

PARSING SUPREME COURT DICTA TO ADJUDICATE NON-WORKPLACE HARMS

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TABLE OF CONTENTS

I. An Introduction to the Problem.....	76
II. Creation of Supreme Court Dicta: The Example of Non-Workplace Harms	81
A. The Relevant Statutory Provisions and Surrounding Debate	82
B. Adjudication of Non-Workplace Harms in the Lower Courts	86
III. Identifying the Amorphous: Definitions and Theories on the Dictum–Holding Divide	90
A. Deconstructing Dicta: What It Is and What It Is Not.....	90
B. Developing the Dicta Doctrine: Supreme Court Pronouncements on the Dictum-Holding Divide	94
C. Theorizing Dicta: Frameworks Proposed by Recent Commentators.....	97
D. Assessing <i>Burlington Northern</i> ’s Dicta: The Definitions and Theories at Work	100
IV. Carving a Paddle to Navigate the Creek: A Proposed Standard for Assessment of Supreme Court Dictum	104
A. Crafting the Standard	104
B. The Constitutional Underpinnings of the Proposed Standard	112
V. Upon Disregarding Dictum: Applying the Proposed Standard to Adjudicate Alleged Non-Workplace Harms.....	116
A. The Legal Justification for Disregarding <i>Burlington</i> <i>Northern</i> ’s Dictum	116
1. The Plain Statutory Language	117
2. The Statutory Context.....	118
B. The Policy Justification for Disregarding <i>Burlington</i> <i>Northern</i> ’s Dictum	121
C. The Appeal of an Independent Inquiry	126
D. Case Studies.....	129

VI. Conclusion	133
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I. AN INTRODUCTION TO THE PROBLEM

When the Supreme Court grants certiorari, the legal world often awaits the Court's decision with great anticipation. For many, the hope is that the Court will resolve the dispute by making a clear statement of the relevant law upon which lawyers and judges can rely to resolve similar disputes in the future. Indeed, such is the nature of a system founded upon principles of stare decisis, as is the United States' system.

Unfortunately, life is not always so simple. Sometimes the Court decides cases on grounds other than those presented in the appellate petition because of some change in the factual circumstances underlying the dispute,¹ a determination that the law requires a decision on some other basis,² or for some other legal reason.³ In these situations, judges

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1. See, e.g., *Bd. of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 239 (1985) (dismissing a Fourth Amendment claim as moot because the liquor store in question went out of business); *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (holding the constitutional question of denying pretrial bail to an inmate was moot after his conviction); *Bd. of Sch. Comm'rs of Indianapolis v. Jacobs*, 420 U.S. 128, 129 (1975) (dismissing class action by students as moot because all named plaintiffs had graduated); *Defunis v. Odegaard*, 416 U.S. 312, 319–20 (1974) (dismissing discrimination claim of law student who was denied admission to state school as moot because plaintiff was one semester away from graduating).

2. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17–18 (2004) (dismissing the claim of a father challenging the constitutionality of a California law requiring the Pledge of Allegiance be recited in every public elementary school because he lacked standing to bring the claim pursuant to a court order granting custody to the mother); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (holding that a wildlife conservation society lacked standing to seek judicial review of environmental reporting law because it had not suffered a legally cognizable injury); *Allen v. Wright*, 468 U.S. 737, 739–40 (1984) (holding that parents of school-aged children did not have standing to bring a nationwide class action alleging the IRS standards for offering tax-exempt status to racially diverse private schools were insufficient).

3. See, e.g., *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 805 (2003) (holding a controversy surrounding the Contract Disputes Act not yet ripe

and lawyers are left to muddle through those future cases without any real guidance from the Supreme Court. The disagreement and debate continue to fester until another case presenting that issue comes along and four of the Court's nine Justices determine that it warrants review. These situations are troubling to those members of the legal community who thrive on definition and order. Even more troubling, though, are the cases wherein the Court purports to resolve the dispute, but instead only exacerbates the confusion—whether due to intentional or unintentional murkiness in the Court's holding, its stray remarks made in the process, or otherwise. Perhaps the worst offenders are those cases in which the Court proclaims to issue a “holding,” when instead its statements are really dicta.

The Court did just that—misabeled its own dicta as “holding”—in its recent decision interpreting the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, *Burlington Northern & Santa Fe Railway Co. v. White*.⁴ At the heart of the case in *Burlington Northern* was a question about the severity of harm a plaintiff must show to establish the adverse action element of a prima facie case of retaliation.⁵ The circuit courts disagreed, sometimes vehemently, about the appropriate standard to apply when assessing the severity of harm alleged by a plaintiff claiming retaliation. The courts fell into three main camps: (1) those adopting a strict “ultimate employment action” standard; (2) those taking the expansive view that any treatment “reasonably likely to deter” protected activity is actionable; and (3) those falling in the middle, requiring a “material adverse employment action.”⁶ This disagreement brewed for years until the Supreme Court finally granted certiorari in *Burlington Northern*, promising to resolve the issue.⁷ Indeed, the posture of *Burlington Northern* made it a good candidate for resolution of the circuit split. The plaintiff, Sheila White, alleged that her employer, defendant Burlington Northern, had retaliated against her after she complained of

for adjudication); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (raising the question of jurisdiction sua sponte and dismissing for lack of subject matter jurisdiction); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804) (dismissing claim because the lower court did not have subject matter jurisdiction).

4. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

5. *Id.* at 57.

6. See Lisa M. Durham Taylor, *Adding Subjective Fuel to the Vague-Standard Fire: A Proposal for Congressional Intervention After Burlington Northern & Santa Fe Railway Co. v. White*, 9 U. PA. J. LAB. & EMP. L. 533, 544–54 (2006) (discussing the circuit split that preceded the Court's decision in *Burlington Northern*).

7. *Burlington N. & Santa Fe Ry. Co. v. White*, 546 U.S. 1060 (2005).

sexual harassment in violation of Title VII.⁸ She alleged two separate adverse employment acts in support of her prima facie case of retaliation: (1) alteration of her job duties by reassigning her from forklift operation to other “dirtier” and “more arduous” tasks within her job description, and (2) her placement on a thirty-seven day unpaid suspension pending investigation of alleged insubordination, followed by reinstatement with full back pay.⁹

The harms Sheila White alleged bore a direct relationship to her job. She claimed that Burlington Northern inappropriately altered her duties and suspended her employment. Thus, the fact that her claims related to her work was undisputed. Instead, the question in her case was whether the harms she allegedly suffered were sufficiently severe to support her retaliation claim as a matter of law. Indeed, the question presented in Burlington Northern’s petition for certiorari—the only question as to which the Supreme Court ultimately granted review—narrowly framed the issue as one focused directly on the requisite severity of harm:

Whether an employer may be held liable for retaliatory discrimination under Title VII for any “*materially adverse change* in the terms of employment” (including a temporary suspension rescinded by the employer with full back pay or an inconvenient reassignment, as the court below held); for any adverse treatment that was “reasonably likely to deter” the plaintiff from engaging in protected activity (as the Ninth Circuit holds); or only for an “*ultimate* employment decision” (as two other courts of appeals hold).¹⁰

In answer to the question presented, the Court held that “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, ‘which in this context means it well might have “dissuaded a reasonable worker from making or supporting a charge of discrimination.”’”¹¹ Whether the standard issued by the Court is as judicially administrable as the Court suggests is a matter of some debate,

8. *Burlington Northern*, 548 U.S. at 58–59.

9. *Id.* at 58–59, 71.

10. Petition for Writ of Certiorari at i, *Burlington Northern*, 546 U.S. 1060 (2005) (No. 05-259). Burlington also sought the Court’s review on a question of the applicable burden of proof on a retrial that was limited to a claim for punitive damages. *See id.* The Court denied review on this second question. *Burlington Northern*, 546 U.S. 1060 (granting certiorari limited to question one in the petition).

11. *Burlington Northern*, 548 U.S. at 68 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (citation omitted)).

but it is also beyond the scope of this Article.¹² What is important here is that the Court did not confine its “holding” to this issue. Instead, the Court attempted to reach much further, offering a separate holding as to another question that had troubled the lower courts but did not present itself for resolution in the *Burlington Northern* case. That is, the Court dedicated an entire section of its opinion to deciding whether Title VII’s anti-retaliation provision protects against *non-workplace* harms,¹³ even though the harms alleged by White clearly occurred in the workplace.¹⁴

At this point, I might simply declare that the Court’s conclusions about the anti-retaliation provision’s applicability to non-workplace harms are dicta and that courts should disregard them. But to do so would substantially oversimplify the situation. First, the Court was apparently quite convinced its conclusions about non-workplace harms were anything but dicta. The Court stated at the outset that resolution of White’s case would require answering that question¹⁵ and went on to reach a separate holding that bore directly upon it: “The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.”¹⁶ Non-discerning lawyers and judges may therefore rely upon that statement as the pronouncement of law, when perhaps it is not. Second, there is the deeper problem of whether the Court’s holding on this point is dictum or not. The distinction between holding and dictum is often blurry, and commentators have offered varying frames of reference by which the proper categorization might be made.¹⁷

12. See Taylor, *supra* note 6, at 570–92 (arguing the Court’s standard is both vague and impracticable).

13. See *Burlington Northern*, 548 U.S. at 61–67.

14. See Brief of Respondent at 1–4, *Burlington Northern*, 548 U.S. 53 (No. 05-259) (identifying alleged harms as alteration of job duties and temporary disciplinary suspension).

15. *Burlington Northern*, 548 U.S. at 61–62 (“To [resolve the circuit split] requires us to decide whether Title VII’s anti-retaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace.”).

16. *Id.* at 67.

17. See Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1017–25 (2005) (proposing analytic framework for distinguishing between dicta and holding); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2039–40 (1994) (indicating that courts’ treatment of dicta as holding is problematic in light of Article III’s parameters). Professor Charles A. Sullivan provided a good description of the recent scholarly attention to the distinction between dicta and holding:

Whether the Court's discussion of and conclusions about non-workplace harms is dicta is therefore not only a tricky question, but also one as to which the answer has substantial implications. And finally, there is the problem of how lower courts should approach questions that the Court has purported to resolve by holding when a deeper analysis shows that its statements were in fact mere dicta.

This Article attempts to resolve those problems by identifying the various theories proposed for pinpointing the divide between dictum and holding and offering a framework for adjudicating subsequent cases in the wake of Supreme Court dicta, using *Burlington Northern*'s discussion of non-workplace harms as an example. First, in Part II, I will elaborate on the origin of Supreme Court dicta by discussing the principal pre-*Burlington Northern* retaliation cases and shedding some light on how the Supreme Court might have come to address non-workplace harms in *Burlington Northern* in light of its facts and procedural posture. In Part III, I will delve more deeply into the question of holding versus dictum and the theories offered to answer it, concluding that the *Burlington Northern* Court's assertions about non-workplace harms are indisputably dicta. Then, in Part IV, I propose a framework for adjudicating issues on which the Supreme Court has offered instruction in dictum: in particular, that courts should not follow dictum blindly, but instead should engage in an independent assessment of the pertinent issue, bearing in mind not only the Supreme Court's dictum-based instruction, but also any relevant statutory language and history and the prevailing policy concerns. I suggest that such an independent inquiry is not only constitutionally motivated, but also critical to the foundation of our legal system. Finally, in Part V, I return to the example of non-workplace harms to demonstrate how courts should apply the framework crafted in Part IV to adjudicate non-workplace harms going forward.

On the scholarly front, a related development is the revived concern about the traditional distinction between holding and dictum. The Supreme Court and the federal circuits, without erasing the distinction entirely, have moved away from [the] traditional view that only the holding of a case has precedential power. At least with respect to vertical precedent, there is an increasing tendency to hold inferior courts bound not merely by what the higher court *did* but by what it *said*.

Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1152 (2006).

II. CREATION OF SUPREME COURT DICTA: THE EXAMPLE OF NON-WORKPLACE HARMS

Retaliation is a fact of life in the modern workplace. It is human nature for one accused of discrimination to treat his accuser differently than others. Indeed, it is probably safe to say that retaliation—in varying degrees and taking a myriad of forms—occurs much more frequently today than discrimination.¹⁸ This is somewhat ironic because the federal anti-discrimination statutes were originally enacted to prevent disparate workplace treatment based mostly on immutable personal traits, and their protections against retaliation were included simply to promote that original goal.¹⁹ Given the reality of the modern workplace, though, the importance of a coherent body of law marking the line between the permissible and the unlawful cannot be understated. Nevertheless, vagueness and discord have flourished.²⁰

18. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION CHARGE STATISTICS (1997–2007), *available at* <http://www.eeoc.gov/stats/charges.html> (showing that of the eight possible claims, only racial and sexual discrimination claims are filed more often than Title VII retaliation claims).

19. *See, e.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2000) (prohibiting arbitrary age limits that tend to disfavor qualified elderly candidates); Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000) (prohibiting workplace discrimination based on race, color, religion, sex, or national origin); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2000) (prohibiting discrimination based on physical or mental disabilities); *see also* *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (finding that one of the anti-retaliation provision's primary purposes is "[m]aintaining unfettered access to statutory remedial mechanisms"); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 606 (3d Cir. 1998) ("Indeed, the ADA's accompanying House report states that the purpose of the ADA is 'to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women.'" (quoting H.R. REP. NO. 101-485, pt. 3, at 48 (1990))); *Castellano v. City of New York*, 142 F.3d 58, 69 (2d Cir. 1998) (applying the *Robinson* Court's interpretation of the Title VII anti-retaliation provision to ADA retaliation claims); *Holt v. JTM Indus. Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1996) ("Congress intended the anti-retaliation provision of the ADEA to enable employees to engage in protected activities without fear of economic retaliation.").

20. *See* Linda M. Glover, Comment, *Title VII Section 704(a) Retaliation Claims: Turning a Blind Eye Toward Justice*, 38 HOUS. L. REV. 577, 579 (2001) ("[The] disarray in precedent stems from inconsistent statutory interpretation and inappropriate application of one of the prima facie elements . . ."); Rosalie Berger Levinson, *Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623, 623–29 (2003) (addressing the circuit split and the differing levels of harm needed for retaliation and disparate treatment to become actionable); Scott Rosenberg & Jeffery Lipman, *Developing a Consistent Standard for*

A. *The Relevant Statutory Provisions and Surrounding Debate*

The heart of these problems lies at the source of their very existence—the statutory language. Two separate provisions of Title VII afford the protections relevant here.²¹ The first, which I term the “core substantive provision,” guards against differential treatment of individual employees based on “race, color, religion, sex, or national origin” by making it “an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s [protected trait].”²² The second, which I term the “anti-retaliation provision,” similarly protects individual employees against differential treatment.²³ These protections, arise not from the employee’s inherent personal characteristics or traits, but instead come into play only when an employee engages in certain protected activities:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.²⁴

Similarities abound between these two provisions. Both label the prohibited conduct “an unlawful employment practice.”²⁵ Each provision

Evaluating a Retaliation Case Under Federal and State Civil Rights Statutes and State Common Law Claims: An Iowa Model for the Nation, 53 DRAKE L. REV. 359, 363–91 (2005) (discussing each circuit’s approach to determining the level at which retaliation becomes actionable); Taylor, *supra* note 6, at 544–53 (discussing the circuit split and how each standard differs).

21. I refer here specifically to Title VII, but the same can be said of other federal employment statutes, such as the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2000), the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2000), the Family Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2000), and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (1994), each of which has a comparable “core substantive” provision (29 U.S.C. § 215 (FLSA); 29 U.S.C. § 623(d) (ADEA); 29 U.S.C. § 2615(a) (FMLA); 42 U.S.C. § 12112 (ADA)) and a separate anti-retaliation provision (29 U.S.C. § 215(a)(3) (FLSA); 29 U.S.C. § 623(d) (ADEA); 29 U.S.C. § 2615(b) (FMLA); 42 U.S.C. § 12203 (a)–(b) (ADA)).

22. 42 U.S.C. § 2000e-2(a)(1).

23. *Id.* § 2000e-3(a).

24. *Id.*

25. *Id.* §§ 2000e-2(a), 2000e-3(a).

broadcasts this language prominently in its title.²⁶ Both refer to the key players as “employer,” whose conduct each provision regulates, and “employee,” the beneficiary of each part’s protections.²⁷ Both use the terms “discriminate against” to describe the acts made unlawful thereby.²⁸ Thus, the two provisions are strikingly similar and they diverge in only two respects. First, as mentioned above, the core substantive provision offers protection based on one’s personal characteristics or traits (“race, color, religion, sex, or national origin”), while the protections of the anti-retaliation provision apply only when an employee, regardless of personal trait, engages in certain conduct (i.e., participation or opposition).²⁹ Second, the core substantive provision defines in more detail the kind of acts that it prohibits.³⁰ That is, while the anti-retaliation provision simply makes it unlawful “to discriminate against” protected individuals,³¹ the core substantive provision goes further, making it unlawful “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.”³²

Therein lies the source of conflict among the courts that led to the Supreme Court’s decision in *Burlington Northern*.³³ What, if anything, is the significance of the difference in language between the two provisions? Is the abbreviated language in the anti-retaliation provision, prohibiting only “discriminat[ion] against” protected employees, simply shorthand for the more detailed prohibitions spelled out in its core counterpart?³⁴ Or is the scope of the core substantive provision, with specific reference to the protected employee’s “compensation, terms, conditions, or privileges of employment,” different?³⁵ If so, how?

