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> I cannot tell you how many times I have read briefs asserting an improbable proposition of law and citing a case as authority. The proposition sounds so dubious that I immediately look it up to see if the cited court can really have made this ruling. So often I find the proposition is indeed there, but was uttered in dictum—where the court paid no price, and consequently paid little attention.[1]

INTRODUCTION

For close to a century, members of the legal profession have debated the distinction between holding and dicta.[2] Even

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[1] Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1263 (2006).

[2] *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66-67 (1996); Ingram v. Comm'r of Soc. Sec. Admin., 496 F.3d 1253, 1265-66 (11th Cir. 2007); Tate v. Showboat Marina Casino P'ship, 431 F.3d 580, 582 (7th Cir. 2005); Cetacean Cmty. v. Bush, 386 F.3d 1169, 1173-74 (9th Cir. 2004); People v. Williams, 788 N.E.2d 1126, 1135-37 (Ill. 2003); State v. Baby, 946 A.2d 463, 495-99 (Md. 2008) (Raker, J., dissenting); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 177-78 (1996); Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005); Ruggero Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605 (1990); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 25 (1989); David Coale & Wendy Couture, *Loud Rules*, 34 PEPP. L. REV. 715, 716 (2007); *Dictum Revisited*, 4 STAN. L. REV. 509 (1952); Michael Dorf, *Dicta and Article III*, 142 U. PENN. L. REV. 1997, 1998 (1994); Thomas Fowler, *Holding, Dictum . . . Whatever*, 25 N.C. CENT. L.J. 139 (2003); Henry J.

when judges and scholars have articulated seemingly workable definitions, difficulty still remains in applying them to real cases. This debate has gone on for so long that one questions whether the problem can ever be resolved. But most of the debate to date has focused on determining what qualifies as holding—and therefore by negative inference—what qualifies as dicta. Some authors have attempted to clarify existing definitions,[3] while others have proposed new definitions.[4] Yet little attention has been paid to *why*, even after substantial consideration, lawyers and judges continue to confuse dicta for holding and holding for dicta. No doubt, the distinction is difficult to articulate, and that alone suggests that confusion in the application is inevitable. However, even if such confusion is unavoidable, understanding the reasons that underlie it may allow us to establish practices that would help clarify the holding/dicta distinction.

Because of the rule-making power judges enjoy under principles of stare decisis,[5] our judicial system depends on

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Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 385-86 (1964); Arthur Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930); Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. LEG. ED. 431 (1989); Leval, *supra* note 1; Adam Steinman, *A Constitution for Judicial Lawmaking*, 65 U. PITT. L. REV. 545 (2004); Lisa M. Durham Taylor, *Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms*, 57 DRAKE L. REV. 75 (2008); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1408 (1995).

[3] *See, e.g.*, Alexander, *supra* note 2; Dorf, *supra* note 2.

[4] *See, e.g.*, Abramowicz, *supra* note 2, at 1044-94.

[5] *See, e.g.*, POSNER, *supra* note 2, at 371-82; Leval, *supra* note 1, at 1258-59; Steinman, *supra* note 2, at 552; Aldisert, *supra* note 2, at 607, 628; Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 886 (2006); Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1069 (2006) ("[A]ny first year law student knows that judges make law constantly.").

The subject of stare decisis continues to capture attention. Stephen Colbert recently dedicated a segment of *The Colbert Report* to the principle of stare decisis. That segment, "The Word—Prece-Don't" (mocking "precedent"), began with Colbert saying: "I believe in America's legal system, except when it makes rulings I don't like." *The Colbert Report*, *The Word—Prece-Don't* (Comedy Central television broadcast Jan. 27, 2010), *available at* http://www.colbertnation.com/the-colbert-report-videos/262612/january-27-2010/the-word---prece-don-t [hereinafter *Colbert Report*]. He added that those decisions are lasting because of stare decisis. *Id.* He then noted, however, that "Chief Justice John Roberts has a brilliant legal strategy to get around following precedent." *Id.* Colbert criticized Chief Justice Roberts's concurring opinion in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010) (Roberts, C.J., concurring). *Colbert Report*, *supra*. Colbert claimed that Justice Roberts's reliance on the "two 'spirited dissents'" in a 1990 decision as a reason to overrule that authority, *Citizens United*, 130 S. Ct. at 922, will disrupt stare decisis. *Colbert Report*, *supra*. Although Colbert acknowledged that there is "ample precedent for ignoring precedent" (citing *Bush v. Gore*, 531 U.S. 98 (2000)), "[a]ccording to Chief Justice Roberts, any Supreme Court precedent that was not unanimous is now in question." *Id.* Colbert

understanding what is and what is not a holding. Everyone agrees that subsequent courts are bound only by a prior case's holding.[6] But too often lawyers argue for, and judges treat, extraneous statements made in a prior case—that is, dicta—as holding. This ratcheting up of persuasive law into binding law is problematic on a number of fronts. To the extent that courts treat dicta as holding, they are more likely to reach incorrect decisions, to exceed their judicial authority, and to generate illegitimate results.

This article aims to identify the causes that lead to the repeated conflation of dicta with holding. Based on these underlying causes, it advances a few tentative proposals to reduce the confusion between holding and dicta and its detrimental impact on the judicial system. Part I discusses the distinction between holding and dicta. It also identifies the major justifications for the distinction: accuracy, judicial authority, and legitimacy. Part II provides a series of concrete examples to demonstrate the problems that ensue when courts blur holding and dicta and how that results in dicta being elevated to holding.

Part III identifies three potential culprits for the holding/dicta confusion, which remains despite the vast quantity of ink spilt attempting to clarify the distinction. The first cause is the recursive nature of the legal system, which essentially causes a "ripple effect." Judges confuse holding and dicta, which then confuses lawyers; lawyers blur holding and dicta, which then confuses judges.[7] And both groups may be confused even further by the unresolved scholarly debate on the topic.[8]

The second cause of confusion is the tendency of courts to mimic the Supreme Court.[9] The purpose, structure, and practice of the Supreme Court differ greatly from those of other federal courts and of state courts. The Supreme Court sets broad policy, which invites espousing dicta that would be unnecessary if the Court's sole function were to narrowly resolve litigants' disputes.[10] The Court also issues less than one

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concluded that "[f]uture courts must respect Justice Roberts's decision that he doesn't have to respect previous decisions." *Id.*

[6] *See, e.g.*, Abramowicz, *supra* note 2, at 957; Aldisert, *supra* note 2, at 607; Leval, *supra* note 1, at 1259.

