Narrowing Supreme Court Precedent from Below

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Lower courts supposedly follow Supreme Court precedent—but they often don’t. Instead of adhering to the most persuasive interpretations of the Court’s opinions, lower courts often adopt narrower readings. For example, recent courts of appeals’ decisions have narrowly interpreted the Court’s rulings on police searches, gun control, and campaign finance. This practice—which I call “narrowing from below”—challenges the authority of higher courts and can generate legal disuniformity. But it is also beneficial. Narrowing from below allows lower courts to update obsolete precedents, mitigate the harmful consequences of the Court’s errors, and enhance the transparency of their decision-making process. This Article contends that narrowing from below is usually legitimate when lower courts adopt reasonable readings of higher court precedent, even though those readings are not the most persuasive ones available. This conclusion holds true—with some significant modifications—under multiple scholarly models of vertical stare decisis, including models that view higher court rulings as legally authoritative, comparatively proficient, or usefully predictive. Understanding narrowing from below as a legitimate activity also points toward a new “signals” model of vertical stare decisis. Under this model, lower courts follow the Court’s relatively informal cues to resolve ambiguity in conventional precedent, including by narrowing from below.

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I reflected. “How have we progressed, I wonder?”
Then the obvious reply
Hit me squarely in the eye:
It is by ignoring precedent, by thunder!

—C.J. Dennis

Imagine that you are a judge on a court of appeals and that a party has just cited your least favorite Supreme Court precedent. Much to your chagrin, you have concluded that the precedent, though ambiguous, is most persuasively interpreted as controlling in the case before you. This situation presents several options. First, you could follow the precedent, even though it is misguided and would inflict injustice. Alternatively, you might purport to overrule the precedent, despite the norm that lower courts lack authority to displace the rulings of higher courts. Finally, you could narrow the precedent from below by interpreting it not to apply, even though you think that the precedent is best read to apply. That last approach would acknowledge that the precedent must remain binding in circumstances where it unmistakably applies, while also reducing the precedent’s scope of application in cases of precedential ambiguity.

Judges regularly confront the dilemma described above, but they don’t have a great deal of explicit guidance on what to do. The Supreme Court has plainly said that lower courts lack authority to overrule its decisions, but the Court has not made a similarly categorical or salient statement regarding narrowing from below. Lower courts themselves rarely issue precedential statements on the propriety of narrowing from below; the few cases that do discuss the idea tend to reject it in favor of a strict model of vertical stare decisis, wherein the Supreme Court speaks and the lower courts follow as closely as they can. As Judge Michael Boudin recently put it on behalf of the First Circuit, “a lower federal court such as ours must follow its best understanding of governing precedent, knowing that in large matters the Supreme Court will correct misreadings.” Meanwhile, scholars have heaped critical attention on the question of whether lower courts can legitimately engage in “anticipatory overruling” of higher court precedent. By comparison, lower courts’ authority to narrow

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2. The term “ambiguous” is used throughout in a nontechnical sense to refer to indeterminacy of meaning, including vagueness. See infra note 34 and accompanying text (discussing different approaches to ascertaining the “best” or “most persuasive” meaning of precedent); cf. Ralf Poscher, Ambiguity and Vagueness in Legal Interpretation, in THE OXFORD HANDBOOK OF LANGUAGE AND LAW 128 (Lawrence M. Solan & Peter M. Tiersma eds., 2012).

3. The phrases “vertical narrowing” and “narrowing from below” originated in my prior work. See Richard M. Re, Narrowing Precedent in the Supreme Court, 114 COLUM. L. REV. 1861, 1910 (2014) (“Whether and when vertical narrowing can be legitimate will have to be the subject of future study.”).

4. See, e.g., infra text accompanying notes 159–60, 175, 253–55 (providing examples of lower courts in effect debating the propriety of narrowing from below).

5. See, e.g., Hutto v. Davis, 454 U.S. 370, 375 (1982) (“[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.”); see also infra note 8 (collecting scholarship).

6. Massachusetts v. U.S. Dep’t of Health & Human Servs., 682 F.3d 1, 15–16 (1st Cir. 2012) (Boudin, J.); see also Priests for Life v. U.S. Dep’t of Health & Human Servs., 808 F.3d 1, 14 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc) (“It is not our job to re-litigate or trim or expand Supreme Court decisions. Our job is to follow them as closely and carefully and dispassionately as we can.”).

7. See infra note 94 and accompanying text (describing the doctrine of “anticipatory overruling”).
higher court precedent has received little attention.  

It’s easy to understand the general sense of antipathy associated with narrowing from below. In a pyramidal judicial system, vertical stare decisis is thought to be very strong. Indeed, the entire point of having a Supreme Court is arguably to foster uniformity, and the Court has come to achieve that goal primarily through the promulgation of national precedent. These circumstances suggest that narrowing from below presents challenges that do not arise in connection with horizontal narrowing, or a court’s narrowing of its own precedent. For example, narrowing from below can undermine the authority of higher courts and generate legal disuniformity as varying jurisdictions construe higher court precedent in divergent ways. So narrowing from below could easily be viewed as a subversion of stare decisis that is far more troubling than “stealth overruling,” or horizontal narrowing.

Yet narrowing from below happens all the time, sometimes with the Supreme Court’s blessing. Consider two salient examples. First, lower courts

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8. Commentators typically emphasize the conventional view that vertical stare decisis imposes an “absolute” demand. See, e.g., Michael Abramowicz & Maxwell Stearns, Defining Dicta, 57 STAN. L. REV. 953, 957 (2005) (“Vertical stare decisis is generally considered absolute . . . .”); Michael C. Dorf, Dicta and Article III, 142 U. PA. L. REV. 1997, 2025 (1994) (asserting that “[a] lower court must always follow a higher court’s precedents”); Randy J. Kozel, The Scope of Precedent, 113 MICH. L. REV. 179, 203 (2014) (noting that “the American federal system” is one that “treat[s] vertical precedent as absolutely binding” and that “[w]here a Supreme Court holding applies to a pending dispute, an inferior court has only one available course of action”); Paul W. Werner, The Straits of Stare Decisis and the Utah Court of Appeals: Navigating the Scylla of Under-Application and the Charybdis of Over-Application, 1994 BYU L. REV. 633, 639 (explaining that “stare decisis requires absolute adherence to decisions rendered by higher courts”). At the same time, scholars do in effect acknowledge (and often lament) that narrowing from below happens. See infra note 15.

9. See generally JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES 1–2, 38–44 (2009) (providing an historical account of the principle that “inferior tribunals must generally follow the precedents of their judicial superior”); see also supra note 8 (collecting sources).

10. See infra note 14 (collecting sources).


13. See id. at 1910 (reserving judgment on narrowing from below for these reasons).

14. Barry Friedman offered the leading critique of stealth overruling in the pages of this Journal. See Barry Friedman, The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona), 99 GEO. L.J. 1 (2010); see also Suzanna Sherry, The Four Pillars of Constitutional Doctrine, 32 CARDOZO L. REV. 969, 980 (2011). I have argued that stealth overruling is simply a pejorative term for horizontal narrowing. See Re, supra note 3, at 1865.

15. Commentators have long noted the existence of narrowing from below, while often casting it in a negative light. See, e.g., Ashutosh Bhagwat, Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the “Judicial Power,” 80 B.U. L. REV. 967, 986 (2000) (cataloguing “far from unusual” instances where lower courts appeared to engage in “subtle, subterranean defiance, through means such as reading Supreme Court holdings narrowly, denying the logical implications of a holding, or treating significant parts of opinions as dicta”); Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 STAN. L. REV. 817, 819 (1994) (“Considerable anecdotal evidence suggests that when judges care deeply about a particular legal issue but disagree with existing precedent, they often attempt to subvert the doctrine and free themselves from its fetters by stretching
narrow ambiguous precedents that have become outdated in light of new events or technologies. Recent Fourth Amendment rulings supply powerful examples, as lower courts have construed dated precedents to be inapplicable to new digital surveillance techniques. In reviewing these decisions, the Court has exhibited not alarm, but approval. Second, lower courts sometimes narrow from below in order to provoke the Court to reconsider its own decisions. In the context of car searches incident to arrest, for instance, the Arizona Supreme Court narrowly interpreted a widely followed Supreme Court ruling. The Arizona court’s outlier interpretation was strained—but it successfully prompted the Justices to reconsider a ruling that the Court itself had come to question.

This Article contends that, in many situations, a lower court can legitimately narrow Supreme Court precedent by adopting a reasonable reading of it. This basic conclusion holds true—with some significant modifications—under various justificatory theories of vertical stare decisis, including theories that view higher court rulings as authoritative, comparatively proficient, useful predictors,
or authoritative signals. For instance, the most stringent theory of vertical stare decisis posits that higher court rulings are constitutively correct for lower courts. But even that authority model of vertical stare decisis suggests that lower courts legitimately engage in narrowing from below when they reasonably interpret higher court precedent in a way that comports with first principles and that does not presume that the higher court precedent is wrong. Other models of vertical stare decisis are even more broadly supportive of narrowing from below. The upshot is that ambiguous Supreme Court precedent can and often should be viewed as effecting a kind of delegation to lower courts, affording them legitimate space for interpretive flexibility.

Importantly, narrowing from below is distinct from the more familiar concept of partial overruling. In short, narrowing occurs when a court interprets a precedent more narrowly than it is best read. By contrast, partial overruling occurs when a court accepts that a precedent already covers the relevant legal terrain but then trumps the precedent in whole or in part by establishing a new legal rule. Each of these techniques has an analogue in the context of judicial review of legislation. Narrowing is analogous to constitutional avoidance, in that both practices interpret a single source of law in light of the author’s presumed intention to act lawfully. By contrast, partial overruling is analogous to partial invalidation, whereby a portion of one source of law is overridden in favor of another. Moreover, the two techniques are legitimate under different conditions. As an interpretive exercise, narrowing is legitimate only if precedent is ambiguous, whereas overruling can be appropriate even in the face of precedential clarity. Yet overruling is thought to be legitimate only when there is a “special justification” for dispensing with stare decisis, and that added requirement need not be met for narrowing to be legitimate. Narrowing from below is therefore distinct from partial overruling—and the proper conditions for engaging in the two practices differ as well.

21. See infra Part I.
22. See infra Section II.A.1.
23. See id.
24. See infra notes 118, 201, 218 and accompanying text.
25. By contrast, Kevin Walsh has proposed “recognizing the functional equivalence of narrowing and partial overruling in certain circumstances.” See Kevin C. Walsh, Expanding Our Understanding of Narrowing Precedent, JOTWELL (Feb. 11, 2015), http://courtslaw.jotwell.com/expanding-our-understanding-of-narrowing-precedent/. I have greatly benefitted from Walsh’s comments on my prior work on narrowing. See infra note 40.
26. See, e.g., Crowell v. Benson, 285 U.S. 22, 62 (1932) (explaining that the Court will “ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided”); Re, supra note 3, at 1886 (drawing the analogy between narrowing and avoidance).
27. See supra note 20 (collecting sources).
28. See infra note 51. Some commentators have argued that a clear showing of a precedent’s wrongness might suffice to justify overruling, at least provided there is no showing of a special justification to retain it, such as reliance. See Caleb Nelson, Stare Decisis and Demonstrably Erroneous Precedents, 87 VA. L. REV. 1, 7 (2001); see also AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 236–37 (2012).
Finally, narrowing from below informs the functional relationship between courts in a pyramidal judiciary. Too often judges and commentators assume a simplistic relationship whereby lower courts either do or don’t follow their superiors’ instructions. But lower courts have a substantial interpretive gray zone available to them—and, in taking advantage of that discretion, lower courts sometimes engage in a precedential dialogue with the Supreme Court. In addition, narrowing from below is often linked to the Court’s underappreciated ability to transmit “signals,” or set unconventional precedents for lower courts. As new technologies have enhanced the visibility of the Justices’ work, the Court has acquired new ways of communicating its legal views, and lower courts are increasingly likely to heed those signals. In fact, courts often follow signals when narrowing from below—and rightly so.

The argument proceeds as follows. Adopting an internal perspective on legal practice, Part I analyzes the difference between narrowing and partial overruling and proposes distinct normative criteria for each activity. Part II then discusses the key values underlying vertical stare decisis and argues that those values all point toward the frequent legitimacy of narrowing from below. Finally, Parts III through VI evaluate and categorize salient instances of narrowing from below. Though often portrayed as simple or absolute, vertical stare decisis is actually complex and nuanced. When hierarchical courts communicate, they often do—and should—make use of narrowing from below.

I. NARROWING AND PARTIAL OVERRULING

This Part compares narrowing and partial overruling. By refining our understanding of these two activities, we can identify when one practice is legitimate and the other is not.

A. WHAT IS NARROWING?

The process of conceptual clarification begins with definitions. As used here, “narrowing” means interpreting a precedent not to apply where it is best read to

29. Henry Campbell Black provided an especially brisk and still-cited statement of this principle:

Inferior courts are absolutely bound to follow the decisions of the courts having appellate . . . jurisdiction over them. In this aspect, precedents set by the higher courts are imperative in the strictest sense. They are conclusive on the lower courts, and leave to the latter no scope for independent judgment or discretion.

HENRY CAMPBELL BLACK, THE LAW OF JUDICIAL PRECEDENTS 10 (1912); see also supra notes 8, 15; infra note 76.

30. See infra Section II.A.4 & Part VI.

31. This Article generally assumes an internal perspective of legal practitioners, in that some legal views are deemed more correct than others.

32. In focusing on horizontal stare decisis, my prior work primarily explored the relationship between narrowing, “stealth overruling,” and distinguishing. See Re, supra note 3; Friedman, supra note 14.
apply. This definition assumes—as is often true—that a court can glean the “best” reading of relevant precedent. But it is in the nature of ambiguity that reasonable interpreters may disagree about which reading is best, in part because they use different interpretive tools. Moreover, interpreters sometimes conclude that there are multiple readings with equal claim to being the best, or that no reading is best. Despite these caveats, courts are often able to rank precedential interpretations, such that the options are deemed best, reasonable, or unreasonable.

As I have argued in my prior work, narrowing is distinct from three additional ways of interpreting precedent: following, extending, and distinguishing. These four terms together represent the distinct ways of answering two sequential questions: First, is the precedent at issue best read to apply? And, second, does the court in fact interpret the precedent to apply? Following means interpreting a precedent to apply where it is best read to apply. Extending means interpreting a precedent to apply where it is best read not to apply. And, finally, distinguishing means interpreting a precedent not to apply where it is best read not to apply. These four possibilities are diagrammed in Table 1 below.

Because courts must grapple with numerous cases at once, the four ways of using precedent are often used in conjunction with one another or with other forms of judicial reasoning. For example, a court might narrow one precedent

33. See Re, supra note 3; cf. K. N. Llewellyn, The Bramble Bush: Some Lectures on Law and Its Study 65 (Quid Pro Books 2012) (1930) (discussing a precedent’s “maximum value as a precedent” and its “minimum value”); Ronald Dworkin, Taking Rights Seriously 111, 121–23 (1977) (distinguishing between a precedent’s “gravitational force,” which is reduced if the precedent is defective, and its “enactment force,” which remains until overruled). For clarity, I now consistently speak of whether the court interprets a precedent as applying or not applying. Compare Re, supra note 3, at 1863, with id. at 1869.

34. Different approaches to interpreting precedent resemble debates over statutory interpretation, such as debates as to whether public meaning or authorial intent should control. See, e.g., Adrian Vermeule, Judicial History, 108 Yale L.J. 1311, 1313 (1999) (drawing on intentionalism and other approaches to evaluate the role of “judicial history,” akin to legislative history, when interpreting cases). Compare Arizona v. Gant, 556 U.S. 332, 341 (2009) (emphasizing the “textual and evidentiary support” for a certain reading of precedent), with id. at 361–63 (Alito, J., dissenting) (using pragmatic and contextual points to show what the Court “must have intended” by a precedent).