The discordant answers reached by courts faced with these questions fell into two categories, each representing a separate question of statutory

26. *Id.* §§ 2000e-2(a), 2000e-3.

27. *Id.* §§ 2000e-2(a), 2000e-3(a).

28. *Id.*

29. *Id.*

30. *Id.* § 2000e-2(a)(1).

31. *Id.* § 2000e-3(a).

32. *Id.* § 2000e-2(a)(1).

33. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). For further discussion of the Supreme Court’s decision in *Burlington Northern*, as well as the circuit split it purports to resolve, see generally Taylor, *supra* note 6.

34. 42 U.S.C. § 2000e-2(a)(1).

35. *Id.*

interpretation with respect to the adverse action element of a prima facie retaliation case. The first—and the one that received the most attention by far—pertained to the severity of harm prohibited by that part of the statute. Here, courts split into three camps: (1) those treating the anti-retaliation provision as narrower and requiring an “ultimate employment action” to make out a prima facie case,³⁶ (2) those interpreting the anti-retaliation provision as broader and endorsing a “reasonably likely to deter” protected conduct standard,³⁷ and (3) those falling in the middle ground, requiring a plaintiff to show a “material adverse action” to support a claim.³⁸ This broad, divisive split among the circuit courts of appeals

36. See, e.g., *Okruhlik v. Univ. of Ark.*, 395 F.3d 872, 879 (8th Cir. 2005) (“A plaintiff suffers an adverse employment action when the action results in a ‘material employment disadvantage’ such as, [t]ermination, reduction in pay or benefits, and changes in employment that significantly affect an employee’s future career prospects.” (quoting *Duncan v. Delta Consol. Indus.*, 371 F.3d 1020, 1026 (8th Cir. 2004) (citation omitted))); *Mattern v. Eastman Kodak*, 104 F.3d 702, 707 (5th Cir. 1997) (“Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions.” (quoting *Dollis v. Rubin*, 77 F.3d 777, 781–82 (5th Cir. 1995))), *abrogated by Burlington Northern*, 548 U.S. 53 (2006).

37. *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000) (“[A]n action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity.”); 8 OFFICE OF PROGRAM OPERATIONS, U.S. E.E.O.C., E.E.O.C. COMPLIANCE MANUAL § 8-II(D)(2) (May 20, 1998), available at <http://www.eeoc.gov/policy/docs/retal.html> (“[A]ny adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.”).

38. *Holcomb v. Powell*, 433 F.3d 889, 902 (D.C. Cir. 2006) (“Adverse employment actions are not confined to hirings, firings, promotions, or other discrete incidents.” (citing *Cones v. Shalala*, 199 F.3d 512, 521 (D.C. Cir. 2000))); *Fairbrother v. Morrison*, 412 F.3d 39, 56 (2d Cir. 2005) (“An adverse employment action is a ‘materially adverse change’ in the terms and conditions of employment.” (quoting *Sanders v. N.Y. City Human Res. Admin.*, 361 F.3d 749, 755 (2d Cir. 2004) (citation omitted))), *abrogated by Kessler v. Westchester County Dep’t of Soc. Servs.*, 461 F.3d 199, 204 (2d Cir. 2006); *Medina v. Income Support Div.*, 413 F.3d 1131, 1136 (10th Cir. 2005) (holding that an adverse employment action occurs when there is a “significant change in the employment status”) (citation omitted); *Griffin v. Potter*, 356 F.3d 824, 829 (7th Cir. 2004) (“An adverse employment action must be materially adverse, not merely an inconvenience or a change in job responsibilities.”) (citation omitted); *Ford v. Gen. Motors Corp.*, 305 F.3d 545, 553 (6th Cir. 2002) (“[T]he adverse employment action must be ‘materially adverse’ for the plaintiff to succeed on a Title VII claim.”) (citation omitted); *Shannon v. Bellsouth Telecomm. Inc.*, 292 F.3d 712, 716 (11th Cir. 2002) (deciding that employer conduct that falls short of an “ultimate employment decision” may still be actionable if an “employee’s compensation, terms, conditions, or privileges of employment” were altered) (citations omitted); *Marrero v. Goya of P.R.*,

warranted—and indeed received—substantial attention from courts and commentators alike.³⁹

This article focuses on the second category of discordant statutory interpretation. That is, courts not only disagreed about the severity of harm required to support a claim under the anti-retaliation provision, but also reached differing conclusions about the scope of the prohibited conduct—specifically, did the anti-retaliation provision reach non-workplace harms?⁴⁰ The focus here, as above, was on the statutory language and, specifically, the notable absence from the anti-retaliation provision of the qualifying “compensation, terms, conditions, or privileges of employment” language found in the core counterpart. No one doubted that the presence of those qualifiers in the core substantive provision meant that it protected only against harms bearing some relationship to the workplace.⁴¹ Thus, if the abbreviated language of the anti-retaliation

Inc., 304 F.3d 7, 23 (1st Cir. 2002) (“Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer’s act or omission does not elevate that act or omission to the level of a materially adverse employment action.” (quoting *Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996))); *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001) (holding that a plaintiff must prove an adverse employment action had a significant effect on “terms, conditions, or benefits” of employment), *abrogated by Burlington Northern*, 548 U.S. 53 (2006); *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 787 (3d Cir. 1998) (requiring plaintiffs to prove they suffered a “materially adverse employment action” in order to support a Title VII retaliation claim (quoting *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997))).

39. See, e.g., *Burlington Northern*, 548 U.S. at 61 (stating that the Court granted certiorari to resolve the circuit split); *Ray v. Henderson*, 217 F.3d 1234, 1241–42 (9th Cir. 2000) (observing that a three-way circuit split had occurred); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) (“There is a circuit split on this issue.”); see *supra* note 17. For further discussion of this circuit split and the Supreme Court’s efforts to resolve it in *Burlington Northern*, see Taylor, *supra* note 6, at 544–53.

40. See *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (holding that retaliation is actionable “regardless [of] whether the alleged retaliatory act is related to the plaintiff’s employment”); *Washington v. Ill. Dep’t of Revenue*, 420 F.3d 658, 660 (7th Cir. 2005) (“Retaliation may take the form of acts outside the workplace.”); *Wideman*, 141 F.3d at 1456 (“We join the majority of circuits which have addressed the issue and hold that Title VII’s protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions.”); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (determining that malicious prosecution of a former employee is actionable retaliation).

41. See, e.g., *Traylor v. Brown*, 295 F.3d 783, 788 (7th Cir. 2002) (requiring Title VII discrimination plaintiffs to prove a materially adverse change to the “terms,

provision simply making it unlawful to “discriminate against” protected employees is shorthand for the prohibitions detailed in the core counterpart, then the scope of the provisions is likely the same and neither would cover harms unrelated to the workplace. If, however, the absence of those qualifying terms from the anti-retaliation provision means that its scope is different, then a separate analysis is required and a different conclusion is likely to result.

B. Adjudication of Non-Workplace Harms in the Lower Courts

Several circuit courts took up these questions in the years preceding the Supreme Court’s decision in *Burlington Northern*. One notable decision is that of the United States Court of Appeals for the District of Columbia in *Rochon v. Gonzales*.⁴² Donald Rochon, an FBI agent, claimed that his employer discriminated against him based on his race (black) and retaliated against him for filing a previous Title VII lawsuit by failing to investigate credible death threats made against him and his wife by a federal prisoner.⁴³ The district court dismissed Rochon’s claims on the government’s motion pursuant to Federal Rule of Civil Procedure 12(b)(6), holding that Title VII did not reach non-workplace harms of the sort he alleged.⁴⁴ The D.C. Circuit, however, disagreed, holding that the anti-retaliation provision prohibits employers from taking materially adverse acts against employees who engage in protected activity, “regardless [of] whether the alleged retaliatory act is related to the plaintiff’s employment.”⁴⁵

The Seventh and Tenth Circuits reached similar conclusions in cases decided before *Rochon*. In *Berry v. Stevinson Chevrolet*, the Tenth Circuit rejected the defendant-employer’s contention that filing false criminal charges against a former employee who complained of discrimination fell beyond the ambit of Title VII’s protections.⁴⁶ The court reasoned that the

conditions or privileges of employment” (quoting 42 U.S.C. § 2000e-2(a)(1)); *Davis v. Town of Lake Park*, 245 F.3d 1232, 1238 (11th Cir. 2001) (stating that courts have “uniformly” interpreted the core substantive provision to require a Title VII plaintiff to prove an adverse employment action).

42. *Rochon*, 438 F.3d at 1211.

43. *Id.* at 1213–14.

44. *Id.* at 1214; *see also* *Rochon v. Ashcroft*, 319 F. Supp. 2d 23, 30–32 (D.D.C. 2004) (rejecting plaintiff’s claim that Title VII protected against the harms alleged).

45. *Rochon*, 438 F.3d at 1219.

46. *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996).

anti-retaliation provision should be construed liberally because of its remedial nature and that a liberal construction would necessarily encompass the filing of charges against a former employee because “[a] criminal trial . . . is necessarily public and therefore carries a significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects.”⁴⁷ Likewise, the Seventh Circuit upheld the plaintiff’s allegations as sufficient to support a prima facie case of retaliation in *Aviles v. Cornell Forge Co.*, stating that “the language of the Title VII retaliation provision is broad enough to contemplate circumstances where employers might take actions that are not ostensibly employment related against a current employee in retaliation for that employee asserting his Title VII rights.”⁴⁸ In this case, the plaintiff claimed that his employer retaliated by filing a false police report that he was “armed and laying in wait outside the plant,” in response to which the police made an immediate arrest.⁴⁹ Thus, the court in *Aviles*, like several others,⁵⁰ followed the trend established in *Berry* of upholding a retaliation claim based upon allegations that the employer filed false criminal charges against the plaintiff.⁵¹ Moreover, in each of these cases, the courts at least hinted, and more often concluded, that the anti-retaliation provision

47. *Id.*

48. *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 606 (7th Cir. 1999).

49. *Id.* A subsequent Seventh Circuit panel agreed that the scope of the retaliation provision was necessarily broad, purporting to clear up any confusion along those lines:

Retaliation may take the form of acts outside the workplace. The state’s Department of Revenue might have audited Washington’s tax returns in response to her complaint to the EEOC, or hired a private detective to search for a disreputable tidbit that could be used to intimidate her into withdrawing the complaint. When the employer’s response does not affect a complainant’s terms and conditions of employment, it is vain to look for an adverse “employment” decision. Section 2000e-3(a) is “broader” than § 2000e-2(a) in the sense that retaliation may take so many forms, while § 2000e-2(a) is limited to discrimination “with respect to [the worker’s] compensation, terms, conditions, or privileges of employment.”

Washington v. Ill. Dep’t of Revenue, 420 F.3d 658, 660 (7th Cir. 2005).

50. See, e.g., *Roberson v. Snow*, 404 F. Supp. 2d 79, 93–95 (D.D.C. 2005) (finding internal investigations of false claims that led to the filing of criminal charges and a criminal trial established a prima facie case of retaliation); *Beckham v. Grand Affair of N.C., Inc.*, 671 F. Supp. 415, 419 (W.D.N.C. 1987) (holding that plaintiff established a cause of action for retaliation after her former employer had her arrested for trespass).

51. *Aviles*, 183 F.3d at 606.

reaches beyond the confines of the employment relationship to encompass non-workplace harms.⁵²

Not all courts agreed. The Third Circuit, for example, reached a different result. In *Nelson v. Upsala College*, the plaintiff contended that her former employer retaliated against her for filing a previously settled EEOC charge by sending her a letter accusing her of trespass.⁵³ The alleged trespass occurred when she entered campus grounds after her discharge, in direct violation of the college's instruction forbidding her from reentering without an express invitation from a member of the college's administration.⁵⁴ The Third Circuit upheld the district court's dismissal of plaintiff's retaliation claim on grounds that the college's requirement of approval before reentering the campus "had no impact on [the plaintiff's] actual or proposed employment," whether there or "anywhere else."⁵⁵ The court explained that its limitation of the anti-retaliation provision's coverage to those employer acts that arise out of, relate to, or otherwise touch an employment relationship best comports with Congress's stated goal in enacting Title VII: "to achieve equality of employment opportunities."⁵⁶ Thus, according to the court,

[F]or Title VII's protections to apply, there should be some connection between the allegedly retaliatory conduct and an employment relationship. Although '[t]he connection with employment need not

52. See *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (holding that a materially adverse action that would dissuade a reasonable employee from making or supporting a discrimination claim is actionable "regardless [of] whether the alleged retaliatory act is related to the plaintiff's employment"); *Aviles*, 183 F.3d at 606 ("[T]he language of the Title VII retaliation provision is broad enough to contemplate circumstances where employers might take actions that are not ostensibly employment related against a current employee in retaliation for that employee asserting his Title VII rights."); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) ("It would be illogical to define a section 704(a) employee liberally to include former employees and to simultaneously define an adverse employment action narrowly by limiting it to those formal practices linked to an existing employee/employer relationship."); *Roberson*, 404 F. Supp. 2d at 93 ("Although these actions are not obvious 'personnel' actions, they could have an adverse effect on the plaintiff's future career prospects, and as such, could be considered adverse personnel actions."); *Beckham*, 671 F. Supp. at 419 ("[T]he allegation that Defendant caused Plaintiff to be arrested and prosecuted in retaliation for her having filed or contemplated an EEOC charge against Defendant states a cause of action . . .").

53. *Nelson v. Upsala Coll.*, 51 F.3d 383, 384–85 & n.2 (3d Cir. 1995).

54. *Id.*

55. *Id.* at 388.

56. *Id.* at 387 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971)).

necessarily be direct,' it does not further the purpose of Title VII to apply [the anti-retaliation provision] to conduct unrelated to an employment relationship.⁵⁷

The Tenth Circuit took a similar approach, distinguishing its earlier decision in *Berry* in its 2005 decision, *Dick v. Phone Directories Co.*⁵⁸ In *Dick*, the plaintiff alleged retaliation in the form of a police report filed by employees.⁵⁹ Although similar in that respect to *Berry*, the court nevertheless reached the opposite result, affirming the defendant's summary judgment on the ground that filing a police report did not rise to the level of an actionable adverse employment action because the plaintiff did not have to stand trial or suffer any of the kind of public humiliation suffered by the plaintiff in *Berry*.⁶⁰ Thus, the court distinguished its holding in *Berry*, reasoning that harms involving accusations of criminal activity constitute actionable Title VII retaliation only when they carry concomitant harm to the plaintiff's reputation, which itself has a direct bearing on the plaintiff's future employment prospects.⁶¹

Unlike the cases discussed in the preceding paragraphs, the plaintiff in *Burlington Northern* alleged adverse actions that bore a direct relationship to her employment.⁶² As discussed above, Sheila White claimed that after she complained of discrimination, her employer unlawfully assigned her less prestigious job duties and then placed her on a thirty-seven day unpaid suspension pending investigation of alleged insubordination, after which she was reinstated with full back pay.⁶³ Burlington Northern never contended that her claims should fail because they were not sufficiently related to employment. Instead, Burlington Northern argued throughout the entire course of the litigation that it was entitled to judgment as a matter of law on White's retaliation claim because the acts she alleged were not sufficiently adverse to support a prima facie case of retaliation under Title VII.⁶⁴ Indeed, the requisite degree of harm

57. *Id.* (quoting *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 883 (9th Cir. 1980)).

58. *Dick v. Phone Directories Co.*, 397 F.3d 1256, 1269 (10th Cir. 2005).

59. *Id.* at 1262.

60. *Id.* at 1269.

61. *Id.*

62. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. 53, 58 (2006).

63. *Id.* at 58–59.

64. *White v. Burlington N. & Santa Fe Ry. Co.*, No. 99-2733 N1/BRE, 2000 WL 35498256, at *1–3 (W.D. Tenn. Nov. 16, 2000); Brief of Petitioner, *Burlington Northern*, 548 U.S. 53 (No. 05-259), 2006 WL 704480 at *24–36; Final First Brief of

required to support a retaliation claim was the precise question upon which the Court ultimately granted certiorari.⁶⁵ Nevertheless, the Court took up the question of employment-relatedness in its decision despite the fact that it was not raised by any party and was not presented on the facts of *White*'s case.⁶⁶ In so doing, the Court created more confusion than it resolved—not just by issuing an overbroad holding, but by doing so under the guise of proper authority. As discussed below, the Court's remarks about non-workplace harms are dicta and federal courts should treat them as such.⁶⁷

III. IDENTIFYING THE AMORPHOUS: DEFINITIONS AND THEORIES ON THE DICTUM–HOLDING DIVIDE

A. *Deconstructing Dicta: What It Is and What It Is Not*

One cannot persuasively label the Court's statements in *Burlington Northern* "dicta" without first defining that term. At first blush, this may appear a relatively simple task. *Black's Law Dictionary* defines "dictum"⁶⁸ as, among other things, "a court's stating of a legal principle more broadly than is necessary to decide the case," or "[a] court's discussion of points or questions not raised by the record or its suggestion of rules not applicable in the case at bar."⁶⁹ The dictionary also references "obiter dictum" as an alternative term, which it defines as "[a] judicial comment made while

Appellant/Cross-Appellee, *White v. Burlington N. & Santa Fe Ry. Co.*, 2001 WL 34681776, at *12–26 (6th Cir. Aug. 6, 2001) (Nos. 00-6780, 01-5024); Supplemental Brief of Defendant/Appellant/Cross-Appellee, *White*, 2003 WL 23699991, at *1–11 (6th Cir. March 12, 2003) (Nos. 00-6780, 01-5024); Final Third Brief of Appellant/Cross-Appellee, *White*, 2001 WL 34624908, at *5–13 (Nos. 00-6780, 01-5024); *see generally* Defendant's Motion for Summary Judgment, *White*, 2000 WL 35368449.