[7] *See infra* Part III.A.

[8] *See infra* note 111.

[9] *See infra* Part III.B.

[10] *See infra* note 119 and accompanying text.

hundred opinions each year, and those opinions tend to be lengthy, allowing more space for extraneous commentary—which, in judicial terms, means dicta.[11] Yet other courts look to the Supreme Court in formulating their own judicial opinions.[12] This exacerbates the confusion between holding and dicta.

The third cause is the overemphasis on words, phrases, and quotations to the exclusion of legal principles.[13] Holdings are rarely presented in neatly packaged statements. To determine the holding of a case, the reader must analyze the facts, issues, rationales, and result of that case.[14] In contrast to the difficult task of determining a case's holding, it is often easy to locate language in an opinion that, on its face, supports a particular position, even when the case itself does not stand for that proposition.[15] This reliance on words, phrases, and quotations increases the likelihood that dicta will be confused for a court's actual holding. This overemphasis has evolved for a number of reasons. First, the changing nature of opinion writing—caused by increasing case loads and the greater reliance on law clerks—plays a part.[16] Second, the ability via electronic legal research to search for key words rather than broader concepts contributes as well.[17] Third, current citation rules reflect a bias toward statements made by courts over case holdings.[18] And fourth, changes in broader society—changes to which the legal community is not immune—suggest an overemphasis on words, phrases, and quotations.[19]

Finally, Part IV concludes, suggesting some potential solutions to minimize the confusion between holding and dicta, and ways to mitigate its negative consequences. First, education is perhaps the single most promising antidote to this problem.[20] Second, increasing judicial resources would allow for more time to be spent on each opinion, also reducing the confusion between holding and dicta.[21] Finally, changes to key citation and ethical rules would provide a mechanism for

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[11] *See infra* notes 120-22 and accompanying text.
[12] *See infra* notes 126-30 and accompanying text.
[13] *See infra* Part III.C.
[14] *See infra* note 132 and accompanying text.
[15] *See infra* notes 155-72 and accompanying text.
[16] *See infra* Part III.C.1.
[17] *See infra* Part III.C.2.
[18] *See infra* Part III.C.3.
[19] *See infra* Part III.C.4.
[20] *See infra* notes 197-210 and accompanying text.
[21] *See infra* notes 211-13 and accompanying text.

lawyers and judges to make it explicit when they were relying on dicta and ensure that they would be properly motivated to pay attention to the distinction between holding and dicta.[22]

I. REASONS FOR THE HOLDING/DICTA DISTINCTION

Much has been written about the holding/dicta distinction, both by judges and by scholars.[23] A holding is generally thought of as those parts of a judicial opinion that are "necessary" to the result.[24] Dictum, on the other hand, is anything in a judicial opinion that is *not* the holding.[25] But the distinction is more difficult to capture in practice than these narrow definitions suggest.[26] In light of the problems created by the blurred holding/dicta distinction, a number of judges and scholars have attempted to create a more workable definition of "holding" than those parts of the opinion "necessary to the result."[27] The majority of attempts fall within one of two camps: (1) a holding is limited to the facts plus the outcome;[28] and (2) a

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[22] *See infra* notes 214-23 and accompanying text.

[23] *See supra* note 2. For a clear and relatively short summary of the scholarly debate, see Taylor, *supra* note 2, at 97-100.

[24] *See, e.g.*, Greenawalt, *supra* note 2, at 435; Coale, *supra* note 2, at 726; Dorf, *supra* note 2, at 2003.

Abramowicz and Stearns propose a new definition: "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." Abramowicz, *supra* note 2, at 961.

[25] *See, e.g.*, Greenawalt, *supra* note 2, at 435; Leval, *supra* note 1, at 1257 ("To say that a court's statement is a dictum is to say that the statement is not the holding.").

[26] *See, e.g.*, Alexander, *supra* note 2, at 25 ("I should add a word about the distinction between holding and dictum, the existence of which all lawyers are trained to acknowledge, but the determination of which proves in practice to be quite controversial."); *Dictum Revisited*, *supra* note 2, at 509 ("Every lawyer thinks he knows what [dictum] means, yet few lawyers think much more about it. Nonthinking and overuse combine to make for fuzziness."); Dorf, *supra* note 2, at 2003, 2028; Leval, *supra* note 1, at 1258; *see also* Cetacean Cmty. v. Bush, 386 F.3d 1169, 1173 (9th Cir. 2004) (noting the "line is not always easy to draw" but concluding in that case that the statement at issue was non-binding dicta). The distinction may be difficult in part because, as some have argued, precedent is a "matter of degree." *See, e.g.*, Dorf, *supra* note 2, at 2050; *Dictum Revisited*, *supra* note 2, at 518.

[27] *See, e.g.*, Aldisert, *supra* note 2; Alexander, *supra* note 2; Dorf, *supra* note 2; Goodhart, *supra* note 2, Leval, *supra* note 1.

[28] *See, e.g.*, Alexander, *supra* note 2, at 29-30. Under the "facts plus outcome" theory, limiting the holding to the underlying facts and the final result ensures courts do not go beyond the particular case before them and create broad or prospective rules that bind others. *See, e.g.*, Aldisert, *supra* note 2, at 607; Goodhart, *supra* note 2, at 162, 179, 182. This approach is appealing, most significantly because it is arguably easier to identify the facts and outcome of a given decision than it is to articulate the rationale/reasoning. However, judges rarely state every relevant fact in an opinion, and

holding includes the rationale or reasoning a court employs to reach a particular result.[29]

For purposes of this article, the precise definition of holding (and therefore dicta) is immaterial. Even using a liberal definition of holding, which would include the rationale supporting the court's decision, lawyers and judges regularly treat dicta like a case's holding.[30] Many have pointed out the plethora of problems that ensue when the distinction is not preserved.[31] In addition to the general instability that arises

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judicial efficiency suggests this might be justified, especially when the outcome is a relatively foregone conclusion, as in many criminal appeals. Additionally, the facts in a particular case are almost never identical to the facts in a subsequent case. *See* Aldisert, *supra* note 2, at 613-17.

