right of action against anyone who unduly burdens a person's enjoyment of Ratio Decidendi park. This case presents the question of dogs in the park. The defendant's Great Dane, "Slobber," is over 100 pounds. The court below found that Slobber was running free in the park and ran roughshod over the plaintiff's family picnic, scaring the plaintiff's children and ruining their day; thus, the court found, unduly burdening the family's enjoyment of the park.
>
> The defendant argues that she derives substantial enjoyment from playing "fetch" with her dog Slobber in the park, that is, throwing a stick or other object so that Slobber can run after it and bring it back to her. We do not doubt that this activity is enjoyable, but we nevertheless agree with the court below that fetch is not an appropriate activity in Ratio Decidendi Park, as a dog playing fetch is off leash, unconstrained, running free and thus at risk of unduly burdening the ability of others to enjoy the park. There are other parks in the area where the defendant can play fetch with her large Great Dane, but there is no other park with the character of Ratio Decidendi Park. All residents should have a reasonable opportunity to enjoy this unique landscape. To that end, dogs are not allowed in Ratio Decidendi Park, and accordingly we affirm the injunction preventing Slobber from playing fetch in the park.

What is the holding of this case? It is not clear, but of course this is not unusual, courts often state or imply a number of path-to-judgment propositions at different levels of generality.[17] Even if the court had attempted to signify its holding with a "we hold that," as courts sometimes do but often do not, this would

[17] *See, e.g.*, LLEWELLYN, THE BRAMBLE BUSH, at 44; Arthur Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L. J. 161, 165 (1930).

not necessarily settle the question.[18] The meaning of a case is often defined and refined through subsequent cases.[19] To be sure, the *In re Slobber* court did state in its ultimate sentence that "dogs are not allowed in Ratio Decidendi Park," but as Karl Llewellyn has explained:

> [I]t pays to be suspicious of general rules which look too wide; it pays to go slow in feeling certain that a wide rule has been laid down at all, or that, if seemingly laid down, it will be followed . . . . everything, everything, big or small, a judge may say in an opinion is to be read with primary reference to the particular dispute, the particular question before him."[20]

The following propositions all explicitly or implicitly arise from the decision above, listed from most general (1) to most specific (6).

1. Dogs are not allowed in Ratio Decidendi Park.
2. Dogs are not allowed off leash or unconstrained in the park.
3. Dogs are not allowed to play fetch in the park.
4. Large dogs are not allowed to play fetch in the park.
5. Great Danes are not allowed to play fetch in the park.
6. Slobber is not allowed to play fetch in the park.

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[18] *See, e.g.*, United States v. Rubin, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J.) ("A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'"); Leval, 81 NYU L. REV. at 1257 ("A dictum is not converted into holding by forceful utterance, or by preceding it with the words '[W]e hold that . . . .'").

[19] *See* Jan Deutsch, *Precedent and Adjudication*, 83 YALE L. J. 1553, 1555 (1974); Earl Maltz, *The Nature of Precedent*, 66 N.C.L. REV. 367, 372 (1988).

[20] LLEWELLYN, THE BRAMBLE BUSH, at 38; *see also*, LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA, at 14 ("Everything, but everything, said in an opinion is to be read and understood only in relation to the actual case before the court.").

Under the spectrum model, as the statements become more narrowly tailored to the facts before the court (towards 6) they approach the status of binding holding. As the statements gain breadth (towards 1) their constraining force weakens, and they tend to approach the status of dicta. Constraining force or weight is thus a scalar quantity with magnitude inversely proportional to breadth, for path-to-judgment statements, i.e., statements that are not asides.

None of these six statements are asides, which count as pure dicta under the spectrum model. An example of an aside would be if the *In re Slobber* court had said "no cats in the park," as the question of cats in the park was not before the court. But if the court had said, "no pets in the park," this would be a very broad statement rather than an aside, even though it would include cats. Slobber was a pet but not a cat. While the statement "no cats in the park" would, as an aside, have zero constraining force under the spectrum approach, the statement "no pets in the park" could be part of the path-to-judgment reasoning and as such would have some weak constraining force.

For further illustration, some examples from real caselaw will be examined in Part III, but for now consider a subsequent constrained court faced with the question of a seeing eye dog:

> The plaintiff brought the present case under the Ratio Decidendi Park Act, claiming that the defendant's seeing eye dog unduly burdened the plaintiff's right to enjoy the park, because the plaintiff is allergic to dogs. The court below ruled in favor of the plaintiff, quoting *In re Slobber* for the proposition that "dogs are not allowed in Ratio Decidendi Park." But as we have explained, the purpose of the Act is to ensure that all residents have a reasonable opportunity to enjoy the unique landscape of Ratio Decidendi Park. Some residents, like the defendant, are blind and

> need a seeing eye dog in order to have a reasonable opportunity to enjoy the park.
>
> Though our previous statement that dogs are not allowed was not an aside and thus was not pure dicta, its relative breadth makes it only a weak precedential constraint; we weigh that constraint against countervailing factors, and consider whether a material and principled distinction is to be found. *In re Slobber* involved an unconstrained dog running free in the park. Seeing eye dogs, by contrast, are categorically constrained on a leash. The park is large enough that if one is bothered by seeing eye dogs, one can avoid them. To the extent that seeing eye dogs create any burden on the ability of other residents to enjoy the park, we do not think that burden undue when weighed against the countervailing benefit these dogs provide in allowing the blind a reasonable opportunity to enjoy the park. We reverse the decision below and hold that seeing eye dogs are allowed in the park.

The first sentence of the second paragraph above provides an example of the type of language courts could use in applying the spectrum. Though this decision creates a narrowing exception to the broad proposition from *In re Slobber* that "dogs are not allowed Ratio Decidendi Park," the narrowing is not unprincipled. The opinion here seems plausibly consistent with the overall reasoning expressed in *In re Slobber*, even though it does depart from some of the precise language. Many of the considerations that led the *In re Slobber* court to generalize against dogs are not present with seeing eye dogs, which also present countervailing benefits in that they further the goal of allowing residents the opportunity to enjoy the park in an exceptional way. This inquiry of plausible consistency with precedent is in some accord with what judges must do as a

matter of practice in order to avoid being reversed, or in order to get other judges to join their opinions.[21]

The facts of *In re Seeing Eye Dog* were different enough that of the six propositions listed above from *In re Slobber*, proposition 1 was the only one that required a departure. The decision of *In re Seeing Eye Dog* was not contrary to any of propositions 2-6 because the seeing eye dog was on a leash and was not playing fetch. The spectrum approach thus allows a constrained court some flexibility to narrow an overbroad generalization without narrowing the decision all the way down to its bare facts.

As precedent propositions get narrower, it becomes more difficult to find a principled departure that does not severely violate the overall goals of the precedent case. Propositions 4 and 5 from *In re Slobber* would seem to have strong constraining weight, because the court did not give much reason to think that the decision was based on anything particular about Slobber or even about Great Danes. One would be hard pressed to argue, in a court constrained by *In re Slobber*, that another large dog should be allowed to play fetch in the park. Propositions 2 and 3 would have somewhat less constraining force, as the large size of the dog and the game of fetch seemed as though they did play some role in the decision. The court noted that a dog playing fetch is "running free" and emphasized that Slobber was "over 100 pounds." Thus a closer question would

[21] *Cf.* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 79 (Oxford Univ. Press 2008) (discussing the "golden rule of precedent" where justices "generally know from experience, training, and temperament they cannot be too disdainful of precedents or else they risk having other justices show the same, or even more, disdain for their preferred precedents.").

be presented by, for example, a small dog that was off leash and unconstrained but remaining calm. It might be possible write an opinion allowing such a dog in a manner consistent with the overall reasoning of *In re Slobber*, though it would be more difficult than in the case of the seeing eye dog, as it would require a departure from not just proposition 1 but also from proposition 2.

It is of course somewhat of a fiction to speak of propositions from precedent cases as having objective "breadth," and "weight," or subjective "force."[22] But the spectrum framework, though not perfect, is at least a more accurate approximation of our actual usages and practices, as compared with the binary paradigm wherein propositions are supposedly either binding or unconstraining. And although it is more nuanced than the binary paradigm, the spectrum approach is not so complex as to render the concepts of holding and dicta entirely unworkable.

### B. Underlying Rationale

According to Judge Pierre Leval of the Second Circuit, one reason that dictum is not binding is that it may not have been fully considered to the extent that it speaks to issues not directly before the court.[23] This reasoning clearly applies to asides, but it also supports granting less weight to overbroad statements.

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[22] *See* PIERRE SCHLAG, THE ENCHANTMENT OF REASON 98-108 (1998) (explaining that the "objectivist aesthetic" and the "subjectivist aesthetic" are flawed, but also necessary if one wants to "do law").

[23] *See* Leval, 81 NYU L. REV. at 1263 ("In my experience, when courts declare rules that have no consequence for the case, their cautionary mechanism is often not engaged. They are far more likely in these circumstances to fashion defective rules, and to assert misguided propositions, which have not been fully thought through."). *Cf.* Re, 114 COLUM. L. REV. at 1884.