35. The main text applies to both precedential rules and standards, though precedential standards may be more likely to generate reasonable readings than either best or unreasonable readings. For discussion of how the Court might delegate to different tiers of lower courts by using standards as opposed to rules, see Michael Coenen, Rules Against Rulification, 124 Yale L.J. 644, 687–89 (2014).


37. See Re, supra note 3, at 1861. Although these definitions could be applied either subjectively or objectively, this Article uses them subjectively. That is, narrowing occurs when a court self-consciously adopts a reading of precedent that is not the best. But because we lack direct access to judges’ thought processes, objective evidence is often necessary to draw inferences about judges’ subjective states of mind.

38. Cf. Edward D. Re, Stare Decisis, 79 F.R.D. 509, 514 (1978) (“A court may choose to extend a principle beyond the prior case if it believes that such action will promote justice. If the application of the principle, however, would produce an undesirable result the court will narrow or restrict the principle, or may apply a different precedent.”).
while extending another. 39 Or, if faced with a precedent that is best read as applying in two situations, 1 and 2, a court might narrow by interpreting the precedent to apply only in situation 1. The question of what to do in situation 2 might then no longer be governed by any precedent and, therefore, pose an open question.

B. OVERRULING AND PARTIAL OVERRULING

The next step is to specify the meaning of overruling and partial overruling. 40 “Overruling” occurs when a new precedent trumps an older one. 41 By contrast, “partial overruling” occurs when a new precedent trumps only part of an older precedent. Partial overruling is partial because it displaces only some of a precedent’s applications, leaving others governed by the precedent.

For an example of overruling, consider Lawrence v. Texas. 42 Before Lawrence, the Court held in Bowers v. Hardwick that due process afforded no right to engage in sodomy. 43 Bowers thus established a precedent—a judicial principle dictating a legal result (no constitutional right) with a defined scope of application (constitutional challenges to criminal sodomy laws). In overruling Bowers, Lawrence concluded both that the precedent established in Bowers was erroneous and that it was eligible for overruling. 44 In this way, Lawrence arrived at a new legal conclusion—namely, that due process affords a right to sexual intimacy that includes sodomy—and displaced the contrary ruling in Bowers.

In straightforward cases of partial overruling, the partially overruled precedent is understood to consist of multiple discrete holdings or subrules. For example, Monroe v. Pape included several holdings regarding the federal statute

Table 1: Four Ways of Using Precedent

<table>
<thead>
<tr>
<th>Interpret Precedent to Apply</th>
<th>Best Reading Does Apply</th>
<th>Best Reading Does Not Apply</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Follow</td>
<td>Extend</td>
</tr>
<tr>
<td>Interpret Precedent Not to Apply</td>
<td>Narrow</td>
<td>Distinguish</td>
</tr>
</tbody>
</table>


40. Kevin Walsh has suggested that “another, and in some circumstances closer, analogy may be holding a statute partially unconstitutional coupled with statutory severance.” Walsh, supra note 25. Walsh then suggested that, “when narrowing ventures beyond strained distinguishing (akin to constitutional avoidance), it becomes partial overruling (akin to partial unconstitutionality plus severance).” Id. In this section, I take up Walsh’s invitation to investigate the relationship between narrowing and partial overruling.

41. Cf. Neil Duxbury, The Nature and Authority of Precedent 117 (2008) (“When judges overrule a precedent they are declining to follow it and declaring that, at least where the facts of a case are materially identical to those of the case at hand, a new ruling should be followed instead.”).

42. 539 U.S. 558 (2003).


44. See Lawrence, 539 U.S. at 575–78.
that is now widely known as “section 1983,” including that section 1983 does not create a cause of action against municipalities. In *Monell v. New York City Department of Human Services*, the Court preserved most of what *Monroe* held, but overruled *Monroe* insofar as it precluded section 1983 actions against municipalities. Thus, *Monell* displaced part of the precedent established in *Monroe* in favor of a new conclusion regarding statutory meaning.

But partial overruling is also possible when a precedent establishes what is understood to be a single holding or legal principle. Consider *Planned Parenthood of Southeastern Pennsylvania v. Casey*, where the controlling plurality opinion partially overruled two then-salient abortion rights precedents. The two earlier cases had skeptically evaluated laws that required pregnant women to be told certain information before having abortions. In the view of the *Casey* plurality, however, the two earlier cases had failed to give adequate weight to the government’s interest in preserving the life of the fetus. The *Casey* plurality accordingly held: “To the extent [that the earlier cases] find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information [on certain topics], those cases go too far, are inconsistent with *Roe*’s acknowledgment of an important interest in potential life, and are overruled.”

To a great extent, the difference between overruling and partial overruling is simply a matter of degree. For instance, the same stare decisis analysis should normally apply in connection with overruling and partial overruling, because overruling a precedent with a small scope is functionally equivalent to partially overruling a precedent with a large scope. Insofar as it is unconcerned with whether a precedent’s scope of application is large or small, stare decisis should likewise be indifferent as to whether overruling is total or partial.

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49. 505 U.S. at 882 (plurality opinion).
50. Interestingly, the Court sometimes says that it is engaged in partial overruling but then does not apply the conventional stare decisis factors. *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401, 413–14 (1989) (“To the extent that *Martinez* itself suggests such a distinction, we today overrule that case . . . ”); Welch v. Tex. Dep’t of Highways & Pub. Transp., 483 U.S. 468, 478 (1987) (plurality opinion) (“Accordingly, to the extent that *Parden v. Terminal Railway* is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled.” (internal citation omitted)); Daniels v. Williams, 474 U.S. 327, 330–31 (1986) (“Upon reflection, we agree and overrule *Parratt* to the extent that it states that mere lack of due care by a state official may ‘deprive’ an individual of life, liberty, or property under the Fourteenth Amendment.”). One explanation for this is that the Court perceives that the conventional stare decisis factors are unnecessary because it is actually narrowing—but lacks the vocabulary to articulate that point. *See supra* note 48 (discussing *Casey*’s treatment of *Roe*).
Yet the difference of degree between overruling and partial overruling points toward situations in which courts should engage in one as opposed to the other. For example, if the court believes that only part of a precedent is incorrect, then overruling that precedent would usually make little sense. Instead, partial overruling is more appropriate in those situations as a way of improving or refining precedent. In other cases, a later court may believe that a precedent is entirely wrong. Such a belief may support overruling, which would replace the entire wrong rule with the right one.

However, it is possible to favor partial overruling even when a precedent is regarded as entirely incorrect. In the view of the Court, overruling requires a “special justification,” such as unworkability, and the relevant justification may not apply to the entire precedent. By way of example, assume both that overruling is permissible only if the precedent has not engendered reliance and that parties have relied only on a subset of a precedent’s applications. A court might then conclude that stare decisis protects a precedent from being overruled only insofar as the precedent has become an object of reliance. The proper result might then be partial overruling—that is, the displacement of the precedent’s erroneous and not-relied-upon applications. In general, then, partial overruling is more appropriate when the special justification required for overruling applies to only a subset of a precedent’s applications.

When considering whether to overrule, partially overrule, or preserve precedent, case-specific judgment will frequently be critical. In principle, either overruling or partial overruling could result in an unworkable, unacceptably arbitrary, or bewilderingly complex legal regime. For that reason, later courts must be prepared to overrule entirely or to forgo any overruling in light of the pragmatic implications of the precedential options at hand. However, those concerns are unlikely to arise if courts key their decisions to the special justifications for overruling. The leading stare decisis factors are correctness, workability, and reliance, and rulings attentive to those values will tend to yield rules with some inherent appeal and coherence.

The foregoing conclusions can be summarized in two complementary rules of thumb. First, overruling requires that a precedent is not only wrong as to all of

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51. See, e.g., Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2036 (2014) (“[T]his Court has always held that any departure from the doctrine [of stare decisis] demands special justification.”); Dickerson v. United States, 530 U.S. 428, 443 (2000). The Court and commentators have indicated that a “special justification” may be present when a precedent is unworkable, poorly reasoned, undermined by subsequent case law, based on outmoded premises, clearly wrong, or not relied on. See, e.g., Arizona v. Gant, 556 U.S. 332, 358 (2009); see also supra note 28.

52. In this respect, the choice to partially overrule resembles the choice to narrow. See Re, supra note 3, at 1886. Compare Gillian E. Metzger, Remarks of Gillian E. Metzger, 64 N.Y.U. ANN. SURV. AM. L. 459, 462 (2009) (observing that even “arbitrary” distinctions can be clear and so yield “greater certainty” in the law), with William N. Eskridge, Jr., Overruling Statutory Precedents, 76 GEO. L.J. 1361, 1371 (1988) (arguing that, when narrowing precedent by characterizing it as dicta, the Court can “shift directions” too often, thereby producing confusion in lower courts).

its applications, but also that the special justification for overruling extends to all of its applications. Second, partial overruling is usually appropriate either if a precedent is incorrect only as to some of its applications or if the special justification warranting overruling applies only to some of its applications.

C. NARROWING VERSUS PARTIAL OVERRULING

Given the definitions above, narrowing and partial overruling are qualitatively different activities. Again, narrowing is interpreting a precedent more narrowly than it is best read. Once narrowing has taken place, the narrowed precedent recedes from view, and the court is left with open ground that it or a subsequent court might occupy with a new legal rule. By contrast, a court that engages in partial overruling begins by accepting that a precedent already covers the relevant legal terrain. The court then overrides the precedent in whole or in part by establishing a new, supervening precedent.

The differences between narrowing and partial overruling parallel analogous differences between the statutory-law practices of avoidance and partial invalidation. When courts engage in avoidance, they construe legal ambiguities in favor of compliance with a deeper source of law, such as the Constitution. Likewise, courts engage in narrowing when they construe precedential ambiguities in favor of their own first-principles view of the law. These interpretive approaches reflect a background assumption, perhaps grounded in principles of judicial restraint, that legislatures and courts alike intend to establish rules in compliance with the Constitution. Partial overruling, by contrast, is akin to partial invalidation of statutes. A court that partially invalidates a statute invalidates some of the statute’s applications as contrary to a deeper source of law, such as the Constitution. Likewise, a court that engages in partial overruling negates some of a precedent’s applications in favor of a more legally correct view of an underlying source of law. These trumping actions recognize that

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55. I have previously argued that “narrowing is the decisional-law analogue to the statutory-law canon of avoidance.” See Re, supra note 3, at 1886.

56. See Clark v. Martinez, 543 U.S. 371, 381–82 (2005). Narrowing is actually more plausible than avoidance in that there is more reason to think that a prior court intended to get the law correct, whereas legislatures may ignore lawful bounds. See Re, supra note 3, at 1888.

courts must sometimes reject clear precedents and statutes based on deeper legal authorities.

Narrowing is significantly different from partial overruling for many of the same reasons that avoidance is significantly different from partial invalidation. First, narrowing resembles avoidance in that both activities are thought to be legitimate only if the relevant source of law is ambiguous.58 Once courts identify the relevant ambiguity, they can resolve it based on considerations other than conclusive legal determinations, such as merely tentative views. By contrast, partial overruling and partial invalidation do not depend on whether the relevant source of law is ambiguous. Instead, partial overruling and partial invalidation rely on a conclusive determination that one source of law (either a precedent or a statute) is contrary to another, supervening source of law, such as the Constitution. That supervening authority displaces either the prior precessential principle (partial overruling) or the prior statutory principle (partial invalidation). Once that conclusive determination has been made, it becomes irrelevant whether the preexisting source of law is ambiguous: even if it were clear, it would have to give way.

Second, narrowing can create open ground between the broad reading of a precedent and the precedent-as-narrowed. Here too, narrowing is like avoidance, which frequently allows courts to curtail the scope of statutes based on constitutional concerns, without arriving at a new precessential decision regarding the meaning of the Constitution.59 By contrast, partial overruling, like partial invalidation, operates via displacement and so asserts a new legal determination to the same extent that it displaces an old one. Consider *Miranda v. Arizona*, which announced what seemed like a broad rule: the police may not use statements obtained in violation of *Miranda* itself.60 Later, in *Harris v. New York*, the Court recognized that “[s]ome comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose.”61 But rather than overrule *Miranda*, the *Harris* Court narrowed it. Concluding that *Miranda*’s broad exclusionary rule was “not at all necessary,” the *Harris* Court interpreted *Miranda* so that it prohibited only the use of certain statements in the prosecution’s affirmative case.62 The Court was then free to approve the use of the relevant statements for impeachment.63

58. For a conventional statement of avoidance, see *Martinez*, 543 U.S. at 395 (2005) (“A court faced with an ambiguous statute applies traditional avoidance by asking whether, given two plausible interpretations of that statute, one would be unconstitutional as applied to the plaintiff . . . .”).

59. This approach is often called “modern” avoidance. E.g., Vermeule, supra note 54, at 1949. The present discussion assumes the legitimacy of modern avoidance.

60. 384 U.S. 436, 479 (1966) (“[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant].”).


62. Id. (“*Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel.”).

63. See id. at 226.
did not address the many other situations previously covered by Miranda’s broad rule, the Court had to address those situations in later cases. Harris thus narrowed Miranda’s broad statement, without overruling it in favor of a comparably broad legal principle.

Finally, narrowing and partial overruling are legitimate under different conditions. I have previously argued that, as a rule of thumb, en banc appellate courts may legitimately engage in horizontal narrowing when they: (i) at least tentatively believe that a precedent is wrong, (ii) adopt reasonable readings of precedent, and (iii) do not contradict background legal principles. No part of this rule of thumb should apply to horizontal partial overruling. Because only a new, supervening conclusion of law can displace a precedent, partial overruling requires a confident legal determination—not the tentative belief that suffices for narrowing. Further, the legitimacy of partial overruling does not turn on the reasonableness of reading a precedent narrowly: even if the precedent is both clear and broad, it must give way to the conclusive determination that displaces it. And partial overruling may also be appropriate when the partially overruled decision conflicts with background legal principles, for once a court has adopted a new, supervening determination of law, that determination can displace not just the precedent at issue but also any other contrary sources of law.

Consider Boumediene v. Bush’s narrowing of Johnson v. Eisentrager. On its face, Eisentrager established a categorical rule that constitutional habeas may not extend anywhere beyond the territorial United States. In rejecting that broad reading, Boumediene held that Eisentrager turned, in part, on functional considerations. The result was to narrow Eisentrager’s scope to such an extent that it now arguably bars constitutional habeas only in the Landsberg Prison of 1950 and, perhaps, in a few similar facilities. This move allowed Boumediene to set Eisentrager aside without adducing the special justification thought to be required for overruling. Boumediene then went on to find that the Suspension Clause reached Guantanamo, without ruling on whether it extended anywhere else. The upshot is that no comparably determinate precedent filled the vast

64. See, e.g., Oregon v. Haas, 420 U.S. 714, 723 (1975). That Miranda had already been narrowed may explain why its broad statements played only a peripheral role in later decisions. See Re, supra note 3, at 1889 n.126. For example, in United States v. Patane, the United States deflected a question based on Miranda’s broad language by noting, “[T]here are many things in the Miranda opinion that have not stood the test of later litigation in this Court.” See Transcript of Oral Argument at 8, United States v. Patane, 542 U.S. 630 (2004) (No. 02-1183).

65. See Re, supra note 3, at 1874, 1876.

66. Cf. Nelson, supra note 28, at 3 (defending the view that horizontal stare decisis can be overcome when a precedent is demonstrably erroneous).


68. Eisentrager, 339 U.S. at 768, 770.

69. Boumediene, 553 U.S. at 769–70 (Kennedy, J., concurring).

70. Id. at 768.

71. Id. at 771, 795.
doctrinal space that Eisentrager had occupied. In a locale unlike both Guantánamo and Landsberg Prison, the applicable legal framework is supplied by the combined reasoning of Eisentrager-as-narrowed and Boumediene—but neither case provides a clear result.72

The table below summarizes these points by describing the distinct legitimacy conditions for narrowing and partial overruling.

