Precedent and Legal Authority: A Critical History

Charles W. Collier
University of Florida Levin College of Law, collier@law.ufl.edu

Follow this and additional works at: https://scholarship.law.ufl.edu/facultypub

Part of the Courts Commons, Jurisprudence Commons, and the Rule of Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in UF Law Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.
PRECEDENT AND LEGAL AUTHORITY: A CRITICAL HISTORY

In this Article, Professor Charles Collier traces out a general theory of prece-
dential authority through historical sources. The Article focuses on three particu-
larly influential views of precedent: Wambaugh's concept of dictum, Oliphant's concept of 
stare decisis, and Goodhart's concept of ratio decidendi. These views illustrate an 
underlying tension between two distinct doctrines of precedential authority. The first 
doctrine, derived from humanistic thought, restricts legal authority as narrowly as 
possible to the express terms of an original text. The second doctrine draws on the 
broad, generalizing tendencies of the empirical sciences and their corresponding con-
ceptions of scientific authority. The two doctrines coexist in a state of essential ten-
sion, because legal principles can become non-precedential either by being too broad 
and general or by being too narrow and particularized.

CHARLES W. COLLIER*

Legal discourse could not advance far without an underlying 
notion of "legal authority." Such a notion is implied in talk about 
authoritative legal texts and opinions, about "holdings" and 
"doctrines" of cases, and about the "gravitational force of 
precedent"—all of which are comparatively common in current legal 
discussions. Yet, the idea of legal authority itself raises basic questions 
to which the prevailing answers seem strikingly inadequate. How is it, 
for example, that particular legal texts become authoritative in the first 
place? What makes a case decided in 1409 "good precedent" for 
determining who is liable for leakage from a gas burner installed in 
1929?1 Why is a case about contracting for an incestuous marriage 
bounding on, or even relevant to, the decision in a case of attempted

* Assistant Professor of Law, University of Florida. B.A. 1972, Reed College; M.A. 1973, 
M.Phil. 1975, Ph.D. 1978, Yale University; J.D. 1985, Stanford Law School.

An earlier version of this Article was presented as a Senior Thesis at Stanford Law School in 1985. I would like to thank Bob Gordon and Tom Grey of Stanford for advising me and guiding 
the course of my research on that original project. I am also greatly indebted to Jonathan Culler, 
Kermit Hall, Barbara Hauser, Bob Moffat, John Monahan, Walter Probert, Rolf Sartorius, 
Frederick Schauer, Chris Slobogin, Sally Jan Smith, Laurens Walker, G. Edward White, James 
Boyd White, and Ann Woolhandler for helpful comments, criticisms, advice, and encouragement. 
Martha Downey, Paul Healy, Curtis Kinghorn, and Brian Solomon provided valuable research 
assistance; the University of Florida Department of History gave me an opportunity to try out 
these ideas at a faculty colloquium; and the University of Florida College of Law supported much 
of the research on this article with a Summer Research Appointment.

1. See Bottomley v. Bannister, [1932] 1 K.B. 458, 464 & n.1; cf. A. GOODHART, 
PRECEDENT IN ENGLISH AND CONTINENTAL LAW 29 (1934).
poisoning? How can a series of empirical social science studies be said to constitute “modern authority” for a judicial decision?

This Article traces out a general theory of precedent and legal authority through historical sources. It focuses on a particularly influential triumvirate of legal Latinisms: dictum, stare decisis, and the ratio decidendi of a case. These concepts are closely related, and each of them has had an important interpreter and expositer in modern Anglo-American legal thought: Wambaugh (dictum); Oliphant (stare decisis); and Goodhart (ratio decidendi). One purpose in bringing these concepts and thinkers together is to see whether they shed new light on each other or add up to more than the sum of their parts. A second purpose is to document, reconstruct, and “creatively redescribe” this important chapter in the intellectual history of legal doctrine. As Holmes once remarked, “It is perfectly proper to regard and study the law simply as a great anthropological document... as an exercise in the morphology and transformation of human ideas.”

Sections I, II, and III of the Article are devoted to the three thinkers and concepts mentioned above. In Section IV, I analyze and explain the emergence of two, distinctly opposed, doctrines of precedential authority. The first doctrine is based on the narrow, deferential reading of original texts that is peculiar to the humanistic intellectual tradition. The second doctrine draws on the broad, generalizing tendencies of the natural and social sciences and their corresponding conceptions of scientific authority. Both doctrines are necessary to a full understanding of precedential authority because propositions can become non-precedential either by being too broad and general or by being too narrow and particularized. Thus, the two doctrines of precedential authority coexist in a state of “essential tension,” like the thesis and antithesis of a Hegelian dialectic.

I. WAMBAUGH AND THE TRADITIONAL CONCEPT OF DICTUM

The term dictum derives from the Latin dicere, “to say,” and refers in legal usage to anything in a judicial opinion that is “merely” said and


4. Accordingly, any evaluative or comparative weighing of the merits of the various doctrines I describe will be incidental to my purpose. At many points I do, nevertheless, attempt to make sense of or explain these doctrines, and if an explanation is carried out far enough, it will often implicitly suggest justifications as well. On the justifications for this type of legal scholarship, see Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57 (1984).

5. Holmes, Law in Science and Science in Law, 12 Harv. L. Rev. 443, 444 (1899).
not, strictly speaking, meant. That which is "obiter dictum" is stated only "by the way" to the holding of a case and does not constitute an essential or integral part of the legal reasoning behind a decision. The concept of dictum has thus been used to distinguish that which is significant, authoritative, binding—in short, meant—in a judicial opinion from that which is not. As can be seen, the study of dictum necessarily involves consideration of broad themes in adjudication and legal interpretation.6

Eugene Wambaugh's *Study of Cases*7 provides a good initial orientation in the traditional doctrine of dictum. Nominally, it is a kind of primer for the beginning law student on how to read and interpret reported cases. As Wambaugh notes in his preface, a major aim of the book is to teach students to "detect dicta" and to determine the pertinence and precedential weight of cases.8

To this end an opening chapter is devoted to "finding the doctrine" of a case, that is, "ascertaining the proposition of law for which a decision is authority."9 For Wambaugh this inquiry immediately turns in the direction of exploring common law principles of judicial restraint.10 Apparently, by understanding the self-constraints common law judges consider themselves subject to, we are better able to assess the pertinence and weight of opinions written subject to those constraints. By understanding in general terms what the judges ought to be constrained by, we understand what they ought to have been constrained by in particular cases. Whatever individual judges do in particular cases, the true "doctrine" of their decisions is what survives scrutiny in light of these general principles of judicial restraint; the unconstrained residue is dictum.

The first of Wambaugh's four principles of judicial restraint is that "the court making the decision is under a duty to decide the very case presented and has no authority to decide any other."11 Common law courts do not render advisory opinions or decide hypothetical cases;12 and, in the cases they do take, they decide only points upon which the disposition of the cases depends.13 "[T]he court's duty is to consider the

---

7. E. WAMBAUGH, THE STUDY OF CASES (2d ed. 1894) [hereinafter STUDY OF CASES].
8. Id. at vii.
9. Id. at 8.
10. One might well have expected to be convinced first that cases in fact always embody such propositions and to learn why they do. Wambaugh explains this later.
11. Id. See also State v. Baughman, 38 Ohio St. 455, 459 (1882).
whole case to the extent, and only to the extent, requisite in order to
decide what . . . to do." Wambaugh offers three rationales for this
principle of restraint. First, adjudication is an essentially pragmatic or
practical activity aimed at resolving real disputes, "deciding what to
do" about them; the court's duty is "measured by this practical
purpose." Viewed from this perspective, deciding unnecessary questions
would be an inefficient use of judicial resources—"to do this would be
to waste strength." But even if courts had unlimited resources, two
additional reasons would dictate this form of restraint.

Deciding unnecessary questions or taking on moot cases would
threaten the adversary system of proof. This system depends on ad-
versely affected parties to bring their concerns to the court's attention,
to present their own evidence, and to vindicate their view of the law
through full argument. Any other procedure would amount to a pre-
judgment, a binding impairment of the rights of parties who have not
been afforded an "opportunity to be heard." Finally, the "case or
controversy" requirement of Article III and other separation-of-pow-
ners principles inherent in our state and federal constitutional schemes
dictate that controverted legal questions come before courts only in
their judicial capacity.

For a court to decide in advance a case or
question not before it would be an exercise of legislative power, binding
on other courts before which such cases or questions might properly
arise later. Respect and moral support for the law are weakened where

Eng. Rep. 35, 40 (1841) ("[I]n modern times it has been the usage of judges, not to go out of the
way to decide every point that arises, but to adjudicate only upon the point necessary for the
disposal of the cause."); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 574-76 (1895); State
v. Pugh, 43 Ohio St. 98, 122, 1 N.E. 439, 453-54 (1885).
14. STUDY OF CASES, supra note 7, at 9.
15. Id.; cf. Holmes, Codes and the Arrangement of the Law, 5 AM. L. REV. 1 (1870),
reprinted in 44 HARV. L. REV. 725 (1931) ("It is the merit of the common law that it decides the
case first and determines the principle afterwards."); J. Gray, THE NATURE AND SOURCES OF THE
LAW 100 (1921) ("the function of a judge is not mainly to declare the Law, but to maintain the
peace by deciding controversies").

Of course, courts decide cases, but they also guide people and other courts. Perhaps a focus
on this aspect of judicial decisionmaking would lead to some different conclusions about the na-
ture of precedent. For the necessary corrective, see infra text accompanying notes 215-22.
16. STUDY OF CASES, supra note 7, at 10.
17. Answer of the Justices, 148 Mass. 623, 625, 21 N.E. 439 (1889); see also P. Car-
18. See H. Hart & H. Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 64-70
(2d ed. 1973). Hart and Wechsler cite the following as factors to be considered: the "sheer . . .
dispersion of thought" when legal questions are formulated in the abstract, without the aid of a
concrete set of facts (ex facto jus oritur); the diminished scope for "the play of personal convic-
tions or preferences" with respect to public policy; the value of having courts function as "organs
of the sober second thought" in appraising actions already taken, rather than as "advisers at the
front line of governmental action"; and the importance of the above factors in ensuring social
acceptability of judicial decisions. Id. at 67. See also A. Bickel, THE LEAST DANGEROUS BRANCH
113-17 (1962).
courts are seen as "constitutional advisers" to other branches of government rather than as neutral, passive adjudicators of private rights.  

Wambaugh's second principle is a "minimalist" version of a rule of decision: The doctrine of a case is "a proposition which strips away the unessential circumstances and declares a rule as to the essential ones." All cases are of course, strictly speaking, unique and absolutely distinguishable on their facts. If a court must decide only the actual case before it and no other, as Wambaugh's first principle requires, the rule of decision in any given case could apparently apply only where identical fact situations presented themselves, that is, nowhere else. But of course the authority of doctrine is not this limited; it applies wherever the differences between cases are unessential. Assuming that we can decide what is essential and what is not, Wambaugh restricts the true doctrine of a case to the rule without which the essential questions in the case could not have been decided as they were. If a question could have been decided either way without affecting the outcome of a case, then "according to the principles of the common law, an opinion on such a question is not a decision." The doctrine of a case is the narrowest rule by which the essential circumstances presented in the case could have been decided and disposed of as they were. This is implicitly also the rule that judges should follow in deciding cases. They should articulate and follow the narrowest rule that leads to a correct decision on the essential facts of the case, and no more. Thus, Wambaugh's sec-

---

19. J. Bryce, American Commonwealth part I, ch. xxiii (1913); Fed. R. Evid. 103; P. Carrington & B. Babcock, supra note 17, at 406-09.

20. Study of Cases, supra note 7, at 15.

21. For Wambaugh, this assumption appears to be unproblematic; but see Section III(B) infra, especially text accompanying notes 106-11; cf. Schauer, Precedent, 39 Stan. L. Rev. 571, 582-83 (1987). An "unessential" difference is one whose presence or absence would not affect the determination of the legal principle for which a case is authority. As examples of unessential differences, Wambaugh gives "a difference as to the persons interested" (unless in one case the party is an infant, a lunatic, an alien, "or otherwise clothed with extraordinary qualities") and a difference as to the times of the events upon which the cases are based (unless in one case a statute of limitations, laches, or some similar principle makes the lapse of time important). Study of Cases, supra note 7, at 14; see also id. at 68-69.

22. [L]et [the beginner] first frame carefully the supposed proposition of law. Let him then insert in the proposition a word reversing its meaning. Let him then inquire whether, if the court had conceived this new proposition to be good, and had had it in mind, the decision could have been the same. If the answer be affirmative, then, however excellent the original proposition may be, the case is not a precedent for that proposition, but if the answer be negative the case is a precedent for the original proposition and possibly for other propositions also. Study of Cases, supra note 7, at 17 (footnote omitted).

23. Carroll v. Carroll's Lessee, 57 U.S. 128, 136, 16 How. 275, 286-87 (1853); cf. Bole v. Horton, Vaughan 360, 382, 124 Eng. Rep. 1113, 1124 (1673) ("An opinion given in Court, if not necessary to the judgment given of record, but that it might have been as well given if no such, or a contrary, opinion had been broach'd is no judicial opinion, nor more than a gratis dictum.").
ond principle, which starts out looking like a key to discerning the true doctrine of a case, is actually another rule of judicial restraint. The keys to proper interpretation are the same as the rules of proper adjudication.

Wambaugh's third principle is that the words of the court are not themselves the doctrine of the case and are, therefore, not authority of the highest order. The actual language of the judges does not have the force of precedent, but to the extent that it expresses "the proposition of law necessarily involved in the decision" it is not dictum either. It lies somewhere in between. The doctrine of the case may be expressed by none of the court's language, as when an order issues without an opinion. It may even be wrongly expressed by the court. Be that as it may, the essential propositions from which the case derives its precedential force can, Wambaugh asserts, be discovered by anyone who "diligently studies the problem and the result."25

Wambaugh appears to be groping here toward a kind of Platonic dualism of the doctrine and the language expressing it. The doctrine of the case is an idea, a reason, an intellectual proposition.26 It may be expressed more or less appropriately in the words of the court, but it is never exhausted or perfectly captured in any actual formulations. Wambaugh compares the case, which comprises the problem submitted to the court and the result eventually reached, to an artificial person whose essence consists in uttering a proposition of law. "[I]t is the court's duty to hear this proposition and to embody it in words."27 But again, these words derive their precedential value not from the fact that they have actually been pronounced by judges, but from the fact that they express, however imperfectly, the doctrine necessarily involved in the decision. They are approximations to the ideal.28

25. Id. at 22; see also Dubuque v. Illinois Cent. R.R. Co., 39 Iowa 56, 79-80 (1874).
27. Study of Cases, supra note 7, at 21.
28. Wambaugh gives the Platonic example of a musician's reduction of a bird's tune to musical notation: "To the extent to which the notation is accurate, it is not the musician's composition, but is the bird's own song; and to the extent to which the notation is inaccurate, it is not the bird's song, but is a more or less original and pleasing composition by the musician." Id. at 22-23.

For articulations of the view, pace Dworkin and numerous others, that it may be a mistake to treat rules and their formulations as different in any interesting sense and that rules—including the rules we construct from materials we take to be precedentially authoritative—may in an important sense reside in rather than behind their formulations, see Schauer, Book Review, 85 Mich. L. Rev. 847 (1987) (reviewing R. Dworkin, Law's Empire (1986)); Schauer, Formalism, 97 Yale L.J. 509 (1988).
According to Wambaugh, judges have no special priority in determining the propositions for which their decisions shall be precedent.29 Judges are like artists whose works, once released to the general public, mean what the cultured learning of the day says they do.30 The work of judges is the decision, not the opinion. They may try to explain their work in an opinion, but they need not—and even if they do, they may get it wrong. In principle, anyone who thinks long enough, hard enough, and reasonably enough about a case can determine the proposition of law necessary to the decision, though this may be expressed in any number of ways. Thus, whatever courts may say, they cannot make an unnecessary proposition the doctrine of a case.

In his fourth principle Wambaugh offers a kind of corrective to the third, which might be taken to imply that judges’ opinions can safely be ignored. No, says Wambaugh, a case is not a precedent for any proposition that was not in the mind of the court. It is possible that a correct judgment could be arrived at for the wrong reasons, but is it likely? Ascribing infallibility to a judge’s decisions while at the same time discrediting his powers of reasoning is an “undignified piece of perverseness. Surely the judgment and the reasons for it are too intimately connected to allow of such distinctions; they must stand or fall together. . . .”31 We cannot assume that a decree from the bench is like the enchanted bullet in Der Freischutz, which always hits its mark even when the gun is pointed in the opposite direction. Instead, we demand that the judicial work-product be the result of considered deliberation. “What makes decisions of value as precedents is the fact that they are based upon reasoning and not upon chance. . . . Otherwise decisions could not be . . . reduced to a scientific system . . . .”32 Such an assumption probably underlies any practical activity thought of as a rational enterprise.