The broader a proposition is, the farther it reaches beyond the facts that were directly at issue. Cases that sweep too broadly in their reasoning can create problematic law if applied rigidly to new facts.[24] The concept was explained well by Chief Justice Marshall in *Cohens v. Virginia*:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.[25]

Under the spectrum, the less a proposition goes beyond the facts of the case, the stronger its constraining force and thus the greater the possibility that it will control in a subsequent suit where it applies. But precisely because it is narrower, it will apply to a smaller array of potential future facts.[26]

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[24] *See, e.g.*, 4-13 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1][d] ("Although *Whelan* reached the correct result given the facts of that case, its sweeping rule and broad language extend copyright protection too far.") (referring to Whelan Associates v. Jaslow Dental Labs., 797 F.2d 1222 (3d Cir. 1986)); Pamela Samuelson, *Reflections on the State of American Software Copyright Law and the Perils of Teaching It*, 13 COLUM. – VLA J. L. & ARTS 61, 63-64 (1988) ("The court's sweeping pronouncements in *Whelan* . . . went far beyond the specific issues presented by the facts of that case . . . . and although the *Whelan* decision has met with a virtual avalanche of criticism in the law review literature, the *Whelan* decision is having some influence on trial court decisions.").

[25] *Cohens*, 19 U.S at 399–400.

[26] An interesting corollary thus suggested is that under the spectrum approach, there is some sense in which all path-to-judgment propositions have roughly the

The spectrum approach is also consistent with rationales underlying *stare decisis*, one of which is fairness or equality, or the idea that like cases should be treated alike.[27] No two cases are exactly alike. Some differences justify different treatment, and some don't. So as Frederick Schauer explains, the issue "is not the sterile question of treating like cases alike," but rather "the more difficult question of whether we should base our decisionmaking norm on relatively large categories of likeness," that is, how alike do the cases have to be so as to be treated alike?[28] Professor Schauer concludes that "the prescription to treat like cases alike, does not help us choose between a decisional system with a strong precedential constraint and one with virtually no precedential constraint."[29]

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same amount of constraining "power," but broader propositions spread this power out over a wider array of potential cases and as such have less force as applied to any particular subsequent case. In other words, narrow propositions have strong constraining weight for the relatively small set of potential cases that they cover, whereas broad propositions have weak constraining weight but cover a relatively large set of potential cases. If one were inclined to think in terms of formulas, one could represent this idea as:

Power = (Breadth)*(Weight)

Because under the spectrum approach, the constraining force (or weight) of a path-to-judgment proposition tends to be inversely proportional to breadth, power would remain roughly constant as breadth changes.

[27] *See, e.g.*, Alexander, 63 S. CAL. L. REV. at 9; Schauer, *Precedent*, 39 STAN. L. REV. at 595; Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 4 (2012); Maltz, 66 N.C.L. REV. at 369; RONALD DWORKIN, LAW'S EMPIRE 225-75 (1986).

[28] Schauer, *Precedent*, 39 STAN. L. REV. at 596.

[29] *Id.* at 596-97.

It is true that under a binary paradigm, the prescription to treat like cases alike does not help us decide whether broad statements should be binding or not. But if we discard the binary paradigm, the prescription to treat like cases alike does support the notion that broader generalizations should tend to have less constraining weight. Broader statements encompass a wider array of potential facts, with a greater possibility that some such differing facts will justify different treatment under the law.

Another justification for following precedent is fostering predictability in the law, and relatedly, that observers might rely on precedent.[30] As will be shown in Part III, broad statements from different precedent cases will sometimes conflict with each other, so a system granting pure binding effect to all path-to-judgment statements would be unpredictable, in that interested parties would not know which conflicting statement to rely upon. Given that the Supreme Court in cases such as *Cohens* has cautioned that broad statements (or general expressions) must be considered in the context of the facts of the case, there should be some understanding that such statements may not always be rigidly applied to new facts and thus reliance should tend to decrease as breadth increases.[31] Although a

[30] *See, e.g.*, RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY, 78 (2016); Alexander, 63 S. CAL. L. REV. at 13; Schauer, *Precedent*, 39 STAN. L. REV. at 597; Waldron, 111 MICH. L. REV. at 4 (noting that one of the justifications for stare decisis is "the quest for constancy and predictability in the law"); Maltz, 66 N.C.L. REV. at 368.

[31] *Cf.* Re, 104 GEO. L. J. at 948 ("Because ambiguous precedent is by definition open to reasonable debate, the presence of ambiguity in a higher court precedent is a warning that interested parties should hedge their bets rather than rely on reasonably disputable meanings.").

spectrum framework is more malleable and therefore may seem less precise and less predictable, this malleability is the price to be paid for a single consistently workable framework for discussing our system of precedent.[32]

Because it provides a single consistent framework, the primary advantage of the spectrum is that it encourages increased transparency and candor. David Shapiro calls candor "the sine qua non of all other judicial restraints on abuse of judicial power," and explains that lack of candor "serves to increase the level of cynicism about the nature of judges and judging."[33] By fostering increased transparency and candor, the spectrum approach serves the rule of law.[34] The binary paradigm discourages candor.[35] As will be shown in the next part, it is not just that the courts happen to be inconsistent in their approach; the problem is deeper in that such inconsistency is unavoidable under the binary paradigm.

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[32] *Cf.* LLEWELLYN, THE BRAMBLE BUSH, at 71 ("People – and there are curiously many – who think that precedent produces or ever did produce a certainty that did not involve matters of judgment and persuasion . . . simply do not know our system of precedent in which they live.").

[33] David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1997). *See also*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 178-181 (1982) (advocating a "choice for candor" and explaining that the "language of categoricals" is "particularly prone to manipulation").

[34] *See* RAZ, AUTHORITY OF LAW, at 213 ("It is one of the important principles of the [rule of law] doctrine that the making of particular laws should be guided by open and relatively stable general rules."); Micha Schwartzman, 94 VA. L. REV. 987, 990-91 (2008) ("[J]udges must make public the legal grounds for their decisions. Those who fail to give sincere legal justifications violate this condition of legitimacy.").

[35] *Cf.* Shapiro, 100 HARV. L. REV. at 734 ("a judge who believes that a particular precedent can be fairly distinguished . . . but who nevertheless describes it as 'controlling,' can properly be accused of lack of candor").

## II – The Spectrum Compared

This part discusses different approaches to precedent and the holding-dicta distinction. First to be discussed are the too narrow approaches to holding: the pure facts-plus-outcome approach and the necessity approach. These approaches are too narrow in that they essentially limit every case to its facts, such that a case would never stand as precedent for anything beyond its own facts. Second will be the too broad announcement approach, which is too rigid in that it counts announced rules along the path-to-judgment reasoning as binding holding regardless of how broad. Third will be the cynical view, which is that courts use a narrow approach for distinguishing precedent, but a broad announcement like approach when using a precedent for support. There is truth to the cynical view, but it is to some degree an outgrowth of the binary paradigm, under which a consistent definition of holding and dicta is impossible. Fourth will be some middle ground approaches: the minimalist announcement approach, the material facts-plus-outcome approach, and finally the spectrum approach.

### A. Overly Narrow Approach

#### 1) Pure Facts-Plus-Outcome

The pure facts-plus-outcome approach is a non-sequitur because it does not allow a case to stand as precedent for anything beyond its own facts. Under this approach, a case stands only for its facts and outcome. Given that no two cases are exactly alike and that there will always be at least some minor factual distinction, the pure-facts-plus-outcome approach is somewhat inconsistent with

the concept of precedent.[36] This approach would thus undermine the values of fairness and predictability supporting stare decisis.

For example, under a pure facts-plus-outcome approach, the hypothetical case of Part I(A) would stand only for the proposition that Slobber may not play fetch in the park. It would have no constraining force for even the proposition that another Great Dane cannot play fetch in the park. Though it could of course be persuasive, a court that did not find it persuasive would have no obligation to give it weight, unless that court happened to be faced with the case of Slobber playing fetch in the park, again, (and even then the fact of time would be different). So if precedent *qua* precedent is to carry any weight at all, a *pure* all facts-plus-outcome approach cannot stand.

A secondary point about the pure facts-plus-outcome approach is that it is a type of result-centered approach, that is, an approach that focuses on the facts and the outcome rather than the reasoning.[37] In other words, result centered approaches focus on what the court did, rather than what it said about why it was doing it.[38] The holding-dicta distinction is immaterial in the context of any result-centered approach because the reasoning or words of the decision have no constraining weight.[39] Later another result-centered approach will be discussed,

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[36] Schauer, *Precedent*, 39 STAN. L. REV. at 577.

[37] MELVIN AARON EISENBERG, THE NATURE OF THE COMMON LAW 52 (1988) ("Under a result-centered approach, the rule of a precedent consists of the proposition that on the facts of the precedent (or some of them) the result of the precedent should be reached.").

[38] EISENBERG, *supra*, at 52-53.

the *material* facts-plus-outcome approach, which is a middle ground approach and is more defensible in that it does allow a case to stand as precedent for something beyond its own facts. But reasoning is seemingly an integral part of the notion of caselaw,[40] so there is something fundamentally unsatisfying about any approach that disregards reasoning as result-centered approaches do.

2) Necessity

Under the necessity approach, dictum is any statement that is not necessary to the decision in the case. This is the most prominent or traditional definition of dictum.[41] The necessity approach is not a result-centered approach, so it could grant some constraining weight to the reasoning of decisions. But as Michael Abramowicz and Maxwell Stearns explain, despite its prominence, the necessity definition is "indefensible."[42]

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[39] *See* Alexander, 63 S. CAL. L. REV. at 25 (explaining that the holding-dictum distinction cannot apply to a result model of precedent because under such a model "what the court says, as opposed to what it does, is irrelevant to the constrained court").

[40] *See* Schauer, *Giving Reasons*, 47 STAN. L. REV. at 641; n.11, *supra*.