65. Petition for Writ of Certiorari at i, *Burlington N. & Santa Fe Ry. Co. v. White*, 546 U.S. 1060 (2005) (No. 05-259).

66. *Burlington Northern*, 548 U.S. at 61–67.

67. *See infra* Part III.D (explaining why the Court's "holding" as to non-workplace harms in *Burlington Northern* is dictum).

68. The term "dicta" is the plural form of the noun "dictum," but the former of these terms enjoys a much more common usage and is generally understood to refer to either one or multiple propositions in a court's opinion. *See Abramowicz & Stearns, supra* note 17, at 955 n.3 (comparing "dicta" as plural form of "dictum" to "data" as plural form of "datum" and noting that "dicta" can refer to "one or more statements").

69. BLACK'S LAW DICTIONARY 485 (8th ed. 2004). The quoted definitions actually appear in the dictionary's definition of the related term "gratis dictum," but best reflect what I perceive as the commonly understood meaning of the term "dictum" itself. The primary definitions, by contrast, define "dictum" as "1. A statement of opinion or belief considered authoritative because of the dignity of the person making it. 2. A familiar rule; a maxim." *Id.*

delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).”⁷⁰ The *Burlington Northern* Court’s conclusion that the anti-retaliation provision applies outside the workplace easily satisfies these definitions. That is, it was not “necessary” for the Court to decide that the anti-retaliation provision reached non-workplace harms, since none were alleged in that case.⁷¹ Further, that question was “not raised by the record” and the “rule” regarding non-workplace harms that the Court “suggest[ed]” was “not applicable in the case at bar.”⁷² But to jump so quickly to the conclusion that the Court’s statements were dicta, based solely on a *Black’s Law Dictionary* definition of the term, would be at least hasty, if not wholly improper. Indeed, the very nature of the law is not so black and white as to permit mechanical application of dictionary definitions. Rather, much of the law exists in hues of gray, in which the shade is primarily a function of the observer’s perspective. Such is certainly the case with the term “dicta.”⁷³

Perhaps the best approach to assessing a term like “dicta” is to contrast it with what it is not. As suggested by *Black’s* definition of “obiter dictum,” that which is “holding” is not “dictum,” and vice versa.⁷⁴ Indeed, the distinction between dictum and holding has attracted recent scholarly attention, and deservedly so.⁷⁵ That distinction lies at the core of a judicial system founded upon the doctrine of stare decisis, wherein courts are

70. *Id.* at 1102.

71. *See Burlington Northern*, 548 U.S. at 57–60.

72. *See supra* notes 8, 10, and 13–16 and accompanying text (discussing procedural history of *Burlington Northern* and demonstrating that question of non-workplace harms was not presented therein).

73. *See Dorf, supra* note 17, at 2005 (suggesting that “the term dictum has no fixed meaning” and that the distinction between dictum and holding “is almost entirely malleable”).

74. *See BLACK’S LAW DICTIONARY* at 1102.

75. *See Abramowicz & Stearns, supra* note 17, at 1017–25 (developing and discussing an analytic framework to differentiate between holdings and dicta); Dorf, *supra* note 17, at 2040–49 (discussing “how to ascertain the rationale of a decision” in order to determine the binding law of an opinion); Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. LEGAL EDUC. 431, 431 (1989) (attempting “to help clarify what is uncontroversial about the distinction between holding and dictum”); Pierre N. Leval, Madison Lecture, Judging Under the Constitution: Dicta About Dicta, in 81 N.Y.U. L. REV. 1249, 1253 (2006) (“What is problematic is not the utterance of dicta, but the failure to distinguish between holding and dictum.”); Sullivan, *supra* note 17, at 1152–53 (discussing the recent trend “away from [the] traditional view that only the holding of a case has precedential power”).

required to follow prior precedents.⁷⁶ Thus, a court's holdings garner future precedential effect, but its dicta do not.

Not all dicta, however, are treated the same. Rather, notwithstanding that dicta is, by its very nature, comprised of statements that do not constitute the court's holdings, there is a tendency—one that may be growing⁷⁷—to treat some dicta as binding authority.⁷⁸ The degree of

76. This Article makes the basic assumption that the American judicial system adheres to the doctrine of stare decisis. See Greenawalt, *supra* note 75, at 431 (asserting that the core of the distinction between dictum and holding lies in judicial system's acceptance of principles of stare decisis). For a discussion of scholarship questioning that basic assumption, see generally Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994). While an exposition on the historical origins and present operation of the doctrine of stare decisis is beyond the scope of this Article, it is nevertheless worth noting that the world of stare decisis exists in two hemispheres, often labeled horizontal and vertical. The former refers to the requirement that a court adhere to its own precedents, while the latter invokes the binding effect of a superior court's decisions on those courts that are hierarchically inferior to it. See Dorf, *supra* note 17, at 2024–25; see also Caminker, *supra*, at 822 (employing the term “hierarchical precedent” to refer to vertical stare decisis). Most academics agree that questions of horizontal stare decisis are more complicated, thus subject to broader debate than their vertical counterparts. See Abramowicz & Stearns, *supra* note 17, at 957 (“Vertical stare decisis is generally considered absolute”); Dorf, *supra* note 17, at 2025 (“While the answer to the question of when must a court follow its own precedents may be extremely complex, questions of *vertical stare decisis*, that is, questions of a lower court's obligation to follow the precedents of a higher court, present fewer difficulties.”) The vertical axis is most pertinent to this Article, as the question ultimately posed here is the extent to which the district and circuit courts must or must not accept the Supreme Court's statements about the scope of the anti-retaliation provision in *Burlington Northern*. This could ultimately become a question of horizontal stare decisis, but given the strong majority vote in *Burlington Northern* and the high bar set for overruling cases of statutory interpretation, it is unlikely that this shift will happen any time soon. See *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 362–63 (2000) (“The policy of *stare decisis* is at its most powerful in statutory interpretation (which Congress is always free to supersede with new legislation)”) (citation omitted); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763–64 (1998) (discussing the binding effect of prior Supreme Court precedents interpreting Title VII, especially in light of the fact that Congress has amended Title VII substantially in the meantime without affecting the rule of such precedents).

77. See Sullivan, *supra* note 17, at 1152 (“[T]here is an increasing tendency to hold inferior courts bound not merely by what the higher court *did* but by what it *said*.”).

78. See, e.g., *United States v. Jiménez-Beltre*, 440 F.3d 514, 517 (1st Cir. 2006) (applying Supreme Court “dicta” as binding authority); *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) (“We have previously recognized that ‘dicta from the Supreme Court is not something to be lightly cast aside.’”) (citation omitted); Oyebanji

respect afforded to such dicta is, in turn, directly proportional to the quantity and quality of discussion it originally received.⁷⁹ Thus, the various gradations of dicta might best be envisioned on a spectrum, with the left end comprised of the court's offhand remarks and side comments, referred to by some as obiter dicta,⁸⁰ and the right end occupied by the court's reasoned conclusions about the law, often labeled judicial dicta or

v. Gonzales, 418 F.3d 260, 265 (3d Cir. 2005) (stating that lower federal courts are "advised to follow the Supreme Court's 'considered dicta'"); Wynne v. Town of Great Falls, 376 F.3d 292, 298 n.3 (4th Cir. 2004) ("[W]ith 'inferior courts,' like ourselves . . . 'carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.'" (citation omitted); United States v. Marlow, 278 F.3d 581, 588 n.7 (6th Cir. 2002) ("Appellate courts . . . are obligated to follow Supreme Court *dicta*, particularly when there is no substantial reason for disregarding it, such as age or subsequent statements undermining its rationale."); United States v. Gaudin, 28 F.3d 943, 956 n.2 (9th Cir. 1994) ("Even if it *were* dicta, we could not lightly ignore it . . ."); City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 557 (8th Cir. 1993) (stating that appellate courts are bound by some Supreme Court dicta); McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) ("We think that federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings . . ."); Nichol v. Pullman Standard, Inc., 889 F.2d 115, 120 n.8 (7th Cir. 1989) (affording "respect" to Supreme Court dicta and citing other cases doing same). *But see generally* Leval, *supra* note 75 (criticizing the failure of courts to distinguish between dictum and holding).

79. *See McCoy*, 950 F.2d at 19 ("[I]n evaluating dicta, '[m]uch depends on the character of the dictum. Mere obiter may be entitled to little weight, while a carefully considered statement . . . , though technically dictum, must carry great weight, and may even . . . be regarded as conclusive.'" (quoting CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* § 58 (4th ed. 1983))); *Goodson v. United States*, 151 F. Supp. 416, 420 (D. Minn. 1957) ("Yet while dicta are not conclusive evidence of the law of any state, considered dicta, as distinguished from mere obiter dicta, should not be ignored, and are even entitled to great weight.") (citations omitted); *see also* *Hawks v. Hamill*, 288 U.S. 52, 59 (1933) ("At least it is a considered dictum, and not comment merely *obiter*. It has capacity, though it be less than a decision, to tilt the balanced mind toward submission and agreement."); *United States v. Wade*, 152 F.3d 969, 973 (D.C. Cir. 1998) ("Because that issue was not before the court, its overly broad language would be *obiter dicta* and not entitled to deference."); *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975) ("There is authority for the proposition that a distinction should be drawn between 'obiter dictum,' which constitutes an aside or an unnecessary extension of comments, and considered or 'judicial dictum' where the Court, as in this case, is providing a construction of a statute to guide the future conduct of inferior courts.") (citations omitted).

80. *See* Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 716 (1999) (suggesting that "off-hand remarks about the law" are called "obiter dicta").

considered dicta.⁸¹ The further a particular statement of dictum falls toward the right end of the spectrum, the more likely it is to garner future precedential effect. Indeed, expanding the spectrum analogy further to the right, to encompass at the far extreme the court's "holdings," is not just appropriate but perhaps imperative. Envisioning a court's statements along this spectrum aids one's understanding that the definitions of each term along the way—from "obiter dictum" to "considered dictum" to "holding"—are nothing if not malleable. Moreover, not only does each term defy precise definition, but the location on the spectrum designated for any given court statement often varies widely, depending upon the identity, perspective, and goals of the person doing the locating.

The categories of dicta, which are loose to begin with, can be subdivided even further. Most importantly, for purposes of this Article, are two subcategories within the broader grouping of considered dictum—those court statements backed by some degree of reasoning, as opposed to unsupported offhand remarks. Sometimes a court will attach a disclaimer to statements that it recognizes as dicta, but will nevertheless issue such statements with great gusto. The virtue of such statements is that the court recognizes it is overreaching and forewarns all future readers of that fact. Thus, lawyers and judges are much less likely to rely on those statements as binding law in the future. There is little confusion about the matter—the court's statement may constitute persuasive authority at best but is not binding. The other subcategory here is more troubling. It is comprised of all those unnecessary yet well-reasoned statements that a court makes without disclaiming their future precedential effect. As will be discussed in more detail below, the Supreme Court's assertion in *Burlington Northern* that the anti-retaliation provision of Title VII redresses non-workplace harms falls squarely within this troubling category.⁸²

B. Developing the Dicta Doctrine: Supreme Court Pronouncements on the Dictum–Holding Divide

If the discussion in this Article thus far has accomplished nothing else, it should now be apparent that there is little about modern dicta that is

81. See *Afroyim v. Rusk*, 387 U.S. 253, 261–66 & n.22 (1967) (analyzing the extent to which statements in previous cases should receive precedential effect and employing the term "obiter dictum" in the process); *Cerro Metal Prods. v. Marshall*, 620 F.2d 964, 978–79 n.39 (3d Cir. 1980) (noting the distinction between judicial dictum and obiter dictum); Quinn, *supra* note 80, at 716 (defining "judicial dicta" as "expressions of law made for the deliberate purpose of guiding future litigation").

82. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61–67 (2006).

clear. Its definition is the subject of great debate, and opinions vary widely about the extent to which courts should afford dicta precedential effect. Moreover, a precise definition of the term and a broadly accepted framework for dealing with dicta seem not only unlikely, but also implausible. The Supreme Court has not offered much by way of cleaning up this wasteland. Nevertheless, several trends emerge from the Court's scattered statements about dicta.

Supreme Court musings about dicta date back to at least 1821, when Chief Justice John Marshall reasoned that the Court could not give effect to certain statements made in its earlier decision in *Marbury v. Madison*⁸³ because those statements pertained to matters not squarely presented in that case.⁸⁴ Chief Justice Marshall's statement that courts should not afford precedential effect to statements made in dicta is often cited as the Court's first instruction in that regard:

It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.⁸⁵

This oft-quoted passage suggests at least two things: (1) that the Court recognizes that it will make statements that "go beyond the case" from time to time, and (2) that such statements "may be respected" but are not binding in future lawsuits. This passage, therefore, lays the groundwork for treatment of dicta as persuasive, but not mandatory, authority.⁸⁶ It leaves the details of that framework wide open to future

83. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

84. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821).

85. *Id.*

86. *Id.* Several other early Supreme Court authorities fell in line with the advice of Chief Justice Marshall in *Cohens v. Virginia*. See, e.g., *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 574–75 (1895) (noting that the Court is not bound by matters beyond the scope of the question presented in prior precedents), *abrogated by* *South Carolina v. Baker*, 485 U.S. 505, 524 (1988); *Sullivan v. Iron Silver Mining Co.*, 109 U.S. 550, 554 (1883) (stating that the Court should not express its opinion as to the interpretation of a statute "unless its determination is necessarily involved in

shaping.

Unfortunately, little such shaping has occurred, at least not directly. Much of the Court's instruction about dicta amounts to no more than a discussion of, or reliance upon (albeit sometimes without citation), the principles announced by Chief Justice Marshall in *Cohens*—that “general expressions” must be taken in the context of the case in which they appear, and those reaching beyond the question presented constitute persuasive authority at best but are not binding.⁸⁷ The only further refinements of the *Cohens* “maxim” consist of statements that the binding portions of a court's opinion encompass both its ultimate conclusions and the reasoning employed to get there.⁸⁸ In that vein, the Court might be seen as having

adjudication of the case at bar”); *Carroll v. Lessee of Carroll*, 57 U.S. (16 How.) 275, 287 (1853) (citing *Cohens* and stating that the Court is not “bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties” and that an opinion's “weight of reason must depend on what it contains”).

87. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2762 (2007) (citing *Cohens* as support for Court's rejection of authority relied upon by the dissent on the ground that the Court is not bound by statements in prior cases if that issue was not involved); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) (citing *Cohens*, 19 U.S. at 179, 6 Wheat. at 399–400) (“[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.”); *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 351 n.12 (2005) (dismissing dicta relied upon by dissent because “[d]ictum settles nothing, even in the court that utters it.”); *McDaniel v. Sanchez*, 452 U.S. 130, 141 & n.19 (1981) (rejecting petitioner's argument premised on a footnote in an earlier case on the ground that it was “dictum unnecessary to the decision in that case”); *Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968) (rejecting an argument based on dictum in an earlier Supreme Court case wherein the Court, by way of illustration, made a statement about the meaning of a statute “not even obliquely at issue” in that case); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) (“Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances.”); *Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98, 102–03 (1937) (citing *Cohens* and rejecting a petitioner's argument based on an earlier interpretation of the Immigration Act of 1903 in *Taylor v. United States*, 207 U.S. 120, 124–125 (1907), because the Court in that case was dealing with a different situation); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626–27 (1935) (rejecting the government's argument premised on the Court's decision in *Myers v. United States*, 272 U.S. 52 (1926), because the parts the government relied upon went beyond “the narrow point actually decided” and also citing to *Cohens*).

88. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66–67 (1996) (responding to the dissent's criticism of “attend[ing] to dicta” by clarifying that the majority opinion does not rely on “mere *obiter dicta*” but instead draws upon the “well-established rationale” of a prior case); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928) (asserting that the Court's rationale in an earlier case was “not . . . obiter

narrowed the scope of what it considers “dicta” to some extent, but the parameters nevertheless remain open to debate and, thus, exceptionally malleable.