Where deliberation is completely lacking, a case is of no authority for any proposition whatever. The same applies on a smaller scale to issues or questions not considered by the court; the decision says noth-

29. See Study of Cases, supra note 7, at 23; cf. R. Cross, Precedent in English Law 42 (3d ed. 1977) (“it is trite learning that the interpreter has nearly as much to say as the speaker so far as the meaning of words is concerned”).


The sonnet . . . was written 55 years ago, and I should hardly trust myself to say now exactly what interpretation, if any, might exactly correspond to what may have been in my mind when I wrote it . . . .

When once anything is given to the public it belongs to the public and they are at liberty to find in it what meaning they choose.

31. Study of Cases, supra note 7, at 25 n.2 (quoting The Reporting System, 7 Law Rev. 223, 227-28 (1848)).

32. Study of Cases, supra note 7, at 25, 24.
ing about them. A judgment entered without an opinion can stand for something, if we have reason to think it was duly considered by the court; but unless there is an opinion "there cannot be a very useful or weighty precedent." And what about wrong but thoughtfully considered opinions supporting correct decisions? If Wambaugh were true to his "Platonism," he would insist that such a decision affirmed something even if no one were insightful enough to understand it or express it. Conversely, the misunderstood or misexplained idea—the wrongheaded opinion—is not an intellectual advance. Wambaugh does not say this, however. The wrongheaded opinion misexplaining a case is "a precedent, though often not a strong one, for the proposition really necessary." The goal of adjudication is to dispose of social problems in socially acceptable ways, not to discover eternal truth. The imperfect product of a conscientious judge is still a useful contribution to the essentially pragmatic, practical activity of adjudication. Opinions do not lack precedential value because judges are wanting in wisdom or insight; rather, they lack it when judges have not fully deliberated, bestowed "sufficient thought" on an issue, or "solemnly decided" a question with full argument at the bar. When Wambaugh says that "what makes decisions of value as precedents is the fact that they are based upon reasoning and not upon chance," by "reasoning" he does not mean any specialized scientific training or philosophical insight; he means reasoning that is subject to the safeguards of the legal process.

In the remainder of his book, Wambaugh elaborates a conception of dicta as judicial pronouncements upon which sufficient thought has not been bestowed. This can occur when a general principle applicable to the decision of one case is brought to bear on other cases to which it is inapplicable. In Cohens v. Virginia, for example, Chief Justice Marshall, in a rare admission of error, explains the inapplicability of his own opinion in Marbury v. Madison as follows:

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. . . . The reason of this maxim is obvious. The question actually before the court

33. Id. at 23 n.2; see also id. at 47 ("If the reasons for a decision are not given, the decision can be of little weight, for it does not appear to have been the result of thorough investigation."); cf. J. VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN 39-40 (1986) ("Of course any analyst pays attention to what a speaker did after speaking, but only as an aid in determining what the speaker meant. What a judge did is evidence only, not the object of investigation.") (emphasis in original).

34. The form of justice, to take a Platonic example, is every bit as real even when no one is trying to discover or understand it; the idea is true even though no one happens to be thinking it.

35. STUDY OF CASES, supra note 7, at 23.

36. Id. at 19, 23 n.2.
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.\(^{37}\)

*Marbury v. Madison* proceeded upon the principle that an affirmative grant of one sort of jurisdiction must negate any other sort of jurisdiction, if otherwise the relevant constitutional clause would be totally inoperative. "Having such cases only in its view," acknowledges Chief Justice Marshall in *Cohens*, "the [Marbury] court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle."\(^{38}\)

In relation to the fact situation of *Cohens*, the *Marbury* principle was dictum. The *Marbury* Court either had not sufficiently thought through the general principle to foresee the circumstances presented in *Cohens* or had intended that the principle, however general in the abstract, be understood and interpreted only in relation to circumstances such as were presented in *Marbury*. In either case, the authority of the principle is, to paraphrase Wambaugh, roughly proportional to the amount of thought bestowed on it by the court in relation to the situation to which it would be applied.

Another way that less thought can be bestowed on a question is for the judge or tribunal to be inherently less thoughtful. Conversely, the opinions of more learned and esteemed judges carry more weight and have more authority as precedents because more thought has been in-

\(^{37}\) Cohens v. Virginia, 19 U.S. 82, 97-98, 6 Wheat. 264, 399-400 (1821); cf. Quinn v. Leatham, [1901] App. Cas. 495, 506:

... [E]very judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found.

See also State v. Clarke, 3 Nev. 566, 572-73 (1867) ("The reason assigned for their [dicta's] not being entitled to weight is that usually they are upon some point not discussed at bar. . . ."); Railroad Cos. v. Schutte, 103 U.S. 118, 143 (1880) ("It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion.").

\(^{38}\) Cohens, 19 U.S. at 98, 6 Wheat. at 401. Chief Justice Marshall concedes that in *Marbury* "some expressions are used which go far beyond" the reasoning of the Court in support of that decision (*id.* at 98, 6 Wheat. at 400) but adds that "[t]he general expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion; limitations which in no degree affect the decision in that case, or the tenor of its reasoning." *Id.* at 99, 6 Wheat. at 401-02.
vested in them.39 Wambaugh notes, for example, that great weight is attached to any opinion delivered by Coke, Hale, Holt, Lord Mansfield, Baron Parke, Chancellor Kent, Chief Justice Marshall, Justice Story, Chief Justice Shaw, or Chief Justice Gibson.40 The same applies to certain courts. At various times in our history the Supreme Judicial Court of Massachusetts, the New York Court of Appeals, the California Supreme Court, and the United States Supreme Court have enjoyed unquestioned preeminence, at least in certain fields of law. Even the dicta of these esteemed judges and courts take on considerable authority, especially when they are strengthened through frequent citation and approval.41 As noted above, an uncritical reliance on dicta would violate accepted principles of judicial restraint and the separation of powers. Yet to give no weight at all to the dicta and non-judicial utterances of learned jurists would be to ignore aids that in any other field of inquiry would seem well worth investigation.42 After all, as Justice Samuel F. Miller remarked, “the convincing power of the opinion or decision in a reported case must depend very largely on the force of the reasoning by which it is supported, and of this every lawyer and every court must of necessity be his and its own judge.”43 One must simply recall the inherent limitations on the precedential value of dicta and keep in mind that even the most esteemed jurists make ill-conceived pronouncements every so often.

In general, learned judges or courts necessitate an important qualification of Wambaugh’s principles by which dicta are to be discounted. When he discusses the safeguards of the legal process—the adversary

39. The weight given to dicta and the like is dependent largely upon the learning and reputation of the utterer. Some old text-books have very great weight; and so have the dicta of some famous judges. . . . [In this sense a dictum is authority, its weight varying with the learning of the court and with the amount of thought bestowed by the court upon the point covered by the dictum.] STUDY OF CASES, supra note 7, at 103, 19 (footnotes omitted).

40. See id. at 63 n.1. Similarly, Justice Samuel F. Miller cites in this regard the names of Marshall, Taney, Kent, and Shaw. “Even the dissenting opinions of these men and their obiter dicta have weight in the minds of lawyers who have a just estimate of their character, which they cannot give to many courts of last resort of acknowledged ability.” J. DILLON, THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA 263 (1895).

41. See STUDY OF CASES, supra note 7, at 66.

42. See id. at 103 (“Any lawyer in search of a solution for an intricate problem is glad to know what view, however hasty, is taken by any other person learned in the law; and when the lawyer goes upon the bench he does not lose his spirit of inquiry.”).

43. Letter from Samuel F. Miller to John F. Dillon (Nov. 16, 1885) (quoted in J. DILLON, supra note 40, at 263); cf. Adams Export Co. v. Beckwith, 100 Ohio St. 348, 352, 126 N.E. 300, 301 (1919):

A decided case is worth as much as it weighs in reason and righteousness, and no more. It is not enough to say “thus saith the court.” It must prove its right to control in any given situation by the degree in which it supports the rights of a party violated and serves the cause of justice as to all parties concerned.
system, judicial restraint, separation of powers—Wambaugh’s emphasis is on the quantity of thought, on the opportunities for thoughtfulness. But when he discusses the authority of the learned judge or tribunal his emphasis is on the quality of thought. Both factors are important. This point is summarized well in the revised and condensed version of Wambaugh’s work:

It is true that, as [dicta] are not required as steps toward the decision of the very case, they may have been uttered without full argument from counsel and without full consideration from the court; but if they can be shown to have been considered carefully, or to have been pronounced by unusually skillful judges, already well acquainted with the subject, no lawyer denies that they are of consequence.44

II. Oliphant’s “Return” to Stare Decisis

A notable reaction to what has been termed the “traditional” doctrine of Wambaugh set in during the 1920s and 1930s. The legal realist

44. E. WAMBAUGH, How to Use Decisions and Statutes, in BRIEF MAKING AND THE USE OF LAW BOOKS 111 (R. Cooley ed. 1909); see also id. at 121 (“In discussing dicta, it probably became clear that their lack of great weight—even their occasional lack of great persuasive authority—although due theoretically to their somewhat extrajudicial character, is also justified from a purely practical point of view by the customary absence of careful deliberation in uttering them.”).

Henry Campbell Black’s Handbook on the Construction and Interpretation of the Laws appeared in 1896, just two years after Wambaugh’s work. Most of Black’s analysis covers the same ground as and is closely compatible with Wambaugh’s. See K. LLEWELLYN, THE COMMON LAW TRADITION 73 n.56 (1960). But there are a few important differences. In his chapter on dicta, Black states that:

The reason usually assigned for not conceding to dicta the weight and effect of precedents is that they are expressions of opinion upon some matter which may not have been argued at the bar, or duly brought to the attention of the court, or that they do not embody the mature and deliberate opinion of the judges. But this is not the true ground. The test is whether the statement made was necessary or unnecessary to the determination of the issues raised by the record and considered by the court.... [A] statement of law makes a precedent; not because it emanates from a wise and learned man, but because it is laid down by a judge, in his office of judge, and speaking to a question brought before him as a judge.

H.C. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 397 (1896). In a later revised and expanded version of his book, Black added to this explanation the following sentence: “And although a point may not have been fully argued, yet the decision of the court thereon cannot be considered a dictum, when the question was directly involved in the issues of law raised by the record, and the mind of the court was directly drawn to, and expressed upon, the subject.” H.C. BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS 173 (1912). This proves only that lack of full argument and deliberation are not sufficient conditions for dictum, not that they are not necessary conditions. Here Black clearly takes issue with Wambaugh, for whom both kinds of factors are limitations on the authority of dicta. They are logically and causally inseparable because they are both forms of judicial pronouncements upon which insufficient thought has been bestowed. As noted previously, the reason that statements “unnecessary to the determination of the issues raised by the record and considered by the court” do not have the full weight of precedents is that “[t]he question actually before the court is investigated with care, and considered
and other critiques suggest a return to "even more traditional" conceptions of legal authority. Herman Oliphant's important 1927 Presidential Address to the Association of American Law Schools is a primary example of this shift in thought. Entitled *A Return to Stare Decisis*, it traces a profound malaise in Anglo-American jurisprudence and legal scholarship back to developments in the late nineteenth century.

**A. Oliphant’s Historically Based Critique of Over-Generalization**

The realists are usually thought of as progressive innovators rather than conservative antiquarians. It therefore requires some analysis to see why their theory of stare decisis is aligned with the jurisprudence of an earlier time. Oliphant’s essay includes an historical sketch that helps explain the connection.

Furthermore, Black’s own pronouncements on this subject are not entirely consistent. He says, as quoted above, that a statement of law does not make a precedent because it emanates from a wise and learned man. Later, however, when discussing the varying force of precedents, he asserts that "aside from the relative rank of the court, much may depend upon its reputation for learning, consistency, and sound judgment." In that same discussion Black also remarks that "[t]he opinion in a case gains in weight and authority, and hence in importance as a precedent, in proportion as the point was the more fully discussed, more completely considered and comprehended by the court, and more elaborately elucidated in its judgment." And, finally, he notes that a decision made upon an ex parte application or in an uncontested suit carries less precedential force than one in a contested suit, since in the latter case "the points involved in the case are thoroughly brought into prominence and before the mind of the court, the questions implicated in the case are argued and discussed, and the judgment of the court is enlightened and its decision influenced by the exhaustive examination of both sides of the case and by the reference to pertinent authorities..." H.C. Black, *Handbook on the Construction and Interpretation of the Laws* 392-93, 415, 414-15 (1896).

Of course, these are the very factors that Black singled out in his earlier discussion, when he denied that they explained the lessened precedential value of dicta. On balance, then, Wambaugh’s view seems sounder: The judicial thought invested in an opinion or decision is the measure of its precedential force, and the quantity and quality of that thought are interchangeable, each convertible into the other. Cf. 1 G.W.F. Hegel, *Wissenschaft der Logik* 168-70, 177 (G. Lasson ed. 1923).


Early English law had two characteristics that are especially significant from Oliphant's perspective: Life was simpler, and the legal forms were more complicated. Life was simpler in two ways. Legal problems were less numerous and complex and judges were closer to and more familiar with the phases of human life they regulated. The legal forms were more complicated because in earlier English law the writs and forms of pleading were more numerous and more specific than they now are. Then too, in earlier times these legal forms were of relatively recent origin. Their legal contents fit them with less forcing, because the forms had not yet become antiquated, alien, and artificial.

When a judge ascertained and enunciated the "doctrine of a case" in earlier times, he was able to do so in a way that was relatively specific and definite. The writs and pleadings directed legal attention to narrowly but accurately compartmentalized sectors of life. Legal principles, even when stated too broadly, related, and were applied, only to these comparatively specific fact situations. The abstractions and generalizations used in articulating the doctrine of a case were therefore relatively narrow. F.W. Maitland, describing the fourteenth century scheme of writs, even says that "[t]here has been [up to that time] no generalization; the imaginary defendant is charged in different precedents with every kind of unlawful force, with the breach of every imaginable boundary, with the asportation of all that is asportable. . ." More recently, however, life has become more complicated, and the legal forms have become simpler, thus reversing their beneficent relationship of earlier times. The number of actions has been greatly reduced, and those remaining have been extended to cover "a flood of wholly new situations." Similarly, many of the old pleas have been abandoned, and others have been broadened. This "dulling [of] the tools for producing the discrimination necessary for intimacy of treatment" at the same time legal problems were becoming rapidly more complex "is the over-towering fact in Anglo-American legal history of

---

46. "The old actions divided and minutely subdivided the transaction of life for legal treatment. . . . In earlier law there was a wealth of well differentiated pleas." A Return to Stare Decisis, supra note 45, at 73.

47. Oliphant observes in this connection that things have changed more in the past two hundred years than in the previous two thousand years. See id. at 74. Those in the field of law are, he says, "far from having finished drawing all the implications of [that] fact. . . ." Id. Some of the more obvious recent developments are the rise in commerce, increasing urbanization, and the Industrial Revolution. But see Goodhart, Case Law in England and America, 15 CORNELL L.Q. 173, 185 (1930) ("[Oliphant's] plea resembles Rousseau's demand for a return to the law of nature—a law of nature which never existed except in the author's imagination").

48. A Return to Stare Decisis, supra note 45, at 74.

49. Maitland, The History of the Register of Original Writs, 3 HARV. L. REV. 212, 225 (1889) (citing as examples the well known writs against the shoeing smith who lames the horse, the hirer who rides the horse to death, and so forth).
As a result, when judges now ascertain and enunciate the doctrine of a case, they are forced to use relatively older, broader, and more tenuous abstractions and generalizations to classify legal problems that, at the same time, are becoming ever more numerous and complex. Oliphant's historical analysis does not, however, fully explain why he deplores the current state of jurisprudence and legal scholarship. Oliphant bases his normative analysis on three principles. First, and most generally, adjudication and legal scholarship have, through reliance on increasingly general classifications of legal problems, become detached and remote from everyday life. Courts regulate life with a steadily decreasing feeling for its realities. 