[41] *See, e.g.*, McAllister, 47 WILLAMETTE L. REV. at 166 ("According to the traditional view, dicta include statements in an opinion not necessary to the decision of the case; holdings, on the other hand, are statements actually necessary to decide the issue between the parties.").

[42] Abramowicz & Stearns, 57 STAN. L. REV. at 959, 1056 (rejecting the necessity approach because it is inconsistent with the general understanding that alternative holdings are not pure dicta). For a discussion of alternative holdings under the spectrum, *see* Part II(D)(3), *infra*.

The simplest problem with the necessity definition is that it is almost always possible to decide a case on narrower grounds.[43] An insightful 1952 student note in Stanford Law Review put it succinctly:

> The traditional view is that a dictum is a statement in an opinion not necessary to the decision of the case. This means nothing. The only statement in an appellate opinion strictly necessary to the decision of the case is the order of the court. A quibble like this shows how useless the definition is.[44]

Thus the pure necessity approach ultimately has the same problem as the pure facts-plus-outcome approach in that it does not allow a case to have precedential weight as applied to any other case.[45] One could avoid this conclusion by taking the view that a proposition is only unnecessary if there are sufficient other grounds for the decision that were *actually expressed*, regardless of whether a narrower ground could be imagined. This is a different and more defensible approach, which I call the minimalist announcement approach, and will address below in addressing what I call middle ground approaches.

Black's Law Dictionary offers the following advice in defining dictum:

> As a dictum is by definition no part of the doctrine of the decision, and as the citing of it as a part of the doctrine is almost certain to bring upon a brief maker adverse comment, lawyers are accustomed to speak of a dictum rather slightingly, and sometimes

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[43] *Id.* at 1041 ("It is always possible to make statements narrower and more dependent on the particular facts of a case, but our system of precedent sometimes counts generalizations beyond the facts of a case as holdings.").

[44] Dictum Revisited, *supra*, 4 STAN. L. REV. at 509.

[45] *Cf.* Abramowicz & Stearns, 57 STAN. L. REV. at 1059 ("Taken to its logical conclusion, this understanding of necessity would call into serious question twin premises of legal realism: first, that judges make law, and second, that they have discretion in doing so.").

> they go so far as to intimate a belief that the pronouncing of a dictum is the doing of a wrong. Yet it must not be forgotten that dicta are frequently, and indeed usually, correct, and that to give an occasional illustration, or to say that the doctrine of the case would not apply to some case of an hypothetical nature, or to trace the history of a doctrine, even though it be conceded, as it must, that such passages are not essential to the deciding of the very case, is often extremely useful to the profession.[46]

Though this appears in a dictionary, it is not a definition, it merely opines that dicta (whatever it is) generally should not be cited in a brief but may still be "extremely useful to the profession." The ambivalent advice however does seem to imply or assume something like the necessity definition, that is, that dicta "are not essential to the deciding of the very case." Thus perhaps fittingly, this purported definition of dicta performs precisely the slight of hand that is often done by the courts, which is to act as though that the concept of dictum is so incontestably simple that it requires no definition.[47]

### B. Overbroad Announcement Approach

Rejecting the pure facts-plus-outcome and necessity approaches for being too narrow, some relatively recent commentators appear to embrace a version of what Melvin Eisenberg calls the "announcement" approach, where "the rule of a

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[46] BLACK'S LAW DICTIONARY 549 (10th ed. 2014) (quoting WILLAIM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 307 (Roger W. Cooley & Charles Lesley Ames eds., 3d ed. 1914)).

[47] *See* Dorf, 142 U. PA. L. REV. 1997 at 2003 ("Judges often appear to take for granted that discerning the difference between holding and dictum is a routine, noncontroversial matter. Yet an examination of the kinds of statements that courts label dicta reveals gross inconsistencies."); *cf.*, Dictum Revisited, *supra*, 4 STAN. L. REV. at 509 ("Dictum is one of the commonest yet least discussed of legal concepts. Every lawyer thinks he knows what it means, yet few lawyers think much more about it. Nonthinking and overuse combine to make for fuzziness.").

precedent consists of the rule it states, provided that rule is relevant to the issues raised by the dispute before the court."[48] The announcement approach is often used by courts and litigants, quoting announced statements from cases as having precedential weight.[49] In perhaps the most comprehensive treatment of dicta, Michael Abramowicz and Maxwell Stearns offer the following definitions:

> A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta.[50]

The announcement approach generally allows "judges to determine the breadth of their holdings."[51] As explained by Professors Abramowicz and Stearns, "a court can fit the facts of a case within a broad circle and resolve all the fact patterns within that circle, but it cannot then annex an additional circle and resolve the fact patterns within that circle too."[52] This reflects Michael Dorf's distinction noted earlier between asides and overbroad statements, (asides would be the "additional circle").[53] If a court deciding whether a car is allowed in a park

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[48] EISENBERG, *supra*, at 55.

[49] *Id.* ("The use of this approach is so common that it needs no extensive illustration. Pick up any reported case and examples will come readily to hand.").

[50] Abramowicz & Stearns, 57 STAN. L. REV. at 1065. The second sentence of this definition makes clear that it assumes a binary paradigm. *See* n.9, *supra*.

[51] *Id.* at 1040-41.

[52] *Id.*

[53] *See* Dorf, 142 U. PA. L. REV. at 2007.

were to say "no wheelchairs in the park," that would be an aside, but if it were to say "no vehicles in the park," that would just be a broad statement, even though it would include wheelchairs. Cars and wheelchairs are two separate non-overlapping circles, but "vehicles" is a larger circle that surrounds both. Under the announcement approach, it seems that asides are dicta but there is no breadth limit on holdings. To put it differently, under this binary approach, asides have constraining force of zero, but path-to-judgment statements have full binding force regardless of their breadth.

The conceptual problem with the announcement approach is that it does not sufficiently account for the fact that courts, in explaining their decisions, will inevitably make overbroad generalizations. If decisions are to stand as precedent for anything beyond their own facts, they must generalize to some extent. These generalizations in reasoning are not accidental, to the contrary, they at the core of our system of precedent.[54] But generalizations will not always be perfect; the courts cannot be expected to foresee or fully consider all potential fact situations falling within the generalizations that they necessarily make.[55]

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[54] *See* Schauer, *Giving Reasons*, 47 STAN. L. REV. at 635 ("The institution we call 'law' is soaked with generality, for one of its central features is the use of norms reaching beyond particular events and individual disputes. Indeed it is more than mere coincidence that the very name for the enterprise – law – is the same one that scientists use to designate exceptionless empirical generalizations.").

[55] LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA, at 15 ("The original judge, later courts will say, did not have the other possible sorts of cases in mind; now we have one of those cases not foreseen by him before us for decision, and we must reconsider the overbroad wording he employed . . . and so on.").

To return to the hypothetical of Part I(A), the *In re Seeing Eye Dog* court would seem under this approach to be bound by the prior announcement that "dogs are not allowed" and would not have any leeway to create a reasonable narrowing exception for seeing eye dogs.[56] But the fact is that this type of narrowing happens all the time.[57] This is why a consistently workable framework for holding and dicta cannot treat all path-to-judgment generalizations as pure binding holding.

A pure announcement approach would seem to be in some accord with Pierre Schlag's aesthetic of "the grid," where "law is stabilized and objectified into an orderly field of clearly delineated, neatly bounded, perfectly contiguous legal conceptions and propositions," with the appeal of "stability, predictability, and uniformity."[58] But as Professor Schlag explains, the grid is "inert," and "does not move," such that "even to pose the problem of legal change is already to

[56] One might attempt to avoid this type of conclusion by arguing for example that the *In re Slobber* court did not really mean to endorse the proposition that *all* dogs are not allowed in the park. *Cf.* Abramowicz & Stearns, 57 STAN. L. REV. at 966 ("There will often be ambiguities about just what propositions a particular opinion endorsed, and where the boundary lines of those propositions lie."). But again, generalizations in caselaw are inevitable and are not accidental. If cases are to stand as precedent for anything beyond their own facts, they must generalize. When a court makes a generalization such as "dogs are not allowed in the park," the court often cannot have not considered all possible instances of dogs in the park, (this is *a fortiori* true as the generalizations get broader and the cases more complex), but the court nevertheless makes and endorses the generalization.

[57] *See* n.6, *supra*; *see also*, EISENBERG, *supra*, at 55 (explaining that "despite its predominance the announcement approach does not describe all judicial practice," as "[m]any cases do deal with precedents in part by using moderate versions of the minimalist or result-centered approaches to reformulate the rule announced by the precedent court"); *see also*, Part III, *infra*.

[58] Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1055 (2002).

weaken the grid."[59] If path-to-judgment announcements are generally considered pure binding holding, it seems inevitable that holdings will conflict. This runs counter to any claim that the announcement approach has the advantage of predictability as compared with a more flexible approach, for if two announced rules conflict, it may be difficult to predict which would prevail.[60] Both the Supreme Court and distinguished commentators have accordingly cautioned that general statements must always be viewed in the context of the facts of the case decided.[61] A consistently workable model of holding and dicta must better account for the fact that the announcing court "might have selected its rationale without fully anticipating the implications of its immediate holding for a significant future case."[62]

### C. Cynical Inconsistent Approach

The cynical view is that a court will take a broad approach to precedent it wants to follow, and a narrow approach to precedent that it does not want to follow. Karl Llewellyn explains that the doctrine of precedent is "two-headed" or

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[59] *Id.* at 1065-66.