Table 2: Legitimacy Conditions for Narrowing and Partial Overruling

<table>
<thead>
<tr>
<th>Does the Precedent Apply?</th>
<th>Narrowing</th>
<th>Partial Overruling</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ambiguously Yes</td>
<td>Clearly Yes</td>
<td></td>
</tr>
<tr>
<td>Is the Precedent Incorrect?</td>
<td>Tentative Belief of Yes</td>
<td>Confident Belief of Yes</td>
</tr>
<tr>
<td>Does the Precedent Implicate Other Legal Principles?</td>
<td>The Narrowed Precedent Does Not Contradict Background Principles</td>
<td>There is a “Special Justification” for Rejecting the Precedent</td>
</tr>
</tbody>
</table>

For a final illustration, consider Justice Scalia’s recent proposal to curtail an unwanted precedent based on an “accurate-in-fact (but inconsequential-in-principle) distinction.”73 If Scalia’s proposed “distinction” represented a reasonable reading of the precedent and violated no background principles of law, then it would qualify as legitimate narrowing.74 And if those conditions were not met, then Scalia’s proposal might still qualify as legitimate partial overruling. Scalia would then have to adduce a special justification for allowing a new legal principle to displace the unwanted precedent where it applied.

II. NARROWING AND VERTICAL STARE DECISIS

Narrowing from below, or vertical narrowing,75 occurs when a lower court interprets higher court precedent not to apply, even though the precedent is best

72. For example, the D.C. Circuit has adjudicated a Suspension Clause claim rooted in Bagram Airforce Base, Afghanistan. See Al Maqaleh v. Gates, 605 F.3d 84 (2010). The court reasoned that “we are controlled by the Supreme Court’s interpretation of the Constitution in Eisentrager as construed and explained in the Court’s more recent opinion in Boumediene.” Id. at 94; see also id. at 98.


74. See text accompanying supra note 65.

75. “Vertical narrowing” is one court’s narrowing of precedent established by another court at a different hierarchical level. Normally, vertical narrowing is narrowing from below, but it can in principle entail narrowing from above. See, e.g., City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1775–76 (2015) (narrowly construing Ninth Circuit cases while resolving a qualified-immunity issue on the assumption that circuit law can strip qualified immunity); Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (narrowly reading Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)).
read to apply. On reflection, the principal values underlying vertical stare decisis—namely, correctness, practicality, and candor—all counsel in favor of regarding vertical narrowing as legitimate, provided the right conditions.

A. CORRECTNESS

The first value relevant to vertical stare decisis, or any other type of precedent, is the value of legal correctness. This Part considers four models of legal correctness. The first three are familiar in the literature on stare decisis, whereas the fourth is novel. Although each model points in a somewhat different direction, all the models suggest that narrowing from below can be legitimate when a lower court reads higher court precedent in a way that is both reasonable and consistent with the lower court’s own view of the law.

1. Authority Model

Under the authority model, the holdings of Supreme Court majority opinions are not just relevant to legal correctness, but constitutive of it. The authority model thus calls for lower courts to treat the Court’s majority holdings as law in much the same way that a statute is law. Judges and commentators have grounded this strong principle of hierarchical judicial authority in various sources including uniformity interests; Article III’s reference to “one supreme Court”; the historical tradition of precedent arguably incorporated in Article III’s reference to the “judicial Power”; and the background assumptions underlying the judicial oath of office. Whatever the reason, the authority model maintains that the Court’s holdings constitute legal correctness for lower courts, though this principle

76. See, e.g., Kelman, supra note 15, at 4 (arguing that “[i]t is not inaccurate to say that high court precedents have the same preeminence vis-a-vis the contrary opinions of lower courts as statutes have to common law”); see also Harold J. Berman & Charles J. Reid, Jr., The Transformation of English Legal Science: From Hale to Blackstone, 45 EMORY L.J. 437, 449 (1996) (discussing the rise of the modern doctrine of stare decisis). The authority model is consistent with either “rule” or “result” approaches to stare decisis, because either a rule or a result can be authoritative, or constitutive of legal correctness. See Larry Alexander, Constrained by Precedent, 63 S. CAL. L. REV. 1, 18 (1989) (discussing the rule and result models of precedent). Notably, the Court’s asserted power to generate legal rules for lower courts is related to the “law-declaration” aspect of the judicial function, as distinct from the “dispute-resolution” model. See Henry Paul Monaghan, On Avoiding Avoidance, Agenda Control, and Related Matters, 112 COLUM. L. REV. 665, 669–72 (2012) (collecting sources on law declaration and dispute resolution).

77. See PFANDER, supra note 9, at 38–44; Caminker, supra note 15, at 828–54 (collecting and categorizing justifications); see also Winslow v. FERC, 587 F.3d 1133, 1135 (D.C. Cir. 2009) (“Vertical stare decisis—both in letter and in spirit—is a critical aspect of our hierarchical Judiciary headed by ‘one supreme Court.’” (quoting U.S. CONST. art. III, § 1)); Sanford Levinson, On Positivism and Potted Plants: “Inferior” Judges and the Task of Constitutional Interpretation, 25 CONN. L. REV. 843, 848 (1993) (noting the view that “[t]he oath of constitutional fidelity, required of every public official by Article VI of the Constitution, is transformed, for the ‘inferior’ judge, into a duty to obey the Supreme Court”). For an analysis of the oath’s ability to distribute interpretive authority, see Richard M. Re, Promising the Constitution, 110 NW. U. L. REV. 299 (2016) (arguing that the oath incorporates contemporaneous minimum public meanings).

78. See State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (“[I]t is this Court’s prerogative alone to overrule one of its precedents.”); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477,
might apply somewhat differently to state courts.79

But in deeming higher court precedents to be constitutively correct, the authority model raises questions about what those precedents mean. In many cases, the best reading of precedent is unambiguously correct or, equivalently, the only reading that is reasonable. Yet precedent is often ambiguous and therefore susceptible to multiple competing reasonable interpretations.80 The existence of ambiguity in higher court precedent introduces the possibility that narrowing from below, unlike anticipatory overruling or overruling from below, might be legitimate under the authority model. When a precedent is open to alternative meanings, there is competition for the mantle of constitutive correctness. The winner of that competition largely turns on an important issue: the lower court’s degree of confidence that what seems like the best reading of higher court precedent actually is.

Imagine, for example, that a lower court judge is faced with three options: A, B, and C. The judge believes that A is right as a matter of first principles, but that the most relevant Supreme Court precedent is best read as endorsing B.81 If the Court’s endorsement is constitutive of legal correctness, then B seems like the answer that most promotes the value of correctness. But what if the lower court judge believes that the respective odds of each option being the best reading are 48%, 49%, and 3%? In that stylized situation, the judge thinks that B may be the law, but is not sure of that—in fact, the judge doesn’t even think it’s more likely than not to be true. That uncertainty about which reading of

79. Federalism considerations may counsel in favor of affording state courts more leeway to narrow from below. For instance, even though the Supreme Court can review state court rulings on federal law, state courts are not referenced as “inferior courts” in Article III and may not be subject to the Court’s “supervisory power.” See Amy Coney Barrett, The Supervisory Power of the Supreme Court, 106 COLUM. L. REV. 324, 342 & nn.77–78 (2006); Kozel, supra note 8, at 184 (“[T]he argument for interpreting Supreme Court decisions broadly may be stronger with respect to federal appellate courts than it is with respect to state supreme courts, because the constraint of state courts raises unique issues for the federal–state balance.”); see also Frederic M. Bloom, State Courts Unbound, 93 CORNELL L. REV. 501, 542–46 (2008) (arguing that the Supreme Court sometimes encourages state court disobedience). As a descriptive matter, state courts are responsible for some of the most salient instances of narrowing from below, see infra Sections III.A, IV.A, IV.B, possibly reflecting their incentives as locally appointed or elected officials.

80. See Fallon, supra note 20, at 124–25; Shapiro, supra note 20, at 734.

81. The discussion assumes that A, B, and C are distinct legal rules and that the lower court seeks to choose the correct rule, perhaps to establish guiding circuit precedent. However, lower courts may prioritize correct dispute resolution and so focus on outcomes rather than rules. In that case, A, B, and C can be understood as legal rules that also have distinctive results. To illustrate this difference, imagine that X, Y, and Z are precedential rules that are equally likely to be correct and that X and Y point toward result 1 in the case at hand, whereas Z points toward result 2. If the lower court cares mainly about achieving the correct result, perhaps because it is a trial court, it might opt for result 1 without choosing between the rules established by X or Y.
precedent is the best creates room for other arguments about legal correctness—that is, arguments rooted in considerations other than the best reading of the most relevant Supreme Court precedent—to come into play. These additional arguments may rest on adjacent Supreme Court rulings, the meaning of court-of-appeals precedents, or the lower court judge’s own view of first principles. In relying on these factors to resolve ambiguity in Court precedent, the lower court would be engaged in an activity of precedential interpretation akin to constitutional avoidance in the statutory interpretation context.

There should be more room for considering nonprecedential arguments about legal correctness as the lower court becomes more uncertain about the meaning of the most relevant Supreme Court precedent. For the sake of illustrating this point, imagine that the odds that A is the best reading are 60%, whereas the nearest competing reading, B, has only a 30% likelihood of being the best. Assuming that there is ambiguity in that scenario, only a powerful argument could support choosing B given A’s strong claim to constitutive correctness by virtue of being the best reading of precedent. Put more broadly, courts should narrow from below only when they are unsure that they have identified the best reading of higher court precedent and other reasons convince them that an alternative reading represents a more correct view of the law.

In addition, the authority model suggests that lower courts should not narrow because they believe that a higher court arrived at an erroneous result. In holding that higher court precedent is constitutively correct for lower courts, the authority model leaves no room for lower courts to believe that a higher court precedent is incorrect. Thus, disagreement with a higher court ruling does not supply a legitimate reason, consistent with the authority model, for courts to engage in narrowing from below. This added restriction on legitimate narrowing from below is difficult to enforce because lower courts, fearing reversal, do not usually advertise that they engage in vertical narrowing out of disagreement with the higher court precedent being narrowed. Yet there are times when they arguably do so, as discussed below.82

Notably, the authority model suggests that narrowing from below should differ from horizontal narrowing. As just discussed, the authority model opposes vertical narrowing based on disagreement with higher court precedent. But because en banc courts have legitimate authority to overrule their own precedents, the authority model allows for the possibility that horizontal narrowing can legitimately rest on disagreement with the narrowed precedent.83

The authority model thus supports a rule of thumb: courts may legitimately engage in narrowing from below when: (i) they have only weak confidence that they have identified the best reading of the higher court precedent; and (ii) without impugning the precedent’s correctness, they have identified persuasive

82. See infra Section V.B.
83. Cf. Re, supra note 3, at 1903 (discussing “narrowing to overrule” and Citizens United v. FEC, 558 U.S. 310 (2010)).
reasons to believe that an alternative reading represents a correct or more correct view of the law.

2. Proficiency Model

The proficiency model holds that, as a nine-member body at the apex of the United States judicial system, the Supreme Court has unusual and perhaps unmatched skill at answering legal questions.84 As a result, the Court’s expressed belief in a particular legal view is substantial evidence of that view’s correctness.85 This approach has special import for those who doubt that vertical stare decisis is authoritative.86

The proficiency model leaves ample room for narrowing from below. As with the authority model, Supreme Court precedent can be ambiguous, creating uncertainty about which reading deserves the Court’s imprimatur. But the proficiency reading allows much more narrowing from below than that. The Court’s special features may render it more likely to be correct than virtually any lower court, but those features plainly do not preclude the possibility of faulty results and reasoning. That the Justices have asserted a legal principle is some reason to adhere to it, but a lower court judge’s independent assessment of the law can produce a countervailing reason. Furthermore, there may be reasons in particular cases to think that the Court’s general decision-making superiority has failed.

The proficiency model thus suggests that lower courts should be on the lookout not only for precedential ambiguity, but also for special circumstances

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84. Defenders of this view can point to the Supreme Court’s large size, light caseload, extensive resources, elite bar, and choice personnel. See, e.g., Salve Regina Coll. v. Russell, 499 U.S. 225, 232 (1991) (“Courts of appeals, on the other hand, are structurally suited to the collaborative judicial process that promotes decisional accuracy.”); Caminker, supra note 15, at 845–49 (discussing the possibility of justifying vertical stare decisis based on the “greater decisionmaking proficiency of superior courts”). But see Hutto v. Davis, 454 U.S. 370, 375 (1982) (“Admittedly, the Members of this Court decide cases ‘by virtue of their commissions, not their competence.’”).

85. Some defiance of Supreme Court precedent may implicitly rest on the proficiency model, combined with a bleak view of the Court’s actual proficiency. For example, the chief justice of the Supreme Court of South Carolina is reported to have said that “Alabama v. Shelton [is] one of the more misguided decisions of the United States Supreme Court, I must say . . . . So I will tell you straight up we [are] not adhering to Alabama v. Shelton in every situation.” ROBERT C. BORUCHOWITZ ET AL., NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS 15 (2009) (alteration in original) (quoting Chief Justice Jean Hoefer Toal).

that indicate the unreliability of particular higher court precedents. When evaluating whether there are special reasons to suspect a Supreme Court error, lower courts should be most attentive to objective indicia that the Court’s decision-making process may have been strained. For example, the Court’s ruling may have been procedurally irregular, unusually divisive, or dependent on out-of-date premises. Indeed, the Court itself looks to some of these considerations when evaluating its prior rulings. Additionally, a lower court may have reason to think that its own view is especially reliable. Its differing view may be the result of new information, based on a subject of lower court expertise, or consonant with the views of many other lower courts.

In sum, narrowing from below is generally appropriate under the proficiency model when it is appropriate under the authority model, as well as when there is reason to think that the Court’s decision-making resources have failed.

3. Prediction Model

The prediction model holds that lower courts should do what they imagine that higher courts would do if faced with the same case. This approach views higher court precedent not as constitutively correct, but rather as evidence of how higher courts would rule.

The prediction model usually denies that lower courts should overrule higher court precedent. More often than not, a higher court—here, the Supreme Court—strives to follow its own precedents. However, in an unusual subset of cases a lower court might predict that the higher court will overrule or otherwise set aside its own case law. In those situations, the prediction model affords the
lower court the ability to deviate from higher court precedent without waiting for the higher court to do so. The prediction model thus allows lower courts to conclude that precedential evidence of how higher courts will rule can be outweighed by nonprecedential evidence. Evan Caminker, a leading commentator on the prediction model, has ranked various forms of nonprecedential evidence, with the most reliable being separate opinions written by individual Justices and dicta in majority opinions. Less reliable, in Caminker’s view, are Justices’ statements to the media or their general ideological background.

The prediction model is closely associated with “anticipatory overruling,” or disregarding a higher court precedent because the higher court will predictably overrule the precedent. Anticipatory overruling is controversial, and understandably so. In principle, the prediction model might enable five Justices to effect sweeping legal change without compliance with any normal procedure. Simply by issuing extrajudicial statements, the Justices could alter lower courts’ predictions and so authorize anticipatory overruling.

Attention to the concept of narrowing from below has significant implications for the prediction model. In grappling with the dramatic prospect of anticipatory overruling, proponents of the prediction model have emphasized that higher courts tend to adhere to their own precedents rather than overrule them. But a lower court adhering to the prediction model should attend to the separate possibility that the Court might narrow its own precedent without overruling it. So in suggesting that lower courts do as the Court does, the prediction model supports anticipatory narrowing from below. That is, the prediction model supports anticipatory narrowing from below whenever lower courts predict that the Court would likely engage in such narrowing.