Law purports to be an applied, empirical science, says Oliphant, but in its recent developments it "approximates the unearthly perfection of pure reason." Second, some of the valuable policy rationales for a more empirically based jurisprudence have fallen to the wayside. The earlier adherents to stare decisis exhibited "[t]he grace to drudge away on today's problem and the refusal to foreclose tomorrow's issues." These jurists of an earlier time were "patient particularists" who "unalterably refused to indulge in broad speculation" and kept their attention "pinned to the immediate problem" in order that to its solution might be brought "the illumination which only immediacy affords and the judiciousness which reality alone can induce." Their version of stare decisis "leads us forward over untried ground, a step at a time, no step being taken until it is judged wise, and the stages of its advance are so short that the direction of march can be quickly shifted as experience dictates." In other words, these earlier jurists were careful observers of judicial restraint, separation of powers, standing, and "case or controversy" requirements. Oliphant's policy rationales remain essentially

---

50. A Return to Stare Decisis, supra note 45, at 74.
51. "While the law was thus grouping the transactions of life into larger and larger piles, held together by common attributes more and more accidental, life rolled on, always concrete, always specific, but becoming more and more diversified with ominous speed." Id.
52. Id.
53. Id. at 76.
54. Id. ("The products of a legal science which neglects its empirical branch share some of the futility of the findings of a cloistered biologist whose mind ponders only such specimens as his cat may chance to bring in.").
55. Id. at 75.
56. Id.
within the conceptual framework of Wambaugh, though the relevant cultural context is now Her Majesty’s Foreign Service.\(^{57}\)

The final and most important principle of Oliphant’s critique is that more attention should be focused on judicial decisions than on judicial opinions. We are in danger of turning stare decisis into “stare dictis,” he says. Instead of concentrating on the exact holdings and actual dispositions of cases, our jurists “follow” only vague judicial pronouncements and generalized principles. Only when a case appears to fall near an important doctrinal boundary is any attention focused on its holding—and then only to place it on one side or the other of “the rim of some favorite theory whose precise border we want to mark out.”\(^{58}\) No one, except Oliphant it seems, is interested in re-examining the holdings of cases lying squarely at the center of accepted doctrines or theories; but only in this way can the general utility of those doctrines and theories be tested.

Here Oliphant genuinely parts ways with Wambaugh and the earlier tradition, for which accepting a judge’s decision while discrediting his reasons was an “undignified piece of perverseness.”\(^{59}\) Oliphant’s emphasis on what judges do, as opposed to what they say, largely reflects a new conception, common to the legal realists, of what it means to be “scientific.”\(^{60}\) Oliphant assumes, without argument, that “our main business as legal scientists is to predict the behavior of courts in deciding future cases.”\(^{61}\) Legal doctrine is not an item of observable behavior or a datum of experience.\(^{62}\) Its natural realm is the world of ideas, and it manifests itself in the real world only indirectly, through the medium of intellectual interpretation and comprehension. The strand of causality running in that direction is at best ambiguous and hard to follow; it may even be interrupted or broken by willful misinterpretation.\(^{63}\) Far better, say the empirical-minded realists, to focus on

\(^{57}\) Oliphant also attributes to this spirit the development of the British Empire and the English Constitution. See id. at 75-76. At that level of generality, who is to say that he has not keenly and penetratingly observed something?

\(^{58}\) Id. at 76, 107.

\(^{59}\) See supra text accompanying notes 31-32.

\(^{60}\) This issue will be discussed more thoroughly later, in connection with the theories of Pollock and Goodhart. See infra Sections II(B) and III.

\(^{61}\) A Return to Stare Decisis, supra note 45, at 76.

\(^{62}\) See id. at 159 n.5 (“The thesis is that facts are the only stimuli capable of scientific study as a basis of prediction. Prior rationalizations are rejected for this purpose because the facts prevail when they diverge from the prior generalizations and for each rationalization indicating one result, a contradictory one indicating the opposite result can usually be found.”) (emphasis in original).

\(^{63}\) See id. at 160 (“[T]he choice between the legal principles competing to control the new human situations involved in the cases we pass upon is not dictated by logic. Neither deduction nor induction can do more than suggest the competing analogies and to indicate promising directions for trial and error testing. Neither the astuteness of legal scholarship nor the authority
non-vocal judicial behavior that can actually be observed, on judicial action. After all, every case always presents, in addition to whatever interesting theoretical problems may be there, a purely practical problem: what to do with the case, how to dispose of it. The tools of legal doctrine are simply too clumsy and indirect to help us predict the practical activity of judges with any accuracy.

This reasoning becomes even more urgent when, as Oliphant maintains, what judges say is becoming more abstract and general than it used to be. The doctrine of stare decisis does not tell us in as many words just what it is in prior decisions that is to be followed. After running through the usual arguments to show that the mere action in a case cannot have significance as a precedent (for no two cases are ever identical in that limited respect), Oliphant comes up with the interesting proposition that the holding of a case must be “a proposition of law covering . . . the fact situation of the instant case and at least one other.” That minimum of abstraction or generalization is necessary if the common law system of precedent is to work at all. It makes sense that if one decision is to serve as a precedent for another, then they must have something in common, even if they share it with no other cases. But in the other direction there opens up a “bad infinite” of gradations of generalization that seems to have no natural or principled limit. Not only does the subject area of a case admit of innumerable gradations of generalization, but any case can be analyzed into an almost indefinite number of subject areas, each with its own innumerable and imperceptible gradations of generality. Oliphant uses the analogy of a spectator entering an empty stadium (to view a precedent, as it were). The spectator has a choice not only of where around the field to sit (angle of view, or legal subject area), but also of how far up the rows of bleachers to go (level of generalization). No internal logic dictates a resting place in either dimension.

of judicial position can transcend these limitations inherent in logic.”); see also H. BLOOM, A MAP OF MISREADING (1975).

64. Wambaugh recognized that too, but he thought that anyone who considered long enough and hard enough the problem submitted to a court and the result eventually reached, could determine the proposition of law necessary to the decision. By contrast, Oliphant has less confidence in the unaided powers of pure reason, and more confidence in the evidence of experience. He lives in a world in which judges decide cases involving promises not to compete according to whether union contracts or business purchases are involved. See A Return to Stare Decisis, supra note 45, at 159. See also Radin, The Theory of Judicial Decision: Or How Judges Think, 11 A.B.A. J. 357 (1925).

65. See A Return to Stare Decisis, supra note 45, at 72.

66. Id.

67. Oliphant gives the example of a father inducing his daughter to break a promise to marry and suggests six types of holdings, ranging from “1. Fathers are privileged to induce daughters to break promises to marry” to “6. All persons are so privileged as to all promises made by anyone.” Id. at 72-73.
Where on that gradation of propositions are we to take our stand and say “This proposition is the decision of this case within the meaning of the doctrine of *stare decisis*?” Can a proposition of law . . . ever become so broad that, as to any of the cases it would cover, it is mere dictum?68

Ultimately, Oliphant does not answer this question—he admits as much in the opening pages of his essay69—but it is instructive to compare his efforts to do so with those of an influential predecessor, Pollock, and an important contemporary, Goodhart. All three suggest answers in their emphasis on method.

B. Pollock’s Paradigm of Legal Method

Sir Frederick Pollock entitles his best known essay on legal method *The Science of Case-Law* and complains in his first paragraph that “not much attention has been paid to the scientific character of the methods” by which English case law has actually been built up, administered, and developed.70 Acting on his belief that “English case-law may fairly claim kindred with the inductive sciences,”71 Pollock provides a general paradigm of legal method based on inductive science.

If law is like other inductive sciences, its ultimate object will be to predict future events—in this case, the decisions of courts of justice. In order for these legal events to be predictable, an all-embracing, fundamental assumption is needed, one that corresponds to the assumption in the natural sciences that nature is uniform and that whenever the same conditions are repeated they will give rise to the same result. Similarly, in order to predict legal results, we must assume that the same facts give rise to the same decision.72 In other words, judges’ decisions are assumed not to be arbitrary.73 This assumption is conventional in the sense that it is under human control. Things might well have been otherwise, unlike with nature, which just *is* uniform. But as it is, one of

---

68. Id. at 73.
69. See id.
71. Id.
72. Id. at 170-71.
73. See id. at 178. For Wambaugh, “[w]hat makes decisions of value as precedents is the fact that they are based on reasoning and not upon chance. . . . Otherwise decisions . . . would be arbitrary or accidental, and could not be reduced to a scientific system. . . .” STUDY OF CASES, supra note 7, at 24-25. Nevertheless, this translates into a weaker form of predictability than that assumed by Pollock. The reasoning process cannot be supposed to give rise to the same results whenever the same “conditions” obtain. See supra text accompanying notes 62-64; see also F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS 9-10 (W. Hammond ed. 1880) (interpretation is not arbitrary).
the chief aims of the judicial system—and of essays like Pollock’s—is to make law uniform and legal decisions capable of prediction. Of course, they are only approximately and imperfectly so. Nevertheless, a uniformity that is known to be relative and approximate may still be of great practical value.

One of the most important aids for ensuring uniformity in common law adjudication is the understanding that courts follow the authority of decisions formerly given on similar facts. For systematic uniformity, it is helpful to have one (and preferably only one) court of last resort, whose decisions are binding on all lower courts and on itself. A final necessary ingredient is a system of reports; like the natural scientist, the legal scientist can predict the future only on the basis of detailed and carefully recorded observations of the past.

After these somewhat formal institutional assumptions have been granted, Pollock’s further elaboration of scientific legal method is harder to describe in precise terms. He says that, in making predictions of legal decisions, the jurist first sifts through the facts of the case to separate out the most material ones, next makes a provisional determination as to what area of law is involved, and then seeks out the general rule of law that governs those facts. Still, Pollock advises only that...

... the success of these operations depends on the manner in which the work of selection and comparison is performed in each case. In other words, the inquirer must select the right kind of cases for comparison with the case before him. And... he must observe the right points of likeness and unlikeness in the cases he compares. Failure in any one of these things may lead him to a wrong conclusion.

If this "method" sounds a little like "Don't make mistakes," it is because these operations cannot be reduced to a rule (at least not to any rule yet known). Rather, they draw upon the "unconscious habits" of experts, whose ways of "looking at the matters of their own art in the right way... may almost be called an instinct."

---

74. See The Science of Case-Law, supra note 70, at 180.
75. Id. at 179 ("We work with an assumed rule which we know not to be exactly true, but which we find near enough to the truth for the purpose in hand.").
76. Id. at 177.
77. Id. Compare with this conclusion of Pollock the concept of judicial "intuition" developed by Oliphant, who says that "immediate experience in contemporary life,—the battered experiences of judges among brutal facts" and "[t]he response of their intuition of experience to the stimulus of human situations is the subject-matter having that constancy and objectivity necessary for truly scientific study." A Return to Stare Decisis, supra note 45, at 159. Oliphant places reliance on the fact the "[j]udges are men and men respond to human situations" in reliable ways that are susceptible of sound and satisfying scientific study. "That ancient empiricism was intuitive. It worked well because judges sat close to problems and viewed them as current problems. It would have worked better still had it been conscious and methodical." Id. at 160.
Resting a paradigm of inductive legal science on "instinct" is, of course, something of an anomaly. Yet even if Pollock's scheme is ultimately unsatisfactory, some of the details are interesting, especially those that concern the status of general rules of law. When a general principle is familiar and settled law, then the original authorities for it need not be discussed at great length. But if a rule is not so well established, or not obviously applicable to the case at hand,

... a sound lawyer ... will attend as little as possible to the form in which the general proposition is expressed, but will proceed to study the particular cases from which it is collected, examining their points of likeness and unlikeness to the case before him ... [and] consider the legal results of the various sets of facts already decided upon in the reported cases. ... 78

This is so because good lawyers acknowledge that case law is at best an inexact "science." As Aristotle remarks in his Ethics, one mark of an educated man is to know the degree of precision possible in his discipline, and not to expect more. 79 Good lawyers recognize that legal predictions are rough and approximate and that care must be taken not to formulate general principles as if they were based on anything more than the actual results of particular cases. Induction proceeds from particulars to particulars. Even when jurists purport to deduce their decisions from general propositions, Pollock says they really have in mind not so much the general propositions as the decided cases in which those propositions are justified. 80 The inductive method, properly conceived, is an ideal safeguard against dictum: "Lawyers fully recognize that it is unsafe to rely on a general statement of law, however solemnly adopted by the court, which is 'not necessary to the decision'. In other words, they admit the inductive method alone as valid." 81

Pollock's position thus ends up as a kind of legal nominalism. General rules of law may have a useful "symbolic" or heuristic function as shorthand references to specific bodies of decisional authority. They are, however, "only misleading if they are supposed to mean anything else." 82 This is a sterner and more positivistic or empirical doctrine
than that offered by Wambaugh. For Wambaugh the general proposition necessary to a decision must eventually be arrived at by anyone who studies the legal problem and the result diligently enough. Pollock has no such confidence in the unaided powers of pure reason to discern the "true doctrine" of a case. More likely, the correct result would be reached for the wrong reasons, if deduced from a general rule. "[A] correct induction may disguise itself . . . in the shape of an incorrect deduction."  

III. GOODHART AND THE RATIO DECIDENDI OF A CASE

It was left to Arthur L. Goodhart to build on, refine, and apply the paradigm of legal method sketched out by Pollock. As Goodhart notes in his introduction to a volume of Pollock's essays, The Science of Case-Law is "[p]erhaps . . . of even greater interest to-day than it was when it was first published, for it deals with a number of problems which have become of major concern to the modern jurist."  

A. Goodhart's Original Theory

Goodhart accepts the basic paradigm of an inductive legal method in predicting decisions of courts, but he also insists that judges are guided by "principles" in their adherence to precedent. These principles, the "rationes decidendi" of cases, are narrower than Wambaugh's "doctrine" of a case, because they are found neither in the reasons given for a decision nor in the rule of law set forth in an opinion. In this sense Goodhart favors a "scientific" method, in the style of Oliphant and Pollock, that does not take judicial doctrine at face value but instead remains at the more reliable level of observable judicial behavior. Although the reasons given for a decision may be wrong and the rule of law set forth by the judge may be demonstrably incorrect, the case may nevertheless be a good precedent. In fact, Goodhart asserts that "it is precisely some of those cases which have been decided on incorrect premises or reasoning which have become the most important in the law."  

Our modern law of torts has developed through a series of bad

83. See Study of Cases, supra note 7, at 20-22; see also supra text accompanying notes 24-28.
84. The Science of Case-Law, supra note 70, at 182-83.
85. Id. at xxxii.
86. Goodhart, Determining the Ratio Decidendi of a Case, 40 YALE L.J. 161, 163 (1930), reprinted in A. GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW I (1972) (subsequent references are to the YALE L.J. version [hereinafter Determining the Ratio Decidendi of a Case]).
arguments, property law is based on misunderstood history, and yet their authority is not doubted. Because "[a] bad reason may often make good law," the precedential value of decisions cannot lie in the reasons judges give for them or the rules of law they formulate in explaining them. It must lie elsewhere. "There may be no rule of law set forth in the opinion, or the rule when stated may be too wide or too narrow. . . . Nevertheless each of these cases contains a principle which can be discovered on proper analysis."\(^{87}\) In other words, in setting forth the wrong rule, or stating it too broadly or narrowly, the judge has not set forth the ratio decidendi of the case, and may not have "set forth" anything at all.

Like Pollock and Oliphant before him, Goodhart feels free to "second-guess" judges in their legal reasoning and their statements of the law.\(^{88}\) Goodhart can be seen as simply attempting to provide more content for the process of legal decisionmaking than Pollock or Oliphant. Yet, Goodhart does not, unlike Oliphant, resort to the purely behavioral study of judges' decisionmaking. Nor does he follow Pollock in developing a merely formal inductive paradigm. While Goodhart feels free to second-guess judges' statements of law, he holds sacred their statements of fact. In so doing, he brings some new considerations to bear on our understanding of the "facts" of a case.

Goodhart states in about ten different ways that we must understand the "facts" of a case as the judge saw them and not as we or the record can show them to have been. "We are bound by the judge's statement of the facts even though it is patent that he has mistated them, for it is on the facts as he, perhaps incorrectly, has seen them that he has based his judgment."\(^{89}\) Since the judge selects and interprets the facts on which the decision is based, it would be "illogical" to be bound by the judge's conclusion but not by his factual premises. "It is by his choice of the material facts that the judge creates law."\(^{90}\)

---

87. *Id.* at 163, 165 (footnote omitted); *see also* *id.* at 163 ("'New principles, of which their authors were unconscious or which they have misunderstood, have been established by these judgments.'") (emphasis added).