[60] *Id.* at 1063 ("One problem posed by the multiplication of classification schemes is simple: What happens when some lines of division in one scheme sometimes register in some other set and sometimes not? Which classification scheme enjoys priority over the other – or are they coequals?"); *see also*, Part III, *infra*.

[61] *See* n.15, n.20, n.25, *supra*.

[62] Abramowicz & Stearns, 57 STAN. L. REV. at 1050. *See also*, RAZ, *supra*, at 188 ("courts may be and often are a little careless in formulating rules").

"janus-faced," in that a judge will apply one doctrine of precedent when following a case and a "wholly contradictory" doctrine when distinguishing a case.[63]

But when a court classifies a statement from a precedent case as dicta, there is at least a pretense that this means something more than that the court does not intend to follow it. That is, the terms holding and dicta are generally presented as constative rather than performative.[64] A court would not say "we do not agree with this statement, so it is dictum," rather, it might say "this statement is dictum, so we are not required to follow it." To use an inconsistent approach to dicta is thus to disguise a performative as a constative, and to mask the true basis for the decision.[65]

Nevertheless, there is truth to the cynical view.[66] For example, Michael Dorf reviews the Supreme Court's removal line of cases and argues persuasively

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[63] LLEWELLYN, THE BRAMBLE BUSH, at 69-70 ("[T]here is one doctrine for getting rid of precedents deemed troublesome and one doctrine for making use of precedents that seem helpful.").

[64] *See* J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 4 (Harv. Univ. Press. 1975) (explaining that the performative masquerading as a constative can "engender rather special varieties of nonsense"); David Gray Carlson, *Jurisprudence and Personality in the Work of John Rawls*, 94 COLUM. L. REV. 1828, 1830 n.9 (1994) ("A 'performative' is an articulation that demands no prior reality for its existence. A 'constative' is a report of some pre-existing reality.").

[65] *See* Dictum Revisited, *supra*, 4 STAN. L. REV. at 517-18 (explaining that the use of the word dictum "is absolutely indefensible if the primary meaning of the word is incorrectness," because in that case "the word only disguises the true basis of decision"); Pintip Hompluem Dunn, *Note, How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*, 113 YALE L. J. 493, 525 (2003) ("the Court enacts the constative fallacy by attempting to disguise its performative utterances as constative ones").

that the decisions are not consistent.[67] But considering the prominent approaches that have been discussed so far, it is easy to see why courts are sometimes inconsistent in their approach to dicta. To return to the example from Part I(A), under an announcement approach, *In re Slobber* would be binding even in its broadest announced proposition (1), but under a necessity approach, it would stand (at most) only for the narrowest proposition (6). If the only choices are these two extremes, then some inconsistency is unavoidable, given the inevitable reality of overbroad generalizations. A subsequent constrained court like the *In re Seeing Eye Dog* court, in reasonably declining to treat proposition (1) as dispositive, under a binary paradigm would be forced to conclude that the statement is dicta, using one of the narrow approaches such as necessity. Yet such a narrow approach – if consistently applied – is a slippery slope that would essentially narrow every decision all the way to its facts, so it would not allow the court to use a generalization from another case for support.

The problem of inconsistency is related to the adversarial nature of our legal system. A litigant generally has incentive to argue for either a strong or weak reading of a particular precedent, and may be reluctant to recognize ambiguity. Similarly, a court ultimately will adhere to a proposition or not, which can create the illusion of a binary paradigm. Both courts and litigants are under pressure to choose one side over another and to justify that choice, and

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[66] *See, e.g.*, Andrew C. Michaels, *Pot Calls Kettle Dictum: Expanded Secret Prior Art in Obviousness*, 26 FED. CIR. BAR J. 93 (2016) (exposing inconsistency in Federal Circuit treatment of dicta).

[67] *Dorf*, 142 U. PA. L. REV. at 2022-24.

accordingly may have a tendency to make questions of precedent seem more clear cut than they actually are. When a court follows a proposition from precedent, it can seem as though that proposition had absolute binding effect, though perhaps it was merely one factor among many. Conversely, when a court declines to follow a proposition from a precedent case, it may seem as though that proposition was treated as pure dicta and was given no constraining weight, though it may have simply been outweighed by other countervailing cases or considerations. Courts may have some tendency to foster these illusions as a way of attempting to bolster their decisions, intimating that the result is clearly dictated by precedent rather than a more subjective balancing of authorities.[68]

A consistently workable middle ground framework could help curb deceptive manipulation of precedent and thereby further judicial candor and legitimacy. As Professors Abramowicz and Stearns explain:

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[68] *See* GREENAWALT, *supra*, at 442 ("[S]imple dichotomies such as holding-dictum and overruling-distinguishing do not adequately capture our complex practices. Lawyers who want to use concepts in a way that will persuade may not need to worry too much about these subtleties, but for scholars who seek to illuminate what the practices are really like finding an appropriate terminology is difficult."); Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983) ("Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest."); Pierre Schlag, *My Dinner at Langdell's*, 52 BUFF. L. REV. 851, 857 (2004) (providing a fictional dialogue on reductionism in law, wherein the "Duncan Kennedy" character states: "sometimes, very often actually, taking too intelligent a view of the matter will hinder the judge's effort to reach a holding, to achieve a conclusion"); Paul F. Campos, *Advocacy and Scholarship*, 81 CAL. L. REV. 817, 836 (1993) ("The doctrinal approach is, in short, almost a purely rhetorical activity bereft of any significant descriptive depth.").

> If the holding-dicta distinction were perfectly clear (a goal that we recognize as impossible), then disingenuous manipulation of precedents would be immediately recognizable. That clarity would reduce the incidence of manipulation and increase the legitimacy of judicial process.[69]

While perfect clarity surely is impossible, a framework that accounts for legitimate narrowing of the inevitable overbroad general statements, while still allowing cases to weigh as precedent for something beyond their own facts, would be a step in the right direction. But the prevailing binary paradigm is standing in the way of such a framework.

### D. Middle Ground Approach

#### 1) Minimalist Announcement

Under the minimalist announcement approach, the narrowest *announced* rule is the holding, and everything else is dicta.[70] This approach is somewhat of a hybrid between the necessity approach and the pure announcement approach. It differs from the necessity approach because here it does not matter if the court *could* have articulated a narrower basis, or if such a basis can be imagined. And the minimalist announcement approach differs from the pure announcement approach in that instead of counting all path-to-judgment announcements as holdings, only the narrowest announced rule is a holding.

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[69] Abramowicz & Stearns, 57 STAN. L. REV. at 1025. *See also*, Dorf, 142 U. PA. L. at 2067.

[70] *Cf.* EISENBERG, *supra*, at 52 (discussing a "minimalist" approach where "the rule of a precedent consists of that part of the rule announced by the precedent court's opinion that was necessary for the decision").

One problem with this approach is that it may be difficult to determine the narrowest announced rule in a decision. But even setting this difficulty aside, there is a more fundamental problem in that the minimalist announcement approach perversely grants broader precedential authority to less thorough opinions. By articulating narrower reasons for its decision, a court would render any broader generalizations devoid of constraining force. In contrast, under a spectrum approach, although a narrow rule would have stronger constraining weight than a broad one, articulation of a narrower rule would not *ipso facto* eliminate (or even lessen) the constraining force of a broader announcement.

The minimalist announcement approach thus helps to demonstrate the problem with the binary paradigm. Finding announcement too broad and necessity too narrow, one seeks a middle ground. But any attempt to draw a middle ground *line* between holding and dicta will be arbitrary and unsatisfactory. To return to the Abramowicz and Stearns device of a circle, it seems impossible to say that once the circle expands beyond a certain size it crosses the line from holding to dicta.[71] The spectrum approach does not draw a line; rather, it posits that constraining force gradually weakens as the circle expands.

2) Material Facts-Plus-Outcome

The material facts-plus-outcome approach is attributable to Arthur Goodhart, who was of the view that the "principle of the case is found by taking

[71] Abramowicz & Stearns, 57 STAN. L. REV. at 1040-41; *See also*, Leval, 81 NYU L. REV. at 1258 ("There is no line demarcating a clear boundary between holding and dictum. What separates holding from dictum is better seen as a zone, within which no confident determination can be made whether the proposition should be considered holding or dictum.").

account (a) of the facts treated by the judge as material, and (b) his decision as based on them."[72] This approach differs from the pure facts-plus-outcome approach discussed earlier in that the precedential effect of a case is not limited based on *all* of the facts, only the *material* facts. This view is more defensible because it allows a case to stand as precedent for something beyond its own facts. Though no two cases will have exactly the same facts, some may have the same facts in all material respects. The key then is to distinguish between a "material" factual distinction, and a distinction without a difference.[73] Professor Goodhart explains that "the facts of person, time, place, kind, and amount are presumably immaterial unless stated to be material."[74]

The material facts-plus-outcome approach is, like the pure facts-plus-outcome approach, a result-centered approach. So the holding-dictum distinction is immaterial under this approach; it does not matter whether certain propositions of reasoning are holding or dicta because the reasoning has no constraining effect in and of itself.[75] Under this view, the only relevance of the opinion is in its identification of material facts.[76]

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[72] Goodhart, 40 YALE L. J. at 182.

[73] *Cf.* Robin Feldman, *A Conversation on Judicial Decision-Making*, 5 HAST. SCI. & TECH. L. J. 1, 22 (2013) (explaining that in determining whether a factual distinction should make a legal difference, one "must ask why the [factual] difference matters in the full doctrinal framework of the question").