Lower courts sometimes seem to engage in anticipatory narrowing. For example, after the Court’s decision in *Hein v. Freedom from Religion Founda-

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92. See Caminker, supra note 89, at 45–50.
93. See id. at 48–49.
94. Scholars have extensively discussed anticipatory overruling. See, e.g., C. Steven Bradford, *Following Dead Precedent: The Supreme Court’s Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39 (1990); Kelman, supra note 15; Note, *Lower Court Disavowal of Supreme Court Precedent*, 60 Va. L. Rev. 494 (1974); see also supra note 89 (collecting sources on the “prediction model,” which typically dwell on anticipatory overruling); cf. Morrow v. Hood Commc’ns, 69 Cal. Rptr. 2d, 489 (1997) (Kline, J., dissenting) (“There are rare instances in which a judge of an inferior court can properly refuse to acquiesce in the precedent established by a court of superior jurisdiction. This is, for me, such an instance.” (citations omitted)).
95. Proponents of the prediction model sometimes discount this concern by emphasizing its unreality given the norms that currently prevail among the Justices. See Caminker, supra note 89, at 45–50. Fully addressing the concern might require a hybrid approach, whereby lower courts adopt certain normative side-constraints, such as the judicial role within the separation of powers. Cf. infra Section II.A.4.
96. I have previously argued that narrowing is far more common than overruling. See Re, supra note 3; see also David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 Tex. L. Rev. 929, 940 n.41 (2008) (describing the Court’s tendency to narrow rather than overrule during its 2006 Term).
tion, Inc. narrowed the seminal Establishment Clause standing precedent Flast v. Cohen, the Seventh Circuit took stock of the relevant jurisprudential terrain. The Seventh Circuit’s conclusion: “[T]he Supreme Court has now made it abundantly clear that Flast is not to be expanded at all.” That statement is an exaggeration of what Hein held as a matter of conventional precedent, but it is a plausible prediction about how the then-composed Court would rule. Based on the music behind the words of Hein, the Seventh Circuit concluded that Flast is ripe for narrowing from below.

Narrowing from below should also be permissible based on weaker predictive evidence than what is required for anticipatory overruling. Higher court precedent is typically viewed as strong evidence of how the higher court will rule. Given that premise, only comparably strong evidence could justify anticipatory overruling—that is, a lower court’s rejection of plainly applicable higher court precedent. But when higher court precedent is ambiguous, and therefore susceptible to legitimate narrowing from below, there is good reason to doubt how the higher court will interpret it. Even if it has no desire to narrow, the higher court may simply disagree with the lower court regarding the best reading of precedent. This means that ambiguous higher court precedent is relatively weak evidence of how the higher court will rule. The predictive value of ambiguous higher court precedent can therefore be outweighed by comparably weak nonprecedential evidence.

Given all this, the prediction model supports narrowing from below or anticipatory narrowing when a Supreme Court precedent is ambiguous and there is fairly persuasive evidence that the Court would narrow the precedent, even if there is not the kind of compelling evidence necessary to support anticipatory overruling.

4. Signals Model

When issuing “signals,” the Justices act in their official, adjudicatory capacities without establishing conventional precedent, but nonetheless indicate some aspect of how lower courts should decide cases. For example, signals can arise in summary orders, statements during oral argument, separate opinions, and dicta in majority opinions. Signals are thus distinct from the many informal cues that arise outside of the traditional adjudicatory process, such as individual Justices’ statements to the press.

98. 392 U.S. 83 (1968).
100. Caminker, supra note 89, at 45–50.
102. Leading scholars use the term “signal” more broadly, so as to include “extrajudicial statements” such as interviews reported by the press. E.g., Vanessa Baird & Tonja Jacobi, Judicial Agenda Setting Through Signaling and Strategic Litigant Responses, 29 WASH. U. J.L. & Pol’y 215, 218–19 (2009).
The signals model maintains that signals from a majority of the Justices have precedential force but are subordinate to conventional precedent.103 This two-tiered approach to vertical stare decisis builds on the authority model in treating the Court’s official efforts to resolve cases and controversies—and nothing else—as authoritative. In this respect, the signals model diverges from the prediction model’s forward-looking orientation and openness to considering the Justices’ extrajudicial statements as grounds for prediction. At the same time, the signals model captures the main pragmatic benefits of the predictive and proficiency models by attributing supplemental precedential force to the Court’s relatively informal actions, which are likely to be less proficient and predictive than conventional precedent. This approach allows the Court to honor its traditional adjudicatory role while more effectively managing lower courts.

Although the Court’s habit of sending nonprecedential signals is a relatively unremarked-on phenomenon,104 the dearth of commentary on this point largely reflects changing times. Because it can occur through peripheral actions like summary decisions on discretionary relief, signaling is feasible today largely because of contemporary digital media and the growing culture of Court-watching.105 Before the Internet, it wasn’t really possible for far-flung courts and advocates to keep track of the Court’s stay orders, oral arguments, and the like. Indeed, for much of U.S. history it was hard enough for the Court to exert managerial influence through printed case reports.106 In the Court’s early years, most local judges had at best limited information on the Court’s decisions, and the Justices’ practice of circuit riding offered perhaps the best means of informal judicial management.107 Once circuit riding ended, the Court’s formally published precedents became its primary mode of vertical control. Today, however, lots of people, including advocates and lower court judges, follow the Court...
with the help of digital media such as blogs and Twitter. And the rise of the Supreme Court bar, which counts former clerks among its members, has fostered intense attention to the details of the Court’s operations. The result is that the Court has greater opportunity to provide guidance to lower courts while still acting like an adjudicatory body. With their levers of influence multiplied, the Justices might naturally explore new opportunities to use them.\footnote{108}

In using signals to exert managerial oversight outside the conventional bounds of precedent, the Court often promotes efficiency and uniformity. In many cases, the Justices implicitly decide or expressly opine on ancillary issues while resolving the case at hand. These decisions may concern matters of procedure, such as stay decisions or other preliminary rulings made below; or they may pertain to substantive legal questions not presently before the Court.\footnote{109} In other cases, the Court comments negatively on a disfavored precedent, such as by asserting that the precedent is “narrow” or that it is difficult to prevail under the precedent.\footnote{110} Relatedly, the Court sometimes establishes a pattern of repeatedly narrowing a precedent, thereby tacitly establishing the precedent’s disfavored status.\footnote{111} Because these decisions, comments, and patterns lie outside the bounds of conventional precedent, they are often treated as dicta or otherwise denied precedential status. Nonetheless, the Justices routinely express deliberate views on ancillary topics in separate opinions or during oral argument, with the apparent intention that lower courts will pick up the message. And the lower courts often do just that, sometimes even using the term “signal.”\footnote{112}

The main difficulty with the signals model is the challenge of reliably identifying signals. This problem arises precisely because signaling is marked by the lack of formality associated with full-dress rulings on the merits. That the

\footnote{108. This paragraph builds on Re, supra note 101.}

\footnote{109. See infra Part VI (providing examples); see also Re, supra note 101 (same).}

\footnote{110. See, e.g., Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 593 (2007) (plurality opinion) (“In Flast v. Cohen, 392 U.S. 83 (1968), we recognized a narrow exception to the general rule against federal taxpayer standing.”); see also MELVIN ARON EISENBerg, THE NA TURE OF THE COMMON LAW 122, 139 (1988) (discussing signaling as “a technique by which a court follows a precedent but puts the profession on notice that the precedent is no longer reliable”).}

\footnote{111. See, e.g., Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001) (“Since Carlson we have consistently refused to extend Bivens liability to any new context or new category of defendants.”).}

\footnote{112. For a recent example, the Eighth Circuit expressly followed the signal that the Court had sent in stay orders relating to the religious exemption from the Affordable Care Act’s contraception coverage provisions. See Sharpe Holdings, Inc. v. U.S. Dep’t of Health & Human Servs., 801 F.3d 927, 944 (8th Cir. 2015) (“Although the Court’s orders were not final rulings on the merits, they at the very least collectively constitute a signal that less restrictive means exist by which the government may further its interests.” (citing Priests for Life v. U.S. Dep’t of Health & Human Servs., 808 F.3d 1, 25 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc)); see also Priests for Life v. U.S. Dep’t of Health & Human Servs., 772 F.3d 229, 257 (D.C. Cir. 2014) (finding no substantial burden but acknowledging “that the Supreme Court’s recent order in Wheaton College might be read to signal a different conclusion”); DeBoer v. Snyder, 772 F.3d 388, 402 (6th Cir. 2014) (“But don’t these denials of certiorari signal that, from the Court’s perspective, the right to same-sex marriage is inevitable? Maybe; maybe not.”). For examples of signals during oral argument, see Re, supra note 101.
Court is so closely observed is part of what makes signaling possible, but that reality also multiplies the opportunities for picking up false signals. And because so many people have an interest in gleaning desired signals from the Court, there is a serious risk that self-interested observers will misinterpret signals. Complicating things even further, Justices on the losing end of cases might sometimes send false signals by suggesting that they speak for a majority while actually offering just noise or cheap talk that is better ignored than relied on.

Yet lower courts can mitigate signals’ downsides. First, signals should give way in the face of clear conventional precedent. This principle reflects the comparative rigor, deliberateness, and clarity associated with conventional holdings and limits the opportunity for mistaken signals. In other words, signals cannot justify lower courts in overruling or partially overruling higher court precedent. But when conventional higher court precedent is ambiguous, lower courts should follow signals to resolve that ambiguity, including by narrowing the conventional precedent from below. In this way, the signals model depends on the recognition that narrowing from below is distinct from anticipatory overruling. Second, lower courts should attend to signals only when they reflect deliberate judgments by a majority of the Justices. This restriction addresses the risk that individual Justices might attempt to influence lower courts by telegraphing minority views that may even be opposed by the Court as a whole.

In general, courts applying the signals model should narrow from below when (i) they confidently discern a signal to that effect from the majority of the Court and (ii) that course of action is reasonably consistent with conventional precedent.

B. PRACTICALITY

Practicality, or the value of adopting rules to avoid harmful effects, is important for all forms of stare decisis but doubly so for vertical stare decisis. The Supreme Court and lower courts are in different practical positions, and that discrepancy complicates the legitimacy of narrowing from below.

1. Uniformity

Uniformity is the value of resolving the same legal question similarly in as much of a given jurisdiction as possible. This value promotes evenhanded application of the law; reduces the costly complexity that arises from legal heterogeneity; and facilitates nationwide planning across states and other subjurisdictions.

To a great extent, the Supreme Court exists to promote uniformity. Not only does the Court offer a single judicial body capable of hearing cases

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113. Cf. Jacobi, supra note 103, at 3 (providing a model suggesting that the primary factors determining whether signals are reliable are “the level of alignment between judicial and litigant interests” and “the cost of signaling”).

114. See Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816); Alexander M. Bickel, The Least Dangerous Branch 10 (1962) (outlining this argument); Tara Leigh Grove, The Exceptions
initially resolved by diverse jurists, but it also establishes precedents that apply nationwide. The Court’s role in promoting uniformity provides a powerful reason to be concerned about narrowing from below because deviation from the best reading of higher court precedent invites doctrinal fragmentation among lower court jurisdictions. If this fragmentation were too frequent or rapid, the Court might even become unable to restore uniformity through laborious case-by-case review. At a minimum, the coordination value of the Court’s precedents would be much reduced if they were each typically interpreted in myriad ways across jurisdictions.

Yet uniformity concerns counsel the confinement, not the elimination, of narrowing from below. In particular, uniformity suggests that narrowing from below should be available only when higher court precedents are ambiguous. Higher court precedents most promote uniformity when they are clear because clear rulings are ones that all reasonable lower courts will understand, yielding convergent outcomes. By contrast, ambiguity is by nature subject to reasonably divergent interpretations, thereby greatly increasing the odds of disuniformity, even if all lower courts pursue what they regard as the best reading of the higher court precedent. The uniformity costs of narrowing from below are thus at their apex when higher court precedents are clear and at their nadir when higher court precedents are ambiguous. And, in the relatively limited cases in which lower courts do diverge in their readings of ambiguous Supreme Court precedent, the Court can practicably grant review of that dispute in order to restore uniformity.

If limited to situations of precedential ambiguity, narrowing from below would actually reinforce important features of higher court control over the

\[\text{Clause as a Structural Safeguard, 113 Colum. L. Rev. 929, 946 (2013) (“By 1988, virtually all legislators seemed to view the Supreme Court’s ‘principal functions’ as ‘resolv[ing]’ important issues of federal law and ‘ensur[ing] uniformity . . . in the law by resolving conflicts’ among the lower courts.” (alteration in original)); Leonard G. Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 201 (1960) (“Despite some impediments in early statutes, the Supreme Court from its inception has performed the essential constitutional functions of maintaining the uniformity and supremacy of federal law.”). For a different view, see Amanda Frost, Overvaluing Uniformity, 94 Va. L. Rev. 1567, 1613 (2008) (questioning the importance and feasibility of uniformity).}\]

\[\text{115. See Hutto v. Davis, 454 U.S. 370, 375 (1982) (arguing that “anarchy” would result if lower courts could choose not to “follow” Supreme Court precedent that they found “misguided”); Kelman, supra note 15, at 4; see also infra note 135.}\]

\[\text{116. There is some reason to think that the Court is currently failing to provide adequate uniformity, as it leaves many splits unattended for years. See Wayne A. Logan, Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment, 65 Vand. L. Rev. 1137, 1139–40 (2012); cf. Tara Leigh Grove, The Structural Case for Vertical Maximalism, 95 Cornell L. Rev. 1, 33 (2009) (arguing that the Supreme Court’s “supreme” role in the modern judiciary calls for “maximalist” decisions); Frederick Schauer, Abandoning the Guidance Function: Morse v. Frederick, 2007 Sup. Ct. Rev. 205, 207 (criticizing the Court’s minimalist turn for generating narrow rulings that fail to supply lower courts with guidance). On the other hand, the pursuit of uniformity must be balanced against other values, such as correctness and the Court’s legitimate role in the separation of powers. So in allowing circuit splits to linger, the Court may be waiting for a factually well-presented vehicle, or it may want to foster “percolation.” See infra note 119.}\]

\[\text{117. In some instances, lower courts narrow from below in unison, without greatly undermining uniformity. See, e.g., infra Part V (narrowing as resistance).}\]
creation of legal uniformity. When the higher court wants to flex its managerial muscle, it may do so by being clear in its precedents, thereby precluding legitimate narrowing from below. By contrast, the existence of ambiguity in a higher court precedent can itself be regarded as a meaningful message to lower courts, suggesting that the higher court deliberately postponed resolution of certain issues. Higher courts realize that disuniformity can sometimes be helpful in fostering “percolation”—that is, experimentation and reflection on what might otherwise be stale legal rules. And once percolation has run its course, the higher court can intervene to issue a clear ruling and establish uniformity. Some temporary disuniformity, after all, may be preferable to permanent, uniform error.

By speaking clearly in some respects and leaving room for narrowing in others, higher courts can simultaneously tap into the advantages of both uniformity and disuniformity.

2. Reliance

Reliance interests often cut strongly against overruling or partial overruling. A central purpose of precedential clarity is to establish coordination and rules of practice; and interested parties, both private and public, are accustomed to relying on clear case law. So when courts displace one clear precedent in

118. See Kim, supra note 15, at 414 (“[O]ne might think of a Supreme Court opinion as the ‘leash’ which defines a zone of discretion in which lower courts may legitimately exercise their judgment. Depending upon how an opinion is crafted, the ‘leash’ may be longer or shorter, granting lower courts a greater or narrower zone of discretion in which to operate.”); see also Doni Gewirtzman, Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System, 61 AM. U. L. REV. 457, 472 (2012) (“[L]ower courts have to make interpretive choices about whether a new Supreme Court ruling is applied broadly or narrowly . . . .”); Tonja Jacobi & Emerson H. Tiller, Legal Doctrine and Political Control, 23 J. L. ECON. & ORG. 326 (2007) (modeling higher courts’ strategic use of vagueness in opinions partly based on ideological divergence between higher and lower courts); Patricia M. Wald, Upstairs/Downstairs at the Supreme Court: Implications of the 1991 Term for the Constitutional Work of the Lower Courts, 61 U. CIN. L. REV. 771, 778 (1993).