[29] *See generally* Dorf, *supra* note 2, at 2024. Under the rationale/reasoning approach, courts are more able to determine how broadly or narrowly the facts from a previous case should be interpreted. *See, e.g.*, Friendly, *supra* note 2, at 385-86; Leval, *supra* note 1, at 1256-57; *see also* Hart v. Massanari, 266 F.3d 1155, 1170-71 (9th Cir. 2001). Under this theory, the underlying *principles* in a judicial opinion are binding. In addition to resolving concerns about the level of factual abstraction, the main benefit of this approach is stability: judges have less ability to distinguish binding precedent simply because they do not wish to follow it. Dorf, *supra* note 2, at 2024. If the rationale is the same, the later court is bound. Tate v. Showboat Marina Casino P'ship, 431 F.3d 580, 582 (7th Cir. 2005) (concluding that "the holding of a case includes, besides the facts and the outcome, the reasoning essential to that outcome"). However, discerning the rationale or reasoning from a prior case is not always easy to do. Dorf, *supra* note 2, at 2040.

[30] *See infra* notes 81-102 and accompanying text. Literary critics, however, would challenge even the underlying distinction between holding and dicta. They argue that "there are no determinate meanings and that the stability of the text is an illusion." STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 312 (1980). Applying this principle to the law, case holdings are neither firm nor universally determinable. Instead, literary critics argue that each reader's interaction with the text is what creates meaning, and that meaning is necessarily influenced by the reader's experiences and perspectives. *See, e.g.*, *id.* at 2 (arguing that meaning is not "embedded in the text" leaving the reader to simply accurately identify that meaning; instead, "meaning develops . . . in a dynamic relationship with the reader's expectations, projections, conclusions, judgments, and assumptions"); James Boyd White, *Legal Knowledge*, 115 HARV. L. REV. 1396, 1398 (2002) ("Any claim that the law is this or that, or should be read in this or that way, must be made with the awareness that someone else, with adverse interests, may challenge it."). And even if holdings can be determined, "all readers of legal texts, judges as well as law students, subconsciously supply multiple contexts when they read, whether they believe they do or not." Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 166 (1993). For a good summary of this debate, see Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887, 900-03 (2002). These criticisms have some merit but are beyond the scope of this article, which presumes for the sake of argument that case holdings are determinable, and therefore the distinction between holding and dicta is valid.

[31] *See, e.g.*, Ingram v. Comm'r of Soc. Sec. Admin., 496 F.3d 1253, 1266 (11th Cir. 2007); State v. Baby, 946 A.2d 463, 495 (Md. 2008) ("Whether the statement is *dicta* or a holding is not merely an academic exercise, but instead, has real significance in the event there is a retrial of this case, for several reasons.") (Raker, J., dissenting); Abramowicz, *supra* note 2, at 958; Dorf, *supra* note 2, at 2004; Leval, *supra* note 1, at 1250.

when rules are unclear,[32] certain legal claims require that we be able to readily determine holdings.[33]

To combat these general and specific problems, the three most persuasive rationales for maintaining the distinction between holding and dicta are: (1) accuracy, (2) judicial authority, and (3) legitimacy.

A. Accuracy

Accuracy refers to the likelihood that a court's decision is actually correct.[34] In a judicial system based upon stare decisis, reaching the "correct" result is important because holdings bind future courts, so the impact of a single decision is often magnified. And a court is simply more likely to be right when all the arguments relevant to a particular point are articulated, when a judge thoroughly considers all of those arguments, and when the point is essential to the outcome or decision.[35] Statements without full consideration of the merits[36] are more likely to be wrong for obvious reasons: counsel may not have argued the issue or fleshed out the range of options, and the court may not have devoted much time or effort to resolving the problem.

Even when a court has thoroughly considered the issue,[37] if the statement has no impact on the merits, a court is

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[32] *See, e.g.*, Dorf, *supra* note 2, at 2004-05; Leval, *supra* note 1, at 1255.

[33] For example, in order to pierce a public official's qualified immunity, the plaintiff has to demonstrate both that the defendant violated her constitutional right and that "the right at issue was 'clearly established' at the time of defendant's alleged misconduct." Pearson v. Callahan, 129 S. Ct. 808, 815-16 (2009). When holdings and dicta are indistinguishable, it is difficult to imagine any "clearly established" rights.

[34] Dorf, *supra* note 2, at 2000; *see also* Coale, *supra* note 2, at 725.

[35] Leval, *supra* note 1, at 1255 ("The distinction [between holding and dicta] is not a mere technicality. . . . [C]ourts are more likely to exercise flawed, ill-considered judgment, more likely to overlook salutary cautions and contraindications, more likely to pronounce flawed rules, when uttering dicta than when deciding their cases."); *see also* Greenawalt, *supra* note 2, at 434 ("Courts are most to be trusted when they focus on particular disputes. . . . What courts decide, therefore, is much more reliable than their passing comments on peripherally related legal subjects.").

[36] These statements are termed "obiter dicta" and they tend to be the most suspect in terms of accuracy. *See, e.g.*, Phelps Dodge Corp. v. Ariz. Dep't of Water Res., 118 P.3d 1110, 1116 n.9 (Ariz. Ct. App. 2005); People v. Williams, 788 N.E.2d 1126, 1136 (Ill. 2003); Aldisert, *supra* note 2, at 609; Leval, *supra* note 1, at 1260.

Some courts suggest that even obiter dicta, when issued by "a court of last resort," can be binding absent contrary authority. *Williams*, 788 N.E.2d at 1136 (quoting the dissenting opinion of the lower court judge questioning "why the Supreme Court bothered to publish the dicta that we have decided to ignore").