[74] Goodhart, 40 YALE L. J. at 169.

[75] *See* Alexander, 63 S. CAL. L. REV. at 25; *see also*, n.39, *supra*.

The common criticism of Professor Goodhart's approach is that it is difficult to determine what facts were material.[77] Julius Stone demonstrated this criticism using the British case of *Donoghue v. Stevenson*,[78] where the plaintiff discovered a decomposed snail in a bottle of ginger beer purchased in a café. Stone argued that the fact as to the vehicle of harm could be stated at various levels of generality as follows:

> An opaque bottle of ginger beer, or an opaque bottle of beverage, or any bottle of beverage, or any container of commodities for human consumption, or any containers of any chattles for human use, or any chattel whatsoever, or any thing (including land or buildings).[79]

But to push back on this criticism, the problem of identifying the correct level of generality is somewhat inherent in our system of precedent.[80] And some degree of flexibility is desirable so as to allow subsequent courts to adjust for unforeseen situations and evolving circumstances.[81]

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[76] Goodhart, 40 YALE L. J. at 169 ("It is by his choice of the material facts that the judge creates law.").

[77] *See, e.g.*, EISENBERG, *supra*, at 53.

[78] M'Alister (or Donoghue) v. Stevenson, [1932] L.R. App. Cas. 562 (H.L. 1932).

[79] Stone, 22 MOD. L. REV. at 608.

[80] *See* Schauer, *Precedent*, 39 STAN. L. REV. at 577 ("[I]t is clear that the relevance of an earlier precedent depends on how we characterize the facts arising in the earlier case.").

[81] *Cf.* OLIVER W. HOLMES, THE COMMON LAW 5 (1881) ("The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become."); Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 465 (1897); DWORKIN, LAW'S EMPIRE, at 413 ("Law's attitude is constructive: it aims,

The spectrum model borrows from Professor Goodhart's approach in allowing a constrained court to narrow an overbroad announcement by drawing a principled *material* distinction from the facts of a precedent case, so long as the narrowing is generally consistent with the overall goals and reasoning of the precedent case. The fundamental difference though is that the spectrum approach begins with and focuses primarily on the *reasoning* of the precedent case as having constraining weight, whereas the material facts-plus-outcome approach, being result centered, focuses on the facts and outcome.[82]

Professor Goodhart proposes some rules for determining what facts are material, but these rules are somewhat out of touch with the way in which modern judicial opinions are written.[83] One such rule is that "if the opinion does not distinguish between material and immaterial facts then all the facts set forth must be considered material."[84] But modern opinions are generally not directly focused on distinguishing material and immaterial facts.

The primary problem with the material facts-plus-outcome approach is thus that it does not accord with modern practice, for courts generally focus their

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in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past.").

[82] *See* Goodhart, 40 YALE L. J. at 182 ("The principle of a case is not found in the reasons given for the decision.").

[83] *See* Abramowicz & Stearns, 57 STAN. L. REV. at 1052 & n.286 (explaining that parts of Goodhart's analysis "appear dated," for example how he "carefully analyzes the precedential value of cases where courts have not issued opinions and where different reporters indicate different versions of the facts, small problems today").

[84] Goodhart, 40 YALE L. J. at 182.

decisions on reasoning from announced rules in precedent, rather than on identifying material facts.[85] As Melvin Eisenberg explains, "observation shows that courts usually reason from precedent by starting with the rule the precedent announced," rather than "disregarding the rule entirely and instead constructing a rule out of the facts of the precedent and its result."[86] Particularly with the advent of computerized searching of cases, though not necessarily a positive development in all respects, the quoting of snippets of cases has pushed practice further in this direction.[87] Judith Stinson provides an interesting account of how gradual changes to the bluebook citation rules reflect an increasing elevation of judicial statements.[88]

The material facts-plus-outcome approach does have the advantage of providing some weight to precedent while still allowing for reasonable distinctions. But the spectrum framework discussed next has this same

[85] *See* Abramowicz & Stearns, 57 STAN. L. REV. at 1055; Dorf, 142 U. PA. L. REV. at 2036-37 ("judges typically pay a great deal of attention to the words as well as the results of judicial decisions").

[86] EISENBERG, *supra*, at 55.

[87] Stinson, 76 BROOKLYN L. REV. at 245-46 ("lawyers and judges increasingly rely on the words found in judicial opinions rather than the underlying components of those judicial decisions"). *See also*, Thomas L. Fowler, *Holding, Dictum . . . Whatever*, 25 N.C. Cent. L.J. 139, 140-141 (2003). Apparently some had begun to notice a shift as early as 1927. *See* Herman Oliphant, Presidential Address, Association of American Law Schoools (Dec. 1927), reprinted in 14 A.B.A. J. 71, 71-72 (1928) ("we are well on our way toward a shift from following decisions to following so-called principles").

[88] Stinson, 76 BROOKLYN L. REV. at 255-258. *See also*, Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1247 (2007).

advantage, and is more in accord with modern practices by placing weight on the reasoning of decisions rather than just facts and outcomes.

3) Spectrum

To use the spectrum approach, first, determine whether the proposition in question is what I have been referring to as an aside.[89] If it is an aside, then it is pure dicta and has no constraining force, though it may of course be persuasive. Otherwise, the proposition has some constraining force, with the amount of constraining force tending to be inversely proportional to breadth. A subsequent court may find the relatively weak constraining force of broad generalizations outweighed by countervailing considerations, and may narrow overbroad statements by finding a principled distinction consistent with the overall reasoning of the precedent case. This inquiry correlates with breadth because it will be more difficult to find a material distinction from within generalizations that are narrowly tailored to the facts of the precedent case.

Applying the device of the circle,[90] to the hypothetical of Part I(A), one could think of the six propositions as six concentric circles, with proposition 1 being the largest (broadest) circle, and proposition 6 being the smallest (narrowest) circle. The circles would be centered around a point representing the facts of *In re Slobber*. Only proposition 1, the largest circle, covered the facts of *In re Seeing Eye Dog*. The seeing eye dog facts could accordingly be thought of as a point lying outside of all of circles 2-6, and thus just inside the periphery of

[89] *See* n.9, *supra*; Part I(A), *supra*.

[90] *See* n.52-53, *supra*, and accompanying text.

the largest circle. The closer the facts before a constrained court lie to the center of the precedent circle, the more difficult it is to find principled distinctions from all of the surrounding generalizations, and thus the stronger the constraining force of the precedent case.

The general notion of a spectrum involving holding and dicta is not entirely new to this article. Kent Greenawalt raised the possibility of a spectrum "according to which the degree of force varies according to multiple criteria," as an "alternative conceptualization" as compared with the traditional binary holding dictum distinction, and noted that "what judges actually do probably lies closer to this alternative conceptualization than to the traditional dichotomy."[91] The possibility of a spectrum was also briefly raised, but dismissed, by Michael Dorf, who wondered if "the holding/dictum distinction oversimplifies matters by substituting a sharp dichotomy for a multidimensional spectrum."[92] Professor Dorf worried that "if this were so, we might have to abandon the distinction entirely," and ultimately rejected "so radical an explanation."[93]

But recognizing the spectrum does not necessarily require that we throw up our hands and completely abandon the concepts of holding and dictum. Asides remain pure dictum. Broad path-to-judgment statements could be referred to as weak constraints, narrow ones as strong constraints. Courts and litigants would no doubt still sometimes refer to themselves as "bound" by "holdings" when there

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[91] GREENAWALT, *supra*, at 194.

[92] Dorf, 142 U. PA. L. REV. at 2013.

[93] *Id.*

is no sufficient reason to deviate from a strong enough constraint, but it should be recognized that such utterances are more performative than constative.

Shawn Bayern has also advocated for a flexible approach to case interpretation focusing on context and intent, where "the precedential effect of a previously announced rule corresponds to what we infer the court intended to announce, given what we know about the limitations in the court's viewpoint arising from the factual context in which the disputed issues were raised before the court."[94] Under Professor Bayern's approach, "announcements from previous cases" are part of a "continuum of authority along multiple axes," precedent "precisely to the extent context dictates."[95] Professor Bayern argues "for a general interpretive approach that aims primarily to determine the intent of a case's legal announcements."[96] But Professor Bayern's approach seems to be to discard the holding-dicta distinction in favor of his contextual analysis of intent.[97] The spectrum approach set forth in this article provides some structure for enhancing the holding dicta distinction rather than discarding it.

Although breadth is a useful starting point, other considerations, such as the existence of alternative lines of reasoning, may affect the weight of the

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[94] Bayern, 36 FLA. ST. U. L. REV. at 137.

[95] *Id.* at 138, 143.

[96] *Id.* at 174. *But cf.*, Abramowicz & Stearns, 57 STAN. L. REV. at 1054 n.300 ("Requiring an analysis of judicial intent, however, is unlikely to promote clarity in distinguishing holding from dicta.").

[97] Bayern, 36 FLA. ST. U. L. REV. at 126.

constraint in a secondary sense. The general consensus seems to be that alternative paths of reasoning are not dicta, because if that were so, a case that expressed alternative reasons would have no holding.[98] But this reasoning rests on a binary paradigm; i.e., it can't be that both alternatives are pure dicta, so they must both be holdings. In reality though, alternative holdings are sometimes treated as having diminished weight.[99] Judge Pierre Leval explains that courts "often give less careful attention to propositions uttered in support of unnecessary alternative holdings," and he considers such statements as part of a "zone" of uncertainty lying between holding and dictum.[100] Discarding the binary paradigm, the existence alternative lines of reasoning may function to weaken – but not eliminate – the constraining weight of any single line of reasoning.