119. See, e.g., J. Clifford Wallace, The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?, 71 CALIF. L. REV. 913, 929 (1983) (arguing that conflicts between the circuits “may in some ways be beneficial”). But see, e.g., William H. Rehnquist, The Changing Role of the Supreme Court, 14 FLA. ST. U. L. REV. 1, 11 (1986) (questioning the necessity of lower court percolation). Narrowing from below may be less appropriate in connection with legal issues that cannot be heard in different jurisdictions. For instance, patent appeals are all heard in the Federal Circuit and so cannot generate helpful percolation via circuit splits.

120. See Kimble v. Marvel Entm’t, LLC, 135 S. Ct. 2401, 2409 (2015) (justifying stare decisis in part on the ground that it “fosters reliance on judicial decisions” (quoting Payne v. Tennessee, 501 U.S. 808, 827–28 (1991))); see also Pearson v. Callahan, 555 U.S. 223, 233 (2009) (“Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved . . . .” (quoting Payne, 501 U.S. at 828)); Randy J. Kozel, Precedent and Reliance, 62 EMORY L.J. 1459 (2013); Hillel Y. Levin, A Reliance Approach to Precedent, 47 GA. L. REV. 1035 (2013). The Court has outlined a reliance spectrum, with property and contract cases at one end and procedural and evidentiary cases at the other. See Payne, 501 U.S. at 828. This reasoning suggests that vertical stare decisis may weaken—and narrowing may be more permissible—as a case moves along the spectrum.
favor of another, they often undermine reliance where reliance is most appropriate.

But reliance costs are mitigated when lower courts narrow ambiguous higher court precedent by adopting reasonable readings of it. Because ambiguous precedent is by definition open to reasonable debate, the presence of ambiguity in a higher court precedent is a warning that interested parties should hedge their bets rather than rely on reasonably disputable readings. Even if narrowing from below never took place, those who chose to rely on disputable readings of ambiguous precedent would still have to accept the risk that reasonable judges might adopt different readings.

In addition, awareness that there is room for reasonable disagreement often allows interested parties to predict how courts are likely to resolve the ambiguity. Lawyers frequently attempt to predict how the Roberts Court will interpret precedents from prior eras, such as the Warren Court era. Analogously, lawyers also strive to predict how the courts of appeals will construe rulings of the Roberts Court. These predictions allow affected parties to alter their preceptive expectations and account for the prospect of narrowing from below.

In sum, attention to reliance interests suggests that lower courts can legitimately narrow from below if precedent is ambiguous.

C. CANDOR

Candor dictates that judges must believe what they write and should write what they believe. In other words, candor demands honesty and appreciates transparency.

Lower court candor is relatively easy to come by when higher court precedent is clear. After all, clear precedent is hard to read in any way other than the best way. When higher court precedent is ambiguous, by contrast, lower courts often do significant analytical work to show that they are implementing the best available reading. In many instances, those assertions of precedential fidelity are sincere, correct, and worthwhile. Under any model of vertical stare decisis, after all, the best reading of higher court precedent should matter to lower courts.

121. Cf. Re, supra note 3, at 1879.
122. See Eisenberg, supra note 110, at 139. Justice Elena Kagan suggested a plausible qualification to this reasoning during oral argument in Bank of America, N.A. v. Caulkett, 135 S. Ct. 1995 (2015), which concerned in part whether to overrule Dewsnup v. Timm, 502 U.S. 410 (1992). Kagan observed that banks “are the most sophisticated parties that can possibly be imagined” and that “presumably, they discounted all their various calculations in order to take into account the probability that another court would say, you know, Dewsnup is not very persuasive, and we’re just not willing to extend it any further.” Transcript of Oral Argument at 16, Caulkett, 135 S. Ct. 1995 (No. 131421). Kagan concluded: “So if that’s the case, why should we worry about reliance?” Id. However, Kagan ultimately joined the Court in adhering to Dewsnup. See Caulkett, 135 S. Ct. 1995.
123. See, e.g., supra text accompanying note 99.
124. Cf. Kozel, supra note 8, at 224 (discussing transparency as a value distinct from candor); Micah Schwartzman, Essay, Judicial Sincerity, 94 Va. L. Rev. 987, 990–91 (2008) (linking judicial sincerity with judicial legitimacy); Shapiro, supra note 20, at 734 (arguing that a judge can “fulfill[] any requirement of candor when he believes what he is saying about the force of a particular case”).
Most judges have internalized that basic precedential norm.\textsuperscript{125} In some cases of precedential ambiguity, however, judges may feel tempted to exaggerate the degree to which higher court precedent supports their position. This pressure might give rise to deliberate artifice as outcome-maximizing judges strategically contemplate how much they can “get away with,” perhaps on political grounds, without attracting a rebuke from their colleagues, the Justices, or members of the public.\textsuperscript{126} Perhaps more commonly, lower court judges succumb to the argumentative conventions of the opinion-writing genre or to the psychological tendency to view neutral evidence as supportive of one’s own views.\textsuperscript{127} When lower courts pass up the chance to highlight the ambiguities in higher court precedent, they effectively hide their decisions behind the rhetoric of vertical stare decisis and fail to supply reasons for preferring their disputable reading of precedent over other viable options. Emphatic reliance on vertical stare decisis might even foster a mindset of false disempowerment, such that lower court judges assume or convince themselves that they are simply implementing directives given from on high, when they are instead making their own controversial decisions of interpretation and application.

Lower courts should instead embrace the legitimacy of narrowing from below. To be clear, narrowing from below would not usually require that lower courts expressly state that they are rejecting the best reading of precedent. To promote both honesty and transparency, a lower court need only identify ambiguity in higher court precedent and then justify its resolution of that ambiguity. This approach avoids misleading assertions that the lower court’s preferred reading is the best or plainly correct reading of precedent.\textsuperscript{128} What’s more, candid acknowledgement of precedential ambiguity forces lower courts

\textsuperscript{125.} See Richard A. Posner, How Judges Think 45 (2008) (“Lower court judges follow Supreme Court precedent less out of fear of reversal if they do not than because (in my terms) adhering to precedents created by a higher court is one of the rules of the judicial ‘game’ that judges internalize.”).

\textsuperscript{126.} For models of lower court judges as strategic preference maximizers, see Frank B. Cross & Emerson H. Tiller, Essay, Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals, 107 Yale L.J. 2155 (1998); McNollgast, Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law, 68 S. Cal. L. Rev. 1631 (1995). For alternative models, see Pauline T. Kim, Beyond Principal–Agent Theories: Law and the Judicial Hierarchy, 105 Nw. U. L. Rev. 535, 571 (2011) (critically discussing scholarship in which “lower court judges are depicted as strategic actors who will pursue their own goals to the extent that they can and who therefore seek to evade scrutiny of their actions”); Lewis A. Kornhauser, Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System, 68 S. Cal. L. Rev. 1605, 1612 (1995) (advancing a “team model” of the relationship between courts). For leading empirical research into lower court treatment of precedent, see Frank B. Cross, Decisionmaking in the U.S. Circuit Courts of Appeals, 91 Calif. L. Rev. 1457, 1459 (2003) (finding “that legal and political factors are statistically significant determinants of decisions, with legal factors having the greatest impact” whereas “[s]trategic and litigant-driven factors have no significance”); Chad Westerland et al., Strategic Defiance and Compliance in the U.S. Courts of Appeals, 54 Am. J. Pol. Sci. 891, 891 (2010) (concluding that “[w]hen the contemporary Supreme Court is ideologically estranged from the enacting [or precedent-creating] Supreme Court, lower courts treat precedent much more harshly”).


\textsuperscript{128.} See infra text accompanying note 159.
to confront and explain aspects of their thinking that are unconnected to precedent. By narrowing from below in this way, courts accurately and openly place the weight of their decisions on their own shoulders.

Prevailing ways of discussing precedent obscure the possibility of narrowing from below as well as the conditions for its legitimate operation. Drawing attention to vertical narrowing can encourage candor about that practice and normalize its operation.

The foregoing conclusions are summarized in the table below. The left-hand column lists types of narrowing, and the right-hand column describes the general conditions under which each type of narrowing is legitimate.

### Table 3: Legitimacy Conditions for Horizontal and Vertical Narrowing

<table>
<thead>
<tr>
<th>Type of Narrowing</th>
<th>Legitimacy Conditions</th>
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<tbody>
<tr>
<td>Horizontal Narrowing</td>
<td>(i) Tentative belief of error;</td>
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<td></td>
<td>(ii) Reasonable reading;</td>
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<td></td>
<td>(iii) Consistent with background principles of law.</td>
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<tr>
<td>Narrowing From Below</td>
<td></td>
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<tr>
<td>A. Authority Model</td>
<td>(i) Only weak confidence in identifying the best reading of an ambiguous precedent; and</td>
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<td></td>
<td>(ii) Persuasive reasons that do not impugn the precedent’s correctness but do suggest that an alternative reading is the more correct view of the law.</td>
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<tr>
<td>B. Proficiency Model</td>
<td>(i) Appropriate under the authority model; or</td>
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<tr>
<td></td>
<td>(ii) Objective indicia that the Court’s decision-making process has failed.</td>
</tr>
<tr>
<td>C. Prediction Model</td>
<td>(i) Precedent is ambiguous; and</td>
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<td></td>
<td>(ii) Fairly persuasive evidence that the Supreme Court would narrow (even if not the compelling evidence needed to anticipatorily overrule).</td>
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<tr>
<td>D. Signals Model</td>
<td>(i) Appropriate under the authority model; or</td>
</tr>
<tr>
<td></td>
<td>(ii) A signal that comes from a majority of the Supreme Court and is reasonably consistent with conventional precedent.</td>
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In short, narrowing from below is legitimate less often than horizontal narrowing, and under conditions that vary depending on one’s theory of vertical stare decisis. But, under any theory, narrowing from below can be legitimate, and often is.

The next four Parts categorize and assess salient instances of narrowing from below.

III. NARROWING OBsolescence

Courts often narrow obsolescence—that is, they narrow obsolete Supreme Court precedent in order to update it. This approach allows the law to improve relatively quickly in light of new information without having to wait for the Court to get involved. In addition, narrowing obsolescence helpfully informs the Court of the consequences of updating the law in one direction or another. In this respect, narrowing obsolescence can be worthwhile even (or especially) if it is done inconsistently across lower court jurisdictions. Finally, narrowing obsolescence mitigates the costs of the Court’s prohibition on anticipatory overruling by providing an alternative and less disruptive way to update obsolete case law.\(^{129}\)

A. CONTINGENT PRECEDENTIAL RULES

Even under the relatively stringent authority model of stare decisis, lower courts may legitimately narrowly construe Supreme Court precedents whose ongoing force depends on outdated premises.

Case law on the Eighth Amendment supplies a helpful example. In \textit{Stanford v. Kentucky}, the Court held that the Eighth Amendment posed no barrier to executing people who had committed murder as juveniles.\(^ {130}\) On its face, \textit{Stanford} established a fairly conventional, rule-like holding that rested in part on then-extant state sentencing laws and practices.\(^ {131}\) Over a decade later, the Missouri Supreme Court heard a case that seemed controlled by \textit{Stanford}.\(^ {132}\) But the Missouri court concluded that \textit{Stanford}’s holding was contingent on the Court’s assessment of then-extant state law.\(^ {133}\) Based largely on recent changes in state sentencing practices, the Missouri court held that \textit{Stanford}’s reasoning now cut against its announced result. In other words, the Missouri court held that new facts proved that \textit{Stanford}’s rule should no longer apply. In \textit{Roper v. Simmons}, the Supreme Court affirmed, explaining that \textit{Stanford} “should no

\(^{129}\) See supra note 5.
\(^{130}\) 492 U.S. 361, 380 (1989) (plurality opinion) ("[W]e conclude that such punishment does not offend the Eighth Amendment’s prohibition against cruel and unusual punishment."); see also id. at 381 (O’Connor, J., concurring in part and in the judgment).
\(^{131}\) Id. at 370 (majority opinion).
\(^{132}\) See State ex rel. Simmons v. Roper, 112 S.W.3d 397, 406 (Mo. 2003).
\(^{133}\) See id. at 408. The court also advanced arguments based on \textit{Atkins v. Virginia}, 536 U.S. 304 (2002). Frederic Bloom’s account of \textit{Roper} as an instance of “unbound” state courts focuses on \textit{Atkins}. See Bloom, supra note 79, at 542–46.
longer control.”

At first blush, the Missouri Supreme Court’s decision seems like a paradigmatic instance of anticipatory overruling. Indeed, Justice O’Connor and other Roper dissenters emphatically criticized the Missouri Supreme Court on precisely that ground. But Stanford was ambiguous as to whether its announced rule should outlast its factual premises. In other words, Stanford could be read as establishing either of two precedential rules: (i) the Eighth Amendment permits execution of juvenile murderers, full stop, or (ii) the Eighth Amendment permits the execution of juvenile murderers if state sentencing practices remain relevantly unchanged. Under the first reading, Stanford established a “conventional rule”—a legal requirement that, if certain facts are present, then a legal conclusion must result. Under the second reading, by contrast, Stanford announced a “contingent rule”—a legal requirement whose continued application depends on the continued presence of the reasons for its creation in the first place.

In reading Stanford according to the second option—that is, as establishing a contingent rule—the Missouri Supreme Court engaged in reasonable interpretation and did not understand itself to be overruling Stanford. Embellishing the state court’s reasoning, one could imagine a lower court positing that the old rule established in Stanford actually remained in force. What had changed was simply that the old rule no longer applied to the case at hand, or to any other foreseeable case, given a relevant series of factual developments—namely, changes in state law. On this view, the old rule could very well find application once again. For example, the states might change their capital-punishment laws back to what they had been, thereby providing a factual context in which Stanford might once again apply. Or Stanford might apply when courts consider other punitive practices that have support among states comparable to the level of support at issue in Stanford itself.

135. See id. at 594 (O’Connor, J., dissenting) (“[I]t remains ‘this Court’s prerogative alone to overrule one of its precedents.’ . . . By affirming the lower court’s judgment without so much as a slap on the hand, today’s decision threatens to invite frequent and disruptive reassessments of our Eighth Amendment precedents.” (citation omitted) (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)); see also Roper, 543 U.S. at 628–29 (Scalia, J., dissenting) (admonishing the Missouri Supreme Court for its “flagrant” disregard of Supreme Court precedent). For similar discussion of uniformity concerns, see supra Section II.B.1 (Uniformity).
136. See Simmons, 112 S.W.3d at 406 (arguing that “flexible and dynamic” interpretation is the “fundamental premise on which Stanford and other cases “were based”). One might say that the difference between a conventional rule and a contingent rule is whether the ratio trumps the decedendi. Thanks to Sam Bray for this expression.
137. See id. at 407 (“To say that this [Eighth Amendment] determination must be made based on the state of the law and standards that existed when Stanford was decided in 1989, and that to do otherwise is to overrule Stanford, is simply incorrect.”).
More broadly, the stringency of the rule against anticipatory overruling depends on the test for finding ambiguity in Supreme Court decisions. In alleging that the Missouri Supreme Court had engaged in anticipatory overruling, O’Connor implicitly made a claim about what can create ambiguity in a Supreme Court holding. In her view, “Stanford’s clear holding” was necessarily a conventional rule, and the reasoning leading to that holding could not create relevant ambiguity.\textsuperscript{139} In other words, O’Connor wanted to treat Stanford’s holding as a quasi-legislative prescription that could be modified or repealed only by other similarly formal holdings issued by the Court itself.\textsuperscript{140} Given that view, the only way to cut back on Stanford was through overruling—a power conventionally denied to lower courts. By contrast, the Missouri court read Stanford’s holding as being qualified by its supporting reasoning—that is, as a contingent rule.\textsuperscript{141} In particular, Stanford’s assessment of state law was essential to its result, as signaled by O’Connor’s own opinion in Stanford.\textsuperscript{142} That different reading created room for narrowing from below, without asserting authority to anticipatorily overrule.