88. However, Goodhart indicates that an important qualification to his theory is necessary where analogical reasoning is at issue:

> "When a case is used merely as an analogy, and not as a direct binding precedent, the reasoning by which the court reached its judgment carries greater weight than the conclusion itself. The second court, being free to reach its own conclusion, will only adopt the reasoning of the first court if it considers it to be correct and desirable. In such analogous precedents the *ratio decidendi* of the case can with some truth be described as the reason of the case.

*Id.* at 181 n.73.

89. *Id.* at 170.

For Goodhart, then, the first task is to ascertain which facts the judge took into consideration, then to determine which of them were "material" to the decision. The ratio decidendi of a case is the conclusion that the judge reaches on the basis of the facts deemed material and those excluded as immaterial. If in a certain case the court finds that facts A, B, and C exist, excludes fact C as immaterial, and decides X, then this case establishes a broader principle than if fact C had been included. Goodhart applies this analysis to *Rylands v. Fletcher* as follows:

**Facts of the Case**

Fact I. D had a reservoir built on his land. Fact II. The contractor who built it was negligent. Fact III. Water escaped and injured P. Conclusion. D is liable to P.

**Material Facts as Seen by the Court**

Fact I. D had a reservoir built on his land. Fact III. Water escaped and injured P. Conclusion. D is liable to P.

By the omission of Fact II, the doctrine of "absolute liability" was established.

There is a presumption against broad principles of law. In Goodhart's scheme this may usefully be viewed as a presumption against finding a fact to be immaterial; the smaller the number of material facts, the wider the principle of law will be. Goodhart's principle that the facts of the case must be considered to be as the judge saw them, and not necessarily as they actually were, can lead to some strange consequences. If a judge decides X on the basis of facts A, B, and C, then even if the judge has actually made a mistake as to fact C, the decision is still good law for those "facts." But if the court did not determine the existence or materiality of fact C, or treated it as a hypothetical possibility, then the decision is dictum as to C—even if C was actually the case!

---

91. *See Determining the Ratio Decidendi of a Case, supra* note 86, at 179: In a certain case the court finds that facts A, B, and C exist. It then excludes fact A as immaterial, and on facts B and C it reaches conclusion X. What is the *ratio decidendi* of this case? There are two principles: (1) In any future case in which the facts are A, B, and C, the court must reach conclusion X. and (2) in any future case in which the facts are B and C the court must reach conclusion X. In the second case the absence of fact A does not affect the result, for fact A has been held to be immaterial.

92. *3 L.R.-E. & I. App. 330 (1868).*

93. *Determining the Ratio Decidendi of a Case, supra* note 86, at 175.
Everything depends upon the intentions of the judge in ascertaining the material facts.

Goodhart’s theory is an improvement on Pollock’s paradigm because it limits the precedential significance of a case to its material facts and serves as a reminder that the judge’s perspective on the facts of a case must be considered. It is probably useful to make a distinction between saying “a case is authority for a proposition based on all its facts,” and saying “[a case] is authority for a proposition based on those facts only which were seen by the court as material.”94 Pollock and Oliphant may have been naive in taking the facts of a case as a given.95 Goodhart’s naivete, however, may consist in the notion that we can really “get at” the facts deemed material by a judge. Goodhart offers a few techniques based on common law presumptions, such as “all facts which the judge specifically states to be material must be considered material.”96 But all the techniques appear to involve accepting the judge’s version of his or her reasoning process, as expressed in the opinion, at face value. If anything, ascertaining all the facts would seem easier than determining which of them were actually considered material by the judge. Yet Goodhart warns us that “[t]he emphasis which American law libraries are now placing on collecting the whole records in the leading cases may prove to be a dangerous one, for such collections tend to encourage a practice which is inconvenient in operation and disastrous in theory.”97

If we must humor the judge’s choice of the facts and take the judge’s description of that choice at face value, why not accept his or her statements of law as authoritative too?98 The answer might be that only the judge was there, at nisi prius, to determine the facts first hand, whereas we are all able to draw our own conclusions about statements of law. For Goodhart, however, the judge may be totally wrong as to the facts and still make perfectly good law. In Goodhart’s world, adjudication begins to resemble a kind of thought experiment: If the judge thought those were the facts, then the ratio decidendi is .... The judge creates law by choosing the material facts, by selecting and interpreting them, and even more so in selecting and interpreting legal principles.

94. Id. at 174.
95. Cf. id.; A Return to Stare Decisis, supra note 45, at 159 (judges respond predictably to stimuli of the facts of cases before them).
96. Determining the Ratio Decidendi of a Case, supra note 86, at 182; see also id. at 173-79.
97. Id. at 172; cf. Arnold, Book Review, 41 YALE L.J. 318, 318 (1931) (“Librarians should therefore use every effort to keep such records of cases from immature students.”).
98. Thurman Arnold has ably criticized the assumption running through Goodhart’s whole analysis that propositions of “fact” and “law” can be unproblematically distinguished. See Arnold, supra note 97, at 318-19 (“The author is not troubled by what ‘facts’ are, nor by their variety, nor with distinguishing them from conclusions of ‘law.’ ”).
Yet, for Goodhart, it ultimately makes no difference if a judge is "wrong" about either the facts or the law of a case. The facts are of interest only as the judge saw them, and the ratio decidendi is not sought in the judge's reasons or rules of law.

B. Later Discussion of the Ratio Decidendi

Several decades after Goodhart's original article appeared, an intense scholarly debate over his theories broke out in the pages of the English *Modern Law Review*99 and elsewhere.100 Although this debate has much of the characteristic tempest-in-a-teapot flavor of discussions in British academic journals,101 a few valuable points do emerge, and the issues in the debate bring together in a helpful way a number of themes in the theory of precedential authority.

Traditional theorists of the ratio decidendi conceive of it as an authoritative rule of law directly binding—like a statute or constitution—on subsequent courts. Sir John Salmond, for example, says that:

A precedent . . . is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large.102

The enterprise of determining the ratio decidendi of a case traditionally proceeds on the following basic assumptions: 1) every case has one, and only one, ratio decidendi that explains the holding on the (material)

---


101. See, e.g., Goodhart, 22 MOD. L. REV., supra note 99, at 117 (hesitating before intervening in "this gladiatorial combat"); id. at 120 ("Perhaps some confusion might have been avoided if Mr. Simpson, instead of relying on Professor Montrose's interpretation of Dr. Glanville Williams' brief summary of my thesis, had referred to the thesis itself."); cf. Stone, 22 MOD. L. REV., supra note 99, at 600 ("This present article . . . is not designed to defend or even explain the present writer's position."); Simpson, 21 MOD. L. REV., supra note 99, at 158 n.17 (criticizing Montrose for citing his own article improperly).

facts; 2) the ratio decidendi can be determined through an analysis of the particular case itself; 3) this unique and unchanging rule or principle, and it alone, is what is binding on later courts. The traditional approach to the ratio decidendi is, to use Julius Stone's label, "prescriptive"; it seeks to establish "the limits within which, as a matter of law, a prior decision prescribes a binding rule for later decisions."104

The more modest approach favored by Stone, Oliphant, and the legal realists may be termed "descriptive." Instead of seeking to identify and delimit the reasoning that a later court is logically and legally bound to follow, these scholars are content to describe or explain the actual process of reasoning by which a decision was reached, without regard to whether this reasoning is binding in a later case. These scholars simply attempt to set forth how, as a matter of fact, present decisions are related to prior decisions. Indeed, the legal realists may be viewed as abandoning en bloc all attempts to determine the "prescriptive" ratio decidendi of a case and as claiming instead that the ratio is wholly at the discretion or even whim of later judges.105

According to the traditional, "prescriptive" view, the ratio decidendi expresses a legal principle logically necessary to the decision of a case. This is, in effect, Wambaugh's position, though for him the issue is embedded in the context of judicial restraint. Common law courts do not decide unnecessary questions in cases; the questions they do decide are those, and only those, necessary to the disposition of the case.106 Thus, "the reason of the decision, the ratio decidendi, must be a general rule without which the case must have been decided otherwise."107

Much ink has since been spilled to show that, as a logical matter, no single justification for a decision can claim pride of place if—as also as a logical matter—no particular factual description of a case can be

105. See A. WATSON, SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY 89 (1984) ("It is scarcely an exaggeration to claim that the whole American Realist movement insofar as it relates to 'rule-skepticism' is based on the notion that the ratio decidendi of a case cannot be securely determined and is at the whim of any subsequent judge."); Stone, 22 MOD. L. REV., supra note 99, at 600-01 & n.2 (American realists abandon, or at least suspend, the search for the prescriptive ratio decidendi).
106. See STUDY OF CASES, supra note 7, at 19 ("[T]he court need and [therefore (?)] must not do more than the case at bar demands. . . .").
107. Id. at 18 (The unnecessary residue is dictum, the two concepts being complementary.).
deemed authoritative.\textsuperscript{108} For Wambaugh, as previously noted,\textsuperscript{109} this problem does not really arise. Indeed, in offhand passages he refers to different cases as "identical."\textsuperscript{110} For a formalist like Wambaugh, the facts of cases fall more or less naturally into a few familiar patterns. The practicing lawyer does not spend much time pondering how to classify the facts of the cases he tries;\textsuperscript{111} if he did, he would probably succumb to some sort of legal paralysis or incapacitating epistemological confusion. Oliphant, Stone, and others have obligingly documented this potential for confusion in their powerful explications of the choices operating in the classification of facts.

In order for a legally cognizant claim to be made, the world must be carved up in meaningful ways, our experiences classified according to their important features.\textsuperscript{112} If everything were equally important, it would be utterly impossible to formulate even the most rudimentary legal complaint.\textsuperscript{113} Thus, we force the world into our patterns of meaningfulness by making a deliberate, pragmatic selection of the "relevant" or "significant" or "essential" or "material" facts from the teeming mass of irrelevant, insignificant, unessential, and immaterial ones.\textsuperscript{114}

\textsuperscript{108} See, e.g., Stone, 22 MOD. L. REV., supra note 99, at 602-07; Sartorius, supra note 103, at 348-49.

\textsuperscript{109} See supra note 21.

\textsuperscript{110} See Study of Cases, supra note 7, at 14 ("every case ought to furnish a precedent for all other cases in which the circumstances, save as to unessential matters, are identical"); id. at 64 ("precisely identical cases seldom occur"); id. at 96 (subordinate courts may decline to follow distasteful decisions "in cases not identical").

\textsuperscript{111} See id. at 68-69:

The immaterial features are features that have been decided to be immaterial by other cases, or that, in the lawyer's opinion, would certainly be decided to be immaterial. The lawyer may hardly know that he casts aside certain features. Still less may he realize the reason why he casts them aside. Long ago he may have read a case justifying him in ignoring some features of the case now before him; or he may be acting upon knowledge that came to him through a text-book; or he may be simply following his own reasoning faculties, which for years have been trained to think along the lines pursued by his most learned predecessors in the profession. Certain it is that for one reason or another he does cast aside many of the circumstances of the case under examination, for example, the identity of the parties, the time of the transaction, the things that were the subjects of the contract or of the tort; and, without knowing that he has really been combining the results of numerous actual or hypothetical cases, he discovers the doctrine established by the case that is under his eye.

(footnote omitted).


\textsuperscript{113} See, e.g., A. ROBBE-GRILLET, THE ERASERS (1964).

\textsuperscript{114} See M. HEIDEGGER, BEING AND TIME 190-92 (J. MacQuarrie & E. Robinson trans. 1962):

In interpreting, we do not, so to speak, throw a "signification" over some naked thing which is present at hand, we do not stick a value on it; but when something within the world is encountered as such, the thing in question already has an involvement which is disclosed in our understanding of the world, and this involvement is one which gets laid out by the interpretation. . . . In every case interpretation is grounded in something we see
In *Donoghue v. Stevenson*, for example, the plaintiff was unpleasantly surprised (and allegedly became ill) to find the partially decomposed remains of a snail in a bottle of ginger beer she had been drinking. The plaintiff prevailed in her suit against the manufacturer, but was it “essential” to her case that a snail in a bottle was involved, instead of, say, a similarly situated mouse, safety pin, or even a human toe? Would *Donoghue* be good precedent for a case involving, not a decomposed snail, but rather a fresh and lively one? One and the same “fact” may be described at radically different levels of generality. Did the result in *Donoghue* turn on the characterization of the agent of harm as a snail (decomposed or otherwise), or “any noxious physical foreign body, or any noxious foreign element, physical or not, or any noxious element”? The facts of any case admit of as many different in advance—in a fore-sight. This foresight “takes the first cut” out of what has been taken into our fore-having, and it does so with a view to a definite way in which this can be interpreted. Anything understood which is held in our fore-having, and towards which we set our sights “foresightedly,” becomes conceptualizable through the interpretation. . . . An interpretation is never a presuppositionless apprehending of something presented to us. If, when one is engaged in a particular concrete kind of interpretation, in the sense of exact textual interpretation, one likes to appeal to what “stands there,” then one finds that what “stands there” in the first instance is nothing other than the obvious undisputed assumption of the person who does the interpreting. (translation altered).


116. See *Annotation, Liability of Manufacturer or Seller for Injury Caused by Beverage Sold*, 77 A.L.R.2d 215, 257-63 (1961) (annotating cases involving “mouse in bottle or other container”).


118. See *Pillars v. R.J. Reynolds Tobacco Co.*, 117 Miss. 490, 78 So. 365 (1918); *cf. id.* at 500, 78 So. at 366 (“We can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco, and if toes are found in chewing tobacco, it seems to us that somebody has been very careless.”).

119. Stone, 22 MOD. L. REV., *supra* note 99, at 603; *cf. id.* at 604: As to none of these facts . . . and to none of the several alternative levels of statement of each of them, could it be said on the basis of the report of *Donoghue v. Stevenson* alone that it was on its face not “material” (in the logical sense) to the holding in that case. Even as to the time of litigation, as to which we are most tempted to say that this at least must be “immaterial” on the face of it, we must be careful to avoid a *petitio principii*. Are we really prepared to assert with dogmatism that *Donoghue v. Stevenson* should have been, and would in fact have been, so decided in 1800? If not, it follows that logically, i.e., apart from any special indication that should be drawn from the precedent court’s own attitude, the “ratio” of *Donoghue v. Stevenson* did not compel later courts to impose liability in any case where only some of the above possible “material” facts, and some levels of statement of them, were found. . . . [T]his reduces the range of binding *ratio decidendi* to vanishing point.
and competing descriptions as there are combinations of distinct "facts." Each description may, in turn, be stated at virtually any desired level of generality.

Is there some one step on some one stair which is the decision of the case within the meaning of the mandate stare decisis? . . . To ask whether there exists a coercion of some logic to make that choice either inevitable or beneficent, searches the significance of stare decisis in judicial government and the soundness of scholarship in law.\(^\text{120}\)

These questions involve, to use a current phrase, "essentially contested concepts." Since any number of competing rationes decidendi can explain the decision in a case, no one of them can be considered logically necessary to the decision. Thus the notion of the single, determinative, logically necessary justification for a decision cannot be successfully maintained. From a strictly logical point of view, the ratio decidendi is inherently indeterminate.\(^\text{121}\) Moreover, many of the supposed judicial liberties taken with the distinction between ratio decidendi and dictum—and, indeed, the alleged "meaninglessness" of the distinction itself—can be traced to the inherent indeterminacy of the ratio decidendi.\(^\text{122}\)

---

See also Sartorius, supra note 103, at 349:

The point is . . . that even where it would be correct to say that the facts of a given case stood "on all fours" with the facts of a binding precedent, it will always be possible to construct a rule under which the prior decision is subsumable, and under which any decision whatsoever in the instant case is subsumable as well. As Cohen has put it, "To the cold eyes of logic the difference between the names of the parties in . . . two decisions bulks as large as the difference between care and negligence."

(footnote omitted).

120. Oliphant, A Return to Stare Decisis, supra note 45, at 73; cf. J. Stone, Legal System and Lawyers' Reasonings 269 (1964):

[T]here will always be more than one, and indeed many, competing versions of "the material facts"; and there will therefore not be merely one but many rationes, any of which will explain the holding on those facts, and no one of which therefore is strictly necessary to explain it. For apart from any selection by the precedent court, all the logical possibilities remain open; and in the logician's sense it is possible to draw as many general propositions from a given decision (each of which will "explain" it) as there are possible combinations of distinguishable facts in it.

121. See H. Cairns, The Theory of Legal Science 80 (1941) (the question—what single principle does a particular case establish?—is "strictly nonsensical, that is, inherently incapable of being answered").