C. Theorizing Dicta: Frameworks Proposed by Recent Commentators

Many theorists have engaged in the dictum–holding debate over the years, each offering a formula in an effort to solve the puzzle.⁸⁹ Early commentary suggested a more formalistic approach to the dictum–holding distinction, with renowned academics such as Karl Llewellyn proposing that the line between the two is quite stark.⁹⁰ According to Llewellyn:

Four rules . . . form the basis of American case law procedure[:]

1. The court *must* decide *the* legal dispute that is before it.
2. The court *can* decide nothing but the legal dispute before it.
3. All cases must be decided based on a *rule of law of general applicability* (in the relevant state).
4. Everything, but everything, said in an opinion is to be read and understood only in relation to the actual case before the court.⁹¹

With these parameters in place, Llewellyn posits that the “holding” of a case must, by its very nature, be a very narrow proposition: “The holding is no more than the precise point at issue (rarely all issues in a dispute) that the case decided, either for the plaintiff or the defendant. The holding goes so far and no further.”⁹² By default, then, everything else is “non-essential” and therefore dictum.⁹³ Llewellyn’s theory thus proposes a strict interpretation of the term “holding,” confining its parameters to only those parts of the case consisting of the court’s resolution of the legal dispute presented, in light of the relevant rule of law.⁹⁴ Moreover, only those

dictum” but rather forms binding precedent); *Eisner v. Macomber*, 252 U.S. 189, 202 (1920) (finding the Court’s rationale to be binding precedent).

89. See generally Abramowicz & Stearns, *supra* note 17, at 1044–65 (describing in detail and critiquing various “dictum” definitions previously proposed).

90. KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 14–15 (Paul Gewirtz ed., Michael Ansaldi trans., 1989).

91. *Id.* at 14.

92. *Id.*

93. *Id.*

94. *Id.*

statements of law that “bear a direct and necessary relation to the actual facts of the case” are entitled to precedential effect.⁹⁵ In that respect, Llewellyn’s definition of “holding” is quite narrow, and admittedly so.⁹⁶ Llewellyn does recognize that some courts may give precedential effect—albeit of the “second-order”—to parts of judicial opinions falling outside of the narrowly circumscribed holding.⁹⁷ Even while referring to such propositions as “well-considered *dictum*,” however, Llewellyn clarifies that most such statements carry scant weight:

But when the *dictum* does not deal with the actual case before the court or give a direct grounds for the *ratio decidendi* but is merely a remark in passing, an example, an excursus the opinion writer allows himself for whatever reason, then it is called *obiter dictum* and is of little or no value as precedent. It is then not a binding judicial pronouncement, but at most a pertinent expression of opinion—like that, for example, of a legal scholar—which may meet with later approval, thanks to the esteem enjoyed by the opinion writer or to the excellence of its conception or reasoning.⁹⁸

British jurist Arthur Goodhart also took a formalistic approach.⁹⁹ Goodhart suggested a fact-based regime, wherein the judge selects which facts are material, and the holding consists of the result of the case given those facts determined to be material by the judge.¹⁰⁰ By corollary, then, any conclusion “based on a fact the existence of which has not been determined by the court, cannot establish a principle [of the case or holding].”¹⁰¹ Such conclusions are, instead, dicta.¹⁰² Some commentators refer to this as the “facts-plus-outcome” theory.¹⁰³

Perhaps one of the most influential early commentators on dicta was

95. *Id.* at 13.

96. *Id.* at 14 (referring to his narrow interpretation of “holding” as “the strictest view”).

97. *Id.*

98. *Id.* at 14–15.

99. See, e.g., Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930).

100. *Id.* at 173, 178–79.

101. *Id.* at 179.

102. *Id.*; see also *id.* at 183 (“A conclusion based on a hypothetical fact is a dictum. By hypothetical fact is meant any fact the existence of which has not been determined or accepted by the judge.”).

103. See Abramowicz & Stearns, *supra* note 17, at 1052.

Professor Eugene Wambaugh,¹⁰⁴ whose views eventually made their way to print in *Black's Law Dictionary*.¹⁰⁵ While Goodhart's approach centered on material facts, Wambaugh's approach focused on necessity: "So far as the opinion goes beyond a statement of the proposition of law necessarily involved in the case, the words contained in the opinion, whether they be right or wrong, are not authority of the highest order, but are merely words spoken, *dicta*, *obiter*, or *obiter dicta*."¹⁰⁶ Thus, any statement in the opinion that is unnecessary to the case resolution is dictum.

Dissatisfied with these older, arguably simpler approaches, modern scholars have entered the fray offering various alternatives. One of the first and most prominent of such theorists is Professor Michael Dorf. In his 1994 article, Dorf identified and critiqued what he considered the prevailing basis for drawing the holding–dictum distinction, which he termed the "facts-plus-outcome" approach.¹⁰⁷ He then offered his own "rationale-focused" view, founded on principles of preclusion law.¹⁰⁸ According to Dorf, courts should draw on the better-developed body of preclusion law—reflected in the *Restatement (Second) of Judgments*—in order to assess the status (holding or dictum) of a prior court's assertions.¹⁰⁹ Thus, a court's statement crosses the line from dictum to holding when it is entitled to preclusive effect, a point relatively well-defined in the *Restatement*: "'When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'" ¹¹⁰ As such, to perhaps oversimplify but state as succinctly as possible Dorf's view, an assertion constitutes holding rather than dictum when it is essential to the outcome of the case. This is so whether the assertion comprises part of the court's rationale or its ultimate conclusion.

104. See *id.* at 1056 (suggesting Wambaugh's definition is "most influential . . . perhaps largely because of its inclusion in *Black's Law Dictionary*").

105. See *supra* notes 68–70, 74 and accompanying text (discussing *Black's Law Dictionary*'s definition of "dictum").

106. EUGENE WAMBAUGH, *THE STUDY OF CASES* § 13, at 18 (2d ed. 1894).

107. See Dorf, *supra* note 17, at 2067; see also Sullivan, *supra* note 17, at 1185 (discussing Dorf's presentation of "two competing views of what constitutes a holding," referred to as "facts-plus-outcome" and "rationale-focused").

108. Dorf, *supra* note 17, at 2040–49.

109. *Id.* at 2041–42.

110. *Id.* at 2041 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982)).

Dorf's proposal did not go unnoticed in the scholarly world and has evoked not only positive discussion, but also authoritative citation in numerous other recent works addressing the problem of distinguishing dictum from holding.¹¹¹ However, as is often the case, with widespread attention also comes criticism. In this case, that criticism came from Professors Michael Abramowicz and Maxwell Stearns, whose quest for an unassailable definition of dictum included critiques of not just Dorf's proposal, but also those of the other commentators discussed here, as well as others.¹¹² Like their scholarly predecessors, Abramowicz and Stearns proceeded to offer their own framework, wherein "[a] holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta."¹¹³ Notably, while the nuances may differ, their approach bears striking similarities to those they criticize as insufficient, and to Dorf's in particular. Indeed, one could dedicate pages of analysis to a comparison of the various definitions proposed by all of these esteemed scholars and to the further exposition of the virtues and shortcomings of each.¹¹⁴ Such an exposition might add value to the debate or it might not. But, as the discussion below will demonstrate, it is entirely superfluous to this Article, for no matter which of these theories applies, it is clear that the Court's conclusions about the applicability of Title VII's anti-retaliation provision to non-workplace harms in *Burlington Northern* are dicta.

D. *Assessing Burlington Northern's Dicta: The Definitions and Theories at Work*

Just as a thorough critique of the various scholarly theories about dictum is unnecessary to the project at hand, a lengthy consideration of how those theories apply to *Burlington Northern* is likewise unwarranted. A relatively quick glance at each, however, in light of the legal and factual posture of *Burlington Northern*, readily reveals that the Court's purported

111. See, e.g., Abramowicz & Stearns, *supra* note 17, at 1045 (referring to Dorf's work as an "important article"); Sullivan, *supra* note 17, at 1185–86.

112. Abramowicz & Stearns, *supra* note 17, at 1045–65.

113. *Id.* at 1065.

114. For another view, see Leval, *supra* note 75, at 1256 ("[D]ictum is an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner. If the court's judgment and the reasoning which supports it would remain unchanged, regardless of the proposition in question, that proposition plays no role in explaining why the judgment goes for the winner. It is superfluous to the decision and is dictum.").

holding went too far.

Because each theory of dicta relies in some part on the factual posture of the case, a brief review of the facts of Sheila White's case is in order.¹¹⁵ White alleged that her employer, Burlington Northern, unlawfully retaliated against her for complaining about sexual harassment by altering her job duties and suspending her without pay for thirty-seven days.¹¹⁶ The jury found in White's favor and awarded her \$43,500 in compensatory damages.¹¹⁷ The district court denied Burlington Northern's motion for judgment as a matter of law, but the court of appeals initially reversed, holding that the adverse employment actions alleged by White failed to support a prima facie case of Title VII retaliation.¹¹⁸ Specifically, the Sixth Circuit determined that Title VII required "a materially adverse change in the terms and conditions of [the plaintiff's] employment," and that White's allegations failed to meet that standard.¹¹⁹ The court of appeals reconvened en banc, though, and ultimately upheld the trial court's determination that White's allegations were sufficient, albeit under essentially the same material adverse action standard.¹²⁰

The Supreme Court then granted certiorari in White's case, promising to resolve a divisive split among the circuit courts of appeals as to the requisite degree of harm a plaintiff must allege to support a Title VII retaliation claim.¹²¹ The Court's holding, though, reached further. Rather than confine its decision to resolution of the question presented, the Court also addressed and purported to issue an express holding as to another related, but distinct question—whether the anti-retaliation provision protects against non-workplace harms. Specifically, the Court stated: "The scope of the anti-retaliation provision extends beyond workplace-related or

115. See *supra* notes 4–16 and accompanying text (discussing *Burlington Northern*).

116. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 58–59 (2006).

117. Verdict, *White v. Burlington N. & Santa Fe Ry. Co.*, No. 99-2733, 2000 WL 35368446 (W.D. Tenn. Sept. 5, 2000).

118. *White v. Burlington N. & Santa Fe Ry. Co.*, 310 F.3d 443, 443–44, 451 (6th Cir. 2002).

119. *Id.* at 450–51 (quoting *Hollins v. Atl. Co.*, 188 F.3d 652, 662 (6th Cir. 1998)).

120. *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 800–04, 808 (6th Cir. 2004).

121. *Burlington N. & Santa Fe Ry. Co. v. White*, 364 F.3d 789, *cert. granted*, 546 U.S. 1060 (2005); Petition for Writ of Certiorari at i, *Burlington N. & Santa Fe Ry. Co. v. White*, 546 U.S. 1060 (2005) (No. 05-259).

employment-related retaliatory acts and harm.”¹²² Our question is thus framed: Is the Supreme Court’s statement dictum, given that the only harms alleged by Sheila White indisputably occurred in, and related directly to, her workplace?

First, consider Llewellyn. His theory posits that a case’s holding consists of “no more than the precise point at issue . . . that the case decided” and that only those statements of law that “bear a direct and necessary relationship to the actual facts of the case” carry precedential weight—all else is dicta.¹²³ The Court’s conclusion that the anti-retaliation provision reaches non-workplace harms clearly falls within the latter category because it bore no relationship whatsoever to the actual facts of the case, which involved only job-related harms. As such, it pertains to matters beyond the precise point at issue and is therefore dicta.

The same result attends upon application of Goodhart’s facts-plus-outcome theory, under which the holding is the result or outcome given the facts deemed material by the judge.¹²⁴ According to Goodhart, the “principle of the case . . . is to be found in the conclusion reached by the judge on the basis of the material facts and on the exclusion of the immaterial ones.”¹²⁵ In White’s case, the material facts surely must include the alleged unlawful employment actions. Those alleged unlawful acts—alteration of her job duties and her placement on unpaid suspension—indisputably related directly to her employment. Thus, under Goodhart’s theory, the holding would include any outcome reliant upon those material facts. Because those facts entail only allegations of wrongdoing bearing directly on White’s employment and no allegations of harm effected outside the workplace, the Court’s assertions about non-workplace harms cannot constitute a “holding” under Goodhart’s theory.

The Court’s assertions about non-workplace harms likewise constitute dicta under Wambaugh’s necessity-based framework. Wambaugh’s theory invites application of a relatively simple test: if the decision could have been the same with the negation of a proposition, then the proposition was not necessary to the disposition and thus counts as dictum.¹²⁶ The relevant proposition here is the Court’s conclusion that “[t]he scope of the anti-retaliation provision extends beyond workplace-

122. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006).

123. LLEWELLYN, *supra* note 90, at 13–14.

124. Goodhart, *supra* note 99, at 179.

125. *Id.*

126. WAMBAUGH, *supra* note 106, § 11, at 17.

related or employment-related retaliatory acts and harm.”¹²⁷ Negating this proposition would not affect the outcome of the case. That is, even if the Court had concluded that the anti-retaliation provision does not extend beyond workplace- or employment-related harms, its ultimate conclusions about the severity of harm required to support a claim and the sufficiency of White’s allegations under that standard would not change. Thus, the Court’s assertions about non-workplace harms were “unnecessary,” in Wambaugh’s terms, to the Court’s disposition and do not comprise any part of its holding.¹²⁸

The result is no different under modern theories. Without regard to the other elements, the Court’s assertions about non-workplace harms would fail the essentiality part of Dorf’s test.¹²⁹ That is, the Court’s conclusion that Title VII’s anti-retaliation provision reaches harms unrelated to employment was not essential to its ultimate decision that the workplace harms alleged by Sheila White were sufficiently egregious to support her prima facie case of retaliation.¹³⁰ That aspect of the Court’s opinion arguably had no bearing on its final decision at all.¹³¹ Moreover, applying an essentiality test similar to the dicta theory advocated by Wambaugh, the Court’s judgment would not have changed had the Court reached an opposite conclusion about Title VII’s applicability to non-workplace harms.¹³² Its assertions on that point simply had no bearing on the case at all and thus were dicta.

The same is true under the Abramowicz-Stearns model. Under their theory, a holding includes only those propositions that “(1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment.”¹³³ The Court’s conclusion concerning non-workplace harms appears to fail both of the latter two elements. It was not based on the facts of the case, as the facts alleged only work-related harms, and it did not lead to the judgment, which focused solely on the sufficiency of White’s alleged harms vis-à-vis their materiality, not their work-relatedness. Thus, no matter how you roll the dice, the result is always the same—the

127. *Burlington Northern*, 548 U.S. at 67.

128. WAMBAUGH, *supra* note 106.

129. See *supra* notes 107–11 and accompanying text (describing Professor Dorf’s proposed theory).

130. *Burlington Northern*, 548 U.S. at 70–73.

131. See generally *id.*

132. See *id.* at 70–73 (deciding that White’s workplace harms were sufficient to support a claim of retaliation).

133. Abramowicz & Stearns, *supra* note 17, at 1065.

Burlington Northern Court's assertions about non-workplace harms are dicta.

IV. CARVING A PADDLE TO NAVIGATE THE CREEK: A PROPOSED STANDARD FOR ASSESSMENT OF SUPREME COURT DICTUM

A. *Crafting the Standard*

In light of the complexities surrounding the dictum-holding divide, it should come as no surprise that the treatment courts accord dicta is far from predictable. Considering the Supreme Court's own instruction about the precedential effect of dicta—i.e., that dicta is not binding—one might expect courts to freely disregard Supreme Court dicta.¹³⁴ The general practice of the lower courts does not, however, conform to that expectation. Instead, most courts agree that lower courts should give some degree of respect to Supreme Court dicta if the Court dedicated sufficient consideration to such matters.¹³⁵ Such courts are careful to note that statements made in dicta are not binding in a precedential sense, but are nevertheless entitled to “great deference.”¹³⁶ Sometimes employing the

134. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 398 (1821) (“It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.”); *see also* *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) (“[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.” (citing *Cohens*, 19 U.S. (6 Wheat.) at 399–400)).

135. *E.g.*, *Schwab v. Crosby*, 451 F.3d 1308, 1325–26 (11th Cir. 2006) (citing cases that give precedential value to Supreme Court dicta); *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc) (“As we have frequently acknowledged, Supreme Court dicta ‘have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold’; accordingly, we do ‘not blandly shrug them off because they were not a holding.’”) (citations omitted); *United States v. Bloom*, 149 F.3d 649, 653 (7th Cir. 1998) (“The Supreme Court often articulates positions through language that an unsympathetic audience might dismiss as dictum . . . and it expects these formulations to be followed. . . . The Court can hear only a small portion of all litigated disputes; it uses considered dicta to influence others for which there is no room on the docket.”); *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120 n.8 (7th Cir. 1989) (“This Court should respect considered Supreme Court dicta.”); *United States v. Becton*, 632 F.2d 1294, 1296 n.3 (5th Cir. 1980) (“We are not bound by dicta, even of our own court. . . . Dicta of the Supreme Court are, of course, another matter.”).