The various opinions in \textit{Roper} thus illustrate an important point: if lower courts view higher court holdings as contingent rules and, therefore, as conditioned on their supportive reasons, then those courts will have more room to narrow higher court precedent—even while entirely abiding by the Court’s prohibition on anticipatory overruling.

\textbf{B. DOCTRINAL AREAS OF OBSELOSCENCE}

Certain doctrinal areas are unusually dominated by obsolete precedent and, as a result, are especially susceptible to narrowing from below. Fourth Amendment precedents supply a timely example, as many search-and-seizure rules assume a predigital world. Now that digital technologies are changing the nature of surveillance, lower courts have begun to narrow from below—and have been rewarded for it.

\textsuperscript{139} See \textit{Roper}, 543 U.S. at 594 (O’Connor, J., dissenting); cf. Alexander, supra note 76, at 17–18 (describing the “rule model” of precedent, which holds that courts may “promulgate a general rule” that “will operate like a statute and will, like a statute, have a canonical formulation”); Frederick Schauer, \textit{Opinions as Rules}, 62 U. Chi. L. Rev. 1455, 1455 (1995); Peter M. Tiersma, \textit{The Textualization of Precedent}, 82 Notre Dame L. Rev. 1187, 1254 (2007); supra note 76 (collecting sources).

\textsuperscript{140} Lower courts sometimes take similar views. See, e.g., Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 327 (2d Cir. 2010) (“We are bound by Supreme Court precedent, regardless of whether it reflects today’s realities... This Court... is not at liberty to depart from binding Supreme Court precedent unless and until [the] Court reinterpret[s] that precedent.” (alteration in original) (citations omitted)).

\textsuperscript{141} The Missouri Supreme Court’s view finds some support in a traditional conception of stare decisis, which views as precedential all judicial reasoning essential to the judgment. See, e.g., Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996).

\textsuperscript{142} See Stanford v. Kentucky, 492 U.S. 361, 381–82 (1989) (O’Connor, J., concurring in part and in the judgment) (“The day may come when there is such general legislative rejection of the execution of 16- or 17-year-old capital murderers that a clear national consensus can be said to have developed. Because I do not believe that day has yet arrived, I concur...”).
In 1973, *United States v. Robinson* held that police have “categorical” authority to search the contents of arrestees’ pockets without a warrant, or even suspicion that they will find evidence.\(^{143}\) With the advent of smartphones, however, *Robinson*’s rule took on new and unanticipated significance.\(^{144}\) Searching an arrestee’s pockets may occasionally reveal private information, but searching an arrestee’s smartphone will usually entail a significant invasion of privacy. And such searches soon became frequent events. Yet the Court did not rush to address whether *Robinson* should apply to smartphones. Instead, lower courts were left to struggle with the issue for several years.\(^{145}\)

The Court eventually granted review, after a deep division of authority had evolved. In fact, the Court chose to grant review of two cases. In the first case, *People v. Riley*, a California court upheld a warrantless search of a smartphone.\(^{146}\) In the second case, *United States v. Wurie*, the First Circuit acknowledged “that *Robinson* speaks broadly” but nonetheless rejected a “literal reading of the *Robinson* decision.”\(^{147}\) Concluding that *Robinson*’s stated rule could be read as defeasible, or subject to implied exceptions, the First Circuit declined to apply the Court’s stated holding according to its own terms.\(^{148}\) Instead, the First Circuit considered *Robinson*’s underlying purposes and premises, as well as technological and social facts that lay outside the four corners of *Robinson* itself.\(^{149}\) Based on this analysis, the First Circuit fashioned a categorical cell-phone exception to the *Robinson* rule.\(^{150}\)

One might have expected that the Supreme Court would criticize the First Circuit and reverse it, whereas the California court would be praised and affirmed. After all, the First Circuit seemed to have defied an explicit preceden-

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\(^{143}\) See 414 U.S. 218, 225 (1973); see also id. at 226 (referring to the “broadly stated rule”); id. at 235 (rejecting “case-by-case adjudication” and emphasizing that “[i]t is the fact of the lawful arrest which establishes the authority to search”).


\(^{145}\) At least three broadly different approaches had emerged. Compare United States v. Finley, 477 F.3d 250, 259–60 (5th Cir. 2007) (applying *Robinson* to hold search of cellphone lawful); People v. Diaz, 244 P.3d 501, 511 (Cal. 2011) (holding that warrantless search of entire cellphone was valid under the Supreme Court’s “binding precedent” in *Robinson*, with United States v. Flores-Lopez, 670 F.3d 803, 805 (7th Cir. 2012) (noting the government’s “fair literal reading of the *Robinson* decision” but observing that “the Court did not reject the possibility of categorical limits to the rule laid down in” *Robinson* and ultimately concluding that *Robinson* authorized a limited cellphone search); Hawkins v. State, 723 S.E.2d 924, 926 (Ga. 2012) (same); Commonwealth v. Phifer, 979 N.E.2d 210, 216 (Mass. 2012) (same), and United States v. Wurie, 728 F.3d 1, 13 (1st Cir. 2013) (finding *Robinson* did not permit warrantless search of cellphone data); Smallwood v. State, 113 So. 3d 724, 735 (Fla. 2013) (finding warrantless search of cellphone data to be unlawful); State v. Smith, 920 N.E.2d 949, 956 (Ohio 2009) (same).

\(^{146}\) D059840, 2013 WL 475242, at *6 (Cal. Ct. App. Feb. 8, 2013). *Riley* was an unpublished California decision following the California Supreme Court’s decision in *Diaz*, 244 P.3d at 511.


\(^{148}\) 728 F.3d at 11–12.

\(^{149}\) Id. at 8–10.

\(^{150}\) Id. at 13.
tional directive, whereas the California court had dutifully followed it. And the Supreme Court has repeatedly insisted that lower courts follow its precedents until overruled.151

But that is not what happened. Instead, the California court, which applied Robinson, was reversed.152 And the First Circuit was not just affirmed, but also favorably quoted in the Court’s ultimate opinion.153 This celebratory treatment of the lower court’s decision to narrow from below sharply contrasts with the Court’s occasional chastisement of lower courts that have failed to adhere to the rule against anticipatory overruling. Moreover, the Court presented its own decision in Riley as an interpretation of Robinson.154 This approach confirmed that Robinson could be narrowed without being overruled. To wit, the Court unanimously criticized the California court’s straightforward “application of Robinson” as “mechanical.”155

The best way to understand these events is to view Robinson as narrowed. Although Robinson’s expressly categorical rule encompassed cell phones (just as it encompassed other objects), the opinion did not speak directly to smart-phones, a technology that its authors could have only imagined. That silence made it plausible to read Robinson’s rule as defeasible in light of new technology. To resolve that ambiguity, the Court—like the First Circuit—considered facts, law, arguments, and reasons that lay far outside Robinson itself.156 So Robinson was narrowed in light of new technological and social developments. And that narrowing occurred not just in the Supreme Court, but also—with the Court’s blessing—in courts of appeals such as the First Circuit.

The Court’s logic in Riley signals that the time is ripe for narrowing from below in other digital surveillance cases.157 Although still quite controversial, this message has gotten through to those lower court judges who have jettisoned long-held views of search-and-seizure precedent in light of new facts and the Justices’ more recent statements of the law.158 Recent litigation on the third-

151. See supra note 5.
152. Riley, 134 S. Ct. at 2495.
153. Id. at 2485.
154. Id. As often happens, the Court portrayed its decision to narrow as a decision not to extend. See id. (“We therefore decline to extend Robinson to searches data on cell phones . . . .”); see also Re, supra note 3, at 1869 n.27 (collecting examples, including Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 615 (2007) (plurality opinion)).
155. 134 S. Ct. at 2484.
156. Id. at 2485–93.
party doctrine and cellphone locational data supplies a particularly good ex-
ample of how lower courts in effect debate whether to narrow from below.159
These lower court debates would be markedly clearer and more candid if they
explicitly used the concept of narrowing from below and reasoned about the
potential defeasibility of higher court rulings.

In sum, Fourth Amendment jurisprudence is presently marked by consid-
erable doctrinal obsolescence, and lower courts are on notice to act accordingly.

IV. PROVOCATIVE NARROWING

The Supreme Court occasionally issues broad decisions that come to be seen
as misguided, even though no material facts have changed. In these circum-
stances, some commentators have endorsed anticipatory overruling based on the
prediction model, even though the Court has expressly rejected that ap-
proach.160 Narrowing from below offers a more restrained approach, and, re-
markably, the Court has endorsed it in particular contexts. In short, by
construing higher court precedent narrowly, courts can provoke higher court
review and affect the Court’s agenda.161 Moreover, the Court itself has signaled
the propriety of provocative narrowing in some contexts, thereby casting doubt
on the authority model of vertical stare decisis.

A. SIGNALED PROVOCATION

A signaled provocation occurs when lower courts narrow from below in
response to a Supreme Court signal and thereby provoke the Court to reconsider
its own precedent.162 The windup and aftermath of Arizona v. Gant163 provide
an unusually rich example.

159. Compare United States v. Graham, 796 F.3d 332, 360 (4th Cir. 2015) (construing the Supreme
Court’s leading third-party doctrine cases not to apply to cellphone locational information because of
“the increasing tension, wrought by our technological age, between the third-party doctrine and the
primacy Fourth Amendment doctrine grants our society’s expectations of privacy”), with id. at 383, 389
(Motz, J., dissenting in part and concurring in the judgment) (invoking that the majority’s interpreta-
tion of precedent resulted in a test that “is nowhere to be found in either” of the two Supreme Court
precedents at issue and insisting that “until the Supreme Court so holds, we are bound by the contours
of the third-party doctrine as articulated by the Court”), and United States v. Davis, 785 F.3d 498, 519
(11th Cir. 2015) (Pryor, J., concurring) (applying the third-party doctrine because “as judges of an
inferior court, we must leave to the Supreme Court the task of developing exceptions to the rules it has
required us to apply”). See generally Richard M. Re, Narrowing the Third-Party Doctrine from Below,
PRAWFSBLAWG (Aug. 6, 2015, 8:11 AM), http://prawfsblawg.blogs.com/prawfsblawg/2015/08/narrowing-
the-third-party-doctrine-from-below.html.

160. See supra note 5.

161. This approach frequently gives rise to major Supreme Court decisions. See, e.g., Florida v. U.S.
Dep’t of Health & Human Servs., 648 F.3d 1235, 1282 (11th Cir. 2011) (narrowly reading Wickard and
other Commerce Clause cases to invalidate the Affordable Care Act); Parker v. District of Columbia,
478 F.3d 370, 387 (D.C. Cir. 2007) (narrowly reading Miller to invalidate a DC firearm regulation).

162. In a similar vein, Rick Hasen has noted that the Court sometimes “invites” lower courts to
facilitate a precedent’s overruling:

While lower courts do not have authority to ignore binding Supreme Court authority, lower
courts can interpret cases in ways that are equivalent to overruling or use procedural devices,
The story starts with New York v. Belton, which seemed to establish a bright-line rule: when police arrest the driver of a car, they may search the vehicle’s passenger compartment. For decades, lower courts were virtually unanimous in adhering to that bright-line rule. But in the 2004 decision Thornton v. United States, a total of five Justices—three in concurrences and two in dissent—expressly signaled serious concerns with how the lower courts were approaching Belton. The difference between the concurring and dissenting Justices was whether Belton had to be overruled (the concurrences) as opposed to reinterpreted (the dissenters). According to the dissenters, Belton had been misread by, well, almost everybody.

About three years later, the Arizona Supreme Court adopted the narrow reading of Belton put forward in the Thornton dissent. Although finding it “possible” to construe Belton’s “bright-line” holding broadly, the Arizona court concluded that that interpretation was in tension with some language in Belton and would require “abandoning” other Fourth Amendment precedents. The Arizona court therefore limited Belton to the “precise” factual situation it addressed: cases where police were attempting to maintain control over multiple unsecured individuals. So read, Belton did not apply where the arrestee was secured in the back of a police car prior to the search of his vehicle. This certainly was not the best reading of Belton, which had been read much more such as standing, to reach results in line with what the judges predict to be current Supreme Court majority preference.

Hasen, supra note 104, at 797; see also Bloom, supra note 79, at 507 (arguing that state courts “defy binding precedent at the Supreme Court’s own subtle behest”).

165. See Gant, 556 U.S. at 342 (noting that this view had “predominated”); see also Davis v. United States, 131 S. Ct. 2419, 2424 & n.3 (2011) (collecting authorities).
166. See 541 U.S. 615, 624 (2004) (O’Connor, J., concurring in part); id. at 628 (Scalia, J., concurring in the judgment); id. at 633 (Stevens, J., dissenting); infra text accompanying note 233.
167. Because a fractured Supreme Court decision had revealed a change in the Court’s median view, the situation described in the main text is one in which leading proponents of the prediction model might recommend anticipatory overruling. See Caminker, supra note 89, at 73.
169. Id. at 643 (“It is possible to read Belton, as the State and the Dissent do, as holding that because the interior of a car is generally within the reach of a recent occupant, the Belton bright-line rule eliminates the requirement that the police assess the exigencies of the situation.”).
170. Id. at 645 (“Because neither Belton nor Thornton addresses the precise question presented here, we must, if we are to maintain our constitutional moorings, rely on Chimel’s rationales in reaching our holding.”); id. (“We do not, however, read Belton or Thornton as abandoning the Chimel justifications for the search incident to arrest exception.”). So in narrowing Belton and Thornton, the Arizona court created interpretive room to extend Chimel’s more prodefendant standard.
171. Exhibiting a different view of vertical stare decisis, a dissent in the Arizona case acknowledged that numerous Supreme Court Justices had criticized Belton but insisted that only the Supreme Court could revisit the bright-line Belton rule. See id. at 646 (Bales, J., dissenting) (“Although there may be good reasons to reconsider Belton, doing so is the sole prerogative of the Supreme Court, even if later developments have called into question the rationale for its decision.”) (citing State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)); cf. infra text accompanying note 187 (discussing a similar view possibly expressed by Justice Breyer).
broadly by almost every court to encounter it, including the Supreme Court itself. But when the Arizona case reached the Justices, a majority largely ratified the state court’s approach.\textsuperscript{172} The bright-line \textit{Belton} rule was no more.

Remarkably, the Court itself has subsequently held out the Arizona Supreme Court’s decision to narrow \textit{Belton} from below as an example of how lower courts can foster doctrinal change. In \textit{Davis v. United States}, the Court considered whether to apply the exclusionary rule to searches conducted in good-faith reliance on circuit precedent that had read \textit{Belton} broadly.\textsuperscript{173} The defendant argued that withholding the exclusionary rule would effectively preclude requests to overrule settled Fourth Amendment precedent because any request to overrule would necessarily imply that the officers’ search should be protected by the good-faith exception.\textsuperscript{174} The Court’s solution was, in effect, to point out the possibility that lower courts might narrow from below: “[A]s a practical matter, defense counsel in many cases will test this Court’s Fourth Amendment precedents in the same way that \textit{Belton} was tested in \textit{Gant}—by arguing that the precedent is distinguishable.”\textsuperscript{175} The author of this remark was Justice Samuel A. Alito, who was among the five of Justices in \textit{Gant} who emphatically believed that the Arizona Supreme Court had “effectively overrule[d]” \textit{Belton}.\textsuperscript{176}

So the Court encouraged provocative narrowing in three distinct ways. At the outset, \textit{Thornton} included separate writings that signaled the propriety of narrowing \textit{Belton} from below. In \textit{Gant} itself, the Court favorably quoted and endorsed the state court’s narrowing of \textit{Belton}. And, finally, \textit{Davis} held out the Arizona Supreme Court’s decision as a model of how narrowing from below can prompt doctrinal change.