For suggestions that Oliphant, Stone, and their followers overstate the indeterminacy of the ratio decidendi, see Schauer, Precedent, 39 Stan. L. Rev. 571, 587 (1987) (arguing that when rules of relevance come from the larger, extra-legal world, and to the extent they are relied upon in framing precedents, "some determinations of similarity are incontestable within particular cultures or subcultures"; not all characterizations of a past event are always and equally "up for grabs").

The "descriptive" view of the ratio decidendi is an attempt to provide extra-logical support for the traditional doctrine of precedent.\textsuperscript{123} On this view the ratio decidendi is the rule or principle that the precedent-setting court \textit{considered to be necessary} for its decision.\textsuperscript{124} Even if the court was wrong, and no such single, logically necessary ("prescriptive") rule can be determined, later judges might still consider themselves governed by the legal principle formulated by the earlier court or the process of reasoning by which the earlier court reached its decision.\textsuperscript{125}

Even as a purely "descriptive" matter, however, this view does not accurately reflect judicial practice or informed criticism of that practice. As Goodhart readily noted,\textsuperscript{126} a decision may form a binding precedent, and be cited and recognized as such, even when the precedent-setting court has offered no hint as to its reasoning.\textsuperscript{127} Later courts simply supply or infer a "prescriptive" rule of decision from the facts and the result. Moreover, it often happens that a judge will explicitly reject the rule of law laid down by an earlier court, even while purporting to be following the "decision" in the earlier case and acknowledging it as binding precedent.\textsuperscript{128} Thus, even on a purely "descriptive" level, the doctrine enunciated by a court in making a decision is not necessarily what is authoritative about that decision.\textsuperscript{129}

In his later pronouncements Goodhart indicates that some combination of the "rule" and the "result" may be necessary to explain the authority of judicial precedents:

If it were possible to devise a method by which all precedents would become determinate, then the difficulties of interpretation would disappear, but I believe that this is a vain hope. It is not a valid criticism of a system, therefore, to say that some precedents will always remain indeterminate. . . . Further decisions are frequently required before the scope of a principle is finally determined. . . . When we take one step we may not be certain how far this will ultimately lead us, but it is useful to

\textsuperscript{123}. See id. at 323-35 (exploring the limits of formal logical reasoning).
\textsuperscript{124}. See Sartorius, \textit{supra} note 103, at 349-50.
\textsuperscript{125}. Wambaugh, for example, may be viewed as trying to "have it both ways" in maintaining both (1) that the doctrine of a case is the rule or principle without which the case could not have been decided as it was ("prescriptive") and (2) that the doctrine of a case must be a proposition that is in the mind of the court ("descriptive"). See \textit{supra} Section I. In fact, there would be no inconsistency here, if the notion of a "prescriptive" ratio decidendi made sense.
\textsuperscript{126}. See \textit{supra} Section III(A).
\textsuperscript{127}. \textit{Cf.} E. \textit{Wambaugh}, \textit{Study of Cases}, \textit{supra} note 7, at 23 ("A decision creates a precedent whether there be an opinion or not.").
\textsuperscript{129}. For further discussion of this point, see Goodhart's critique of the "descriptive" theory, as analyzed \textit{supra} in Section III(A).
know in what direction we are headed. Paton's metaphor is a sound one: "One case, so to speak, plots a point on the graph of tort, but to draw the curve of the law we need a series of points."  

These are important concessions. They amount to an implicit acknowledgment that legal opinions and their concomitant "doctrines"—unlike statutes, constitutions, and other legal "texts"—cannot be taken as direct sources of legal authority. They are not fully binding on later courts, because their precise contours have not yet been articulated in formulaic and canonical fashion. Instead, they are rather more like "legal experiments" whose definitive meaning and results must await further confirmation by other members of the professional community. The origins and implications of this view, as well as those of the more traditional conception of precedent, will be explored more fully in the remaining section.

IV. THE TEXT AND THE EXPERIMENT: TWO PARADIGMS OF LEGAL AUTHORITY

Two contrasting conceptions of precedential authority emerge in the analysis of the jurisprudential theories discussed above. The first, the "traditional" conception, is that an excessively broad principle, "unnecessary to the decision" of a case, is dictum. The second conception, present at least implicitly in each theory, is that a principle too narrowly tied to the particular facts of one case cannot be part of the ratio decidendi of other cases. These contrasting conceptions of precedential authority derive from two distinct intellectual traditions: the humanities and the empirical sciences. Briefly, in the humanities, authority derives from a text or primary source. Interpretation of the text is thus narrow and deferential. By contrast, in the empirical sciences, the experiment is the source of authority. The experiment is not authoritative in itself, but only to the extent that it can be replicated and that it fits within and extends a more general framework of scientific theory. These two conceptions of legal authority exist in an essential tension, derived from their opposed foundations in the humanities and empirical sciences. Yet both are necessary and, perhaps, inevitable in a system that demands both scientific validity and logical consistency.

130. Goodhart, 22 Mod. L. Rev., supra note 99, at 124 (footnote omitted). "Guesswork must always play a part in legal interpretation," adds Goodhart; "this is what makes the law so interesting." Id.
A. Narrow and Broad Forms of Precedential Authority

The principle that excessively broad principles are dicta is most clearly expressed in Wambaugh's theory. Wambaugh defends this conception through a series of reflections on the policies served by principles of judicial restraint and separation of powers, and by the "case or controversy" and standing requirements. In his later pronouncements Wambaugh can be read as tracing dicta to procedural imperfections in the legal process, especially those that make it likely a question has received insufficient judicial attention or thought. But this latter situation simply represents another variation of dicta as excessively broad pronouncements, since it typically arises when unforeseen circumstances make inapplicable (or applicable) a legal rule that should originally have been formulated more narrowly or restricted more carefully.\textsuperscript{131}

Oliphant's position differs from Wambaugh's on many points, but he probably speaks for both of them in bemoaning the decline of an era in which legal forms could be used with more precision, and in which the fit of form to content allowed less discretion as to how abstractly or generally propositions of law would be treated. Pollock's disdain for broad principles flows from his unwillingness to understand by abstract legal rules anything other than the incremental, empirically acquired results of particular cases. For Pollock, induction as a method yields nominalism as a theory.

Finally, Goodhart, borrowing both from his ally Pollock and his opponent Oliphant, excludes from his version of scientific, inductive legal method the whole realm of legal reasoning, preferring to replace it with a calculus of conclusions based on whatever view of the facts a particular court may have taken. Goodhart's may actually be the view that is inherently the most neutral with respect to the conception of dicta as overbroad rules unnecessary to a decision. For Goodhart—despite the weak "presumptions" against broad principles he offers as techniques of interpretation—the judge's view of the facts is all-controlling. Consequently, the development of sound and binding legal doctrine does not depend on judges' having stated their rules of law narrowly enough, or even having stated them at all.

A second, distinct and quite different conception of precedential authority can be read into all of the competing theories discussed above: A case cannot have authority as a precedent without embodying a relatively broad, general proposition of law.\textsuperscript{132} This alternative con-

\textsuperscript{131} See K. Llewellyn, The Common Law Tradition 77-91 (1960) ("leeways of precedent").

\textsuperscript{132} See E. Wambaugh, Study of Cases, supra note 7, at 102-03:

In so far as a decision, if examined in accordance with the principles heretofore described for ascertaining the doctrine of a case, does not establish any given proposition of law,
ception reorders the usual categorial priorities, but it has always implicitly formed an integral part of the traditional doctrines. Thus, although Wambaugh certainly does not emphasize it when he lays down the rule that the court must pass on each case "precisely" as it would on an essentially similar case, he means that the court has a duty to follow a relatively broad rule. Wambaugh then quickly switches to a discussion of how this lends uniformity to adjudication—a distinct concern—but this discussion originates in the context of observing that no two cases are ever precisely identical.

It is in this same context that Oliphant makes his interesting claim that the holding of a case must be "a proposition of law covering a group of fact situations . . . as a minimum, the fact situation of the instant case and at least one other," if the common law system of precedent is even to get off the ground. Clearly, that which is concrete, unique, and absolutely specific to one case cannot serve as part of the binding ratio decidendi for other cases.

To bring together into one class even this minimum of two fact situations however similar they may be, always has required and always will require an abstraction. . . . Classification is abstraction. An element or elements common to the two fact situations put into one class must be drawn out from each to become the content of the category and the subject of the proposition of law which is thus applied to the two cases.

Oliphant goes on to complain about how fortuitous this grouping of cases by single attributes has become and how easily it leads to useless and harmful over-generalization. But his statement of the minimum requirement of generalization or abstraction remains as a theoretical boundary. Finally, though Pollock prefers not to speak the language of abstract concepts in law, he does say that it is perfectly-appropriate to

---

133. "T]he court must pass upon each case precisely as it would pass upon a similar case, that is to say, in accordance with a general rule." Id. at 15.
134. See id.; cf. Dubuque v. Illinois Central Railroad Co., 39 Iowa 56, 79-80 (1874): A judgment that A recover of B one thousand dollars is not to be cited as a precedent in a subsequent case to support the right of C to recover the same sum from D, for the judgment is simply a conclusion reached by the application of rules of law to certain facts. We are to look farther in a case than to the judgment to find that which constitutes a precedent. It is found in the rules of law, which are the foundation of a judgment.
135. Oliphant, A Return to Stare Decisis, supra note 45, at 72 (emphasis added). Note how this claim goes against the grain of Oliphant’s analysis.
136. See Stone, 22 Mod. L. Rev., supra note 99, at 605-06.
137. Oliphant, A Return to Stare Decisis, supra note 45, at 72 (footnote omitted).
seek out “general principles” in predicting the outcomes of easy cases; that there are such things as “similar facts” to be sought out and compared in hard cases; and that, for the scientist, “the consolidated results of experience” are “namely, established scientific truths expressed in a general form.”

A theory of dictum as that which does not set a precedent explains the need to deny precedential value to legal rules that are too specific, concrete, or particularized. Austin states in this connection that:

[Law] made judicially must be found in the general grounds (or must be found in the general reasons) of judicial decisions ... as detached or abstracted from the specific peculiarities of the decided or resolved cases. Since no two cases are precisely alike, the decision of a specific case may partly turn upon reasons which are suggested to the judge by its specific peculiarities or differences. And that part of the decision which turns on those differences (or that part of the decision which consists of those special reasons), cannot serve as a precedent for subsequent decisions, and cannot serve as a rule or guide of conduct.

A rule of law may be unnecessary to the decision because it is stated too narrowly. In Barwick v. English Joint Stock Bank, for example, the court stated, in ruling on a worthless guarantee fraudulently given by the defendant's manager: “The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master’s benefit, though no express command or privity of the master be proved.” This was generally thought to be a correct statement of the rule until the House of Lords held, in Lloyd v. Grace, Smith & Co., that it was too narrow and that the words “and for the master’s benefit” were merely descriptive of the specific facts of Barwick and not a necessary part of the principle involved. The Barwick principle was upheld, but the Lords added that “it is ... a mistake to qualify it by saying that it only applies when the principal has profited by the fraud.”

139. 2 J. Austin, Jurisprudence 627 (5th ed. 1885).
140. 2 L.R.-Ex. 258 (1867).
141. Id. at 264-65.
143. Id. at 736; see also Goodhart, Determining the Ratio Decidendi of a Case, supra note 86, at 167.

The case of California v. Carney, 471 U.S. 386 (1985), provides a more recent example of a decision that may be considered dictum for the narrowness, rather than breadth, of its holding. In Carney the Court had to decide whether a mobile home was more like a car or a house. Defendant Carney's Dodge Mini Motor Home was parked, with its curtains drawn, in a downtown San
A complete theory of legal authority must take into account the non-precedential character of propositions of law that are too narrow, individualized, or particularized. As analysis proceeds in this direction, Diego parking lot. After receiving information that the vehicle was being used to distribute narcotics, the police watched it for more than an hour. They then knocked on the door and, when Carney appeared, entered and searched the mobile home without a warrant or consent. Marijuana was found in the kitchen area. The California Supreme Court overturned Carney's conviction, ruling that, for purposes of a search warrant, the vehicle should have been treated like a home and that the narcotics should therefore have been suppressed as evidence.

The U.S. Supreme Court reversed, in an opinion by Chief Justice Burger. The Chief Justice set out to construct as narrow an opinion as possible. He first explained that the "automobile exception" to the search warrant requirement stemmed historically from two factors: the greater mobility and the reduced expectation of privacy that one has in an automobile. That one would have less of a feeling of privacy in a car than in a house seems reasonable enough—but probably not for the reason Chief Justice Burger seizes upon:

These reduced expectations of privacy derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways. . . .

The public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation. Id. at 392. This strange reading of the diminished expectation of privacy is the linchpin of the Chief Justice's analysis, because, if it were the real explanation, then mobile homes would indeed be more like cars than houses.

Chief Justice Burger does go on to concede that "respondent's vehicle possessed some, if not many of the attributes of a home" and that "[i]n our increasingly mobile society, many vehicles used for transportation can be and are being used not only for transportation but for shelter, i.e., as a ‘home’ or ‘residence.’" Id. at 393. But here an alternative ground of decision comes into play: An "objective observer" would have concluded that the mobile home was more like a car than a house. The "automobile exception" has historically turned on the mobility of the vehicle "and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for transportation." Id. at 394. Here, the vehicle was "so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle." Id. at 393. Finally, in a footnote, the Chief Justice narrowly circumscribed the boundaries of the Carney holding:

We need not pass on the application of the vehicle exception to a motor home that is situated in a way or place that objectively indicates that it is being used as a residence. Among the factors that might be relevant in determining whether a warrant would be required in such a circumstance is its location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road. Id. at 394 n.3.

Justice Stevens dissented, in an opinion joined by Justices Brennan and Marshall. Essentially, Justice Stevens argues that the Court should never have taken the case in the first place and that, in any event, the Chief Justice completely misreads the "expectation of privacy" associated with a mobile home.

In deciding Carney, Justice Stevens asserts, the Court has "entered new territory prematurely." Id. at 395-96 (Stevens, J., dissenting). The Court's aggressive reversals of state and lower federal court suppressions of evidence have made it "the High Magistrate for every warrantless search and seizure" and have burdened its docket with cases presenting "fact-bound errors of minimal significance." Id. at 396. Here, in what was "at most only a modest extension of our Fourth Amendment precedents," the California Supreme Court had upheld an individual citizen's privacy claim against the law enforcement interest of the state. "[T]his . . . situation . . . rarely presents a compelling reason for Court review in the absence of a fully percolated conflict." Id. at 398. By a "percolated" conflict Justice Stevens means one that has undergone the "painstaking scrutiny of case-by-case adjudication" in the lower courts and received the benefit of extensive debate and refinement of alternative principles that might accommodate the various interests in-
some of the implicit policy rationales favoring broad, general rules of law also begin to emerge against the background of the tradition. But, between the two contrasting—indeed, opposed—conceptions of legal authority outlined above, there exists an intellectual gulf that cannot be ignored. This opposition is not incidental or accidental. Instead, it reflects a deep, inherent tension in the intellectual ancestry of the legal profession and the academic discipline of law. The relatively recent development of common law reasoning as an independent intellectual enterprise draws on an ambivalent heritage and divides its loyalties between the humanities and the empirical sciences. The resulting bifurcated, contradictory notions of legal authority are directly traceable to the differing notions of authority in these two great intellectual traditions, upon which the law of judicial precedents has more or less unconsciously been patterned.144

B. The Text

In the classical tradition of the humanities, authority derives principally from an original text or other primary source. Etymologically, involved. By forging ahead in a vacuum the Court prematurely established a rule for the entire nation.

A related benefit of a series of litigated cases in the lower courts is that they would “define the contours” of the sociological judgment necessitated by a case like Carney. Justice Stevens cites Trailer Life, Motor Home, and RV Lifestyle Magazine in support of his claim that “[i]n this case, the Court can barely glimpse the diverse lifestyles associated with recreational vehicles and mobile living quarters.” Id. at 399. Justice Stevens goes on to a detailed examination of the motor home in question, finding that it was “designed to accommodate a breadth of ordinary everyday living.” Id. at 406. (Interestingly, neither the majority nor the dissent wonders whether respondent actually lived in the mobile home, or whether he also had a “real” home.) “Although it may not be a castle,” observes Justice Stevens, “a motor home is usually the functional equivalent of a hotel room, a vacation and retirement home, or a hunting and fishing cabin.” Id. at 407. Hence Justice Stevens’ ultimate “sociological reading” of the situation presented in Carney: “I believe that society is prepared to recognize that the expectations of privacy within [a motor home] are not unlike the expectations one has in a fixed dwelling.” Id. at 402.