136. *SEC v. Rocklage*, 470 F.3d 1, 7 n.3 (1st Cir. 2006); *Blasi v. Att’y Gen. of Pa.*, 120 F. Supp. 2d 451, 466 (M.D. Pa. 2000). *See supra* notes 79–81 and

label “considered dicta,” those courts reason that, absent binding precedent, well-reasoned conclusions of the Supreme Court deserve deference as the best indicators of what the law should be.¹³⁷ The Third Circuit recently explained this phenomenon well:

Because the “Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket,” failing to follow those statements could “frustrate the evenhanded administration of justice by giving litigants an outcome other than the one the Supreme Court would be likely to reach were the case heard there.”¹³⁸

The seemingly pervasive practice of treating Supreme Court dicta as binding is palatable when viewed from this perspective. That is, it makes some sense that courts would follow otherwise nonbinding Supreme Court statements in the absence of any other authority, given the Supreme Court’s unique institutional position. The nature of our judicial system is such that the Supreme Court, unlike most other courts, can decide only a

accompanying text (proposing sliding scale between poles of obiter dicta and holding, with considered dicta falling in the middle, and suggesting that courts might place a particular statement along the scale in accordance with the extent to which that statement supports the court’s desired outcome); *see also* *Laub v. U.S. Dep’t of Interior*, 342 F.3d 1080, 1090 n.8 (9th Cir. 2003) (“Supreme Court dicta is not to be lightly disregarded.”); *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 561 (3d Cir. 2003) (en banc) (“Although the Committee is doubtless [sic] correct that the Supreme Court’s dicta are not binding on us, we do not view it lightly.”); *Batjac Prod. Inc. v. Goodtimes Home Video Corp.*, 160 F.3d 1223, 1232 (9th Cir. 1998) (stating that “dicta of the Supreme Court is entitled to considerable deference” but declining to follow it); *United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996) (“[W]e treat Supreme Court dicta with due deference, and see no reason not to apply [it] in the case at bar.”).

137. *See, e.g., Nichol*, 889 F.2d at 120; *Bloom*, 149 F.3d at 653.

138. *Galli v. N.J. Meadowlands Comm’n*, 490 F.3d 265, 274 (3d Cir. 2007) (quoting *In re McDonald*, 205 F.3d 606, 612–13 (3d Cir. 2000)); *see also* *Wright v. Morris*, 111 F.3d 414, 419 (6th Cir. 1997) (“We believe . . . [that dictum] is instructive of the Supreme Court’s views and cannot be dismissed out of hand.”), *cert. denied*, 522 U.S. 906 (1997); *Alston v. Redman*, 34 F.3d 1237, 1246 (3d Cir. 1994) (“[W]e must consider it with deference, given the High Court’s paramount position in our ‘three-tier system of federal courts’”) (citing *Casey v. Planned Parenthood*, 14 F.3d 848, 857 (3d Cir. 1994)), *cert. denied*, 513 U.S. 1160 (1995); *Abramowicz & Stearns*, *supra* note 17, at 1067 (“Because the Court sits at the apex of numerous pyramidically structured judiciaries and must make and clarify law through a relatively small number of cases, the Court might require greater latitude than other courts in determining the scope of its holdings.”).

limited number of cases each year. The Court can (or should¹³⁹) decide only those questions of law that arise in the context of real disputes.¹⁴⁰ Thus, lower courts frequently face questions of law that the Supreme Court has had no occasion to answer. Arguably, it should be acceptable for the lower courts to follow Supreme Court advice—even in dictum—given the Court’s role as the final arbiter on open questions of federal law and the strict limitations on its ability to resolve them, notwithstanding their numerosity, variability, and complexity.

Furthermore, not only is adherence to Supreme Court dictum justifiable because of the Court’s unique institutional position, but it is also sensible for lower federal courts to mind the Court’s instructions—albeit in dictum—to the extent of their substantial predictive value. Therefore, even if the Court’s statements are not technically binding, they might in some circumstances offer informed insight as to how the Court might rule if it faced that issue.¹⁴¹ To that end, a court faced with an open question of law, as to which the Supreme Court has offered its own view, may believe reversal much less likely if it follows the Court’s instruction than if it decides the issue differently. The Ninth Circuit has articulated this view:

We do not treat considered dicta from the Supreme Court lightly. Rather, we accord it appropriate deference As we have frequently acknowledged, Supreme Court dicta “have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold”; accordingly, we do “not blandly shrug them off because they were not a holding.”¹⁴²

Thus, adherence to Supreme Court dicta is justifiable in some cases, given the Supreme Court’s unique institutional position as well as the substantial predictive value of its advice.

While this practice of following Supreme Court dicta is acceptable, it

139. As exemplified by the *Burlington Northern* case and discussed more thoroughly below, the Court strays beyond these limits when it issues dictum. *See infra* Part V. For the reasons discussed hereinafter, the Court’s practice in that regard is not advisable, but is nevertheless prevalent.

140. *See, e.g.,* *Hein v. Freedom from Religion Found.*, 127 S. Ct. 2553, 2572 (2007) (“We need go no further to decide this case. Relying on the provision of the Constitution that limits our role to resolving the ‘Cases’ and ‘Controversies’ before us, we decide only the case at hand.”); *Sole v. Wyner*, 127 S. Ct. 2188, 2196 (2007) (“We are presented with, and therefore decide, no broader issue in this case.”).

141. *See* *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc).

142. *Id.* (quoting *Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir. 1992)).

is not universally desirable. Most courts, while suggesting that Supreme Court dicta is highly persuasive, nevertheless recognize that dicta should be disregarded in some cases. That is, while some dicta deserves precedential respect, other dicta, for a variety of reasons, does not. The courts, however, the courts have not developed a cohesive or adequate measure of this distinction. Instead, the criteria employed to assess whether a particular dictum should be disregarded are scattered and mostly without instruction.

Some courts have refused to treat dictum as binding when the statement was expressed unequivocally.¹⁴³ This concept is circular and adds little to the analysis, for most courts agree that even Supreme Court dicta is not binding unless it is “well-considered” to begin with.¹⁴⁴

Other courts suggest that dictum is not binding if not “of recent vintage.”¹⁴⁵ This suggestion is intuitively satisfying if one assumes that

143. See *De Golia v. Twentieth Century-Fox Film Corp.*, 140 F. Supp. 316, 317–18 (N.D. Cal. 1953) (“[H]owever unequivocally the views of the Supreme Court Justices may have been expressed, such expressions were, as even defendants concede, pure dicta.”). But see *Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996) (“It may be *dicta*, but Supreme Court *dicta* tends to have somewhat greater force—particularly when expressed so unequivocally.”).

144. *Boumediene v. Bush*, 476 F.3d 981, 995 (D.C. Cir. 2007) (Rogers, J., dissenting) (referring to “well-considered and binding dictum” of the Supreme Court) (citing *Rasul v. Bush*, 542 U.S. 466, 481–82 (2004)); *IFC Interconsult AG v. Safeguard Int’l Partners L.L.C.*, 438 F.3d 298, 311 (3d Cir. 2006) (“[W]e pay due homage to the Supreme Court’s well-considered dicta as pharoi that guide our rulings.”); *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000) (“[F]irm and considered dicta [of the Supreme Court] . . . binds this court.”); *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) (“[C]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.” (quoting *Doughty v. Underwriters at Lloyd’s, London*, 6 F.3d 856, 861 n.3 (1st Cir. 1993))); *United States v. Santana*, 6 F.3d 1, 9 (1st Cir. 1993) (“Carefully considered statements of the Supreme Court, even if technically dictum, must be accorded great weight and should be treated as authoritative when . . . badges of reliability abound.”); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 459 (1st Cir. 1992) (“Be that as it may, courts often, quite properly, give considerable weight to dictum—particularly to dictum that seems considered as opposed to casual.”); see also *supra* notes 79–81 and accompanying text (discussing a sliding scale whereby courts give more respect to considered dicta).

145. *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991); *Oyebanji v. Gonzales*, 418 F.3d 260, 265 (3d Cir. 2005) (quoting *McCoy* for the proposition that Supreme Court dicta is binding if recent and “not enfeebled by subsequent holdings”); *Montero-Camargo*, 208 F.3d at 1132–33 (rejecting Supreme Court dictum because it was based on outdated demographic data); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (“[T]his court considers itself bound by Supreme Court dicta almost as

recency equals, or at least correlates to, accuracy. Such correlation may exist to the extent that decisions made more recently have the benefit of deeper experience to influence their outcomes, and may better reflect modern social and political policy formulations. In that respect, it makes sense that we are more comfortable relying upon the Court's more recent speculations. But this adds little to the analysis because the cases provide little to no indication of how the line should be drawn. This vague indicator simply allows courts free rein to determine ad hoc whether a particular dictum warrants precedential treatment. Moreover, intuition dictates that recency cannot serve as a definitive proxy for accuracy. Statements made by the Court in dictum 100 years ago may, in some circumstances, warrant greater deference than dictum issued yesterday if the relevant law otherwise indicates that the older dictum is, for one reason or another, more reliable. Thus, while the relative recency of Supreme Court dictum may support a conclusion that it is entitled to precedential weight for some other reason, it likely would not, standing alone, compel that result.

Other criteria, however, provide a more workable starting point for crafting a broader framework. Specifically, the courts suggest that dictum is not binding when there is clear precedent to the contrary¹⁴⁶ and when it is "not enfeebled by any subsequent statement."¹⁴⁷ Taken together, these statements suggest that Supreme Court dictum is binding only when and to the extent that it is consistent with the relevant body of law. For instance, in matters of statutory interpretation (not coincidentally, the pertinent question here), is the dictum consistent with the statutory language and structure as a whole? Would application of traditional canons of statutory construction compel the same result? Likewise, to the extent that the dictum implicates matters addressed by other case law, is it consistent? Does the dictum meld well into the structure of established binding precedents or, alternatively, does it create inconsistencies or gaps that did not previously exist?

firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements.").

146. *United States v. Marlow*, 278 F.3d 581, 588 (6th Cir. 2002) (stating that Supreme Court dicta should be followed "in the absence of any compelling authority to the contrary"); *Wright v. Morris*, 111 F.3d 414, 419 (6th Cir. 1997) ("Where there is no clear precedent to the contrary, we will not simply ignore the [Supreme] Court's dicta."); *see also* *Bembenek v. Donohoo*, 355 F. Supp. 2d 942, 950 (E.D. Wis. 2005) ("[A]nd to the extent that Supreme Court cases contain conflicting dicta, a later dictum supersedes an earlier one just as a later statute supersedes an earlier one.").

147. *McCoy*, 950 F.2d at 19; *see supra* note 145.

Treating Supreme Court dictum as binding only when it is consistent with the relevant body of law is intuitively satisfying. Practitioners and students of the law commonly yearn for consistency and predictability—characteristics that are often lacking in the law but nevertheless emerge from time to time. To be sure, a system founded on principles of stare decisis places a premium on consistency by requiring courts to respect and apply binding precedents, thereby spinning discrete concepts into a seamless web known as the law. Thus, a rule that requires courts to assess each case in light of the relevant legal framework and determine whether given Supreme Court dictum deserves precedential respect makes sense.

A recent case from the Fourth Circuit provides a prime example of a court rejecting Supreme Court dictum on the ground that it is inconsistent with the plain language of an applicable statute. In *In re Bateman*, the court acknowledged relevant instruction from the Supreme Court, stating that “dicta of the U.S. Supreme Court, although non-binding, should have ‘considerable persuasive value in the inferior courts’”¹⁴⁸ Nevertheless, the Fourth Circuit declined to follow the Court’s dictum, reasoning that the plain language of the relevant statute directed otherwise.¹⁴⁹

Other courts have likewise rejected Supreme Court dicta on grounds that it is contrary to binding case law precedent. For example, the Ninth Circuit refused to follow Supreme Court dictum that the Fifth Amendment privilege against self-incrimination is only a “fundamental *trial* right of criminal defendants,”¹⁵⁰ and held that, consistent with binding circuit precedent, the privilege attaches to a coercive interrogation even if it does not lead to prosecution.¹⁵¹ The court stated: “Where the two are at odds . . . we are bound to follow our own binding precedent rather than Supreme Court dicta.”¹⁵² In other words, when Supreme Court dicta is not consistent with other sources of law that are clearly binding—whether statutory or judicial—a court should disregard that dicta.

Likewise, some courts will disregard Supreme Court dicta when an alternative approach is “more credible”—not just in terms of consistency

148. *In re Bateman*, 515 F.3d 272, 282 (4th Cir. 2008) (quoting *Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395, 406 (4th Cir. 2005)).

149. *Id.*

150. *Martinez v. City of Oxnard*, 270 F.3d 852, 857 n.3 (9th Cir. 2001) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)) (emphasis added), *rev’d sub nom*, *Chavez v. Martinez*, 538 U.S. 760, 769 (2003).

151. *Id.* at 857.

152. *Id.* at 857 n.3 (citing *Ayala v. United States*, 550 F.2d 1196, 1200 (9th Cir. 1977) (rejecting Supreme Court dicta because inconsistent with circuit precedent)).

with applicable law, but also in the context of broader policy concerns, including “general fairness.”¹⁵³ A collection of recent prisoner cases provides a worthy example of this phenomenon. In *Heck v. Humphrey*, the Supreme Court held that a state prisoner cannot proceed on a civil rights claim under 28 U.S.C. § 1983 when its resolution would cast doubt upon the validity of an outstanding criminal conviction or sentence.¹⁵⁴ Thus, a state prisoner’s claim for damages under § 1983 that “would necessarily imply the invalidity of his conviction or sentence” is cognizable only if he can prove “that the conviction or sentence has been reversed” on direct appeal, under an executive order, or in a habeas proceeding under 28 U.S.C. § 2254.¹⁵⁵ The Court justified its holding based on, among other things, the policy generally disfavoring expanding the opportunity for prisoners to collaterally attack their sentences.¹⁵⁶ The prisoner in *Heck* could not identify any such favorable termination of the conviction challenged in his § 1983 claim; therefore, the claim was dismissed.¹⁵⁷

Subsequent prisoner-plaintiffs faced a barrier not present in *Heck*’s case: the practical inability to challenge their convictions or sentences, whether on appeal, in a habeas proceeding, or otherwise. For example, in *Dible v. Scholl*, William Dible sought damages under § 1983 for deprivation of his due process rights in conjunction with a prison disciplinary proceeding.¹⁵⁸ Shortly after filing his complaint, Dible completed his sentence and was discharged from prison.¹⁵⁹ Because he was no longer imprisoned, Dible could not seek habeas relief.¹⁶⁰ Nevertheless, the prison officials sought dismissal of Dible’s complaint on the ground that he failed to meet the *Heck* standard because he had not alleged, nor could he demonstrate, that the prison disciplinary determination in question “ha[d] been reversed, expunged, declared invalid, or called into question by a federal court’s issuance of a writ of habeas corpus.”¹⁶¹ The defendants recognized that Dible’s release precluded him from seeking habeas relief but contended that *Heck*’s bright-line rule still applied.¹⁶² Their argument

153. Dible v. Scholl, 410 F. Supp. 2d 807, 825 (N.D. Iowa 2006).

154. Heck v. Humphrey, 512 U.S. 477, 486–87 (1994).

155. *Id.*

156. *Id.* at 484–85.

157. *Id.* at 490.

158. Dible, 410 F. Supp. 2d at 809.

159. *Id.*

160. *Id.* at 827.

161. *Id.* at 811.

162. *Id.* at 812.

found firm foundation in footnote ten of the *Heck* opinion, in which the Court expressly stated its belief that the inability of a prisoner to seek habeas relief because of, for example, his intervening release should not relieve him of the favorable-termination requirement: “We think the principle barring collateral attacks—a longstanding and deeply rooted feature of both the common law and our own jurisprudence—is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated.”¹⁶³ The court, however, rejected defendants’ argument, reasoning that it would be impossible for Dible to demonstrate the favorable termination required under *Heck* because, having been released from prison, any habeas petition he might file would be dismissed as moot.¹⁶⁴ In so doing, the court cast aside as dictum the Supreme Court’s suggestion in *Heck* that its rule should apply to cases brought by former prisoners: “Thus, because habeas unavailability was not before the Court in *Heck*, footnote ten was not necessary to the Court’s decision, and consequently is not binding.”¹⁶⁵

The rationale offered by the *Dible* court in support of its decision to disregard *Heck*’s instruction as dictum drew upon concerns about consistency within the relevant body of law, and also broader policies, including fairness. The court noted its policy concerns first, recognizing the inherent unfairness in a rule precluding a person from pursuing a civil rights claim on the ground that he cannot establish a factual predicate that is legally impossible for him to show.¹⁶⁶ Relatedly, the court expressed concerns about the illogical implications of the Supreme Court’s proposed

163. *Heck v. Humphrey*, 512 U.S. 477, 490 n.10 (1994).

164. *Dible v. Scholl*, 410 F. Supp. 2d 807, 825 & n.15 (N.D. Iowa 2006).

165. *Id.* at 824. The court in *Dible* was not the first federal court to disregard the suggestion in *Heck* that the favorable-termination prerequisite applied to former prisoners who, by virtue of their release, could not seek habeas relief. *See, e.g.*, *Nonnette v. Small*, 316 F.3d 872, 877 (9th Cir. 2002) (deciding § 1983 action was not barred even though habeas was unavailable because of plaintiff’s release from prison); *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001) (concluding that *Heck* did not bar § 1983 claim despite habeas being unavailable). Other courts, however, were more reluctant to depart from the Supreme Court’s instruction, notwithstanding its dictum status. *See, e.g.*, *Gilles v. Davis*, 427 F.3d 197, 210 (3d Cir. 2005) (holding that *Heck* barred § 1983 claim when habeas is unavailable); *Huey v. Stine*, 230 F.3d 226, 230 (6th Cir. 2000) (same); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) (quoting *Heck* as providing “unequivocal” language precluding plaintiff’s claim after his release from prison); *Figueroa v. Rivera*, 147 F.3d 77, 81–83 (1st Cir. 1998) (dismissing a family’s § 1983 claim after a habeas petition was deemed moot following the prisoner’s death).