[37] These statements, termed "judicial dicta" or "considered dicta," are those statements made after full and careful consideration of the issues but that are not

more likely to be wrong.[38] In these instances, the court has less incentive to ensure the "correct" decision because it is not binding on the parties before the court,[39] much less future litigants.[40]

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essential to the result. *See, e.g.*, Coale, *supra* note 2, at 727-28; Taylor, *supra* note 2, at 93-94; *see also Williams*, 788 N.E.2d at 1136.

Courts and commentators are less concerned with the accuracy of judicial dicta because it was more thoroughly considered than obiter dicta. *See, e.g.*, Red 11, LLC v. Conserv. Comm'n of Fairfield, 980 A.2d 917, 927 n.9 (Conn. App. Ct. 2009) (stating that considered dicta is binding). The *Red 11, LLC* court justified reliance on dicta in a previous opinion by the Appellate Court of Connecticut with this language: "As we have previously recognized, . . . *it is not dictum when a court of [appeal] intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy* . . . . Rather, such action constitutes an act of the court which it will thereafter recognize as a binding decision." *Id.* (alteration in original) (citations omitted).

The quoted passage, although cited to an earlier Connecticut case, originated in a 1922 Wisconsin case, *Chase v. American Cartage Co.*, 186 N.W. 598, 599 (Wis. 1922). That court stated, however, not that the considered dicta of any court of appeal (the bracketed language above) is binding, but that the considered dicta from a *court of last resort* was binding. *Id.* Furthermore, the decision in *Chase* relied on rulings in the alternative (first that the court would not extend a rule, and second that the court would overrule the principle to begin with), and most courts recognize alternative rulings as binding holdings, not dicta, in the first place. *Id.*

Similarly, some argue that judicial dictum is binding "absent a cogent reason for departing from it." *Phelps Dodge Corp.*, 118 P.3d at 1116; *see also Williams*, 788 N.E.2d at 1136 (arguing judicial dicta "should receive dispositive weight in an inferior court"). Yet because it is not necessary for the result, even if thoughtfully contemplated, most posit that it remains dicta and has no binding power over future courts. Coale, *supra* note 2, at 727-28 (but noting that because the accuracy concerns are absent, judicial dicta is afforded "greater deference" than "ordinary dicta," with courts treating judicial dicta "almost like holdings"). Furthermore, dicta in this category still suffer from the second and third reasons articulated for rejecting its ability to bind future courts: the issuing court exceeded its judicial authority to promulgate the statement unless it was necessary to the case before the court, and its promulgation is arguably illegitimate. *See infra* notes 48-71 and accompanying text.

[38] Judge Leval points out that when a declared rule has "no consequence for the case"—i.e., it is dicta—courts are unlikely to pay much attention to the rule. "In my experience, when courts declare rules that have no consequence for the case, their cautionary mechanism is often not engaged. *They are far more likely in these circumstances to fashion defective rules, and to assert misguided propositions*, which have not been fully thought through." Leval, *supra* note 1, at 1263 (emphasis added).

[39] Although this argument is somewhat circular—considered dicta is less likely to be accurate because the court knows it is non-binding dicta, and the holding/dicta distinction should be preserved to prevent inaccurate decisions—it remains true that courts should bind future parties only when there exists the highest level of confidence in those decisions. For example, courts regularly exercise their discretion to denote opinions as "unpublished," eliminating any binding effect on future litigants. Amy E. Sloan, *The Dog that Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 765 (2009).

[40] Even for case holdings, the widespread practice of designating judicial opinions as "unpublished," and therefore non-binding, demonstrates the need to restrict the reach of judicial decisions when there is less confidence in their accuracy. J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 ARIZ. L. REV. 419, 421 (2005); *cf.* Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L.

This result is not unique to dicta; courts similarly cannot rule, and therefore cannot create binding precedent, in cases absent standing[41] or when the decision is moot.[42] When a party does not have standing or a decision would be moot, the opportunities and incentives for a full adversarial process are lessened; the same holds true when a court espouses dicta. In addition to ensuring the court is within its authority by deciding an actual case or controversy,[43] these requirements are more likely to result in the "right" decision.[44]

Some courts seem to defer to the deciding court, granting special consideration to the intent of the court issuing judicial dicta.[45] Rarely, though, does a court's intention appear to be dispositive.[46] As Judge Leval so clearly articulated,

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REV. 705 (2006) (arguing that courts should have addressed the propriety of issuing unpublished opinions in the first place when they debated whether to adopt a rule allowing citation to unpublished opinions).

[41] *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168-82 (1992); *see also* Flast v. Cohen, 392 U.S. 83, 101 (1968) (standing focuses on "whether the party invoking" jurisdiction has "'a personal stake in the outcome of the controversy,' and whether the dispute touches upon 'the legal relations of parties having adverse legal interests'") (citations omitted). The Court added that "personal stake and interest . . . impart the necessary concrete adverseness" to the litigation, conferring standing. *Id.* The "nexus" requirement in turn provides confidence in the final decision. *Id.* at 101-06.

[42] *See generally* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603 (1992). And although mootness has an Article III component, that cannot be the exclusive justification, as exceptions are somewhat routinely granted. *See, e.g.*, *id.* at 609; *see also* Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring).

[43] *See infra* notes 48-66 and accompanying text.

[44] *See, e.g.*, Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 460 (2009) (standing ensures "that courts decide only those issues that are briefed and argued by stakeholders with an incentive to adequately represent their interests to the court, which in turn will produce better judicial decisions"). *But see* Schauer, *supra* note 5, at 918 (noting "real events, real parties, real controversies, and real consequences may have distorting effects as well as illuminating ones").

[45] Phelps Dodge Corp. v. Ariz. Dep't of Water Res., 118 P.3d 1110, 1116 n.9 (Ariz. Ct. App. 2005) ("'Judicial dictum' is a statement the court expressly declares to be a guide for future conduct and is therefore considered authoritative.").