Carney may be considered an example of the counter-theory, suggested above, that a decision may be dictum for its narrowness of holding. The issues presented in the case are so fact-specific, and Chief Justice Burger’s grounds for decision so narrowly drawn, that several more cases will undoubtedly be required to fill in the empirical gaps and establish a workable rule. Justice Stevens’ argument is that the Court, rather than setting the narrowest of non-precedents, should have declined to set any precedent at all. Only after the accumulated wisdom of lower court adjudication, refined in the crucible of individual circumstances, has winnowed out the “unnecessary and discordant elements of doctrine” and preserved “whatever is pure and sound and fine,” should the High Court enter the fray. And only then, Justice Stevens seems also to be saying, can the Court really make the kind of authoritative sociological or institutional reading that would be required to support a “binding judgment on the meaning of the Constitution.” Id. at 399.

144. See generally C.P. Snow, The Two Cultures and the Scientific Revolution (1959).
the "authority" is the author (*auctor*), the originator of something.\footnote{145} The development of humanistic learning resembles a perpetual "querelle des anciens et des modernes,"\footnote{146} a "Great Conversation"\footnote{147} across the ages. The source and subject of this dialogue is the ancient learning embodied in classical texts.\footnote{148} Understanding these works, and comprehending their significance for modern times, are the traditional goals of education in the humanities.\footnote{149}

The distinction between primary sources and secondary sources is accordingly basic to scholarly work in the humanities.\footnote{150} That which is authoritative is original, unique, and complete unto itself; all else is secondary and derivative. In the European Middle Ages the development of commentaries or glosses on primary sources became particularly marked, when such great thinkers as Averroes and Thomas Aquinas devoted the greater part of their lives to the works of Aristotle.\footnote{151} The "rediscovery" of Aristotle's works, some of which had lain in desuetude

\begin{footnotes}
\footnote{147}{See generally R. Hutchins, *Great Books* (1954).}
\footnote{150}{See id. at 26-27: The tradition of the West is embodied in the Great Conversation that began in the dawn of history and that continues to the present day. Whatever the merits of other civilizations in other respects, no civilization is like that of the West in this respect. No other civilization can claim that its defining characteristic is a dialogue of this sort. No dialogue in any other civilization can compare with that of the West in the number of great works of the mind that have contributed to this dialogue. . . . [T]he extent to which books can present the idea of a civilization, the idea of Western civilization is presented in great books. These books are the means of understanding our society and ourselves. They contain the great ideas that dominate us without our knowing it. There is no comparable repository of our tradition.}
\footnote{151}{See id. at 3-14; Arnold, *The Function of Criticism at the Present Time*, in *Essays in Criticism: First Series* 8 (T. Hecor ed. 1968); R. Wellek & A. Warren, *Theory of Literature* 3-45 (1949).}
\end{footnotes}
and others of which had actually been lost for centuries, was probably the primary and precipitating cause of the great revival of learning and scholarship in the European Middle Ages.\(^{152}\)

In terms of methodology, the humanities may be said to be "descriptive." They are inner-directed. The commentators and glossateurs seek to probe and plumb the depths of an original source or text and, sometimes, to "draw out" its relevance for modern times. In doing so, however, there is no need to go beyond the original text.\(^{153}\) The critic remains firmly within the orbit of the original, which provides a full and sufficient framework for scholarly and intellectual effort. The text is a satisfying and self-complete world of meanings.\(^{154}\) "The critic is taught to think of himself as a transmitter of the best that had been thought and said by others, and his greatest fear is that he will stand charged of having substituted his own meanings for the meanings of which he is supposedly the guardian. . . ."\(^{155}\)

---

The medieval world is closed. . . . There is no infinity of learning: the final truth on every subject has already been written—by Aristotle for the natural world, by Plato for philosophy, by Euclid for mathematics, by Holy Writ for religion and cosmology. Within such a closed and finite universe, reason is not a revolutionary ferment, but rather interior decoration to an intellectual structure already finished. Of course, ours is no longer the medieval world, and it is no longer closed (at least not in the same way). See generally A. KOYRÉ, FROM THE CLOSED WORLD TO THE INFINITE UNIVERSE (1957); E. BURTT, THE METAPHYSICAL FOUNDATIONS OF MODERN PHYSICAL SCIENCE (2d ed. 1932). As the previous quotation from Hutchins emphasizes, the list of original texts and primary sources gradually lengthens. But that does not diminish in importance the distinction between primary and secondary sources. If anything, the proliferation of the latter only sharpens the distinction.


153. See, e.g., S. BOOTH, AN ESSAY ON SHAKESPEARE'S SONNETS IX-X (1969) ("I do not intentionally give any interpretations of the sonnets I discuss. I mean to describe them, not to explain them.").


155. Id. at 355; cf. Arnold, supra note 149, at 8, 17, 18:

'Of the literature of France and Germany, as of the intellect of Europe in general, the main effort, for now many years, has been a critical effort; the endeavour, in all branches of knowledge, theology, philosophy, history, art, science, to sec the object as in itself it really is.' . . . [Criticism] obeys an instinct prompting it to try to know the best that is known and thought in the world, irrespectively of practice, politics, and everything of the kind; and to value knowledge and thought as they approach this best, without the intrusion of any other considerations whatever. . . . Its business is, as I have said, simply to know the best that is known and thought in the world, and by in its turn making this known, to create a current of true and fresh ideas.
The traditional humanistic method is the *explication de texte*. Erich Auerbach provides a classic example of this in his book *Mimesis*, each chapter of which begins with and is spun out of a passage from a classical author. For the humanist, the text has an almost inexhaustible depth of meaning. Its messages may, as with Plato, be both esoteric and exoteric. With sacred or religious scripture, in particular, a certain reverence for the original text may almost be taken for granted. The authority of scripture is such that even the act of translating it into a modern language may be so traumatic as to suggest an unacceptable departure from true doctrine.

So firmly has textual thinking dominated humanistic learning that contemporary theoretical work in the humanities even tends to take the text as its basic organizing principle. Some of the main thinkers who might be cited in this connection are Gadamer, Ricoeur, Derrida ("Monsieur Texte"), Foucault, Lacan, and Eco. Each of them has, in his own way, constructed a whole view of the

156. Given this dominance and primacy of the original text, the idea of originality in humanistic scholarship becomes problematic at best. The only course left open to a truly creative and original thinker may be to rebel against tradition and willfully "misread" an otherwise overpowering predecessor. See H. Bloom, *The Anxiety of Influence* (1973); H. Bloom, *A Map of Misreading* (1975). Even so, the original remains the point of departure; the rebellious misreading still takes place within its shadow.

157. E. Auerbach, *Mimesis* (5th Auflage 1971); cf. J. Vining, supra note 33, at 28-29: The study and discussion of texts occupies the minds and talk of historians, critics, and philosophers. Over and over again their method is to take a passage of Aristotle or Wittgenstein, Marx, Marvell or Faulkner, and ask, What does this mean? How does it fit, within this writer's work and the work of others? Does it hang together, with internal coherence and consistency? Do inconsistencies have a purpose and a justification that we can see? What was *his* method in producing his text? This is precisely what lawyers (and judges) do with the opinions of judges or the writings of prominent commentators. (emphasis in original).


160. See H.G. Gadamer, supra note 159 (developing a systematic, humanistic, "philosophical hermeneutics" or general theory of interpretation).


162. See J. Derrida, *Of Grammatology* 158-59 (1976) ("There is nothing outside of the text . . ." (emphasis omitted)).


164. See M. Foucault, *The Archaeology of Knowledge* pt. IV (1972) ("Archaeological Description").


world out of texts, "text analogues," and the theory of their interpretation.

In law, Christopher Columbus Langdell was one of the first to attempt to place his subject (or at least its pedagogy) on a modern scientific footing. But an examination of Langdell's pronouncements reveals that he draws from the sciences mainly in matters of methodology: 1) His science will be observational and classificatory, like botany or geology; and 2) his science will be conceptual and analytical, like logic or geometry. For his concept of legal authority, however, Langdell draws on the humanistic tradition, and in this regard his approach is truly revolutionary. He explains his assumptions in a commemorative address as follows:

... It was indispensable to establish at least two things: first, that law is a science; secondly, that all the available materials of that science are contained in printed books. Printed books are the ultimate sources of all legal knowledge; every student who would obtain any mastery of law as a science must resort to these ultimate sources; and the only assistance which it is possible for the learner to receive is such as can be afforded by teachers who have travelled the same road before him.


170. Cf White, supra note 168, at 220-22 ("Langdell believed in an unfiltered exposure of law students to original source materials, which he defined as appellate judicial opinions."); id. at 222-23 (canvassing opinions that Langdell's approach was not scientific in the usual sense); id. at 215 n.15 (pondering whether post-Civil War developments in higher education may be characterized as "revolutionary").

171. A Record of the Commemoration... on the Two Hundred and Fiftieth Anniversary of the Founding of Harvard College 84, 85-86 (1887). Langdell goes on to say that "[a]ccordingly, the Law Library has been the object of our greatest and most constant solicitude." Id. at 86. It is to the lawyer "all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists." Id. at 85-86. Langdell states further that "a good academic training, especially in the study of language, is a necessary qualification for the successful study of law." Id. at 87; see also C. Langdell, A Selection of Cases on the Law of Contracts vi-vii (1871):

Law, considered as a science, consists of certain principles or doctrines. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. . . . It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, devel-
Here Langdell freely indulges the humanist’s assumption that knowledge is derived chiefly through the careful study and analysis of original texts and primary sources. For lawyers, this means the actual reported cases, as opposed to the textbooks, treatises, and hornbooks that had mainly been relied on up to Langdell’s time.\(^\text{172}\)

Similarly, in Wambaugh’s work, the original authorities are the statutes and the reported cases; textbooks and digests are secondary authorities.\(^\text{173}\) “The books from which the unwritten [case] law is

---

opment, or establishment of any of its essential doctrines; and that such a work could not fail to be of material service to all who desire to study that branch of law systematically and in its original sources.

*Cf.* Keener, *Methods of Legal Education*, 1 *Yale L.J.* 143, 144-45 (1892):

> [T]he student should not only be encouraged to investigate the law in its original sources, but should be distinctly discouraged from regarding as law, what is, in fact, simply the conclusions of writers whose opinions are based upon the material to which the student can be given access.

The case system then proceeds on the theory that law is a science and, as a science, should be studied in the original sources, and that the original sources are the adjudged cases and not the opinions of text writers, based upon the adjudged cases... [T]he cases [are] to [the student] what the specimen is to the mineralogist... [T]he opinion of the court giving the reasons for the conclusion reached, is really the only authoritative treatise which we have in our law.

*Cf.* J. REDLICH, *Essential Reason for the Success of the Case Method*, in *The Common Law and the Case Method in American University Law Schools* 35, 37 (1914) (“The whole law lies in the reports of single cases which have been accumulating for centuries.”).


Langdell’s argument was twofold; his conceptualization of law as a science was only the first. The other was his assertion that “all of the available materials of that science are contained in printed books.” Both of these principles are crucial to his approach to law. For Langdell law was essentially a literary enterprise, a science of extracting meaning from words that would enable one to believe in law as a process of submission to the commands of authoritative texts (the rule of law) rather than as the creation of willful interpreters (with submission concomitantly producing the rule of men).

To an extent never sufficiently acknowledged by his many detractors, Langdell was altogether correct in linking the legitimacy of the law to the mastery of texts, whether of cases, statutes, or the Constitution. However much legal positivism justifiably emphasizes the origins of law in social facts, the ordinary language of all developed legal systems includes constant recourse to texts that authorize specific conduct. One does not have to accept the entire Langdellian system (indeed, I most certainly do not) in order to recognize the centrality of textuality to the lawyer’s enterprise.


The original idea of the case method... was simplistically scientific: cases were studied as if they were plants or butterflies in order to discover the laws of regularity by which they could be classified; those regularities in turn constituted “the law.” By the time I was in law school the emphasis had shifted. Now cases were seen as problems, as pieces of law-life, to be taken apart and put together, to be imaginatively participated in. Law school is thus a kind of language school, working by total immersion, that uses the “case” as its archetypal occasion for speech, and the judicial opinion deciding the case as its archetypal form.

173. *Study of Cases*, *supra* note 7, at 73.
learned are the reports, as primary sources, and the digests and textbooks, as secondary sources.”

Scholarly, humanistic rigor is defined by the use of primary, original sources and the disdain for secondary, second-hand accounts.

As a corollary, legal scholarship is authoritative to the extent that it defers to an original and is not itself original. Goodhart, for example, warns sternly that “a statement, unsupported by citations, is only of doubtful value, however distinguished the writer may be.” In the same vein, Jeremiah Smith even asserts that “[t]he convincing force, if any such there be, of this article will consist in its want of originality.” It has indeed become something of a rule in legal scholarship that something can be asserted with authority only if it has already been asserted by someone else. This cult of the original extends to case law too, of course; examples of cases containing well over 300 citations have been found. Saying something “with authority” means saying it, literally, “with authorities.” And what authority do the authori-

174. Id. at 81.
175. Goodhart, Case Law in England and America, 15 CORNELL L.Q. 173, 176 (1930). For an illuminating exception to this rule, see R. Glennon, The Iconoclast as Reformer 112 (1985). Glennon reports on correspondence between Justice Felix Frankfurter and Judge Jerome Frank. Justice Frankfurter had written Frank as follows:

We have a right to expect, and are badly in need of, such illumination and discriminating discussion from Courts of Appeals and, more particularly from a judge like you. After all, while you are what the Constitution calls “an inferior court” and therefore must duly respect the superior, your brain is yours and is to be exercised.

In his reply, Frank asked whether it would be improper to insert, in an opinion he had been working on, the following sentences:

We are an inferior court. Yet we have received intimations that the Supreme Court does not resent, but welcomes opinions from its inferiors on subjects as to which it, as the superior, has not given fairly unequivocal commands.

Justice Frankfurter responded with the somewhat novel suggestion that Frank simply make such a statement on his own authority, so to speak:

You have not received any such “intimations” because I’m not empowered to give any for the Court. What I wrote you was not an “intimation” but my own strong, explicit conception of the duty, not merely the permissible scope, but the duty of lower court judges, where the U.S.S.C. has not spoken clearly. Why not express this view, if it is also yours, in your own way for your authority.

177. My authority for this proposition is, in turn, the fact that it has frequently been asserted by others.
179. This phenomenon could be explored on many levels, beginning with, for example, notions of authority in primitive society. See, e.g., C. Lévi-Strauss, The Savage Mind 236 (1973): [T]he obstinate fidelity to a past conceived as a timeless model... expresses a consciously or unconsciously adopted attitude, the systematic nature of which is attested all over the world by that endlessly repeated justification of every technique, rule, and custom in the single argument: the ancestors taught it to us. . . . [A]ntiquity and continuance are the foundations of legitimacy.

Cf. H. Maine, Ancient Law 130 (1920) (“Much of the old law which has descended to us was preserved merely because it was old. Those who practiced and obeyed it . . . offered no account of it except that it had come down to them from their ancestors.”). For a discussion of parallel tenden-
ties have? To avoid an infinite regress, English jurists postulate an originating custom that has existed since time immemorial.\textsuperscript{180} Thus, in law, the one truly authoritative source may, oddly enough, be the one whose origins we can no longer recall.\textsuperscript{181} The upshot of this traditional view of judicial precedents is that emphasis will be placed on the narrowness and "textuality" of legal authority. The broad, generalizing tendencies of empirical science\textsuperscript{182} will be suppressed.\textsuperscript{183}


\textsuperscript{181} The similarity to the concept of a mythical \textit{Urzeit} in primitive thought is too striking to go unremarked. See generally M. Eliade, The Myth of the Eternal Return (1971).

\textsuperscript{182} See infra Section IV(C).

\textsuperscript{183} Holmes had already drawn this connection in commenting on the pedagogical implications of the Langdellian case method:

We will not be contented to send forth students with nothing but a ragbag full of general principles,—a swarm of glittering generalities like a swarm of little bodiless cherubs fluttering at the top of one of Correggio's pictures. . . . [T]o make a general principle worth anything you must give it a body; you must show in what way and how far it would be applied actually in an actual system. . . .