166. *Dible*, 410 F. Supp. 2d at 825 (citing *Zupan v. Brown*, 5 F. Supp. 2d 792, 797 (N.D. Cal. 1999)).

rule.¹⁶⁷ Specifically, the court noted that applying the dictum “would create a ‘patent anomaly’” by providing a forum to redress the civil rights claims of current prisoners, but not former prisoners, thereby “creat[ing] the appearance of rewarding those prisoners serving the longest terms of imprisonment.”¹⁶⁸ All this, combined with the court’s determination that following the dictum would contravene the relevant statutory language, led the court to disregard the dictum and instead craft a rule to better comport with the relevant body of law and the policy concerns that law implicates.¹⁶⁹

The net result of these decisions is far from shocking. Indeed, the basic principles that emerge are quite logical: a court faced with a decision that could be influenced by Supreme Court dicta may consider the dicta in context but nevertheless should engage in an independent inquiry into its pertinence. Furthermore, the court may be compelled to disregard that dicta when (1) it is not consistent with the relevant body of law or (2) it implicates broader policy concerns, such as fairness. These logical principles, therefore, form the foundation of the framework I propose courts should employ to assess Supreme Court dicta. In other words, a court deciding a legal question that is unguided by binding precedent but potentially influenced by Supreme Court dicta should follow the dicta’s guidance only if an independent analysis yields its consistency with the relevant body of law and pertinent public policies.

B. *The Constitutional Underpinnings of the Proposed Standard*

A standard that requires an independent inquiry when dictum might counsel a particular result, and disregards such dictum when found to be inconsistent with the relevant law and prevailing policy, is at least suggested, and perhaps even compelled, by the United States Constitution.¹⁷⁰ This proposition finds constitutional support in at least two interrelated provisions. First, Article III expressly limits the power of

167. *Id.* (citing *Spencer v. Kemna*, 523 U.S. 1, 20 (1998)).

168. *Id.*

169. *Id.* See also *Batjac Prods. Inc. v. Goodtimes Home Video Corp.*, 160 F.3d 1223, 1233 & n.12 (9th Cir. 1998) (relying upon policy considerations to justify rejection of Supreme Court dicta in copyright context).

170. See generally Leval, *supra* note 75, at 1259–60 (stating that Article III limits the power of federal courts to deciding “Cases” and “Controversies” and thereby prohibits federal courts from proclaiming law via dictum). But see Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 648–49 (1992) (positing that issuing dicta runs afoul of no constitutional mandate or prohibition).

the federal judiciary to deciding “Cases” and “Controversies.”¹⁷¹ Second, and more broadly, the governmental structure established by the Constitution, distinctly separating and defining the power of each branch, affirms that the judiciary can do no more than decide cases as they arise.¹⁷² The federal judiciary is empowered to declare what the law is,¹⁷³ but the power to make law is vested solely in Congress.¹⁷⁴

The constitutional justiciability doctrines reflect these concepts. The Supreme Court has repeatedly stated that it cannot decide cases in which the controversy is not ripe,¹⁷⁵ is moot,¹⁷⁶ or in which one or more of the parties lacks standing.¹⁷⁷ It is well established that constitutional limitations bar a federal court from issuing an “advisory opinion.”¹⁷⁸ One could label as “dicta” a decision violating any one of these principles. That is, when a federal court decides a controversy that is not ripe, its words are

171. U.S. CONST. art. III, § 1; *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (“The exercise of judicial power under Art[icle] III of the Constitution depends on the existence of a case or controversy.”); *Flast v. Cohen*, 392 U.S. 83, 94–95 (1968) (stating that the case-or-controversy requirement of Article III limits the power of the judicial branch vis-à-vis the executive and legislative branches, “to assure that the federal courts will not intrude into areas committed to the other branches of the government”); Dorf, *supra* note 17, at 2001 n.17 (discussing authorities pertinent to limited power of judicial branch).

172. *Flast*, 392 U.S. at 97 (“Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.”); 13 CHARLES ALAN WRIGHT, ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3529.1, at 301 (2d ed. 1984) (discussing hybrid constitutional foundations for the advisory opinions doctrine).

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

174. U.S. CONST. art. I, § 1.

175. See, e.g., *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (stating that the ripeness doctrine’s “basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements”).

176. See, e.g., *SEC v. Med. Comm. for Human Rights*, 404 U.S. 403, 407 (1972) (holding that the court cannot review a moot case).

177. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 518 (1975) (affirming the lower court’s dismissal of the case because all plaintiffs lacked standing); see also *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 121–22 (1998) (Stevens, J., concurring) (suggesting that violation of the standing doctrine leads to issuance of nonbinding dictum).

178. *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (“[T]he implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions”); see generally *Muskrat v. United States*, 219 U.S. 346, 354–59 (1911) (discussing the Supreme Court’s role and stating that the court can exercise its power only over a properly submitted case between parties).

mere dicta. Similarly, an attempt to resolve a moot controversy results in nothing but dicta. And if the plaintiff lacks standing to sue, yet the court decides the case anyway, its decision must be dicta. In each of these situations, constitutional limitations prohibit the court from deciding the case. Absent such power, the court's words cannot be binding and, therefore, must constitute dicta.

The doctrine most relevant here is that which prohibits advisory opinions. Many courts and commentators have likened, and even equated, the issuance of dicta to the issuance of a prohibited advisory opinion.¹⁷⁹ An advisory opinion is defined as “[a] nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose,”¹⁸⁰ but has been broadly construed to include any court decision not substantially likely to have some effect or one that is issued in the absence of an actual dispute between the parties.¹⁸¹ This definition encompasses most dicta to the extent that dicta, as discussed above, usually arises when a court attempts to adjudicate matters not presented in the controversy before it. In that respect, dicta's scope does stray to some extent from *Black's* definition of the term “advisory opinion” in that dictum often issues when the parties have not requested that the court decide a certain issue, but it proceeds to do so anyway. Nevertheless, insofar as a court's decision on a matter unnecessary to resolution of the dispute constitutes dictum,¹⁸² it is

179. *E.g.*, *Steel Co.*, 523 U.S. at 121–22 (Stevens, J., concurring) (criticizing the majority for purporting to decide more than the case presented, thereby issuing a prohibited “advisory opinion” that constitutes “pure dictum”); *Hudson v. United States*, 522 U.S. 93, 112 (1997) (Stevens, J., concurring) (stating that an advisory opinion flowing from the Court's “desire to reshape the law” lacks legitimate basis and has “the precedential value of pure dictum”); *Centillion Data Sys., Inc. v. Am. Mgmt. Sys., Inc.*, 138 F. Supp. 2d 1117, 1120 (S.D. Ind. 2001) (referring to “dictal advisory opinions”); Lee, *supra* note 170, at 645 (describing an advisory opinion as, among other things, “[a]ny opinion, or portion thereof, not truly necessary to the disposition of the case at bar (that is, dicta)”); Alan J. Meese, *Reinventing Bakke*, 1 GREEN BAG 2D 381, 382 (1998) (stating that dicta is “the functional equivalent of an advisory opinion”).

180. BLACK'S LAW DICTIONARY 1125 (8th ed. 2004).

181. *See Chi. & S. Air Lines v. Waterman Corp.*, 333 U.S. 103, 113–14 (1948) (stating that the Court will not give advisory opinions and will only give opinions that are binding on the parties and not reviewable); *United States v. Johnson*, 319 U.S. 302, 304–05 (1943) (stating that “the absence of a genuine adversary issue between the parties” makes the case non-justiciable); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.4, at 58 (3d ed. 2006) (“[F]or a case to be justiciable, and for it not to be a request for an advisory opinion, there must be an actual dispute between adverse litigants . . .”).

182. *See supra* notes 68–70.

advisory in that it constitutes the court's declaration or interpretation of law on issues it need not decide. As such, the court is simply "advis[ing]" the parties (and others) as to what it believes the law should be, but cannot in that respect actually be declaring what the law is. To do so would violate constitutional limitations on judicial power.¹⁸³

Insofar as dicta runs afoul of these constitutional limitations, it is imperative that courts treat it for what it is worth.¹⁸⁴ Supreme Court dictum, whatever its virtues may be,¹⁸⁵ cannot be afforded precedential effect because it lacks proper constitutional foundation. To treat dictum as binding would perpetuate the initial constitutional violation, i.e., deciding matters not presented by the case or controversy before the Court and therefore running afoul of Article III and separation of powers principles. Thus, a court faced with a question potentially guided by Supreme Court dictum should engage in an independent inquiry of the binding statutory and judicial precedents. The court need not completely disregard the Supreme Court's guidance and may give it due regard as reflective of that Court's preferred policy or as persuasive authority. But the court should not follow the Supreme Court's guidance without some other legally justifiable rationale for doing so. Rather than adhere blindly to unconstitutional legal formulations, the court should instead perform the job assigned to it and decide the case in light of the relevant body of law,

183. See *supra* notes 170–81 and accompanying text (discussing constitutional limitations on judicial power relative to issuance of dicta).

184. Professor Lee disagrees, at least in part, with this basic premise. Lee, *supra* note 170, at 648–49. He posits that "whether to engage in dicta is a matter for the considered discretion of a court," and therefore dicta is not unconstitutional. *Id.* at 649. A detailed debate about the viability of his thesis, however, is beyond the scope of this Article.

185. See *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 274 (3d Cir. 2007) ("Because the 'Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket,' failing to follow those statements could 'frustrate the evenhanded administration of justice by giving litigants an outcome other than the one the Supreme Court would be likely to reach were the case heard there.'" (citing *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 561 (3d Cir. 2003) (en banc)); *Bradley v. Henry*, 428 F.3d 811, 818 (9th Cir. 2005) ("The Constitution lives by such comprehensive commentary from the Supreme Court. We cannot deprive the document of vitality by squeezing great principles into a dustbin labeled dicta."); *Oyebanji v. Gonzales*, 418 F.3d 260, 264–65 (3d Cir. 2005) ("[A]s a lower federal court, we are advised to follow the Supreme Court's 'considered dicta.'" (citing *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991))); *Daimler-Chrysler Corp. v. United States*, 361 F.3d 1378, 1385 n.3 (Fed. Cir. 2004) ("Notably, even if dicta, we would feel obligated to follow the Supreme Court's explicit and carefully considered statements . . .").

taking into account pertinent policy considerations when appropriate.

V. UPON DISREGARDING DICTUM: APPLYING THE PROPOSED STANDARD TO ADJUDICATE ALLEGED NON-WORKPLACE HARMS

Having established the dictum status of the *Burlington Northern* Court's statement that Title VII's anti-retaliation provision reaches non-workplace harms, and having crafted a framework for subsequent adjudication in the face of pertinent Supreme Court dicta, the task now comes to assessing the *Burlington Northern* dictum in light of the proposed standard. The result brings little surprise. The Supreme Court's *Burlington Northern* dictum, if interpreted broadly, is inconsistent with a reasonable interpretation of the statutory language in light of well-established canons of statutory construction and is illogical as a matter of policy. As such, the better approach for courts confronting alleged non-workplace harms is to engage in an independent inquiry into whether the alleged harm is one against which Title VII is intended to protect, bearing in mind that Title VII is an employment statute and should be confined to that context in order to prevent dilution of its effectiveness.

A. *The Legal Justification for Disregarding Burlington Northern's Dictum*

Under my proposed standard, assessment of Supreme Court dictum should begin with the relevant body of law. In this case, the relevant body of law consists primarily of the statute itself—Title VII. The rules of statutory interpretation are well-established. First, one must determine whether the language of the statute is plain and unambiguous.¹⁸⁶ A court must enforce plain and unambiguous statutory language as written.¹⁸⁷ If the statutory language “is capable of being understood by reasonably well-informed persons in two or more different senses,” the court should discern its meaning from the apparent intent of the drafters.¹⁸⁸ The intent inquiry

186. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (indicating that if the language is unambiguous, then the inquiry is complete); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (same); see also 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:02, at 6–11 (6th ed. 2000) (collecting cases to support the proposition that “[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.” (quoting *McCord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980))).

187. See *supra* note 186.

188. SINGER, *supra* note 186, § 45:02, at 11–12; *id.* § 45:05, at 25.

requires assessment of three sources: (1) the language of the statute in both the narrow context in which it appears and the broader context of the statute as a whole; (2) the policy goals or purposes that the statute serves, as reflected in its legislative history and elsewhere; and (3) the reasonableness of the proposed interpretation in light of practical considerations.¹⁸⁹ The first and second of these inquiries directly parallel the two-step framework established above for assessment of Supreme Court dicta, focusing first upon the law itself and then upon the policies supporting it. The third of these criteria melds well with the second so that the inquiries under my proposed framework for assessment of dicta and under established canons of statutory construction can be unified for these purposes.

1. *The Plain Statutory Language*

It is almost beyond cavil that the language of the anti-retaliation provision is plain and unambiguous with respect to its inapplicability beyond the workplace. The anti-retaliation provision provides:

It shall be an unlawful *employment practice* for an *employer* to discriminate against any of his *employees* or *applicants for employment*, . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.¹⁹⁰

The workplace limitation is unmistakable. The added emphasis above highlights the statute's repeated reference to employment. First, the statute labels the conduct it proscribes as an "unlawful *employment*

189. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (referencing "text, structure, purpose, and history of the ADEA" as interpretive resources supporting the conclusion that the ADEA is not intended to prohibit employer from favoring older workers over younger ones); *Robinson*, 519 U.S. at 345–46 (turning to the "broader context provided by other sections of the statute" and the statute's purposes in resolving ambiguity as to the meaning of the term "employees" in the anti-retaliation provision of Title VII); SINGER, *supra* note 186, § 45:13, at 107–08 (identifying the following as resources of interpretation: statutory language and context, legislative history and underlying policy, and concepts of reasonableness); see also Taylor, *supra* note 6, at 570–72 & nn. 233–37 (discussing this statutory interpretation framework).

190. 42 U.S.C. § 2000e-3(a) (2001) (emphasis added).

practice.”¹⁹¹ Second, its protections apply only to “employees” or “applicants for employment,” and constrain only the conduct of “an employer.”¹⁹² As such, the anti-retaliation provision encompasses only those acts taken by employers against employees or applicants that affect employment.¹⁹³ It does not reach any further, and any suggestion that it does defies this plain language. If, for example, an employer were to set fire to an employee’s house in alleged retaliation for engaging in protected conduct, the harm suffered—absent some demonstrable impact on her employment, such as a resulting constructive discharge—should not be redressable under Title VII because it cannot be characterized as an “employment practice.”¹⁹⁴ This, of course, does not mean that the employee is left without a remedy. The offense carries with it not only a multitude of civil remedies, such as trespass and damage to property, but also criminal culpability. The pertinent point here is simply that, by its plain language, Title VII does not apply.

2. *The Statutory Context*

Notwithstanding the plain language confining the statute’s application to the workplace, one might nevertheless suggest that because the statute does not expressly require that the harm alleged as an “unlawful employment practice” bear some direct or indirect relationship to the workplace, it is somehow ambiguous on that point. To do so would surely require disregarding its repeated references to the employment relationship and its limited applicability to only employment practices. But indulging this argument does not change the result. Delving further into the canons of statutory construction to glean the drafters’ intent—as a finding of ambiguity would require—only bolsters the conclusion that the statute does not reach non-workplace harms.

Reading the anti-retaliation provision in its context makes it even clearer that it is intended to redress only those harms that occur in the workplace or affect the plaintiff’s employment.¹⁹⁵ The section of the

191. *Id.* (emphasis added).

192. *Id.* (emphasis added).

193. *See* Nelson v. Upsala Coll., 51 F.3d 383, 388 (3d Cir. 1995) (“The words ‘employment practice’ [in the anti-retaliation provision] suggest that the retaliatory conduct must relate to an employment relationship.”).

194. *See id.* (referencing arson as an example of non-workplace harm falling beyond scope of Title VII).

195. *See supra* note 189 and accompanying text (outlining criteria for the assessment of drafters’ intent).

statute in which the anti-retaliation provision appears is entitled “Other unlawful employment practices,” and the subchapter is entitled “Equal employment opportunity.”¹⁹⁶ These labels reinforce what the statute itself makes explicit—that its protections apply only in the employment setting.¹⁹⁷ Other related provisions also carry with them the same workplace limitation. Perhaps most instructive in this regard is the core substantive provision—the section of Title VII that contains its principal protections against discrimination. Found at 42 U.S.C. § 2000e-2, the core substantive provision, in pertinent part, makes it “an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”¹⁹⁸ The similarities between these two provisions, which bear directly on the employment-relatedness question, are striking. First, both refer to the prohibited conduct as “an unlawful employment practice.”¹⁹⁹ Thus, as discussed above, the protections do not sweep broadly, but rather apply only to those acts that occur in, or are at least peripherally related to, the workplace—i.e., employment practices. Second, both refer to the principal actor as “employer.”²⁰⁰ Only one who fits the statutory definition of the term “employer” can violate its provisions, thereby further confining its application to the employment context.