[46] *See, e.g.*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2 (1949) (noting it "is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification"); Abramowicz, *supra* note 2, at 955. *But see* Bush v. Gore, 531 U.S. 98, 109 (2000) (stating the Court's "consideration is limited to the present circumstances"). The anticipated breadth or limits of a court's decision arguably are of no consequence; the holding is binding, and the remainder, although it may be highly persuasive, is not binding. *But see* Teresa Godwin Phelps & Jenny Ann Pitts, *Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation*, 29 ST. LOUIS U. L.J. 353, 355-62 (1985); Wald, *supra* note 2, at 1398 ("The way in which the court describes its own holding may also be important for its future precedential status. Sometimes the court emphasizes the narrowness of what it is deciding; at other times it tells the audience that this is a broader benchmark opinion, putting other prior cases in perspective."). Authorial

"dictum is not converted into holding by . . . preceding it with 'We hold that . . . .'"[47]

B. Judicial Authority

Courts can only create binding law when they actually have the power to do so.[48] Several authors have commented on the potential constitutional problems created by federal courts espousing dicta.[49] Article III's[50] Case-or-Controversy Clause limits the courts' power to issue rulings by requiring that an actual dispute exist between two or more adverse parties before the matter can be decided. Courts are specifically precluded from legislating,[51] as that power is reserved to Congress.[52] When a court suggests what the proper result should be under circumstances not before that court, the case-or-controversy requirement is violated. Even for state courts, separation of powers necessarily limits courts to resolving the dispute before them.[53] Legislatures should legislate and courts should decide only the cases they are presented with, not future disputes.

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intent posits that a text should be interpreted consistent with the intent of the author. Phelps & Pitts, *supra*, at 357-62. In an article comparing text-centered interpretation with interpreter-centered interpretation, Phelps describes the view of Italian legal historian Emilio Betti as follows: "the author's meaning is the norm by which the validity of any interpretation is measured." *Id*. at 359.

[47] Leval, *supra* note 1, at 1257.

[48] *See, e.g.*, Dorf, *supra* note 2, at 2000; Coale, *supra* note 2, at 726. *But see* Peter Schanck, *Taking Up Barkan's Challenge: Looking at the Judicial Process and Legal Research*, 82 LAW LIBR. J. 1, 5 (1990) ("There is, of course, disagreement among the theorists about the degree of discretion available to judges.").

Some authors refer to this concept as "legitimacy." *See, e.g.*, Dorf, *supra* note 2, at 2000, 2002. This article uses the term "legitimacy" to refer to a different rationale supporting the holding/dicta distinction. *See infra* notes 67-71 and accompanying text.

[49] *See generally* Dorf, *supra* note 2; *see also* Leval, *supra* note 1, at 1259-60.

[50] U.S. CONST. art. III, § 2.

[51] F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 902-03 (2009). Despite this, judges create binding rules by virtue of stare decisis, Leval, *supra* note 1, at 1258-59, and as a result of the "canonical role" of the words in their judicial opinions. Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 684 (1986).

[52] U.S. CONST. art. I, § 1.

[53] Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1546-47 (1997). Justice Peters notes:

> Jurisprudentially, separation of powers represents a view of the body politic that, although not a prerequisite to a republican form of government, is nonetheless fundamental to any discussion of the appropriate ordering of governmental responsibilities, state or federal. Operationally, separation of powers provides doctrinal guideposts for courts to consider when drawing the line between the role of the judiciary and the role of popularly elected political institutions. Politically, separation of powers safeguards the

Furthermore, courts exceed their judicial authority when they take advantage of the confusion surrounding the holding/dicta distinction. That confusion creates opportunities for courts and counsel to behave disingenuously;[54] the preferred result can be reached by adjusting the level of deference due a prior opinion. When judges want to reach a particular result, even when it has not yet been held by a higher court or the same court, they can rely on dicta and, labeling it as holding, declare they are "bound" to follow the earlier case.[55] Because it is substantially more difficult to overrule a case than to decide a case of first impression (and impossible for a lower court to do so),[56] an unfair and insurmountable burden has been imposed

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> independence of the courts while providing a principled foundation for appropriately defined judicial deference to the views of other community policymakers.

Id.; *see also* Harold F. See, *The Separation of Powers and the Public Policy Role of the State Court in a Routine Case*, 8 TEX. REV. L. & POL. 345, 352-53 (2004); G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329 (2003).

[54] *See, e.g.*, Abramowicz, *supra* note 2, at 1024; *Dictum Revisited*, *supra* note 2, at 516; Dorf, *supra* note 2, at 2029.

[55] Chief Justice Roberts has accused Justice Breyer of this maneuver:

> Justice Breyer's dissent takes a different approach to these cases, one that fails to ground the result it would reach in law. Instead, it selectively relies on inapplicable precedent and even dicta while dismissing contrary holdings, alters and misapplies our well-established legal framework for assessing equal protection challenges to express racial classifications, and greatly exaggerates the consequences of today's decision.

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 735-36 (2007). Chief Justice Roberts's criticism of the dissent's use of dicta spans six pages. *See id.* at 735-41.

Justice Breyer responded by relying on the blurred distinction between holding and dictum:

> [T]he plurality downplays the importance of *Swann* and related cases by frequently describing their relevant statements as "dicta." These criticisms, however, miss the main point. *Swann* did not hide its understanding of the law in a corner of an obscure opinion or in a footnote, unread but by experts. It set forth its view prominently in an important opinion joined by all nine Justices, knowing that it would be read and followed throughout the Nation. The basic problem with the plurality's technical "dicta"-based response lies in its overly theoretical approach to case law, an approach that emphasizes rigid distinctions between holdings and dicta in a way that serves to mask the radical nature of today's decision. Law is not an exercise in mathematical logic. And statements of a legal rule set forth in a judicial opinion do not always divide neatly into "holdings" and "dicta."

Id. at 831 (Breyer, J., dissenting).

[56] *E.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (noting the "obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit"); *see also* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 581 (1987). At least arguably, courts should only explicitly, not impliedly,

by characterizing dicta as binding precedent.[57] It is true that counsel can, and often do, spend countless hours debating whether a particular statement is in fact holding or dicta.[58] But the lack of clarity in defining holding in the first place makes the task far more difficult and far more likely to yield illogical and potentially unfair results. Similarly, when confronted with binding authority that arguably answers the question, counsel and courts often evade the effect of that law by using the label "dicta"[59] and declaring the authority inapplicable to the case at hand.[60]

It should go without saying that not all uses of the "holding" and "dicta" labels are disingenuous, nor are all instances when courts create dicta attempts to unreasonably usurp their legitimate power. Courts are often motivated by practical considerations such as judicial efficiency. When writing an opinion explaining how a party, especially a repeat player like the government, got it "wrong," it makes some sense to explain what they could have done to get it "right" to avoid repeatedly litigating the issue.[61] Because the case where they

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overrule earlier decisions. United States v. Rodriguez, 311 F.3d 435, 439 (1st Cir. 2002); United States v. Sterling, 283 F.3d 216, 219 (4th Cir. 2002).