Though stopping short of a continuous spectrum, certain terminology in occasional use suggests a non-binary paradigm. The term "judicial dicta," (as compared with "obiter dicta") has been called a "paradox" by Michael Sean Quinn because it seems contrary to the traditional binary paradigm.[101] Similarly, a non-binary approach was suggested by Karl Llewellyn, who distinguished

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[98] *See* Abramowicz & Stearns, 57 STAN. L. REV. at 958 n.15 ("it cannot be the case that an opinion that strikes down a law on two grounds rather than one expresses no holding"); Dorf, 142 U. PA. L. REV. at 2044; Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1940).

[99] *See* Michaels, 26 FED. CIR. BAR J. at 98.

[100] Leval, 81 NYU L. REV. at n.23.

[101] Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 716-717 (1999) ("The notion of judicial dicta as semi-binding rules is contrary to the theory of stare decisis as classically conceived. Nevertheless it is a reality.").

between the holding, which "must be stated quite narrowly," and the *ratio decidendi*, which provides the "generally applicable rule of law on which the opinion says the holding rested," and may have "so to speak, second-order precedential value."[102] However, Professors Abramowicz and Stearns note that this "distinction between holding and *ratio decidendi* has blurred, as has the distinction between dictum and obiter dictum," and refer to the distinctions as seemingly dated.[103]

Larry Alexander appears to endorse a version of the announcement approach, which he calls the "rule model," though he does recognize that the rules announced could have a "moderate but not absolute strength."[104] But he dismisses as "theoretically indefensible," a position he takes to be expressed in a dissent by Justice Harlan "that a judge may be bound by a narrow, but still general rule, with which he disagrees, but not be bound by the broader rule that the previous court endorsed and from which it derived the narrow rule."[105] Justice Harlan's position in dissent was as follows:

> The same illogical way of dealing with a Fourteenth Amendment problem was employed in *Malloy v. Hogan*, 378 U.S. 1, which held that the Due Process Clause guaranteed the protection of the Self-Incrimination Clause of the Fifth Amendment against state

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[102] LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA, at 14-15 ("The *ratio* as stated is, of course, always prima facie the rule of the case, but only prima facie.").

[103] Abramowicz & Stearns, 57 STAN. L. REV. at 1048.

[104] Alexander, 63 S. CAL. L. REV. at 51.

[105] *Id.* at 18 n.20 (referring to Justice Harlan's dissent in Duncan v. Louisiana, 391 U.S. 145 (1968)).

> action. I disagreed at that time both with the way the question was framed and with the result the Court reached. . . . I consider myself bound by the Court's holding in *Malloy* with respect to self-incrimination. . . . I do not think that *Malloy* held, nor would I consider myself bound by a holding, that every question arising under the Due Process Clause shall be settled by an arbitrary decision whether a clause in the Bill of Rights is "in" or "out."[106]

Justice Harlan's position does seem indefensible to the extent that it draws a binding / non-binding line in between the broad statement and the narrow one, as there is no reason provided for drawing the line precisely there. But setting aside this binary aspect, the position is rehabilitated. Justice Harlan appears to have been of the reasonable view that while the *Malloy* Court carefully considered the question with respect to self-incrimination, a generalization as to every question arising under the Due Process Clause would reach too far beyond the *Malloy* facts to have much subsequent constraining force.

If the spectrum were somehow adopted into legal practice, wouldn't courts and litigants just argue about where on the spectrum to place a statement, or about the relative weights of different propositions? Yes, surely they would, but in my view this is a more meaningful argument as compared with one in which the term dicta has no consistent definition. If dictum has no consistent objective meaning, then it is impossible to have a meaningful debate as to whether a proposition is dictum. The binary paradigm breeds inconsistency and is ultimately incoherent. The spectrum approach can be thought of as a common battlefield on which the two sides of a debate over precedent can more directly engage.

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[106] *Duncan*, 391 U.S. at 181.

But then wouldn't courts and litigants just find more nuanced ways to disagree? Is this just another (meta) installment in the endless debate between rules and standards?[107] Perhaps in some sense, but the problem is not just that the "rule" definition of dicta is not consistently applied; it's deeper in that there is no consistent definition at all, because the prevailing binary paradigm is incapable of supporting one. A consistent definition is *impossible* under a binary paradigm. If the concepts holding and dicta are to be used, it seems to me that they should have a more consistent meaning. Otherwise, the terms serve only to disguise the true basis for decision, hindering transparency and discouraging judicial candor.[108] The spectrum framework is a suggestion for how to make the concepts of holding and dictum more nuanced but still workable; a more accurate and less deceptive approximation of actual legal practices.

## III – The Spectrum In Practice

This article will now look at two examples from caselaw and evaluate them in light of the spectrum approach as compared with other approaches. The treatment of different precedents cited in these cases, narrowing them or using them for support, is difficult to reconcile under any one binary approach, but can be explained consistently under the spectrum framework.

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[107] *See* Schlag, *Rules and Standards*, 33 UCLA L. REV. at 383 (explaining that the "dialect" of rules versus standards "doesn't go anywhere" and "is an arrested dialect"); Schlag, *My Dinner at Langdell's*, 52 BUFF. L. REV. at 859-860.

[108] *See* GREENAWALT, *supra*, at 195 (explaining that a binary holding dictum paradigm "invites manipulation by courts, both those setting precedents and those following them, thus encouraging a lack of candor").

### A. Arkansas Game & Fish Commission v. United States

In this Fifth Amendment Takings case, the Supreme Court reversed the Federal Circuit, and in doing so warned the Federal Circuit not to adhere too rigidly to broad statements in the Court's precedents.[109]

The alleged taking occurred by way of increased recurrent flooding due to changes in release patterns from a dam controlled by the Army Corps of Engineers. The plaintiff, Arkansas Game and Fish Commission, owned a wildlife preserve along the banks of the Black River in northeast Arkansas. The Clearwater Dam was located upstream from the Commission's land and was constructed by the Corps in 1948. In 1953, the Corps adopted a plan known as the Water Control Manual to determine the rates at which water would be released from the dam. But in 1993, the Corps approved a deviation from the plan in response to requests from farmers. Under the deviation, the Corps released water from the dam at a slower rate than usual, providing downstream farmers with a longer harvest time, but ultimately causing flooding and damage to the Commission's land. The Commission objected to these deviations, but the deviations continued until 2001, when they were finally abandoned and the original plan was put back into effect.[110]

In 2005, the Commission filed suit claiming that the flooding caused by the deviations from 1993 to 1999 resulted in substantial damage to its land

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[109] Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012).

[110] *Id.* at 515-517.

including the destruction of timber. At the trial level, the United States Court of Federal Claims ruled in favor of the Commission under the Takings Clause of the Fifth Amendment, and awarded $5.7 million to the Commission.[111] However, the Federal Circuit reversed, finding no taking.[112] In doing so, the Federal Circuit relied on a 1924 Supreme Court case, *Sanguinetti v. United States*, which had summarized the Court's Fifth Amendment Takings jurisprudence and then stated:

> Under these decisions and those hereafter cited, in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the *direct result* of the structure, and constitute an actual, *permanent* invasion of the land, amounting to an appropriation of and not merely an injury to the property. These conditions are not met in the present case.[113]

The *Sanguinetti* Court thus found that no taking had occurred under the Fifth Amendment. The statement above is a broad rule: no taking unless certain conditions are met, such as "direct result" (i.e., foreseeability), "and" permanence. The statement draws a "no-taking" circle around the large class of cases that are either not foreseeable or not permanent.[114] This circle covered the facts of *Sanguinetti* and led directly to the judgment of no taking – ("These conditions are not met in the present case") – so the statement was not an aside, though it was

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[111] Ark. Game & Fish Comm'n v. United States, 87 Fed. Cl. 594 (Fed. Cl. 2009).

[112] Ark. Game & Fish Comm'n v. United States, 637 F.3d 1366 (Fed. Cir. 2011).

[113] Sanguinetti v. United States, 264 U.S. 146, 150 (1924) (emphases added).

[114] To say that both foreseeability "and" permanence are "necessary" for a taking, is to make the conditional statement: if not both foreseeable and permanent, then no taking, which may be represented as: –(fp) → -t. This is logically equivalent to: (-f v -p) → -t, that is, if not foreseeable or not permanent, then no taking. *See, e.g.*, W.V. QUINE, METHODS OF LOGIC 14 (4th ed. 1982).

broader than necessary. A narrower rule such as: "no taking unless foreseeable," would have been sufficient to decide *Sanguinetti*.

Seizing on the word "permanent" in the above quote from *Sanguinetti*, the Federal Circuit in *Arkansas* reasoned that because the deviations from the original plan occurred only from 1993-2000 and were never intended to be permanent, they were only temporary in nature and as such could not be considered a taking under the broad announced rule of *Sanguinetti*.[115] In other words, because the government actions were not permanent, they fell within *Sanguinetti*'s broad precedential "no-taking" circle. Although the panel majority recognized that temporary action generally may lead to a temporary takings claim under the subsequent Supreme Court decision in *First English*,[116] it was of the view that "cases involving flooding and flowage easements are different."[117] In support of its flooding distinction, the Federal Circuit quoted *Loretto*, where the Supreme Court had summarized its own takings cases and had stated that they "consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion . . . that causes consequential damage within, on the other."[118]

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[115] 637 F.3d at 1378-79 ("Because the deviations from the 1953 plan were only temporary, they cannot constitute a taking . . . . The deviations in question were plainly temporary and the Corps eventually reverted to the permanent plan.").