The Court’s encouragement of provocative narrowing has significant implications for the various models of vertical stare decisis.\textsuperscript{177} Most saliently, the Court has undermined the authority model by suggesting that lower courts may properly issue decisions with an eye toward facilitating the correction of Supreme Court precedents that were wrong on the day they were decided. By contrast, the Court’s permissive attitude toward provocative narrowing comports with the proficiency and predictive models, which separate Supreme Court precedent from legal correctness. Finally, the Court’s willingness to invite and then embrace narrowing from below supports the signals model.

\textsuperscript{172} \textit{Gant} only partially adopted the reasoning below; in order to get Justice Scalia’s fifth vote, the Court adopted a hybrid rule. \textit{See Arizona v. Gant}, 556 U.S. 332, 344–45 (2009).
\textsuperscript{173} 131 S. Ct. 2419 (2011).
\textsuperscript{174} Id. at 2433.
\textsuperscript{175} Id.; see also id. at 2425 (asserting that the Arizona Supreme Court’s decision in \textit{Gant} had “distinguished \textit{Belton}”).
\textsuperscript{176} \textit{See Gant}, 556 U.S. at 355 (Alito, J., dissenting); see also id. at 351–54 (Scalia, J., concurring). Justice Scalia agreed with Justice Alito’s reading of precedent and that the Court was effectively overruling those cases but nonetheless joined the majority opinion, which purported to interpret them. Id.; see also \textit{Hasen, supra} note 4, at 788 (noting instance where “Justice Alito seems to be inviting litigants to argue forthrightly for the overruling of precedent when appropriate”).
\textsuperscript{177} \textit{See supra} Section I.A.
B. UNSOLICITED PROVOCATION

Sometimes, lower courts engage in provocative narrowing even though they have not received a signal to do so. In these cases of unsolicited provocation, narrowing from below exerts a weak form of agenda control over the Supreme Court.178

An interesting example arose after Citizens United v. FEC.179 In the wake of the Supreme Court’s invalidation of core federal campaign-finance regulations under the First Amendment, the Montana Supreme Court upheld a similar state campaign-finance regime.180 The state court justified its seeming deviation from vertical stare decisis on the ground that Citizens United had not considered Montana’s distinctive history of political corruption, which supposedly supplied a special justification for that state’s campaign-finance measures.181 In effect, the Montana court had arrived at the improbable conclusion that Citizens United precluded regulation of independent corporate expenditures by the federal government—but not by Montana. This was hardly the best reading of precedent.

The case attracted a remarkable amount of media commentary because it afforded the Court a chance to narrow Citizens United or even overrule it.182 Sophisticated commentators have argued that the Court should have used the Montana case to consider changing course on campaign finance.183 Instead, the Court reversed the state court by the same five-to-four vote that gave rise to Citizens United itself, with the majority opinion consisting of just a single paragraph asserting that Citizens United plainly controlled.184 By contrast, Justice Stephen G. Breyer’s four-Justice dissent in effect contended that Citizens

178. The alternative is to follow but note the error of the Supreme Court’s precedent, so that the Court itself can choose whether to reconsider its position. See AMAR, supra note 28, at 232–33 (propounding this approach). This dicta-based approach would not trigger conventional certiorari criteria or otherwise demand Supreme Court review. See SUP. CT. R. 10; see also Kozel, supra note 8, at 210 (calling this solution “underwhelming as a practical matter”). Still, this approach sometimes works and, unlike narrowing from below, is generally legitimate even where higher court precedent is clear. See, e.g., United States v. Hatter, 532 U.S. 557, 567 (2001) (“The Court of Appeals was correct in applying Evans to the instant case.... Nonetheless, the court below, in effect, has invited us to reconsider Evans. We now overrule Evans insofar as it holds....”); see also Scheiber v. Dolby Labs., Inc., 293 F.3d 1014, 1018–19 (7th Cir. 2002).
181. See id. at 5–6 (“Citizens United was a case decided upon its facts, and involved ‘unique and complex’ rules....”); id. at 13 (“Citizens United does not compel a conclusion that Montana’s law restricting independent political expenditures by a corporation related to a candidate is unconstitutional.”).
183. See, e.g., ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 64 (2014) (calling the Supreme Court’s summary reversal of the Montana court a “shocking result” that is “beyond” the author’s “comprehension” given the need to consider the special circumstances of Montana’s law).
United should be either narrowed or overruled.\textsuperscript{185} This position is remarkable because Breyer, as well as Justice Ginsburg, had joined a decision to stay the Montana decision specifically on the ground that the Montana court lacked authority to engage in anticipatory overruling.\textsuperscript{186} These Justices may have believed that the Montana court’s decision to narrow from below was impermissible, whereas the Justices themselves could legitimately engage in horizontal narrowing.\textsuperscript{187}

But attention to narrowing raises the possibility that the Montana Supreme Court’s decision was legitimate. The Montana decision did not purport to overrule \textit{Citizens United}, which still remained in force as to the federal laws that it invalidated. Instead, the state court narrowed \textit{Citizens United} by declining to apply it to the Montana campaign-finance regime. The state court had effectively argued that \textit{Citizens United} was ambiguous in that it could be read as having made a precedential decision only as to the specific laws and evidentiary showing before it.\textsuperscript{188} In addition, some \textit{amici} and commentators argued the state court could have asserted that its decision turned on new information because experience had by then illustrated some perhaps unforeseen consequences of the rule adopted in \textit{Citizens United}.\textsuperscript{189}

Yet the legitimacy of the Montana decision is open to question. To comport with the authority model of stare decisis, for instance, the Montana court would have had to identify grounds for narrowing without presupposing that \textit{Citizens United} was wrongly decided. Although leading scholars have suggested that such grounds existed,\textsuperscript{190} it is also possible that the Montana court had deliberately engaged in a form of judicial protest or resistance—contrary to the authority model. The next Part further explores that general topic.

V. Narrowing as Resistance

Another reason to narrow from below is to resist the disruptive effect of broadly written Supreme Court decisions without provoking the Court’s review. Of course, higher court rulings can be broadly written for good reasons, and lower court resistance can itself threaten disruption and undermine the Court’s authority. But the Court’s broad language can also be suspect, such as when the Court transgresses its own procedural rules by resolving questions that are not

\textsuperscript{185} See id. at 2491–92 (Breyer, J., dissenting).
\textsuperscript{187} See Re, supra note 3, at 1906 n. 249.
\textsuperscript{188} See supra note 183 and accompanying text.
\textsuperscript{190} See, e.g., Pamela S. Karlan, \textit{The Supreme Court 2011 Term—Foreword: Democracy and Disdain}, 126 Harv. L. Rev. 1, 38 (2012) (arguing that the Montana court had taken the Supreme Court “at its word”).
squarely presented, necessary to the judgment, or vigorously argued.191

Particularly when these warning signs are present, lower courts are sometimes prepared to domesticate potentially transformative rulings and turn them into symbolic statements. And when lower courts uniformly follow this approach, they mitigate the risk that bad facts or one-offs make permanently bad law. They also increase the law’s stability by giving the Court a chance to gather information about bold moves before committing to them.192

This Part evaluates two recent precedents that have met with narrowing as resistance.

A. DISTRICT OF COLUMBIA V. HELLER

District of Columbia v. Heller held that there is an individual right to keep and bear arms under the Second Amendment.193 In a vigorous dissent, Justice John Paul Stevens asserted that Heller would “surely give rise to a far more active judicial role in making vitally important national policy decisions than was envisioned at any time in the 18th, 19th, or 20th centuries.”194 But these supposedly vast consequences have not come to pass, in large part because Heller has been narrowed from below.

In recent dissents from denials of certiorari, Justice Clarence Thomas has drawn attention to Heller’s lack of uptake in the courts of appeals.195 Joined by Justice Scalia, who had written Heller, Thomas has argued that, “lower courts . . . have failed to protect” the Second Amendment196 and instead exhibited “noncompliance with our Second Amendment precedents.”197 Lower courts

191. See, e.g., Johnson v. United States, 135 S. Ct. 2551, 2562–63 (2015) (explaining that ruling “without full briefing or argument” is “a circumstance that leaves us ‘less constrained to follow precedent’”); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 572 (1993) (Souter, J., concurring in the judgment) (not following apparently precedential reasoning where the Court had “formulate[d] a rule of constitutional law broader than is required by the precise facts to which it is to be applied”); see also Kastigar v. United States, 406 U.S. 441, 454–55 (1972); Humphrey’s Ex’r v. United States, 295 U.S. 602, 627 (1935); supra note 87.


have in fact invalidated few firearms laws, despite the Court’s statement that the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”\(^{198}\) And although the *Heller* majority emphasized history and tradition, the lower courts have adopted a pragmatic inquiry resembling the balancing approach put forward by the *Heller* dissent.\(^{199}\) What’s more, some courts have apparently refused to follow the best reading of *Heller* by demanding a clearer instruction from the Court before enforcing personal Second Amendment rights beyond the facts of *Heller* itself.\(^{200}\) Thomas’s recent dissents from denials of certiorari aim to draw attention to this apparent narrowing from below.

But even if lower courts have not adhered to the best reading of *Heller*, they have interpreted the decision reasonably. *Heller* left vast room for interpretation. In issuing its holding, the Court emphasized that, in its “first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.”\(^{201}\) Much as an ambiguous statute amounts to a lawmaking delegation to executive agencies,\(^{202}\) *Heller* effectively delegated interpretive power to the lower courts. Thus, the courts of appeals could have followed the strong language in *Heller*, narrowly construed that language, or done anything in between. Again, the trend has been toward narrowing. As a result, *Heller*-as-narrowed-from-below has begun to seem like a mostly symbolic victory for gun rights. *Heller* itself seemed to contemplate that possibility: even as it insisted that “it is not the role of this Court to pronounce the Second Amendment extinct,” the Court outlined a series of “important limitation[s]” that sharply cabined *Heller*’s precedential scope.\(^{203}\) The lower courts’ treatment of *Heller* is thus defensible under all the models of vertical stare decisis discussed above.

*Heller* was born as a landmark and perhaps even revolutionary decision. But the passage of time has seen *Heller*’s legacy shrink to the point that it may soon

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200. See Friedman v. City of Highland Park, 784 F.3d 406, 412 (7th Cir. 2015) (declining to “pars[e] ambiguous passages in the Supreme Court’s opinions” and noting that, “when there is no definitive constitutional rule, matters are left to the legislative process”); United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011) (“On the question of *Heller*’s applicability outside the home environment, we think it prudent to await direction from the Court itself.”); Williams v. State, 10 A.3d 1167, 1177 (Md. 2011) (“If the Supreme Court, in [Heller’s] dicta, meant its holding to extend beyond home possession, it will need to say so more plainly.”); Rostron, *supra* note 199, at 737 (“Many state courts have simplified matters by essentially declaring that they will not strike down any law that is not clearly rendered invalid by *Heller* and McDonald.”).

201. *Heller*, 554 U.S. at 635.


be regarded as mostly symbolic. That transition has happened not in the Supreme Court, but rather in the lower courts. *Heller* has been narrowed from below.

**B. BOUMEDIENE V. BUSH**

For another example of narrowing as resistance, consider the D.C. Circuit’s reaction to *Boumediene v. Bush*. What makes this example most striking is that some lower court judges have made public statements suggesting that they narrowed *Boumediene* because they disagreed with it—in which case, those judges would have contravened the authority model.

In extending constitutional habeas corpus to Guantánamo Bay in Cuba, *Boumediene* upended a congressional scheme for processing hundreds of detainees and raised the possibility of extensive release orders. In one of its more definite statements, *Boumediene* asserted that “the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.” In applying that principle, the Court rejected congressionally established Combatant Status Review Tribunals, in part because those bodies lacked “authority to assess the sufficiency of the Government’s evidence against the detainee” and so created “considerable risk of error.” These conclusions suggested that habeas courts should apply some skepticism in reviewing detention decisions. More broadly, *Boumediene* suggested that habeas should afford Guantánamo detainees a realistic prospect of obtaining relief.

Yet at least some D.C. Circuit judges seemed intent on avoiding that result. In the years following *Boumediene*, the D.C. Circuit consistently reversed district court rulings in favor of Guantánamo petitioners while construing the law strongly in favor of the government’s authority. Meanwhile, judge after judge publicly criticized *Boumediene*. For example, Judge Raymond Randolph asserted that “*Boumediene* ripped up centuries of settled law, leaving in its wake... a legal mess.” In a concurrence, Judge Laurence Silberman bemoaned “the Supreme Court’s defiant—if only theoretical—assertion of judicial supremacy” and expressly found it “unlikely” that the Court would grant review over post-*Boumediene* cases or otherwise “assume direct responsibility for the consequences of *Boumediene v. Bush*.” Finally, the opinion for the court in

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204. 553 U.S. 723 (2008).
205. See supra Section II.A.1.
206. See *Boumediene*, 553 U.S. 723.
207. *Id.* at 779 (quoting INS v. St. Cyr, 553 U.S. 289, 302 (2001)).
208. *Id.* at 785, 786.
209. See LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 200 (2014) (explaining that the D.C. Circuit issued a “string of opinions taking a very narrow view of *Boumediene*” and that several D.C. Circuit judges had “publicly declared war on *Boumediene*”).
Latif v. Obama derided “Boumediene’s airy suppositions,” asserted that they “have caused great difficulty for the Executive and the courts,” and noted that these events had unfolded “[a]s the [Boumediene] dissenters warned.” Latif made these points while establishing a mandatory “presumption of regularity” for government intelligence documents, prompting dissenting Judge David S. Tatel to lament the “court’s assault on Boumediene.” The accumulated effect of all these decisions was to render habeas relief at Guantánamo a most unlikely prospect.

Reacting to these and other events, retired Judge James Robertson—who had adjudicated Guantánamo cases as a member of the D.C. District Court—asserted that the D.C. Circuit had “gutted” Boumediene. Robertson specifically asserted that the D.C. Circuit itself “appears to be hostile, if not defiant, to the Supreme Court’s directive in Boumediene that Gitmo detainees are entitled to meaningful habeas corpus review of their detention.” In other words, Robertson seemed to think that the D.C. Circuit was narrowing from below out of disagreement with the Court’s ruling. The D.C. Circuit’s overall reaction to Boumediene lends credence to Robertson’s evaluation. When Boumediene came down, few expected that the decision’s broad guarantees would be read to permit such lax federal habeas review. Yet on its five-year anniversary, Boumediene could plausibly be viewed as a mostly symbolic result.

Still, it is hard to single out any one D.C. Circuit decision as undoubtedly contrary to Boumediene. As Boumediene itself pointed out, it had left many important questions to “the expertise and competence of the District Court to address in the first instance.” Thus, Boumediene and its “meaningful opportunity” mandate had amounted to a “delegation of a major legislative project to the federal courts”—particularly the D.C. Circuit, which had exclusive habeas jurisdiction over Guantánamo Bay. So, once again, the lower courts could reasonably choose to read the Court’s precedent narrowly.