In pursuance of these views there have been substituted for text-books more and more, so far as practicable, those books of cases which were received at first by many with a somewhat contemptuous smile and pitying contrast of the good old days, but
The humanist intellectual tradition and its "descriptive" method lead naturally to the view of judicial opinions as direct and authoritative sources of legal rules. The "texts" of judicial opinions thus come to be treated like statutes, constitutions, and other legal texts.\(^\text{184}\) The language used in judicial opinions is studied and analyzed in much the

which now, after fifteen years, bid fair to revolutionize the teaching both of this country and of England.

A RECORD OF THE COMMEMORATION . . . ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDED OF HARVARD COLLEGE 65, 72-73 (1887). See also White, supra note 168, at 225 ("skepticism about abstract propositions was soon complemented by a belief that law students should immerse themselves in original sources without prior reliance on the generalizations of scholars"); cf. J. REDLICH, supra note 171, at 35, 36-37:

In this stage law appears, not as a system of norms and general principles, of abstract commands and prohibitions, which the state as the highest power sets up by direct ordinance as the general rule of life, and which is laid upon the people, as it were, from the outside; on the contrary, the law appears here in its original form as the rules of law found by the judges in every single case that has come up for decision. . . . The whole law lies in the reports of single cases which have been accumulating for centuries.

184. Here an important objection must be met. According to the theory of the common law, there is and must always be an important distinction, in concept and in treatment, between constitutions, statutes, regulations, and other true legal "texts," whose language is authoritative and canonical, and judicial opinions, whose language is not. See T. Grey, supra note 159, at 6.11:

Common law tradition treats statutes and judicial decisions differently in this respect. In determining the precedential force of a judicial decision, the judgment is central and its words are canonical; the opinion is explanatory (like a legislative preamble or committee report), and is meant as an aid to the interpretation of the judgment—part of its context, though typically the most important part. The words of a statute, like the words of a [will] or a deed, are canonical; in this respect the Constitution is like a statute. Cf. E. Wambaugh, STUDY OF CASES, supra note 7, at 24 ("The very Words of the Court [are] not the Doctrine of the Case."); Pound, What of Stare Decisis?, 10 FORDHAM L. REV. 1, 8 (1941) ("It cannot be insisted upon too often that our common-law technique does not make the language [of judicial opinions] authoritative, much less of binding authority. It is the result that passes into the law."); E. Levi, AN INTRODUCTION TO LEGAL REASONING 2 (1951) ("Where case law is considered, and there is no statute, [the judge] is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum."); 2 J. Austin, Lectures on Jurisprudence or the Philosophy of Positive Law 628, 630 (5th ed. 1885):

Since a statute law is expressed in determinate expressions, and those expressions were intended to convey the will of the legislator, it follows that the import or meaning which he annexed to those very expressions is the object of genuine interpretation. . . . But in the analogous process of induction, by which a rule of law is extracted from judicial decisions, that scrupulous attention to the language used by the legislating judge would commonly defeat the end for which the process is performed. As the general propositions which the decision contains are not commonly expressed with much premeditation, and as they must be taken in connection with all the peculiarities of the case, it follows that the very terms in which those propositions are clothed are not the main index to the ratio decidendi—to the general rule or principle which that decision established, and which is the governing principle of the case awaiting solution.

(emphasis in original).

I am arguing that much of the authority of judicial doctrine can be explained only by noting that the language of judicial opinions is being treated precisely as if it were formulaic or canonical, like the language of a statute or constitution. In Austin's terms, "that scrupulous attention to the language used" is now being bestowed, for better or for worse, upon judicial opinions. See, e.g., NLRB v. International Brotherhood of Electrical Workers, Local 340, 107 S. Ct. 2002, 2016 (1987) (Scalia, J., concurring) ("[T]he Court, having already sanctioned a point of departure that is
same way that one would puzzle and agonize over the precise wording of a statute, a constitution, or a literary work. The language of the opinion takes on canonical or formulaic status. It begins to command authority in its own right, rather than merely as a report on how the decision was reached. Ultimately, the opinion is viewed as itself an original text or primary source.

Once this perspective takes root, it alters one's whole approach to judicial doctrine. Questions of authorial intent and what might be termed "judicial history" (as a parallel to legislative history) begin to loom large. For the judge, an existing opinion that stands in the way of a desired result in a pending case must be taken seriously and grappled with on the intellectual level. Its wording is not merely one among many versions of the law; it is the law, expressis verbis. The letter of the law, and not merely its spirit, resides in the authoritative language of the opinion.

Manifestations of this development can be seen in every quarter. In Great Western Railway v. Owners of S.S. Mostyn, for example, the House of Lords could have disposed of the matter before it in relatively straightforward fashion, had it not been for inconvenient language in a nineteenth-century case on point, Wear v. Adamson. As it was, the Lords felt compelled to devote almost fifty pages to a close analysis of the language in Wear. Such solicitude would be incomprehensible if the judges' task were merely to establish the facts of the precedential case and the decision reached on those facts.

In this country, particularly in the United States Supreme Court, the textualist approach to judicial doctrine has become especially marked. Professor Robert Nagel has convincingly and exhaustively documented the transformation of the Supreme Court into a great

---

185. See, e.g., Symposium on Law and Literature, 60 Tex. L. Rev. 373 (1982); Interpretation Symposium, 58 S. Cal. L. Rev. 1 (1985); J. White, The Legal Imagination (1973) ("a sustained attempt to define the life of the law as a literary one"); J. White, supra note 172, at 108:

In my own experience at least, the same central method was at work in both legal and literary education, for both to a remarkable degree proceeded by drawing the student's attention to a series of discrete texts, one after another, and holding it there. In law the text was typically the judicial opinion; in literary studies usually, though not always, the poem. In both fields the emphasis was on the text as a self-justifying, self-explaining, self-authenticating object. The primary method of analysis was to focus on the text's language and form, rather than, for example, on its social or economic or other context. Cf. id. at 110 (explaining "this remarkable emphasis on the judicial opinion").


187. 2 App. Cas. 743 (1877).
common law court of general jurisdiction, interpreting a "formulaic Constitution" that exists only in the opinions of the Court.188

During roughly the last thirty years a new style of opinion writing has emerged as the most common method of constitutional exegesis. This style emphasizes formalized doctrine expressed in elaborately layered sets of "tests" or "prongs" or "requirements" or "standards" or "hurdles." The judicial opinions in which these "analytical devices" appear tend to be characterized by tireless, detailed debate among the Justices. The apparently definitive formulations, standing amidst a welter of separate opinions and contentious footnotes, seem forlorn testaments to the ideals of clarity and consensus. But, taken together, the formulae and the extensive explanation comprise a consistent pattern of earnest argumentation.189

Presumably, a bedrock layer of constitutional text lies beneath the formulae, but that original source has become encrusted by so many layers of judicial doctrine that the real debates are now taking place only at the periphery.190 Nagel argues that constitutional doctrine has become

---

188. See Nagel, The Formulaic Constitution, 84 Mich. L. Rev. 165 (1985); cf. id. at 166-68 & nn.3-18 (describing the formulae used in explicating freedom of speech, separation of church and state, state sovereignty, equal protection, substantive and procedural due process, the case and controversy requirement, the commerce power, the contract clause, the privileges and immunities clause, the right against self-incrimination, the cruel and unusual punishment clause, the right to effective counsel, the right to conduct one's own defense, and the fourth amendment cases defining "reasonable" and "searches").

189. Id. at 165 (footnotes omitted); cf. Tushnet, Legal Scholarship in the United States: An Overview, 50 Mod. L. Rev. 804, 810 (1987) ("The canonical statement of what due process requires ... is almost a parody of the balancing approach."); Grey, supra note 167, at 52 n.183 (comparing the U.S. Supreme Court's "levels of scrutiny" in equal protection analysis with the California Supreme Court's negligence formula).

190. See Jones, Precedent and Policy in Constitutional Law, 4 Pace L. Rev. 11, 12-14 (1983):

The tests brought to bear in determining the validity or invalidity of challenged governmental action are ... formulated in terms that paraphrase or refine the simpler and usually more general words of the Constitution itself.

... The constitutional text is down there somewhere under this massive overlay of case law development and refinement, but the usual contest between advocates in the Supreme Court, and more often than not between or among the Justices, is the kind of contest that has characterized the common law judicial process at least since the days of Sir Edward Coke, a battle over cases and what they should be taken to stand for.

... The literal text of the Constitution ... figures in contemporary constitutional adjudication only at one remove, that is, as the words of the original text have been construed, expounded, and developed by successive generations of Supreme Court Justices.

In the two centuries of our life as a constitutional republic, a vast and intricate exegesis has been imposed on the lean text of the original constitutional document. ... [The student or practitioner of constitutional law, or the constitutional judge, is working not just with a text but with an authoritative literature, authoritative because the doctrine of precedent makes it so.]
the authoritative, canonical "text" that the Constitution once was. "[J]udicial construction comes to be interchangeable with the original text. Interpretation can then stand in place of the original text. . . . When doctrine becomes an end in itself, either some perfected formula must stand in place of external authority or that authority must be nullified."

When judicial doctrine comes to serve as an authoritative text, the canons of construction appropriate to it become correspondingly narrow, restrictive, and deferential. "Deductions thus formed, and established in the adjudication of particular cases, become, in a manner, part of the text of the law. Succeeding judges receive them as such, and, in general, consider themselves as bound to adhere to them no less strictly than to the express dictates of the legislature." In this situation the goal of interpretation is simply to describe an original text, illuminate its inner meaning, and essentially defer to its authority. It may be, as Cardozo suggests, that the word starts out to free thought but ends by enslaving it. If so, jurists and legal scholars can nevertheless understand why they have been reduced to commentators and glossateurs, with correspondingly restrictive and deferential notions of dictum, stare decisis, and the ratio decidendi. It is because they are engaged in the essentially humanist enterprise of interpreting an authoritative, canonical text.

191. Nagel, supra note 188, at 184, 190. For similar views, see Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 770-72 (1988) (in constitutional adjudication "the absolute primacy of text over gloss" cannot be maintained; "the case law overweights the text and historical understanding"); and "the Supreme Court is concerned not with the Constitution, but with constitutional law, which consists largely (albeit not entirely) of case law"); Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 234 (1980) (contemporary constitutional doctrine relies increasingly on "the elaboration of the Court’s own precedents"); Weisberg, Deregulating Death, 1983 Sup. Ct. Rev. 305, 313 (the Court is "engaged in a debate over the meaning of its own pronouncements"); Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162, 1193 (1977) ("The evolving content of constitutional law is not controlled, nor even significantly guided, by the Constitution, understood as an historical document."); Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation," 58 S. Cal. L. Rev. 551 (1985).

This Article does not attempt to provide an adequate account of precedent in constitutional law. For discussions of that subject, see Monaghan, supra; P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1118-29 (1975).

192. 1 Douglas’s Reports iv (1807) (emphasis added); cf. Note, 9 LAW Q. Rev. 106 (1893) ("The moment that a principle is enunciated in the form of a parliamentary enactment it is apt to become in the minds of English judges not the statement of a principle but a verbal rule, the meaning whereof is to be determined by rather narrow canons of interpretation.").

193. See Berkey v. Third Avenue Railway Co., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).

194. This account of the humanistic tradition of interpretation should be supplemented by a discussion of the impact of skepticism and ethical relativism on modern views. The debate over original intent, for example, is in part a debate among humanists and not simply between humanists and social scientists. As I have suggested, the way one goes about reading a text makes all the difference. But it is also important to observe that the humanists do not always agree on how to proceed. See, e.g., Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev.
C. The Experiment

The law of judicial precedents shares an ambiguous and ambivalent heritage with the intellectual tradition of the sciences, as well as that of the humanities. In the sciences, the experiment may be said to provide a source or paradigm of authority comparable to the authoritative text in the humanities. This section traces out the contrasting conception of legal authority that has been developed on the model of empirical science.

An experiment may be viewed as a question posed, under carefully controlled conditions, to nature. The experimental conditions are like the facts of a legal case, and nature's answer, properly understood, may (the scientist hopes) be formulated as a law. Likewise in legal analysis, the point of studying varied fact patterns and their adjudicated results is to extract "the law" from them. The results of an experiment serve, both in law and in science, as a decisive, empirical test of some more general doctrine or principle.

A single research project, however, has no significance or value in science. Nothing special attaches to the unique particulars of time, place, and personages involved in an experiment, however momentous it may have been in the history of science. The experiment has value and significance only if it can, in principle and in fact, be repeated—with the same results—at other times, by other scientists, in other places. Experimental results that cannot be so replicated are initially greeted with skepticism or suspicion. If the inability to replicate them persists, they are discarded as worthless.

The scientific experiment derives authority not from its status as an "original," but from the repeated confirmation of its results by other, later experimenters. The difference is fundamental. The text is whole, complete, and self-sufficient; the experiment is radically incomplete—it needs "context" in order to be meaningful. Later scientific experiment-

885 (1985). Charles Beard, a humanist, never accepted the idea that the Constitution was the final and only authority as to what constituted government and protected individual rights. See C. Beard, THE SUPREME COURT AND THE CONSTITUTION (A. Westin ed. 1962); see also R. Hofstadter, THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON (1968). Some would argue that Beard was a social scientist, and he was doubtless influenced by that rising body of knowledge, but this argument simply raises the definitional problem again. By our standards, Beard is not much of a scientist, but by those of his time he was, just as Langdell was widely considered (and considered himself) to be establishing a "scientific" approach to law. Another way of looking at these matters is suggested by P. Bobbitt, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982), though Bobbitt gives history (and humanistic inquiry generally) low marks.

195. See A. Koyré, METAPHYSICS AND MEASUREMENT 12-15 & n.1 (1968) ("Experiment—in contradistinction to mere experience—is a question we put to Nature."); id. at 18-19 ("Experimentation is the methodical interrogation of nature.").

196. For a discussion of the senses in which scientific experiments may be conducted in law, see J. Monahan & L. Walker, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 33-81 (1985).
ers are not trying to redirect attention to an originating event; they are
testing it and challenging its claims to authority. It is the community of
professional scientists, not the individual experimenter, which will fi-
nally be in a position to endow experimental results with true scientific
authority. "Communities of this sort are . . . the producers and
validators of scientific knowledge."197 By the time the scientific com-
munity has confirmed an experiment, the results and the underlying
theory they support are accepted as authoritative, not the original experi-
ment itself. Where the humanists continually hearken back to unique,
original sources, the scientists have no use for them.198

Just as a single experiment cannot confirm a theory, it cannot dis-
confirm one either. Thomas Kuhn has drawn attention to the remark-

SCIENTIFIC REVOLUTIONS]; cf. id. at 164-70, 200 ("It is the community of specialists rather than its
individual members that makes the effective decision."); see also T. KUHN, THE ESSENTIAL TEN-
SION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE xx (1977) [hereinafter
THE ESSENTIAL TENSION]:

Traditional discussions of scientific method have sought a set of rules that would
permit any individual who followed them to produce sound knowledge. I have tried to
insist, instead, that, though science is practiced by individuals, scientific knowledge is
intrinsically a group product and that neither its peculiar efficacy nor the manner in
which it develops will be understood without reference to the special nature of the groups
that produce it.

(emphasis in original).

In a related context, Stanley Fish has explored "the authority of interpretive communities"
in shaping and defining their discussions, disciplines, and even their primary texts. See generally S.
FISH, IS THERE A TEXT IN THIS CLASS? (1980).

198. The way scientific textbooks are written illuminates this point. Typically, their view
of the history of their discipline is drastically foreshortened and compressed. The original experi-
ments and the often laborious efforts required to work them up into a powerful, comprehensive
theory are of "merely historical" interest. The main point is to present contemporary scientific
theory as the timeless and authoritative centerpiece of study:

[Science textbooks . . . refer only to that part of the work of past scientists that can
easily be viewed as contributions to the statement and solution of the texts' paradigm
problems. Partly by selection and partly by distortion, the scientists of earlier ages are
implicitly represented as having worked upon the same set of fixed problems and in ac-
cordance with the same set of fixed canons that the most recent revolution in scientific
theory and method has made seem scientific. . . . [T]he results of scientific research show
no obvious dependence upon the historical context of the inquiry. . . . More historical
detail, whether of science's present or of its past, or more responsibility to the historical
details that are presented, could only give artificial status to human idiosyncrasy, error,
and confusion. Why dignify what science's best and most persistent efforts have made it
discord to discard? SCIENTIFIC REVOLUTIONS, supra note 197, at 138; cf. id. at 165:

Until the very last stages in the education of a scientist, textbooks are systemati-
cally substituted for the creative scientific literature that made them possible. . . . Why,
after all, should the student of physics, for example, read the works of Newton, Faraday,
Einstein, or Schrödinger, when everything he needs to know about these works is recap-
itulated in a far briefer, more precise, and more systematic form in a number of up-to-date
textbooks?