[57] Schauer, *supra* note 5, at 909 ("As long as precedent matters . . . there is the omnipresent possibility that any mistake will be systematically more powerful than any later attempts to correct it.").

[58] *See, e.g.*, Jennifer Bruch Hogan & Richard P. Hogan, Jr., *Charging the Jury in Changing Times*, 46 S. TEX. L. REV. 973, 988 (2005); Bruce A. McGlauflin, *Some Confusing Things Happened on the Way to Modernizing Maine's Adverse Possession Law*, 25 ME. B.J. 38, 43 (2010).

[59] Questioning the distinction, Professor Schauer notes that we often speak of "'mere' dicta as a way to justify ignoring some language in a case, but it is worthwhile to consider the effect of having to go through that exercise compared with the situation in which no such troublesome language exists." Schauer, *supra* note 56, at 580 n.22.

[60] Judge Wald identifies the rhetorical styles courts adopt in labeling statements as dicta or holding. Wald, *supra* note 2, at 1405-06. And Justice Breyer, responding to Chief Justice Roberts, criticizes him of misusing the "dicta" label, although not himself willing to use the "holding" label:

> [I]f the plurality now chooses to reject that principle, it cannot adequately justify its retreat simply by affixing the label "dicta" to reasoning with which it disagrees. Rather, it must explain to the courts and to the Nation *why* it would abandon guidance set forth many years before, guidance that countless others have built upon over time, and which the law has continuously embodied.

Parents Involved in Cmty. Schs., 551 U.S. at 831 (Breyer, J., dissenting).

[61] *See, e.g.*, United States v. Comprehensive Drug Testing, Inc., 579 F.3d 989 (9th Cir. 2009) (en banc). That case involved search warrants for digital evidence. Some members of the court criticized the majority for setting out five "procedures" they trusted would "prove a useful tool for the future," *id.* at 1006-07:

> Although I can appreciate the majority's desire to set forth a new framework with respect to searches of commingled electronic data, I am wary of this

got it "right" is not actually before the court, however, the court's opinions about permissible conduct are dicta.[62] Consequently, this thoughtful and helpful approach to resolving the problem has the potential for confusing the holding/dicta distinction.[63]

Furthermore, courts may misconstrue, and hence mislabel, prior dicta as holding simply in error. Judge Leval asks why "courts accept earlier dicta as holding"[64] and responds simply that judges "are human."[65] Unless the subsequent court disagrees with the proposition of the earlier court, there is not much incentive to take the time necessary to "determine whether the proposition was in fact a holding."[66]

> prophylactic approach. The majority's prescriptions go significantly beyond what is necessary for it to resolve this case. Accordingly, its protocols are dicta and might be best viewed as a "best practices" manual, rather than binding law.

Id. at 1012-13 (Callahan, J., concurring in part and dissenting in part). Judge Wald appears to agree with the Ninth Circuit dissenters, but also notes: "Still, one judge's dicta may be another judge's coherent rationale." Wald, *supra* note 2, at 1410; *see also* POSNER, *supra* note 2, at 177-78.

[62] They are thoughtful, considered dicta, because the court contrasted these reasons with what in fact happened to help determine the actions were wrong—but most would argue such language is also not truly necessary to the opinion. This is true at least under the facts plus outcome approach, discussed *supra* note 28.

[63] Transparency in most contexts is desired, and when espousing dicta, even for good reasons, courts can minimize confusion by explicitly labeling those statements as dicta.

For example, most courts and scholars contend that alternative holdings are binding. *See, e.g.*, Bravo v. United States, 532 F.3d 1154, 1162 (11th Cir. 2008) ("[I]n this circuit additional or alternative holdings are not dicta, but instead are as binding as solitary holdings."); United States v. Wright, 496 F.3d 371, 375 n.10 (5th Cir. 2007) (declaring it is "well-settled that alternative holdings are binding, they are not dicta"); Abramowicz, *supra* note 2, at 1028.

But some courts have concluded that alternative holdings are non-binding dicta, at least when one alternative holding involves a finding of unconstitutionality and the other ground, such as a procedural violation, does not require the court to reach the constitutional issue. Mt. Lebanon v. Cnty. Bd. of Elections, 368 A.2d 648, 650-51 (Pa. 1977). "Since an alternative, non-constitutional ground existed and was discussed, the statement in question was not only dictum, but dictum that flew in the face of existing case law and proper appellate procedure." *Id.* at 650.

[64] Leval, *supra* note 1, at 1269.

[65] *Id.* He also points out that lower courts may fear higher courts will react poorly to having their statements characterized as "dicta." *Id.*

[66] *Id.* ("Determining whether a statement of law is a holding or dictum can be a time-consuming task. You must read the full opinion, understand what were the facts, what question was in dispute, how the court resolved it, and what role the proposition played in justifying the judgment.").

C. Legitimacy

It is a basic tenet of the rule of law that similarly situated people ought to be treated similarly.[67] Stare decisis helps further this goal of consistent legal outcomes.[68] Elevating dicta into holding, however, disrupts this basic tenet. By treating dicta as holding, the court treats as similar those litigants who are *not* similarly situated. And by declaring the holding of a prior court to be dicta, the court treats disparately those litigants who are *in fact* similarly situated.

Not only is this result unfair, but it also creates instability in the law that threatens its very legitimacy.[69] This concept is analogous to the level of deference a reviewing court is required to give a lower court's decisions.[70] If a reviewing court reverses a lower court simply because it would have ruled differently, even though the lower court had the power to make the decisions it did, unpredictability and illegitimacy result.