The Supreme Court, in reaching its dictum conclusion that the anti-retaliation provision encompasses non-workplace harms, disregarded these key similarities and instead focused singularly on qualifiers present in the core substantive provision, but absent from its anti-retaliation counterpart.²⁰¹ It is true that the core substantive provision elaborates on the prohibited conduct—labeled “discriminat[ion]” by both sections—in ways that the anti-retaliation provision does not.²⁰² Specifically, the core

196. 42 U.S.C. §§ 2000e, 2000e-3.

197. *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (“[T]he title of a statute and the heading of a section’ are ‘tools available for the resolution of a doubt’ about the meaning of a statute.” (quoting *Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528–29 (1947))).

198. 42 U.S.C. § 2000e-2(a).

199. *Id.* §§ 2000e-2(a), 2000e-3(a). Indeed, each and every subpart of 42 U.S.C. § 2000e-2 that follows the core substantive provision uses this same language. *Id.* § 2000e-2(b) to (m).

200. *Id.* §§ 2000e-2(a), 2000e-3(a).

201. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61–63 (2006).

202. *See* 42 U.S.C. §§ 2000e-2(a), 2000e-3(a).

substantive provision makes it unlawful “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,”²⁰³ while the anti-retaliation provision stops shorter, simply making it unlawful “to discriminate.”²⁰⁴ According to the Court, this difference necessitated the conclusion that the scope of the provisions is different; therefore, the broader sweeping anti-retaliation provision reaches beyond the workplace while the core substantive provision, with its limiting language, does not.²⁰⁵

Apart from the fact that it is mere dictum, the Court’s conclusion is problematic. Its singular focus on the primary difference between the two provisions blindly and improperly disregards their similarities, which, significantly, are more pertinent to this debate. Congress’s repeated reference to employment and the employment relationship in both provisions is far more instructive on the question of the statute’s application beyond the workplace than is its elaboration (or lack of elaboration) on the forms of discrimination prohibited. That is, the fact that Congress described the relevant conduct as an employment practice and limited its application to the employment relationship bears directly on its application beyond the workplace. A fair reading would suggest that it does not apply in those situations. The same cannot be said of the language included in the core provision but omitted elsewhere. Whether the prohibited conduct must affect the employee’s “compensation, terms, conditions, or privileges of employment” is inconsequential when it is clear that only “employment practice[s]” are covered in the first place.²⁰⁶ Thus, while the statutory language quite unambiguously limits the statute’s application to the workplace, reading that language in context only solidifies that conclusion.

Indeed, an even broader contextual examination encompassing Title VII’s remedial provisions further demonstrates that it is not intended to encompass non-workplace harms and that *Burlington Northern*’s dictum should not persist. In its original form, Title VII offered only equitable relief (e.g., an injunction against continued discrimination).²⁰⁷ A plaintiff’s only opportunity for monetary recovery under this regime came in the

203. *Id.* § 2000e-2(a).

204. *Id.* § 2000e-3(a).

205. *Burlington Northern*, 548 U.S. at 61–67.

206. 42 U.S.C. § 2000e-3(a)(1).

207. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 241, 261 (1965), amended by 42 U.S.C. § 2000e-5 (2000).

form of back pay or attorney's fees.²⁰⁸ Such equitable remedies could afford effective relief only if the alleged harm somehow affected the workplace. Back pay and reinstatement are of no use when the alleged harm lacks any workplace connection, thus further suggesting that the drafters of Title VII intended to limit its scope in that manner. It was only with the enactment of the Civil Rights Act of 1991 that plaintiffs became eligible for other forms of relief, such as compensatory and punitive damages, that might plausibly apply when the harm is not work-related.²⁰⁹ Nevertheless, Congress made no effort at that time to expand the reach of the statute's substantive protections beyond the confines of the employment relationship, thus suggesting that was not its intention.²¹⁰ As such, the remedial structure further demonstrates that no part of Title VII is intended to redress non-workplace harms, whether the anti-retaliation provision or otherwise. The relevant body of law, both on its face and placed in context, counsels that courts adjudicating non-workplace harms should not follow the Supreme Court's *Burlington Northern* dictum blindly.

B. *The Policy Justification for Disregarding Burlington Northern's Dictum*

At the second stage of the statutory interpretation and dictum-assessment process, analysis of the policy and purpose of the relevant provisions likewise reveals that the anti-retaliation provision should apply only to workplace harms. The purpose of Title VII has remained clear and undisputed since its enactment: achievement of equality in employment opportunities.²¹¹ Therefore, courts best serve the statute's purpose only when they require some nexus between the alleged retaliatory act and an employment relationship.²¹² The Supreme Court recognized that the objective of the substantive provision would best be served by elimination

208. *Id.*

209. Civil Rights Act of 1991, Pub. L. No. 102-166, § 1977a, 105 Stat. 1071, 1072 (1992), *amended by* 42 U.S.C. § 1981a (2000).

210. *Id.* § 3(1), 105 Stat. at 1071 (indicating that the purpose of the Act is to "provide appropriate remedies for intentional discrimination . . . in the workplace").

211. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

212. *See Nelson v. Upsala Coll.*, 51 F.3d 383, 387 (3d Cir. 1995) ("[I]t does not further the purpose of Title VII to apply [the anti-retaliation provision] to conduct unrelated to an employment relationship."); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (stating that "'equality of employment opportunities' and the elimination of practices that tend to bring about 'stratified job environments' would be achieved were all employment-related discrimination miraculously eliminated." (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973))).

of employment-related discrimination.²¹³ When, however, the alleged wrong lacks any connection to an employment relationship, even if inflicted by an employer upon his employee, it cannot affect workplace equality. As such, regulation of conduct unrelated to an employment relationship does not promote the statute's purpose—equality in employment opportunities.

The Supreme Court failed to accord sufficient weight to the primary purpose underlying Title VII as a whole when it determined, in dictum, that the anti-retaliation provision reaches non-workplace harms.²¹⁴ Instead, the Court focused on the purpose of the anti-retaliation provision as separate and distinct from the core substantive provision.²¹⁵ The Court stated that the anti-retaliation provision “seeks to secure [the] primary objective [of Title VII, workplace equality,] by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.”²¹⁶ Although recognizing that regulation of workplace conduct is sufficient to achieve the statute's primary goal,²¹⁷ the Court determined that furtherance of the anti-retaliation provision's separate and distinct purpose requires regulation that reaches further:

But one cannot secure the [anti-retaliation provision's] objective by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the anti-retaliation provision's objective would *not* be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace.... A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the anti-retaliation provision's “primary purpose,” namely, “[m]aintaining unfettered access to statutory remedial mechanisms.”²¹⁸

This narrow view falters in at least two respects. First, it fails to accord sufficient weight to the purpose underlying Title VII as a whole.

213. *Burlington Northern*, 548 U.S. at 63–64.

214. *Id.* at 67.

215. *Id.* at 62–63.

216. *Id.* at 63.

217. *Id.* at 61–63.

218. *Id.* at 63–64 (second alteration in original) (citations omitted).

While the anti-retaliation provision, standing alone, serves the primary goal of maintaining access to the statute's remedial mechanisms, the remedial mechanisms themselves serve the broader purpose of equal employment opportunity. As discussed above, that broader purpose is best served by a standard that requires some nexus between actionable wrongs and the employment relationship.²¹⁹ Thus, viewing the anti-retaliation provision in isolation does not do justice to the statute's underlying goal; rather, the protections against retaliation must be examined as part of the whole from which they come.

Second, the Court's narrow focus on the purpose of the anti-retaliation provision in isolation stretches the statute's protections to their breaking point. Put bluntly, the Court attempts to make the statute too big for its britches. Admittedly, the Court's suggestion that an employer can effectively retaliate against an employee by inflicting harm unrelated to the workplace is not without foundation. For example, setting fire to an employee's house because he has complained of discrimination surely constitutes retaliation in nearly every sense of the term. Indeed, fear of such arson might even deter some employees from engaging in protected conduct and thereby hamper the goal of "[m]aintaining unfettered access to statutory remedial mechanisms."²²⁰ Nevertheless, it is inappropriate to rely upon Title VII, an employment statute, to remedy these wrongs absent some demonstrable impact on the employee's employment, such as a resulting constructive discharge. In the vast majority of cases, any alleged retaliatory act that meets the threshold of severity to warrant Title VII relief would be actionable under some other body of law.²²¹ For example, in the hypothetical case of an employer setting fire to an employee's home,

219. See *Nelson v. Upsala Coll.*, 51 F.3d 383, 387 (3d Cir. 1995) (discussing the employment-relatedness requirement inherent in the anti-retaliation provision); *Reed v. Shepard*, 939 F.2d 484, 493 (7th Cir. 1991) (stating that anti-retaliation provision requires a showing of "employment impairment") (emphasis added).

220. *Burlington Northern*, 548 U.S. at 64 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

221. *Nelson*, 51 F.3d at 388 n.7. The *Nelson* court summarized this point well:

We recognize that it might be argued that it is necessary to permit retaliation claims for actions unrelated to an employment relationship so that employees are not discouraged from bringing Title VII claims or assisting in their prosecution. We believe, however, that the possibility that the denial of a retaliation claim for conduct not related to an employment relationship will discourage Title VII activity is slight because serious retaliatory conduct unrelated to an employment relationship will be actionable under state law.

Id.

the act of arson would invoke not just civil remedies under state tort and property laws, but also criminal sanctions. Likewise, when an employer threatens or actually inflicts bodily harm upon the employee outside the workplace, state tort law generally affords relief, and state criminal law may support prosecution.²²²

Granted, the remedies afforded in these examples stand in stark contrast to the Title VII remedy in at least one significant respect. Unlike claims under Title VII, which are redressable of right in the federal court system, these state-law claims supply no basis for federal jurisdiction, but instead must be heard in state courts.²²³ Moreover, in those cases suggesting criminal culpability, their pursuit turns upon the discretion of the local prosecutor, who might be thought unduly sympathetic to a major local employer, at least in some circumstances. Indeed, one rationale offered at the outset to support the provision of a federal forum for Title VII claims was elimination of concerns stemming from distrust of both state judicial systems and public enforcement officials during the 1960s. These concerns are insufficient, however, to support extending Title VII's reach beyond its intended protective sphere: the workplace. First, the argument is somewhat circular because those claims, whose relationship to the workplace is insufficient to evoke Title VII protection, likely also lack the requisite federal element to make jurisdiction proper in the limited federal forum to begin with. It is an elementary principle of constitutional law that Congress may legislate only pursuant to the powers given it under Article I of the United States Constitution. While there is little debate that Congress properly invoked those powers when enacting Title VII, it did so with express reference to the employment relationship.²²⁴ Thus, permitting a claim that reaches outside the workplace at least arguably necessitates extending the jurisdictional reach of federal courts beyond that properly given to them by Congress. The absence of a federal remedy in those circumstances is therefore fully justified given the limited jurisdiction of the federal courts in the first place. Moreover, the fact remains that other remedies—properly redressed only in state systems—exist to protect

222. See, e.g., *Reed*, 939 F.2d at 492–93 (affirming directed verdict against employee on retaliation claim based upon allegations that former employer physically attacked, shot at, and threatened employee).

223. Of course, if the requirements of the diversity statute are met, then the federal forum remains available. 28 U.S.C. § 1332 (2000).

224. 42 U.S.C. §§ 2000e-2, 2000e-3 (2000); see also *id.* § 2000e(b) (defining operative term “employer” as “a person engaged in an industry affecting commerce” and thereby suggesting invocation of legislative power granted under the Commerce Clause).

against these wrongs, and, as discussed below, valid concerns about the strength of Title VII's intended role counsel against overextending it.²²⁵ Should Congress wish to redress these non-workplace harms with a federal remedy, it may do so by invoking proper constitutional authority. But it is unnecessary, and indeed improper, to stretch the statute's protections beyond the scope of the employment relationship upon which it is founded to encompass all sorts of non-workplace harms because other laws exist to perform that function.

Furthermore, substantial transaction costs accompany overextension of Title VII's protections beyond the workplace. The federal dockets are heavily burdened—indeed, some might say overburdened—with employment discrimination lawsuits as it is.²²⁶ To extend the reach of Title VII even further would only exacerbate that problem by adding to the docket unnecessarily and without justification.

The concern about overcrowded dockets highlights a related policy problem. To stretch the bounds of Title VII beyond the workplace would, in essence, convert it into a general or catchall tort statute, and thereby dilute its effectiveness in its intended sphere. As discussed above, most truly non-workplace harms that warrant relief could be redressed by other laws that apply more directly.²²⁷ Thus, confining Title VII's application to its intended sphere—the workplace—would not leave deserving plaintiffs without a remedy. Moreover, attempting to stretch the statute's reach further could have a detrimental impact on its effectiveness in the employment context. Were plaintiffs to seek relief under Title VII for non-workplace harms, it is possible that the statute would become less effective at accomplishing its original goal of equal employment opportunity because broader application might desensitize judges to employment

225. See *infra* notes 226–31 and accompanying text (discussing other policy concerns evoked by overbroad reading of the statute).

226. Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 45 (2005) (“The number of employment discrimination lawsuits rose continuously throughout the last three decades of the twentieth century. In the federal courts, such filings grew 2000%, while the docket as a whole increased a mere 125%.”); Letter from Stuart J. Kaswell, Senior Vice President, Securities Industry Association, to Mary L. Schapiro, President, NASD Regulation, Inc. (Apr. 25, 1997), in 27TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 811, 871 (1998) (“Nor can it be said that overcrowded court dockets and increasing case delays are soon to be a thing of the past. Court statisticians openly recognize that the delays in court are on the rise due to the increased volume of civil cases in general and employment cases in particular.”).

227. See *supra* notes 221–23 and accompanying text.

disparities or, alternatively, cause them to question the veracity of the plaintiff's allegations given a more widespread and rampant invocation of the statute's protections.

Finally, interpreting Title VII to reach beyond the workplace is not reasonable²²⁸ (an inquiry begged by the third statutory interpretation criterion, listed above²²⁹) because it would afford greater protection to victims of retaliation than victims of discrimination, whom the statute was originally enacted to protect. To illustrate, reconsider the rather unlikely, yet quite demonstrative scenario discussed above in which an employer sets fire to an employee's house. If that employee has recently complained of discrimination so as to qualify for protection under the anti-retaliation provision, then applying the Court's dictum as binding law would afford that employee relief for his property losses under Title VII.²³⁰ If, however, that employee has not engaged in any protected activity, but rather the employer burns the house simply because the employee is black, then Title VII does not apply.²³¹ As such, the Court's dictum would elevate the status of employees who engage in protected activity above the status of those the statute was originally designed to protect, while doing nothing to further its primary goal of ensuring equality in the workplace. Such a reading is impractical and implausible, and should not be perpetuated.

C. *The Appeal of an Independent Inquiry*

The independent inquiry necessitated upon disregarding *Burlington Northern's* pernicious dictum will afford courts sufficient leeway to grant appropriate relief without overstepping the permissible bounds declared by Congress in the language of the statute. Some alleged harms bearing only an indirect relationship to employment may nevertheless be redressable under Title VII, so long as the harm bears a sufficient nexus to the

228. See SINGER, *supra* note 186, § 45:12, at 82–85 (“It is a ‘well established principle of statutory interpretation that the law favors rational and sensible construction.’”); see also *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) (“Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.”).

229. See *supra* note 189 and accompanying text.

230. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (stating that the anti-retaliation provision applies to non-workplace harms).

231. See, e.g., *Traylor v. Brown*, 295 F.3d 783, 788 (7th Cir. 2002) (requiring Title VII discrimination plaintiffs to prove a materially adverse change to the “terms, conditions or privileges of employment”); *Davis v. Town of Lake Park*, 245 F.3d 1232, 1238 (11th Cir. 2001) (stating that courts have “uniformly” interpreted the core substantive provision to require a plaintiff to prove an adverse employment action).

workplace or the employment relationship to warrant Title VII relief.²³² Admittedly, this proposal is not a black-and-white solution. To suggest that courts engage in an independent workplace-relatedness inquiry without specifying the degree of relatedness required certainly leaves room for differing and inconsistent interpretations. However, the alternative—applying Title VII’s protections whether the retaliation is workplace-related or not—is simply untenable, for all of the reasons discussed above.²³³

Casting aside the *Burlington Northern* dictum would not leave courts to flounder unguided in the abyss. The statutory language itself—which a court should, in any event, consult first—offers some instruction.²³⁴ As

232. Two of the principal pre-*Burlington Northern* non-workplace harm cases, both of which are discussed in the Court’s opinion, provide excellent examples. See generally *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006); *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996). In *Rochon*, a former FBI agent claimed retaliation when the FBI acted contrary to its stated policy and standard practice by failing to investigate credible death threats against him and his wife made by a federal prisoner with whom the plaintiff dealt while employed. *Rochon v. Ashcroft*, 319 F. Supp. 2d 23, 26 (D.D.C. 2004). The FBI’s failure to investigate those death threats is plausibly classified as an “employment practice” insofar as the circumstances that gave rise to the need for such an investigation came about only because of the plaintiff’s former employment. *Rochon*, 438 F.3d at 1219–20. Moreover, had the plaintiff remained employed at the time the death threats were received, the FBI’s duty to investigate would likely have been undisputed. Because the plaintiff came into contact with the prisoner who threatened him only as a result of his (albeit former) employment with the FBI, the requisite connection was present to afford Title VII relief. *Id.* In *Berry*, the Tenth Circuit held that the anti-retaliation provision of Title VII encompassed the filing of false criminal charges by an employer against its former employee. *Berry*, 74 F.3d at 986. Indeed, while the Supreme Court treated *Berry* as a non-workplace harm case, the Tenth Circuit expressly recognized and even relied upon the connection between the alleged harm and the plaintiff’s employment in reaching its conclusion. *Id.* The harm alleged by the *Berry* plaintiff was connected to the workplace in at least two ways. First, the plaintiff committed the acts that allegedly supported criminal penalties during his employment. *Id.* at 983–84. Second, as the court stated, “retaliatory prosecution can have an adverse impact on future employment opportunities” due to the concomitant damage to the employee’s reputation and employability. *Id.* at 983–84, 986. Given the nexus between the workplace and the alleged harm in both of these cases, I suggest that neither would be decided differently under the framework I propose.