212. 677 F.3d 1175, 1199 (2011) (Brown, J.).
213. Id. at 1178; id. at 1215 (Tatel, J., dissenting).
218. BENJAMIN WITTES, ROBERT CHESENY & RABEA BENHAIM, BROOKINGS INST., THE EMERGING LAW OF DETENTION: THE GUANTANAMO HABEAS CASES AS LAWMAKING 1 (2010); see also id. at 83 (noting that courts are “the key legislative body in this area”).
What makes *Boumediene* so unusual is that, as noted, at least some D.C. Circuit judges seem to have narrowed *Boumediene* out of the belief that it was wrongly decided. That deliberate rejection of higher court precedent might be defensible under the proficiency or prediction models, but would run afoul of the authority and signals models.219

C. THE ROLE OF RESISTANCE

The possibility of narrowing as resistance has complicated implications for the relative power of the Supreme Court and lower courts. On the one hand, the foreseeable availability of narrowing as resistance indirectly enhances the Court’s power by giving it the option of sending up a doctrinal test balloon. After packing a potentially disruptive holding with ambiguity, the Justices can wait for a period of years, watching the reactions of the courts of appeals and the practical consequences of those courts’ decisions. At that point, the Court would be in a stronger position to decide whether to commit to a disruptive legal rule. *Heller* and *Boumediene* both supply potential examples of this dynamic. But narrowing as resistance also distributes power to lower courts. For example, the lower courts’ roughly uniform reaction to *Heller* has affected the Court’s docket and agenda. By reading *Heller* narrowly, lower courts avoided the kind of disruptive holdings that trigger Supreme Court review. Yet narrowing as resistance has an important limitation: it must be widespread to be effective. If lower courts narrowed from below only inconsistently, they would provoke higher court intervention to establish uniformity,220 thereby transferring decision-making power back to the Justices.

Precisely because it must be widespread to be effective, narrowing as resistance will likely remain limited to only a small, if important, subset of Supreme Court cases. Unlike so many other controversial precedents, *Heller* and *Boumediene* exhibited four interrelated traits. First, both precedents threatened to undermine highly controversial political settlements that plausibly affected life-and-death issues. Second, both precedents created novel doctrinal principles, yet the Court self-consciously afforded lower courts limited guidance as to how those principles ought to apply to specific factual circumstances. Third, both precedents appeared to demand pragmatic forms of expertise that lie outside normal judicial experience—namely, expertise regarding either the social effects of firearm regulations or the reliability of evidence related to foreign theaters of combat. Finally, both cases rested on controversial methodological moves and, far from evincing a clear mandate, included numerous caveats while prompting vehement four-Justice dissents. Most Supreme Court rulings have none of these characteristics, and their combined presence is rare. Together, these four factors may have made resistance the path of least resistance for lower courts. Narrowing from below would minimally upset and harm

219. *See supra* Section II.A (outlining models).
the public, and it was also intellectually easier and unlikely to provoke rapid reversal from on high. In this sense, *Heller* and *Boumediene*, though ideologically opposed, are rare precedential twins.

### VI. NARROWING SIGNALS

This Part focuses on the relationship between narrowing from below and Supreme Court signals. These concepts are interrelated in two important ways. First, lower courts must choose whether to give full effect to signals, or to narrow them. Second, lower courts sometimes receive signals to narrow conventional precedents. The sections below address cases that respectively address these points.

#### A. NARROWED SIGNALS

Though an important and under-studied phenomenon, signals can defy conventional precedent and so not be worth following, even when they are clear. A recent case regarding race and employment discrimination supplies a remarkable example.

In *Ricci v. DeStefano*, the city of New Haven had assessed firefighter promotions using a test that disproportionately disadvantaged African-American applicants. After the city threw out the test results, white and Hispanic firefighters sued, alleging disparate treatment according to race. The Supreme Court sided with the plaintiffs and directed New Haven to certify the test results. However, that disposition created a foreseeable problem: would the African-American firefighters who lost out under the test now sue on a disparate-impact theory? The Court addressed that potential future case in a single sentence:

> If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.

This “clear” guidance plainly says that the city should not be subject to a disparate-impact suit based on its certification of the test results. However, the statement also presents itself as being an implication “in light of” the Court’s holding, rather than the holding itself. *Ricci’s* guidance could therefore be viewed as a dictum or, alternatively, as a signal, rather than a conventional precedent.

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221. On signals, see *supra* Section II.A.4 & note 112.
222. See *supra* Section II.A.4.
224. See id. at 592.
225. Id. at 593.
When African-American firefighters brought the disparate-impact suit that Ricci had foreseen, the Second Circuit rejected Ricci’s guidance about what to do.²²⁶ In a thorough discussion, the Second Circuit noted that Ricci’s guidance diverged from its “precise” holding and appeared to be “dicta.”²²⁷ However, the Second Circuit—like most federal courts of appeals—recognizes that Supreme Court dicta “must be given considerable weight,” despite its lack of formal precedential status.²²⁸ In this respect, Supreme Court dicta, particularly when well-considered, is treated as a kind of signal. Yet the Second Circuit found it difficult “to reconcile” Ricci’s signal “with either the Court’s actual holding in Ricci or long-standing, fundamental principles of Title VII law.”²²⁹ So, consistent with the rule of thumb defended above,²³⁰ the Second Circuit dismissed Ricci’s signal and instead chose to follow the Court’s conventional precedents. One might have expected the Court to be concerned with the Second Circuit’s failure to obey Ricci’s avowedly “clear” directive. Instead, the Court simply denied certiorari.²³¹

The Second Circuit’s decision is best understood as an application of the signals model. Though quite “clear,” Ricci’s guidance was in tension with the Ricci Court’s actual holding and arguably contrary to the rule against dicta. And the Court’s own failure to exhibit fidelity to conventional decision-making norms arguably diluted the precedential force of its directive. At the same time, Ricci’s guidance was highly dubious as a matter of law and seemed inconsistent with background precedential rules. So the Second Circuit had good reason to read Ricci’s guidance as nonbinding advice, even though it generally follows Supreme Court dicta and, perhaps, other signals.

B. SIGNALS TO NARROW

Lower courts sometimes narrow from below in response to Supreme Court signals. Gant, discussed earlier, supplies an example.²³² A more recent and salient instance involves same-sex marriage.

²²⁶. See Briscoe v. City of New Haven, 654 F.3d 200 (2d Cir. 2011).
²²⁷. Id. at 207. The Second Circuit noted, for example, that “all other indications in the opinion are of a holding limited” to the question presented and that “the Court’s precise formulation of its holding (corroborated elsewhere in the majority opinion, and by concurring and dissenting opinions) supersedes any dicta arguably to the contrary.” Id. at 206–07. Further, the circuit court argued that the Ricci guidance was “perhaps attributable to a simple logical error,” id. at 206, and “expect[ed] that any holding that is meant to shape the contours of a disparate-impact claim would cite and quote the statute.” Id. at 207.
²²⁸. See United States v. Bell, 524 F.2d 202, 206 (2d Cir. 1975) (Supreme Court dicta “must be given considerable weight and can not be ignored in the resolution of . . . close question[s].”); see also David Klein & Neal Devins, Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making, 54 WM. & MARY L. REV. 2021 (2013); Kozel, supra note 8, at 182 (discussing how “many” lower federal courts “unabashedly defer to Supreme Court dicta”).
²²⁹. Briscoe, 654 F.3d at 206.
³³⁰. See supra Section II.A.4.
³³². See supra Section IV.A.
Decided in the 1971, the Supreme Court’s ruling in *Baker v. Nelson* summar-
ily affirmed a state-court ruling denying a same-sex couple the constitutional
right to marry.233 *Baker* involved sophisticated arguments resting on both equal
protection and due process and so seemed to reject the modern legal case for
same-sex marriage as nearly frivolous.234 Moreover, the Court maintains that its
summary affirmances preclude lower courts from reaching “opposite conclu-
sions on the precise issues presented and necessarily decided.”235 Given that
precedent on vertical precedent, *Baker* was best read as barring lower courts
from granting federal claims for same-sex marriage rights. Indeed, lower courts
so read *Baker* for many years.236 Meanwhile, the Court carefully avoided
casting doubt on *Baker’s* apparent holding, even when expanding same-sex
couples’ rights.237

But then the Court heard a pair of cases expressly concerned with same-sex
marriage: *Hollingsworth v. Perry* and *United States v. Windsor*.238 Although the
Court eventually resolved *Hollingsworth* on standing grounds, the highly publi-
cized oral argument in that case featured extensive discussion of the constituti-
onal right to same-sex marriage.239 It is impossible to listen to that argument
without realizing that at least five Justices were seriously interested in finding a
constitutional right to same-sex marriage. *Windsor*, which the Court resolved on
the merits, only reinforced that impression. Authored by Justice Kennedy,*Windsor*
invalidated part of the Defense of Marriage Act.240 Along the way, *Windsor*
included language supportive of same-sex marriage rights.241 At the
same time, Justice Antonin Scalia’s *Windsor* dissent found it “inevitable” that
“this” Court would rule for same-sex marriage rights.242 These events signaled
*Baker’s* susceptibility to narrowing without overruling it, thereby giving lower

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234. *See* *Baker v. Nelson*, 190 N.W.2d 185, 186–87 (Minn. 1971).
vertical precedent is itself ambiguous and so may be susceptible to legitimate narrowing. For instance,
the Court has said that “if the Court has branded a question as unsubstantial, it remains so except when
doctrinal developments indicate otherwise.” Hicks v. Miranda, 422 U.S. 332, 344–45 (1975) (internal
citations omitted). Some lower courts have emphasized that statement when narrowly reading compa-
8:04-CV-1680-T-30TBM, 2004 WL 3142528, at *4 (M.D. Fla. July 20, 2004); Anderson v. King Cty.,
(concluding that after *Lawrence*, “there are differences that could sufficiently distinguish *Baker* from
the current case”).
241. *Id.* at 2694 (explaining that the Defense of Marriage Act’s “principal effect is to identify a
subset of state-sanctioned marriages and make them unequal” and that it “demeans the [same-sex]
couple, whose moral and sexual choices the Constitution protects” while “humiliat[ing] tens of
thousands of children now being raised by same-sex couples.” (citations omitted)).
but they instead read *Windsor* broadly. *See Re, supra* note 3, at 1909.
courts a degree of precedential freedom—as well as an opportunity to inform
the Court’s eventual resolution of the issue.

In the wake of Hollingsworth and Windsor, the overwhelming majority of
lower courts hearing same-sex marriage claims suddenly felt free to set Baker
aside. In arriving at this conclusion, lower courts tended to view Baker as
having been stripped of precedential force in light of subsequent doctrinal
developments, including Windsor. However, these lower courts also acknowl-
edged that the Supreme Court had repeatedly taken care not to pass judgment on
Baker or the issue of same-sex marriage. Indeed, Windsor itself included a
disclaimer indicating as much. Thus, Baker had not been overruled, even sub silentio. And, consistent with the Court’s edicts, lower courts did not purport to
engage in the anticipatory overruling of Baker. So, how could Baker have been
curtailed without ever having been rejected?

The most persuasive answer is that lower courts narrowed Baker in light of
signals from the Court and their own best views of the law. The oral argument
in Hollingsworth and the opinions in Windsor demonstrated that a constitutional
right to same-sex marriage was no longer a frivolous proposition. Moreover, the
Hollingsworth argument featured fresh reasons for that conclusion. For ex-
ample, Justice Kennedy emphasized that the Court must consider “the voice of
the children”—that is, the interests of the 40,000 children being raised by
same-sex couples in California. Baker could not possibly have considered
that new social fact, any more than it could have anticipated changing public
attitudes or empirical evidence regarding same-sex parenting. In this respect,
Baker resembled Stanford, Robinson, and other cases that, though broadly
written, tacitly depend on then-extant information. Lower courts were there-
fore on solid ground in reading Baker narrowly, as limited to then-extant facts
and case law.

Later, the Court issued an even clearer signal. After several courts of appeals
had ordered same-sex marriages as a matter of constitutional right, aggrieved

243. See Richard Wolf, For Same Sex Marriage Pioneer Edie Windsor, A Very Busy Year, Wash.
Post (June 26, 2014), https://www.washingtonpost.com/national/religion/for-same-sex-marriage-pioneer-
edie-windsor-a-very-busy-year/2014/06/26/171f8df2-fd52-11e3-beb6-9c0e896dbcd8_story.html.
244. See, e.g., Latta v. Otter, 771 F.3d 456, 466 & n.6 (9th Cir. 2014) (“Although [they] did not tell
us the answers to the federal questions before us, Windsor and Lawrence make clear that these are
substantial federal questions we, as federal judges, must hear and decide.”); see also Baskin v. Bogan,
766 F.3d 648, 660 (7th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352, 373–75 (4th Cir. 2014); Kitchen v.
Herbert, 755 F.3d 1193, 1204–08 (10th Cir. 2014).
245. See, e.g., Latta, 771 F.3d at 466 n.6 (“This opinion and its holding are confined to those lawful
marriages [recognized by states].” (alteration in original) (quoting Windsor, 133 S. Ct. at 2696)); see
also Lawrence v. Texas, 539 U.S. 558, 578 (2003) (“The present case . . . does not involve whether the
government must give formal recognition to any relationship that homosexual persons seek to enter.”).
246. See supra Sections III.A & III.B.
states sought certiorari from the Court and accompanying stays of the lower court rulings. Surprising commentators, the Court chose to deny certiorari and the stay requests, thereby allowing many same-sex marriages to occur by court order. Given the standard applicable to stay requests, it seemed that most Justices must have concluded that the states lacked a likelihood of prevailing before the Court. And because the Court had apparently reached that conclusion, lower courts felt especially confident in ruling in favor of same-sex marriage claims and denying stays of those rulings.

After the Court’s stay denials, a divided Sixth Circuit panel denied a same-sex marriage claim. Expressly worrying about the legitimacy of “anticipatorily overruling,” the panel majority noted that Baker had not been overruled and so remained binding. The majority went on to express uncertainty as to whether the Court’s recent stay denials were a “signal” and then ultimately rejected same-sex marriage rights on the merits. Meanwhile, the panel dissent dismissed Baker as both wrongheaded and in tension with the Court’s recent actions. In effect, the majority and dissent debated whether to narrow Baker’s ambiguous holding. If Baker had unequivocally controlled, the majority and dissent’s debate over signals and the merits would have been superfluous.

In reversing the Sixth Circuit in Obergefell v. Hodges and establishing a constitutional right to same-sex marriage, the Court confirmed Baker’s prior precedential status by expressly overruling it. What the Court left unsettled was whether the Sixth Circuit could legitimately have followed other lower courts in narrowing Baker. The framework set out in Part II affords the answer. Baker was ambiguous and obsolete, the Court had repeatedly signaled that its days were numbered, and no background principle of law prevented a narrow interpretation of its scope. So under any model of vertical stare decisis, lower

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252. See DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014) (Sutton, J.).

253. Id. at 401 (“Any other approach returns us to a world in which the lower courts may anticipatorily overrule all manner of Supreme Court decisions based on counting-to-five predictions, perceived trajectories in the caselaw, or, worst of all, new appointments to the Court.”).

254. Id. at 402 (“But don’t these denials of certiorari signal that, from the Court’s perspective, the right to same-sex marriage is inevitable? Maybe; maybe not.”).

255. Id. at 430 (Doughtrey, J., dissenting) (suggesting Baker is “a legal ‘dead letter’”).

courts could legitimately narrow Baker—the Sixth Circuit majority notwithstanding.

CONCLUSION

In a pyramidal judiciary, precedent’s primary role is vertical. It coordinates jurists and harmonizes their divergent first-principles views of the law. That critical function explains why legal culture discourages lower courts from ignoring or defying Supreme Court precedent. Lower courts themselves often intone that they must dutifully follow the Court’s edicts.257 Yet there are more ways of honoring precedent than adhering to the best available reading. The Court does not just dispense directives, and lower courts do not simply implement them. Instead, the Court signals that its precedent should be treated as suspect in certain situations and areas of the law. And lower courts sometimes use creative precedential interpretation to engage in dialogue with the Justices and influence the Court’s agenda. In short, courts should, and often do, narrow Supreme Court precedent from below.

257. See supra text accompanying note 6; see also supra notes 4, 8.