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[67] *See, e.g.*, Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982) (defending appellate review as "necessary to preserve the most basic principle of jurisprudence that 'we must act alike in all cases of like nature'") (citations omitted). Judge Friendly adds that this "jurisprudential rule of like treatment demands consistency not only between cases that are precisely alike but among those where the differences are not significant." *Id.* He then provides an example: "[W]e cannot have one rule for a man riding a white horse on Monday and another for one riding a black horse on Tuesday—even though some old cases indicated it might be as well never to be injured on Sunday." *Id.*

The constitutional guarantee of equal protection of the laws likewise requires similarly situated people be treated similarly, at least unless the government has a reason of sufficient strength to support the distinction. U.S. CONST. amend. XIV, § 1; *see also* Romer v. Evans, 517 U.S. 620, 631 (1996) (acknowledging that the "Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons," yet striking on equal protection grounds Colorado's Amendment 2, which prohibited any judicial, legislative, or executive anti-discrimination protections on behalf of homosexuals).

[68] This holds true for corporations as well; contract law depends on consistency for its validity and reliability. *See generally* 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:1, at 15 (4th ed. 2007) ("The principles governing the law of contracts . . . are fundamental in virtually every field of law.").

[69] *See* McGinley v. Houston, 361 F.3d 1328, 1331 (11th Cir. 2004) (identifying stability and predictability as requiring stare decisis). Judge Posner notes that a similar reduction in "the authority of judicial decisions" would result if it were readily apparent that an opinion was "the work of [a] law clerk" (as opposed to the judge, and as opposed to simply having been drafted by the clerk). POSNER, *supra* note 2, at 149. This knowledge would reduce the "attention judges and lawyers . . . pay" to the broad holding of the case. *Id.*

[70] *See* Friendly, *supra* note 67, at 754 (defining "discretion" as "how far an appellate court is bound to sustain rulings of the trial judge which it disapproves but does not consider to be outside the ball park").

The power of a reviewing court to substitute its judgment for that of a lower court is similar to the power of a subsequent court to ignore existing precedent; it can be done, but the court should only do so legitimately—when, for example, the trial court has exceeded the scope of its power, or when the cases are truly distinguishable.[71] Arbitrariness is simply not legitimate.

Because courts need to reach accurate decisions to act within their authority and to act legitimately, the holding/dicta distinction is significant. Yet lawyers and judges routinely confuse the two and, most importantly, treat dicta as if it were holding.

II. EXAMPLES OF ELEVATING DICTA TO HOLDING

Dictum is generally not a problem until it is treated by a subsequent court as a holding.[72] Consider the following examples, presuming the subsequent courts would be bound by the prior courts' holdings:

Example 1:

Step 1: The court issues dictum in Case *A*.[73]

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[71] This effect is further compounded by the lack of appeal when the dictum is created. *See, e.g.*, Leval, *supra* note 1, at 1262.

[72] This is distinguished from one court finding persuasive the holding of a non-binding court. That is not only permissible, but often wise and expected. *See, e.g.*, Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1958 (2008). The key distinction is that the principle from the first case was in fact a holding, and even if not binding on the second court because of jurisdictional forces, the holding in the first case was thoroughly considered, and therefore likely accurate. Furthermore, there are no legitimacy problems, including constitutional issues or concerns of disingenuousness, because the first case is clearly not binding.

[73] For example, the United States Supreme Court issued dicta in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). In *Carolene Products*, the Court ruled that a statute prohibiting the interstate transportation of filled milk was constitutionally proper under Congress' Commerce Clause powers, and that it did not violate the Fifth Amendment's Due Process Clause. *Id.* at 147, 148. The Court applied the rational basis test which includes a presumption of constitutionality, but added in a footnote that this presumption may not apply when "legislation appears on its face to be within a specific prohibition of the Constitution." *Id.* at 152 n.4. The Court acknowledged that "*[i]t is unnecessary to consider now* whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation," but went on to identify a number of situations where that may be the case. *Id.* (emphasis added).

The Court also noted:

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities;

> Step 2: Case B addresses the issue posed by the dictum in Case A. Rather than viewing the issue as a case of first impression, the court in Case B treats the dictum in Case A as Case A's holding and rules consistent with that dictum.[74]
>
> Step 3: Case C arises, and it addresses the issue raised in Case B. It is now harder to overrule Case B than to decide the issue from a fresh perspective in the first place[75]—as Case B could and should have done. Yet the court in Case B did not fully consider the issue because it treated the dictum in Case A as a binding holding.[76]

> whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. (citations omitted).

The Court cited two cases for its final speculation regarding "prejudice against discrete and insular minorities," but neither of those two cases is on point. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819) (holding unconstitutional a state tax on a federal bank branch within that state); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184-85 n.2, 196 (1938) (holding South Carolina could constitutionally restrict the weight and size of trucks upon its highways).

[74] The oft-quoted footnote four from *Carolene Products*, 304 U.S. at 152 n.4, has arguably created the current standard for equal protection challenges. In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Court held that an initiative that prohibited certain types of student bussing for desegregation purposes violated equal protection. The Court relied, in part, on *Carolene Products*' footnote four:

> And when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the "special condition" of prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Seattle Sch. Dist. No. 1, 458 U.S. at 486 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)). *San Antonio* also relied on the footnote in *Carolene Products* in imposing strict scrutiny review. 411 U.S. at 105. Compounding the dicta problem, *Carolene Products* was a plurality opinion.

[75] *See supra* note 56 and accompanying text.

[76] *Carolene Products* has not escaped the criticism of courts. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 89-96 (1949) (Frankfurter, J., concurring). Challenging *Carolene Products*' footnote four in the First Amendment context, Justice Frankfurter pointed out:

> A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine, and the *Carolene* footnote did not purport to announce any new doctrine; incidentally, it did not have the concurrence of a majority of the Court. It merely rephrased and expanded what was said in *Herndon v. Lowry* and elsewhere. It certainly did not assert a presumption of invalidity against all legislation touching matters related to liberties protected by the Bill of Rights and the Fourteenth Amendment. It merely stirred inquiry whether as to such matters there may be "narrower scope for

Example 2:

Step 1: The court issues dictum in Case A.