233. See *supra* part V (explaining why interpreting Title VII to include non-workplace harms is unnecessary and makes the goal of preventing employment discrimination virtually unattainable).

234. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (using plain language, purpose, history, and structure of the ADEA as interpretive tools to clarify textual ambiguities); see generally *Robinson v. Shell Oil Co.*, 519 U.S.

discussed above, the anti-retaliation provision applies only when one who claims some present or former employment relationship with another alleges a harm that constitutes a discriminatory “employment practice.”²³⁵ Thus, courts faced with harms at best characterized as bearing an indirect relationship to employment can assess whether the alleged harm falls within the ambit of Title VII’s protections by determining whether it might be construed as a discriminatory employment practice. If so, then it may be covered by Title VII. If not, then the alleged harm falls beyond the statute’s protections.

Admittedly, the language of the statute will not answer every question. Some will remain too close to call based on the statute alone. Thus, courts engaging in this independent inquiry may also benefit from review of the more expansive and better developed body of case law interpreting the core provision when applying its anti-retaliation counterpart.²³⁶ The workplace limitation in cases alleging harms redressable under Title VII’s core substantive provision is clearer and better defined, likely due to the statutory language requiring the alleged harm to affect the employee’s “compensation, terms, conditions, or privileges of employment.”²³⁷ The absence of these qualifiers from the anti-retaliation provision, however, does not render cases interpreting the core provision irrelevant. Indeed, setting aside this singular distinction, the core substantive provision and its anti-retaliation counterpart are nearly identical. Both provisions declare certain discriminatory employment practices unlawful.²³⁸ Thus, whether harms alleged under the core provision must directly affect an employee’s “compensation, terms, conditions, or privileges of employment” is in many respects inconsequential—harms alleged under both provisions still must affect

337 (1997) (looking to context in other areas of Title VII to resolve ambiguities).

235. 42 U.S.C. § 2000e-3(a) (2000); *see also supra* notes 219–22, and *infra* note 237, and accompanying text (discussing employment-relatedness requirement inherent in language of anti-retaliation provision).

236. *See Taylor, supra* note 6, at 571–72 (offering proposal and justification for interpreting the anti-retaliation provision consistent with the core substantive provision).

237. 42 U.S.C. § 2000e-2(a)(1); *see, e.g.,* Traylor v. Brown, 295 F.3d 783, 788 (7th Cir. 2002) (requiring Title VII discrimination plaintiffs to prove a materially adverse change to the “terms, conditions or privileges of employment”); Davis v. Town of Lake Park, 245 F.3d 1232, 1238 (11th Cir. 2001) (stating that courts have “uniformly” interpreted the core substantive provision to require a plaintiff to prove an adverse employment action).

238. 42 U.S.C. §§ 2000e-2 to 2000e-3.

employment.²³⁹ Given the employment-relatedness requirement inherent in both provisions, case law assessing whether a harm is sufficiently related to employment to warrant relief under the core provision is at least persuasive with respect to claims under its anti-retaliation counterpart.

Courts engaging in the requisite independent assessment of non-workplace harms under the anti-retaliation provision would be guided by the statute's underlying and primary purpose—ensuring workplace equality. Any decision affecting the statute's coverage should serve this important goal. Thus, any alleged harm that fosters inequality in the workplace (so long as it is sufficiently adverse),²⁴⁰ even one that bears only an indirect or peripheral relationship to employment, may fall within the scope of the anti-retaliation provision and warrant its protection. By contrast, a harm that does not affect workplace inequality does not.

D. Case Studies

A survey of cases decided since the Supreme Court issued its pernicious dictum reveals that courts are indeed readily falling prey to the lure of blind adherence to the Court's dictum rather than engaging in the independent assessment that this Article suggests. A prime example of this phenomenon occurred in *Walsh v. Irvin Stern's Costumes*.²⁴¹ In addition to other claims of discrimination, Walsh alleged that her employer retaliated against her by threatening, via telephone and U.S. mail, to make false allegations of criminal theft to local law enforcement authorities unless she withdrew her discrimination lawsuit.²⁴² The court initially dismissed her retaliation claim, citing well-established Third Circuit precedent requiring that the alleged retaliation "affect the plaintiff's current or future employment—e.g., it must 'alter [] the employee's compensation, terms, conditions, or privileges of employment, deprive [] him or her of employment opportunities, or adversely affect [] his [or her] status as an employee.'"²⁴³ After the Supreme Court's decision in *Burlington Northern*,

239. *Id.* § 2000e-2(a)(1).

240. Whether the harm alleged is sufficiently adverse to warrant Title VII relief is a question that lies beyond the scope of this Article. That question, of course, was the central one presented in *Burlington Northern* and is also the topic of a different article. See generally Taylor, *supra* note 6.

241. *Walsh v. Irvin Stern's Costumes*, 2006 WL 2380379 (E.D. Pa. Aug. 15, 2006).

242. *Id.* at *1.

243. *Id.* at *1 (citing *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997)).

however, the plaintiff requested that the court reconsider its dismissal of her retaliation claim, and the court thereupon reinstated it.²⁴⁴ In so doing, the court disregarded the dictum status of the Supreme Court's pronouncement that an alleged retaliatory harm need not affect employment. Instead, the court focused exclusively on the *Burlington Northern* Court's broader holding that the alleged harm must have been "materially adverse to a reasonable employee" such that it "might 'dissuade a reasonable worker from making or supporting a charge of discrimination.'"²⁴⁵ The court held that the plaintiff's allegations met this revised materiality standard and that its reinstatement was therefore appropriate.²⁴⁶

Had the *Walsh* court engaged in the independent inquiry suggested here, the outcome might have been different. The court was apparently convinced upon initial review of the plaintiff's claims that the alleged threats bore no relationship to her job and would have no effect on her current or future employment.²⁴⁷ It would be a stretch, to say the least, to characterize the alleged threat of criminal charges as an employment practice, at least on the facts provided in the court's slim opinion. Moreover, it is difficult to imagine how regulation of such conduct might affect the ultimate goal of workplace equality that Title VII is intended to promote. While filing false criminal allegations should not be condoned, its regulation under a statute aimed at workplace equality simply does not make sense. Individuals affected by such a wrong may find redress in other civil rights laws or in state statutes regulating malicious prosecution, but should confine their claims under Title VII to those that affect employment. As such, the court's decision in *Walsh* that Title VII may encompass these harms—tainted as it is by the court's blind adherence to questionable Supreme Court dictum—stretches the bounds of Title VII too far. Instead of following the Court's dictum blindly, the *Walsh* court should have engaged in its own independent inquiry into the redressability of the alleged wrongs under a statute aimed at workplace equality.

Other courts have likewise adhered blindly to the Supreme Court's dictum, but with less striking results. For instance, in *Boeser v. Sharp*, the court relied directly upon the Supreme Court's statement in *Burlington*

244. *Id.* at *2.

245. *Id.* (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 60 (2006)).

246. *Id.*

247. *Id.* (quoting *Walsh v. Irvin Stern's Costumes (Walsh I)*, 2006 WL 166509, at *6 (E.D. Pa. Jan. 19, 2006)).

Northern that Title VII's anti-retaliation provision "extends beyond workplace-related or employment-related retaliatory acts and harm" to reverse its earlier determination that a letter threatening recovery of attorney fees could not support a retaliation claim because it did not affect the plaintiff's employment status.²⁴⁸ The court did not acknowledge the dictum status of that instruction and engaged in no independent inquiry whatsoever on that point.²⁴⁹ Instead, the court simply stated that the Supreme Court's instruction—which, notably, it termed a holding—necessitated reversal of its earlier determination that Title VII did not cover the alleged harm.²⁵⁰ The court's determination on that point did not, however, affect the ultimate outcome. That is, regardless of the outcome, had the court engaged in an independent inquiry of the alleged harm's work-relatedness, the ultimate disposition would not have changed because the court went on to conclude that the harms alleged were not sufficiently severe to support a claim.²⁵¹ This determination alone would have supported the defendant's motion for summary judgment, notwithstanding the court's assessment of the alleged harm's work-relatedness.²⁵²

In other cases, the courts' blind adherence to the Supreme Court's dictum did not affect the outcome because the harms alleged bore at least an indirect relationship to the plaintiff's workplace or employment. In *Persichitte v. Board of Trustees of the University of Northern Colorado*, the court denied defendant's motion for summary judgment on plaintiff's retaliation claim in which she alleged that the defendant university had, among other things, contacted her new employer to accuse her of improper conduct while in the university's employ and to inform the new employer of the initiation of an ethics inquiry.²⁵³ The court pointed out that *Burlington Northern* extended the reach of Title VII's anti-retaliation provision beyond actions affecting "the terms, conditions, or privileges of

248. Boeser v. Sharp, 2006 WL 3703932, at *2 (D. Colo. Dec. 14, 2006) (quoting *Burlington Northern*, 548 U.S. at 67).

249. *Id.*

250. *Id.*

251. *Id.* at *2–3.

252. *Id.*; see also *McDonald v. Gonzales*, No. 7:05-CV-55, 2007 WL 951445, at *9–11 (N.D.N.Y. Mar. 27, 2007) (failing, in light of *Burlington Northern* dictum, to assess work-relatedness of harms alleged in support of the retaliation claim—issuance of erroneous tax forms and grouping of reported income so as to increase tax liability—but holding that alleged harms were insufficient to support a claim in any event).

253. *Persichitte v. Bd. of Trs. of the Univ. of N. Colo.*, No. 05-CV-01508-PSF-PAC, 2007 WL 218781, at *8 (D. Colo. Jan. 26, 2007).

employment or future employment opportunities,” but did not address the work-relatedness of the alleged harms, one way or another.²⁵⁴ Instead, the court determined that the alleged harms met the threshold level of severity required under *Burlington Northern* and denied summary judgment on those grounds, without regard to whether the harms affected the workplace.²⁵⁵ In this case, however, unlike in the *Walsh* case discussed above, the court’s disregard for the dictum status of *Burlington Northern*’s non-workplace instruction probably did not affect the outcome. The harms alleged—contacting a new employer with allegations of improper conduct—bear directly upon the plaintiff’s employability and employment prospects, and therefore could readily be construed as an employment practice. As such, the court’s failure to acknowledge the *Burlington Northern* dictum was probably without consequence.

The same is probably true of the court’s reversal of defendant’s summary judgment on plaintiff’s retaliation claim in *Moore v. City of Philadelphia*.²⁵⁶ The three white police officer plaintiffs in that case alleged a plethora of retaliatory harms after they complained about their supervisors’ treatment of other black officers.²⁵⁷ Many of these harms bore a direct relationship to the plaintiffs’ employment, such as less desirable work assignments and job transfers, poor performance evaluations, and physical assaults at the workplace.²⁵⁸ The work-relatedness of at least one of the alleged harms—a supervisor’s intervention in one plaintiff’s legal battle for custody of his child—is more questionable.²⁵⁹ Yet, while the court specifically referenced the *Burlington Northern* dictum—failing to acknowledge it as such—the court never considered the work-relatedness of any of the harms alleged but rather assessed each alleged harm with regard only to its materiality.²⁶⁰ Thus, when it considered the alleged intervention in plaintiff’s custody battle, the court never acknowledged that the alleged harm might not affect the workplace and therefore fall beyond Title VII’s reach.²⁶¹ Instead, the court characterized this allegation as part of a “pattern of harassment” that “might dissuade a reasonable worker from bringing or supporting a charge of discrimination,” thereby grouping

254. *Id.*

255. *See id.*

256. *Moore v. City of Philadelphia*, 461 F.3d 331 (3d Cir. 2006).

257. *Id.* at 338–40.

258. *Id.* at 339.

259. *See id.*

260. *Id.* at 346–49.

261. *Id.* at 348–49.

this allegation with other harms that bore a more direct relationship to the workplace, and finding it sufficiently severe to be actionable as such.²⁶² Accordingly, the court's failure to address the work-relatedness of this singular alleged harm, in the face of numerous other harms directly affecting the plaintiff's employment, was without consequence.

In sum, several clear trends emerge from these post-*Burlington Northern* cases. No court faced with an alleged harm bearing little to no relationship to the workplace has acknowledged that the Supreme Court's instruction on non-workplace harms was dictum. Each such court has recited plainly the Supreme Court's determination on that point and has applied it as binding law. As discussed above, courts should not engage in blind adherence to Supreme Court dictum when the law favors a different result. Such blind adherence carries with it the risk of reaching what would otherwise be an erroneous decision, as evidenced by at least one of the post-*Burlington Northern* cases.²⁶³ The occurrence of such potentially erroneous outcomes directly attributable to blind reliance upon dictum is troubling. Yet, at least so far, no such widespread trend has emerged. Instead, it appears that the decisions of many courts addressing harms bearing only an indirect relationship to the workplace are not affected by reliance upon the Court's dictum because the outcome is often determined by some other subissue. Given that a plaintiff must cross a number of hurdles in order to establish a viable retaliation claim, the prevalence of cases that turn on the work-relatedness of the alleged harms is likely to remain low. Nevertheless, just because the cases are not commonplace does not mean they do not deserve proper attention and treatment. Proper attention and treatment requires an independent assessment of whether the law invoked affords recovery for the alleged harm—not blind adherence to dictum.

VI. CONCLUSION

While the Supreme Court stated unequivocally and early in its existence that its dictum is not binding, a faulty trend has developed among the lower courts of blindly following Supreme Court dictum in the absence of other directly binding precedent. The error of such courts' ways is neither unjustified nor surprising, yet it should not persist. The very

262. *Id.*

263. *See* Walsh v. Irvin Stern's Costumes, No. 05-2515, 2006 WL 2380379, at *2-3 (E.D. Pa. Aug. 15, 2006) (relying directly upon dictum to reinstate retaliation claim based on allegation that defendant threatened to accuse plaintiff of theft and seek criminal charges against her).

underpinnings of our judicial system, founded upon principles of stare decisis and a constitutionally compelled separation of powers among the three branches of federal government, demand that courts delve a bit more deeply into the relevant legal issue and not blindly adhere to Supreme Court dictum. The better approach for a court to take when faced with pertinent Supreme Court dictum is to engage in an independent assessment of that dictum, focused on the relevant body of law and prevailing policy concerns, to determine whether the dictum warrants adoption or not.

Courts confronting claims of retaliation under Title VII after the Supreme Court's 2006 decision in *Burlington Northern* have the opportunity to depart from the recent trend toward blind adherence to dictum and instead engage in the independent assessment that this Article proposes and the Constitution arguably compels. It is clear that the harms Sheila White alleged in that case bore a direct relationship to her job, so it was entirely unnecessary for the Court even to consider, much less decide, whether Title VII's anti-retaliation provision encompassed non-workplace harms.²⁶⁴ As such, the Court's statement that it does was indisputably dictum. Blind adherence to this dictum, while in some respects appealing, does not do justice to the statute's language, its purpose, or the broader policies it serves. Title VII's goal of workplace equality is a worthy one and is not to be taken lightly, but expanding the reach of Title VII beyond the workplace is not the best or even an appropriate means of attaining that goal. Instead, courts should engage in an independent inquiry in each case to determine whether the harm alleged bears a sufficient nexus to the employment relationship or the workplace to warrant Title VII relief. This inquiry may be guided by the language of the statute itself, by the case law interpreting the core substantive provision, or by a broader based assessment of whether affording relief under the circumstances would promote the statute's primary purpose of workplace equality. Undertaking such an independent inquiry would allow for applications that are more consistent with the statutory language and better serve Title VII's purposes than would blind adherence to the Court's relatively unguided, out-of-context assertion that Title VII's anti-retaliation provision is essentially unbounded. The lower courts should not perpetuate the Supreme Court's errant and pernicious dictum but should instead assess each case independently in light of the statute's demands.

264. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57–59 (2006).