[116] First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304 (1924).

[117] *Arkansas*, 637 F.3d at 1374-75.

But the Supreme Court reversed the Federal Circuit. The Court did not buy the "flooding is different" distinction that the Federal Circuit had used to avoid *First English*, noting that there was "certainly no suggestion in *Sanguinetti* that flooding cases should be set apart from the mine run of takings claims."[119] With respect to *Sanguinetti* and the broad quote which the Federal Circuit had relied upon to require permanence, the Court narrowed that proposition:

> [N]o distinction between permanent and temporary flooding was material to the result in *Sanguinetti*. We resist reading a single sentence unnecessary to the decision as having done so much work. In this regard, we recall Chief Justice Marshall's sage observation that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."[120]

The Court's statement that the sentence in question from *Sanguinetti* was "unnecessary to the decision," sounds in the necessity approach discussed in Part II(A)(2), supra, though the Court does not actually say that the sentence was dicta.[121] So perhaps the Court is using the traditional necessity definition of dicta so as to find the quoted sentence from *Sanguinetti* not binding.

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[118] *Id.* at 1375 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428 (1982)).

[119] *Arkansas*, 133 S. Ct. at 520.

[120] *Id.* (quoting Cohens v. Virginia, 19 U.S. 264 (1821)).

[121] Although aspects of the holding dicta distinction are at play here, neither the Federal Circuit opinion nor the Supreme Court opinion in this case would have been picked up in the empirical study of dictum by David Klein and Neal Devins, which searched for "dictum," "dicta," "not a holding," or "not the holding." Klein & Devins, 54 WILLIAM & MARY L. REV. at 2035. Nor would the majority opinion in *Lexmark*, discussed in Part III(B), *infra*, have been picked up were it

However, earlier in the decision, the Court appears to be using more of the announcement approach, quoting *First English* for the proposition that once the government's actions have worked a taking of property, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[122] Under a pure necessity approach, this generalization from *First English* would not have any constraining force, because the *First English* Court could have provided a narrower rule, such as one limited to regulatory (rather than physical) takings, or at least one not including floodings.[123] Yet the *Arkansas* Court seems to treat that broad generalization as having some constraining force.[124] If the generalization from *First English* has

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not for the dissent in that case. Professors Klein and Devins acknowledge that their strategy "probably missed some cases in which lower courts confronted dicta from higher courts but did not draw attention to the fact that the statements were dicta," but they consider it "highly unlikely that there are a substantial number of such cases," because they "suspect that very few judges would purposefully engage in unprofessional conduct by pretending not to notice a statement from a higher court that appears to bear on the case being decided." *Id.* at 2042. But as these cases demonstrate, a court is not necessarily acting unprofessionally in narrowing a broad statement without using those terms. Indeed this is related to the idea that broad statements are something in between holding and dicta, so it wouldn't be correct to call them pure dicta. *See id.* at 2048 (noting that some of the apparent reluctance to use the holding-dicta distinction "may be tied to discomfort over the drawing of this line").

[122] 133 S. Ct. at 519 (quoting *First English*, 482 U.S. at 321).

[123] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 328 (2002) (describing *First English* as establishing the rule that "once a court finds that a police power regulation has effected a taking, the government entity must pay just compensation for the period commencing on the date the regulation first effected the taking, and ending on the date the government entity chooses to rescind or otherwise amend the regulation").

[124] *See Arkansas*, 133 S. Ct. at 520 (noting that *Sanguinetti* was decided before *First English*, and stating "[i]f the Court [in *Sanguinetti*] indeed meant to express

some precedential weight even though it wasn't necessary to the decision, as it appears that it did for the *Arkansas* Court, then the Court is not consistently using the necessity approach in the *Arkansas* decision.

So then maybe the *Arkansas* Court is using the announcement approach? But under a pure announcement approach, the quoted sentence from *Sanguinetti* would in fact appear to be a binding holding as the Federal Circuit had found, since it does appear to be part of the path of reasoning that leads directly to the result.[125] Given that it did not treat the broad statement from *Sanguinetti* as holding, the *Arkansas* Court is not consistently using the announcement approach either. Thus the Court could be using what I have called the "cynical approach," applying a narrow necessity approach to precedent it wants to distinguish (*Sanguinetti*), and a broad announcement approach to precedent it wants to use as support (*First English*).[126] Under the binary paradigm, such a conclusion is difficult to avoid.

However, the *Arkansas* Court's approach to *Sanguinetti* can be reconciled with its approach to *First English* under a spectrum model. Using the spectrum, the quoted sentence from *Sanguinetti* does have some constraining weight, as it is a path-to-judgment statement and not an aside. However, because it is quite broad and reaches far beyond the facts that were at issue in *Sanguinetti*, its

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a general limitation on the Takings Clause, that limitation has been superseded by subsequent developments in our jurisprudence").

[125] *See Sanguinetti*, 133 S. Ct. at 149; n.111-112, *supra*, and accompanying text.

[126] *See* Part II(C), *supra*.

constraining weight is relatively weak. The *Arkansas* Court was able to find a principled distinction consistent with the overall goals and reasoning of *Sanguinetti*, namely, that *Sanguinetti* primarily "rested on settled principles of foreseeability and causation."[127] The Court appeared to be of the view that the use of the word "permanent" in *Sanguinetti* may not have been fully considered, referring to the "Court's passing reference to permanence," and explaining that "no distinction between permanent and temporary flooding was material to the result in *Sanguinetti*."[128] The *Arkansas* Court was able to find whatever weak constraining weight the broad statement from *Sanguinetti* had to be outweighed by other factors, such as the constraining force of *First English* and other temporary takings cases.[129] Unlike binary approaches such as announcement and necessity, the spectrum approach provides a framework that can consistently reconcile a court's treatment of supporting precedent (like *First English*), with its treatment of opposing precedent (like *Sanguinetti*).

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[127] *Arkansas*, 133 S. Ct. at 520. That is, *Sanguinetti* did not appear to rest on any lack of permanence in the flooding, rather, it appeared to rest more primarily on the idea that the overflow was not "the direct result of the structure," or in other words that the flooding was not the foreseeable result of the government actions. *See Sanguinetti*, 264 U.S. at 149-150 ("It was not shown that the overflow was the direct or necessary result of the structure; nor that it was within the contemplation of or reasonably to be anticipated by the Government."). The *Arkansas* Court emphasized that by contrast, the flooding of the Commission's land was found to be the foreseeable result of the Corps' deviated release patterns. *Arkansas*, 133 S. Ct. at 523 ("The Court of Federal Claims found that the flooding the Commission assails was foreseeable.").

[128] 133 S. Ct. at 520.

[129] *See Arkansas*, 133 S. Ct. at 520; n.122, *supra*.

B. Lexmark Int'l, Inc. v. Impression Products

In *Lexmark Int'l v. Impression Products* before the *en banc* U.S. Court of Appeals for the Federal Circuit, the majority and the dissent disagreed, *inter alia*, on how to interpret Supreme Court precedent.[130] The majority took a flexible approach in some accord with the spectrum model of holding and dicta. By contrast, the dissent seemed to take a more rigid announcement approach.

The plaintiff, Lexmark, made and sold printers as well as toner cartridges, and owned a number of patents covering the cartridges and their use. The relevant cartridges were sold domestically and at a discount but subject to an express single-use/no-resale restriction. The defendant, Impression, later acquired the cartridges, not directly from Lexmark, but rather after a third party had physically modified them so as to enable re-use, in violation of the restriction. Impression then resold the cartridges, and Lexmark sued for patent infringement. Impression attempted to defend under the doctrine of patent exhaustion, arguing that by selling the cartridges, Lexmark had exhausted its patent rights in those cartridges and could no longer sue for infringement. Impression pointed to the Supreme Court decision in *Quanta*, which had stated that "[t]he authorized sale of an article that substantially embodies a patent exhausts the patent holder's rights and prevents the patent holder from invoking patent law to control postsale use of

[130] Lexmark Int'l, Inc. v. Impression Prods., 816 F.3d 721 (Fed. Cir. 2016) (en banc), *certiorari granted* (Dec. 2, 2016).

the article."[131] As this statement on its face covered the facts of *Lexmark*, Impression argued that it should control.

The majority however found no exhaustion, and distinguished *Quanta* on the grounds that in *Quanta*, the sales of the patented article were made by a licensee of the patent, rather than by the patentee itself, and also the licensee sales of the article were not subject to any restrictions.[132] Although some broad statements from Supreme Court cases such as *Quanta* would seem to cover the facts in *Lexmark* and thus require a finding of patent exhaustion, the Federal Circuit majority narrowed those statements by interpreting them contextually:

> Context is particularly important where, as here, the phrase being interpreted comes from judicial opinions not directly deciding the point at issue. Chief Justice Marshall wrote for the Court almost 200 years ago: "It is a maxim not to be disregarded, that general expressions in every opinion, are to be taken in connection with the case in which those expressions are used." . . . We bear that maxim in mind in applying the body of Supreme Court case law on exhaustion: that body of precedent contains no decision against a patentee's infringement assertion in the present circumstances, and the decisions on related circumstances require careful reading to determine the best understanding of what issues the Court actually decided.[133]

The dissent, for its part, thought that the majority took too much liberty with precedent, stating that the majority's "justifications for refusing to follow Supreme Court authority establishing the exhaustion rule misconceive our role as

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[131] Quanta Computer, Inc. v. LG Elecs., Inc., 553 U.S. 617, 638 (2008).