See also R. WOLHEIM, ART AND ITS OBJECTS 75 (1968) (literary works, unlike scientific explana-
tions, are not "expendable" once they have been understood).
able extent to which anomalies and counter-instances are tolerated within all scientific paradigms.199 "[T]here is no such thing as research without counterinstances . . . because no paradigm that provides a basis for scientific research ever completely resolves all its problems."200 Some of this evident tolerance for anomalies can doubtless be attributed to scientists' ability to refine or modify their theories to accommodate apparently discrepant results.201 Similarly, legal rules may be modified in light of decisions that are apparently at variance with an original precedent. But perhaps a more basic reason for this tolerance of anomalies is that experimental verification is only one of a number of important criteria of an authoritative scientific theory.202 Kuhn, for example, suggests the following set of criteria:

First, a theory should be accurate: within its domain, that is, consequences deducible from a theory should be in demonstrated agreement with the results of existing experiments and observations. Second, a theory should be consistent, not only internally or with itself, but also with other currently accepted theories applicable to related aspects of nature. Third, it should have broad scope: in particular, a theory's consequences should extend far beyond the particular observations, laws, or subtheories it was initially designed to explain. Fourth, and closely related, it should be simple, bringing order to phenomena that in its absence would be individually isolated and, as a set, confused. Fifth . . . a theory should be fruitful of new research findings: it should, that is, disclose new phenomena or previously unnoted relationships among those already known.203

Kuhn notes that his first criterion, accuracy, is in some sense the most decisive, and scientists are particularly unwilling to give it up.204 But a theory that offers only superior accuracy may be at a relative disadvantage as against one that offers more consistency, scope, sim-
The concept of "generalizability" in law is discussed in more detail below.


209. Thus, Monahan and Walker "propose that courts treat social science research as they would legal precedent under the common law." Social Authority, supra note 208, at 488. This Article argues that one major strand in the judicial treatment of precedents derives from notions of authority established in the sciences. There thus appears to be substantial agreement that the principles and evaluative criteria used by a social scientist in determining the scientific worth of a piece of research parallel those used by a court in determining the precedential value of a prior decision. See Social Authority, supra note 208, at 498-99 (noting a "striking similarity"); Social Frameworks, supra note 208, at 587 ("remarkable resemblance" observed).

210. Social Authority, supra note 208, at 499.
In the social sciences, critical review is accomplished through peer review of research proposals by screening panels, the publication of research results in refereed scholarly journals, and subsequent reviews by other researchers in other journals.\textsuperscript{211} In law, a similar review process can be seen in the provisions for appeals to progressively larger panels of progressively more eminent (and presumably more disinterested) appellate tribunals. As Wambaugh noted, "A decision of a court not of last resort is usually not of high persuasive authority."\textsuperscript{212}

Research methods are said to be well designed or "internally valid" when they logically rule out, or at least minimize, competing explanations for the observed results.\textsuperscript{213} Scientific theories based on internally invalid research methods are like poorly reasoned judicial opinions. Again, as Wambaugh pointed out, the precedential authority of legal opinions rests to a considerable extent on the quality of their reasoning.\textsuperscript{214}

Monahan and Walker place special emphasis on their third criterion of social science authority, "generalizability" (Kuhn's "broad scope"). Research findings have generalizability or "external validity" to the extent that they can be applied beyond the specific facts of the study to other people, other places, and other times.\textsuperscript{215} Monahan and Walker state that the factors involved in social science generalizability "parallel almost precisely the factors courts commonly consider in ascertaining the precedential pertinence of prior decisions";\textsuperscript{216} and indeed the notion of generalizability captures much that is central to precedential authority in law:

The principal similarity between social science research and law is that both are general—both produce principles applicable beyond particular instances. . . . Like social science, law, particularly court decisions in a common-law system, derives from specific empirical events (the facts of a case), but speaks more broadly. It is this attribute of generality that is described as the "precedential effect" or authoritative nature of a court decision. A decision takes on the mantle of legal authority in subsequent litigation precisely to the extent that the decision transcends the people, situation, and time present in the original case.\textsuperscript{217}

\textsuperscript{211} See id. at 500-01.
\textsuperscript{212} STUDY OF CASES, supra note 7, at 62.
\textsuperscript{213} See Social Authority, supra note 208, at 502; cf. id. at 502-05.
\textsuperscript{214} See supra Section 1.
\textsuperscript{215} See Social Authority, supra note 208, at 506-07.
\textsuperscript{216} Id. at 506.
\textsuperscript{217} Id. at 490-91.
There are also specific policy reasons to favor broad rules of law. Legal doctrine has an important heuristic function; it teaches and educates us as to our legal rights and duties. The whole point of written judicial opinions, after all, is to explain legal decisions, not merely to announce them. The diffusion of legal knowledge cannot be accomplished where it is difficult or impossible to generalize from past “lessons.” We need these cultural repositories of accumulated legal wisdom in order to understand the law and to learn from it. Broad, general rules and principles serve these ends in a way that narrow, fact-specific decisions cannot.

Monahan and Walker’s final criterion, whether scientific findings are “supported by a body of other research,” has already been discussed in the context of the scientific experiment. The more often experimental results can be independently confirmed, the less likely it is that


[The function of a court is not only to give judgment, but also to lay down a principle consistent with that judgment. . . . One of the functions of the courts in general, and of appellate courts in particular, is to discuss and enunciate general principles as pointers to the future development of the law.

Cf. E. Burke, Report from the Committee of the House of Commons, Appointed to Inspect the Lords’ Journals in Relation to Their Proceedings on the Trial of William Hastings, in XI THE WORKS OF EDMUND BURKE 1, 41 (S. Pinney ed. 1871) (speech given April 30, 1794):

Your committee do not find any positive law which binds the judges of the courts in Westminster Hall publicly to give a reasoned opinion from the bench, in support of their judgment upon matters that are stated before them. But the course hath prevailed from the oldest times. It hath been so general and so uniform, that it must be considered as the law of the land.

219. See R. CROSS, supra note 218, at 48 (“In general . . . the authority of a decision for which no reasons are given is very weak.”); E. WAMBAUGH, STUDY OF CASES, supra note 7, at 47 (“If the reasons for a decision are not given, the decision can be of little weight, for it does not appear to have been the result of thorough investigation. Clearly, the same result follows if there is no citation of authorities.”); 1 Douglas’s Reports v (1807) (“[T]he authority of a decision, for obvious reasons, is held to be next to nothing, if it passes sub silentio, without argument at the bar, or by the court; and it is impossible from the record of a judgment to discover whether the case was solemnly decided or not.”); see also A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 23-28 (1962); Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 19-20 (1959); Hart, The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices, 73 HARV. L. REV. 84, 98-99 (1959).

220. See Baldwin, Teaching Law by Cases, 14 HARV. L. REV 258, 259 (1900) (“No science can be learned purely from particulars. The universals must be studied to discover what the particulars mean and whence they sprang.”); cf. Monahan & Walker, Social Authority, supra note 208, at 491 (“Scientific findings are evaluated in part by their heuristic value—by their ability to order and make understandable new phenomena. Likewise, a court decision comes to be accorded the status of precedent when it is found to embody a principle that assists in the resolution of a subsequent conflict.”).

221. See J. WHITE, A TALK TO ENTERING STUDENTS, in HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 55-56 (1985) (“the judicial opinion . . . is the last stage of a long and complicated process[,] . . . the cultural deposit or artifact left behind by weeks or months or years of work by actual people in the real world. . . .”)

222. See Schauer, supra note 121, at 600-01 (generality of precedents depends on “substantive value choices” and varies with “the purposes to be served within a decisional domain”).
they are due to unrepresentative data or methodological flaws in the design of the experiment. Similarly, a legal precedent gains in authority as it is followed and relied on by other courts in subsequent cases.\textsuperscript{223} Law, like science, builds on its accomplishments as it adds to them; and a given doctrine finally acquires legal authority only when "the collective opinion of legal experts"\textsuperscript{224} has coalesced around it. As early as 1930, Goodhart had detected in American legal doctrine a peculiar and unacknowledged affiliation with \textit{la jurisprudence} in the Continental tradition, which requires a settled course of decisions before precedential authority can be established.\textsuperscript{225} "[I]n modern Continental law the emphasis is not on the individual case in particular, but rather on a series or group of cases creating a practice."\textsuperscript{226} His later pronouncements are any indication ("further decisions are frequently required before the scope of a principle is finally determined"),\textsuperscript{227} Goodhart may ultimately have come over to that view himself.\textsuperscript{228}

\textsuperscript{223} "The greater the number of courts that cite and rely upon a decision, the less likely it is that the decision contains some hidden flaw that, if discovered, would lead to a different result." Monahan & Walker, Social Authority, supra note 208, at 508.

\textsuperscript{224} F. Pollock, The Science of Case-Law, supra note 70, at 179: The ideal standard is, in fact, nothing else than the objective side of the legal habit of mind itself, when considered as independent of the particular individuals in whom the habit is formed. It cannot be found in any one book or in any one lawyer, but only in the collective opinion of legal experts.

Cf. J. Beale, Jurisprudence Lectures (1909), reprinted in 29 U. Miami L. Rev. 281, 293 (1975) ("It is the opinion of those expert in that method of thought, which is the law. How do you tell what is the law of Massachusetts today? . . . The law of Massachusetts is what the body of the Massachusetts bar thinks it is."); J. Beale, A Treatise on the Conflict of Laws 150 (1916) ("The law of a given time must be taken to be the body of principles which is accepted by the legal profession.").

\textsuperscript{225} See Goodhart, Case Law in England and America, 15 CORNELL L.Q. 173, 173-75, 179-86 (1930) ("in no distant time the American doctrine will approximate that of the civil law"); cf. Radin, Case Law and Stare Decisis: Concerning Prädizienrecht in Amerika, 33 COLUM. L. REV. 199, 209-11 (1933) (explaining the "process of generalization" that a single precedent initiates, and comparing the common law judicial opinion to the "doctrine" of Continental jurisprudence); E. Levi, An Introduction to Legal Reasoning 2-4 (1949) (common law rules are derived from determinations of similarity and difference among cases over time).

\textsuperscript{226} A. Goodhart, supra note 1, at 10; cf. Lambert & Wasserman, The Case Method in Canada and the Possibilities of its Adaptation to the Civil Law, 39 YALE L.J. 1, 15 (1929) ("The practice of the courts does not become a source of the law until it is definitely fixed by the repetition of precedents which are in agreement on a single point.").

\textsuperscript{227} See supra Section III(B).

\textsuperscript{228} As noted previously, see supra note 4, the task of this Article is the "creative redescription" of legal doctrine and not an evaluative or comparative weighing of the various doctrines so described. Nevertheless, it may be useful to indicate in broad outline how a critique of the "scientific" doctrine of precedent might proceed. Fortunately, such a critique has already been adumbrated in the context of tort law. See White, The Impact of Legal Science on Tort Law, 1880-1910, 78 COLUM. L. REV. 213, 250-57 (1978) [hereinafter White, Legal Science]; see also G.E. White, Tort Law in America: An Intellectual History 55-62 (1980).

A basic assumption of the scientific doctrine of precedent is that rules of increasing breadth and generality can be extracted from the varied fact patterns of adjudicated cases. See supra text accompanying notes 195-96; Posner, Volume One of The Journal of Legal Studies—An Afterword,
V. Conclusion

A comprehensive doctrine of precedent—complete with its own policy rationales—can thus be developed on the assumptions of the natural and social sciences. This doctrine stands in direct opposition to the traditional view of precedent, derived from humanistic thought, which restricts legal authority as narrowly as possible to the express terms of an original text. The model of narrowness cannot be followed to its logical conclusion because it leads to a particularity and specificity that can never be of more than individual interest or form the basis of a useful rule (the ratio decidendi). The model of generalizability is not, however, entirely satisfactory either, because the regime of case law demands that judicial intrusions into ordinary life be of a strictly limited, restrained, and modest sort (the dictum principle).

How these two, directly opposed doctrines of precedent could have coexisted for so long is itself an interesting question. Their opposition is not, in any event, incidental or fortuitous, like an afterthought in

1 J. LEGAL STUD. 437 (1972) ("the application of scientific methods to the study of the legal system" should be encouraged in order "to discover and explain the recurrent patterns in the observations—the 'laws' of the system"). These broad rules are, however, vulnerable to atomizing tendencies at several levels. How can a set of general principles applicable to all cases be derived from a quantitatively growing and qualitatively changing body of cases? Langdell's response, that most of the cases are "useless and worse than useless" for this purpose, is, as White notes, only a "primitive" response. White, Legal Science, supra, at 251. Later efforts were directed at integrating imperfect cases and refining existing principles.

Even assuming that a provisional rule can be derived from the cases, how is the rule to be maintained in the face of varied applications of it by idiosyncratic legal officials (including juries) in different fact contexts? "The more often a principle of tort law, such as negligence, took its operative meaning from individualized decisions by discrete juries, the less meaningful that principle was as a uniform guide to conduct." White, Legal Science, supra, at 252. If substantive rules are largely subject to modification in the process by which they are implemented, then the better part of "scientific" valor would be to focus on that modification process itself, not on the rules. This would be the empirical, inductive approach, since it "proceeded from the diverse facts of cases to generalizations about the 'judicial process.' " In contrast, the reasoning of the soi-disant scientists can be seen as "dogmatic reasoning, emphasizing the formulation of meaningless abstract principles that were asserted to have some universal validity. That assertion... ignored the operation of the principles in practice." White, Legal Science, supra, at 254.

This suggests the range of criticism to which the scientific paradigm may be subject. For general discussions in this vein, see E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE (1973); D. HOLLINGER, MORRIS R. COHEN AND THE SCIENTIFIC IDEAL (1975). On the Legal Realists' critique of general, abstract categories and their project of replacing them with narrow, concrete ones, see Grey, supra note 167, at 49 & n.177.

229. An answer may be sought in the suggestion that "[l]aw is a scavenger. It grows by feeding on ideas from outside, not by inventing new ones of its own. How borrowed ideas—not political and social theories, but abstract ideas borrowed from other disciplines—affect the law is a topic scholars have overlooked." Elliott, The Evolutionary Tradition in Jurisprudence, 85 COLUM. L. REV. 38, 38 (1985); cf Hoeftich, Law & Geometry: Legal Science from Leibniz to Langdell, 30 AM. J. LEGAL HIST. 95, 96 (1986) ("One might argue that precisely because law does not possess one unique set of methodological assumptions dictated by its nature and process jurists must seek for methodological paradigms elsewhere.").
the history of ideas. Instead, it expresses an essential tension deep at the heart of the doctrine of precedent, which has always had recourse to these opposed ways of thinking. Both are inevitable in a system that aspires simultaneously to scientific validity and judicial restraint, individual justice and the protection of settled rights, progress and order.\textsuperscript{230} Theories of precedential authority are driven between these two paradigms in something very like a Hegelian dialectic. What makes the tension and the dialectic “necessary” is that if the rule of a case is either too broad or too narrow, it loses its force as legal authority. As a result, legal analysis is pushed outward, by methods patterned on the experimental sciences, to make principles broader and to avoid non-precedential particularity. In order to avoid creating overly broad dictum, however, it is drawn back to the text and the humanities tradition.

The law of judicial precedents is in this sense theoretically unstable; it rests on shaky conceptual foundations, borrowed from other disciplines, that only indirectly address legal concerns. But things could hardly be otherwise for what is, at bottom, a system of pragmatic accommodations that has come into existence largely through historical happenstance. At this stage, to demand complete logical consistency and methodological purity from an historical and intellectual edifice that has to solve the practical problems of real life is neither realistic nor reasonable. The law is, like Whitman, “large”; it contains multitudes; and it contradicts itself.\textsuperscript{231}

\footnotesize{\textsuperscript{230} See Schauer, supra note 121, at 595-602; White, Legal Science, supra note 228, at 255.  
\textsuperscript{231} See W. Whitman, Song of Myself, in 1 Leaves of Grass: A Textual Variorum of the Printed Poems 1, 82 (S. Bradley ed. 1980):  
Do I contradict myself?  
Very well then I contradict myself,  
(I am large, I contain multitudes.)  
Cf. O.W. Holmes, The Common Law 32 (M. Howe ed. 1963) (“The truth is, that the law is always approaching, and never reaching, consistency.”); B. Cardozo, The Paradoxes of Legal Science 4 (1928) (“The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law.”).}