[132] *Quanta*, 553 U.S. at 737-38 ("In short, *Quanta* did not involve the issues presented here. The facts defining the issues for decision, and the issues decided, were at least two steps removed from the present case. There were no patentee sales, and there were no restrictions on the sales made by the licensee.").

[133] *Lexmark*, 816 F.3d at 742 (quoting *Cohens*, 19 U.S. at 399-40).

a subordinate court."[134] The dissent stated that the majority "characterized the statements of the exhaustion rule in the Supreme Court cases as mere dictum. . . ."[135] However, though the majority did interpret broad statements contextually and narrow them, it did not use the term dicta or dictum. Thus the dissent seems to have assumed the logic of the binary paradigm: because the majority did not follow the broad statements from *Quanta* and similar cases, the majority necessarily viewed such statements dicta.

But the majority may instead have been using something like the spectrum approach, according those broad statements some constraining weight but finding them outweighed by other factors in light of their breadth and material factual distinctions. The majority explained that the broad statements were made in cases such as *Quanta* which "did not involve restricted patentee sales of patented articles," as were at issue in *Lexmark*.[136] The majority at least arguably drew a principled narrowing distinction in this respect, reasoning that because the Court in cases such as *General Talking Pictures* had allowed patentees to impose restrictions through licenses, they should be allowed to do so through direct sales as well.[137] Thus the majority appears to have found the relatively weak

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[134] *Lexmark*, 816 F.3d at 780 (Dyk, J., dissenting).

[135] *Id.*

[136] *Lexmark*, 816 F.3d at 739. *See also*, *id.* at 749 ("we do not think it appropriate to give broad effect to language in Univis, taken out of context, to support an otherwise-unjustified conclusion here on a question not faced there").

[137] *See id.* at 735 ("It is undisputed and clear under Supreme Court precedent – most prominently, the 1938 decision in *General Talking Pictures* – that Lexmark

precedential constraint of broad statements from cases like *Quanta* to have been outweighed by other cases and considerations.[138]

The dissent, by contrast, was taking more of an announcement approach, stating the Supreme Court "cases impose no such qualification on the rule announced."[139] The dissent also seemed to imply that even if the broad statements *were* dicta, they should have been followed simply because they were written by the Supreme Court.[140] It is indeed sometimes suggested that courts have a particular obligation to give serious consideration to Supreme Court dicta.[141] In fact, as the dissent pointed out, the Federal Circuit has previously stated: "As a subordinate federal court, we may not so easily dismiss [the

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would not have exhausted its patent rights in those cartridges, upon the manufacturing licensee's sale (the first sale), if a buyer with knowledge of the restrictions resold or reused them in violation of the restrictions. . . . And there is no sound reason, and no Supreme Court precedent, requiring a distinction that gives less control to a practicing-entity patentee that makes and sells its own product than to a non-practicing-entity patentee that licenses others to make and sell the product.") (referring to *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938)).

[138] *See Lexmark*, 816 F.3d at 741. Aside from *General Talking Pictures*, another consideration appears to have been the majority's view that the exhaustion doctrine is an interpretation of the "without authority" language in 35 U.S.C. § 271. *See Lexmark*, 816 F.3d at 734 ("If ordinary congressional supremacy is to be respected, exhaustion doctrine in the Patent Act must be understood as an interpretation of § 271(a)'s 'without authority' language.").

[139] *Lexmark*, 816 F.3d at 780 (Dyk, J., dissenting).

[140] *See id.* at 780 and n.7.

[141] *See, e.g.*, In re McDonald, 205 F.3d 606, 612 (3d Cir. 2000) ("We should not idly ignore considered statements the Supreme Court makes in dicta. The Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket.").

Supreme Court's] statements as dicta but are *bound to follow them*."[142] It is true that Supreme Court dicta should not be dismissed "easily," but it is an overstatement to call them binding.[143] This should be evident for example from the discussion of *Arkansas* in Part III(A), supra, where the Supreme Court reversed the Federal Circuit and cautioned it not to obstinately or rigidly apply such "general expressions" from Supreme Court precedent but rather to pay attention to context.[144] As Judge Leval has explained:

> Anything the Supreme Court says should be considered with care; nonetheless, there is a significant difference between statements about the law, which courts should consider with care and respect, and utterances which have the force of binding law. The Supreme Court's dicta are not law.[145]

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[142] Ariad Pharm., Inc. v. Eli Lilly & Co., 598 F.3d 1336, 1347 (Fed. Cir. 2010) (en banc) (emphasis added).

[143] One could, however, argue that broad path-to-judgment statements from Supreme Court precedent deserve additional constraining weight on lower courts as compared with such statements from a court's own precedent, given different considerations as between vertical stare decisis and horizontal stare decisis. *See* Schauer, *Precedent*, 39 STAN. L. REV. at 576 ("the hierarchical ordering of decisionmakers implicates considerations different from those involved when a decisionmaker is constrained by *its* previous actions as opposed to the orders of its superiors in the hierarchy"); Stinson, 76 BROOKLYN L. REV. at 242-243 ("The United States Supreme Court occupies a unique position in our legal system. In direct contrast to the theories of judicial restraint that underlie stare decisis, many advocate that the Supreme Court is not only able to act without restraint, but sometimes is obligated to do so.").

[144] *Arkansas*, 133 S. Ct. at 520 (quoting Cohens v. Virginia, 19 U.S. 264 (1821)). The proposition in question from *Sanguinetti* was a broad statement rather than an aside, and as such was not pure dicta under the spectrum, but if broad statements are not to be absolutely binding, then pure dicta surely are not either.

[145] *Leval*, 81 NYU L. REV. at 1274.

The spectrum framework is a common ground where the majority and dissent could have engaged more directly, forcing each side to more directly address the opposition. The dissent could for example have acknowledged that the broad statement from *Quanta* might not have had absolute binding effect on its own, but argued that the fact that the Court has repeatedly made such statements multiplies the constraining weight.[146] And the majority could have acknowledged that the broad statements from cases like *Quanta* did have some weak constraining weight, but explained that it found those constraints outweighed by other factors. Such acknowledgements are difficult under a binary paradigm, where a statement must be either binding holding or pure dicta, but they are at least possible under a spectrum. Thus although disputes would remain as to its application, the spectrum approach has the advantage of facilitating judicial candor and more transparent common analysis.[147]

## Conclusion

Modern scholars correctly reject the facts-plus-outcome approach and the necessity approach for being inconsistent with the concept of precedent, as under these methods a case stands as precedent for nothing beyond its own facts. But with the announcement approach, the pendulum swings too far in the other direction, with sweepingly broad announced rules achieving the status of binding

[146] *Lexmark*, 816 F.3d at 774-776 (Dyk, J., dissenting) (listing quotes from nine Supreme Court cases).

[147] *See* Abramowicz & Stearns, 57 STAN. L. REV. at 1025 ("We believe that a regime that encourages a judge to disguise true beliefs about cases ultimately undermines the rule of law, first by reducing predictability and legal clarity, and second by inhibiting the emergence of nuanced doctrine.").

holding. The all or nothing nature of this debate rests on the prevailing binary paradigm, where a proposition must be either holding or dicta, one or the other.

When we attempt to discuss the complex reality of precedent using a binary holding dicta paradigm, what we end up with is inconsistency. A court that wants to distinguish a broad proposition will use a narrow necessity definition, while one that wants to use such a proposition for support will take a broad announcement approach. The incoherent binary paradigm stems in part from the binary nature of judging. Courts must ultimately decide the case one way or the other, and in explaining their decisions, have an understandable tendency to spin statements from precedent as holding or dicta in whatever way supports the desired result. But the inconsistency is not acknowledged. Courts maintain the façade that there is some objective meaning to holding and dicta; that the terms are constative rather than performative. The effect is to disguise the true basis for decision.

This article offers a spectrum as a more consistent and transparent framework, one that accounts for reasonable legitimate narrowing of overbroad statements, while still according some weight to precedent. Though more nuanced than a binary framework, this approach remains workable by first setting aside "asides" as pure dictum, and then treating the path-to-judgment reasoning as a spectrum, along which constraining force tends to be inversely proportional to breadth. Such a framework would encourage disputes over the weight of precedent to meet head on instead of sailing past each other on different

definitional ships, thereby facilitating judicial candor and more refined analysis, serving the values of transparency and rule of law.

Given that the holding-dicta distinction is rather fundamental in our legal system, the amount of discussion it has engendered is not surprising. What is perhaps surprising is the persistent grab bag of contradictory approaches.[148] Although some have begun to question the binary nature of the holding dicta distinction, it is still often taken for granted. It may be that the binary paradigm is somewhat of a hidden assumption standing in the way of a more meaningful framework for holding and dicta.[149]

[148] *But see*, Dictum Revisited, *supra*, 4 STAN. L. REV. at 509 ("Few desire to endanger such a useful tool by subjecting it to the destructive light of analysis."); Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053, 2055 (1993) ("There is, thus, a very real sense in which the judge wants not to see, wants not to understand, wants not to pursue certain lines of inquiry."); n.68, *supra*.

[149] *Cf.* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 49-50 (1983) ("[C]ategorical schemes have a power that is greatest when it is least noticed. They channel the attention of those who use them, structuring experience into the focal and the peripheral.").