Step 2: The dictum in Case A is repeated in Case B; it is not followed, because it is not the holding of Case B, but the Court in Case B presents the dictum as Case A's holding.

Step 3: Case C arises, and the dictum in Cases A and B is actually relevant.[77] Case C should be considered a case of first impression. But the court in Case C follows the dictum in Cases A and B—even though the statement is not the holding of those cases—because it has been characterized as "holding."[78]

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operation of the presumption of constitutionality" and legislation regarding them is therefore "to be subjected to more exacting judicial scrutiny."

Id. at 90-92 (Frankfurter, J., concurring) (citation omitted).

[77] *See, e.g.*, Ingram v. Comm'r of Soc. Sec. Admin., 496 F.3d 1253, 1265-66 (11th Cir. 2007). In *Ingram*, the Eleventh Circuit dealt with this exact problem. The court had issued dicta in *Keeton v. Department of Health & Human Services*, 21 F.3d 1064 (11th Cir. 1994). That dicta was repeated in a later case, *Falge v. Apfel*, 150 F.3d 1320 (11th Cir. 1998), and both statements were relied upon by the Commissioner in *Ingram*. The *Ingram* court noted that the Commissioner's position was supported by "some of the language in *Keeton* and *Falge*, but neither *Keeton* nor *Falge* decided the issue we now face." *Ingram*, 496 F.3d at 1264. The Eleventh Circuit also acknowledged the difficulty the earlier dicta posed for the district court: "In its review of Ingram's case, the district court was understandably confounded by our dicta in *Keeton* and *Falge*" and therefore ruled erroneously. *Id.* at 1266. The court also noted that other circuits had labeled the dicta as Eleventh Circuit holdings. *Id.* They added: "We hope that our discussion of the dicta in *Keeton* and *Falge* will clear up this confusion to the benefit of both district courts within this Circuit and our sister circuits." *Id.*

[78] "Thoughtless repetition should not convert a dictum into law, but it manages to do so." Leval, *supra* note 1, at 1273; *see also infra* notes 79-103 and accompanying text.

Similarly, *Carolene Products*' reference to heightened scrutiny for racial groups may have influenced the Court in *Korematsu v. United States*, 323 U.S. 214 (1944). The Court applied the higher standard but found it was met, stating: "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. *It is to say that courts must subject them to the most rigid scrutiny*." *Id.* at 216 (emphasis added). The Court offered no citations for this principle.

The Court in *Loving v. Virginia*, 388 U.S. 1 (1967), similarly made a broad statement paraphrasing *Carolene Products* with no citation: "In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Loving*, 388 U.S. at 9. Later in the opinion, the *Loving* Court cited *Korematsu* for the principle that *Korematsu* announced without citation:

> At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," Korematsu v. United States, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.

The problem is this: there is no incentive in Case *A* or *B* to fight about the statement, because it does not control the outcome.[79] But by the time of Case *C*, courts treat the statement as such a long-standing principle that it becomes a holding without ever having been adjudicated. And it is nearly impossible to argue the principle on the merits because courts (and lawyers) are so used to hearing the principle that they believe there must be support; it must have actually been a court's holding at some point, even if they cannot find the original source. But there was neither opportunity nor incentive to litigate the principle in Cases *A* or *B*. What started as an off-handed statement[80] now has the power of precedent—it became holding just because it was said so often.

The following examples illustrate this point. First, the rule that employers do not have to reinstate employees following a strike is generally supported with a citation to the 1938 United States Supreme Court case *NLRB v. Mackay Radio & Telegraph Co.*[81] As recently as 1989, the Supreme Court characterized its earlier holding as follows:

> In Mackay Radio, . . . [w]e held that it was not an unfair labor practice . . . for the employer to have replaced the striking employees with others "in an effort to carry on the business," or to have refused to discharge the replacements in order to make room for the strikers at the conclusion of the strike.[82]

Id. at 11.

[79] Leval, *supra* note 1, at 1279 ("People do not appeal from abstract statements they don't care about."). And as Judge Leval notes, appeal is not possible for dicta; there is "no available correction mechanism." *Id.* at 1262.

[80] Leval, *supra* note 1, at 1267-68 ("Particularly to be feared is the scholarly, treatise-type opinion, which for no good reason lectures on the nature and origins of the doctrine, making pronouncements that have no consequence for the dispute. Although the court generally believes it is correctly explaining non-controversial matters, the practice is risky."); *see also* Aldisert, *supra* note 2, at 609-10 (noting that framing the decision in terms of general "principles" is problematic; this "occurs when a court does not announce a narrow rule based solely on record facts, but embarks on an intellectual frolic of its own").

In addition to including off-handed comments, some have opined that judges sometimes intentionally plant language in an opinion with the hope it will be followed by future courts. This may be the case with footnote four in *Carolene Products*, discussed *supra* notes 73-78. As noted by one commentator in the copyright context, we should pay closer attention to "loaded judicial rhetoric" because of its ability to "generate 'doctrine' as enduring as any 'holding.'" Kate O'Neill, *Against Dicta: A Legal Method for Rescuing Fair Use from the Right of First Publication*, 89 CAL. L. REV. 369, 371 (2001).

[81] 304 U.S. 333 (1938).

[82] TWA, Inc. v. Indep. Fed'n of Flight Attendants, 489 U.S. 426, 433 (1989).

In *Mackay Radio*, however, the employer was required to reinstate the striking employees.[83] Although the Court twice *stated* the general proposition that employers did not have to reinstate employees after a strike,[84] it nevertheless held that the employer in that case *did have to reinstate its employees*.[85] The Court's rationale was that an employer could not selectively determine which striking employees to reinstate based upon their union activity, which was precisely what the employer at Mackay Radio & Telegraph Co. had done.[86] The Court even characterized its own holding as follows: "We hold that we have jurisdiction; that the Board's order [reinstating the striking employees] is within its competence and does not contravene any provision of the Constitution."[87] Yet courts continue to treat the dicta in *Mackay Radio*—the proposition that employers do not have to reinstate striking employees—as the case's holding.[88]

Examples with more problematic ramifications in other contexts abound, as demonstrated by *Stern v. Schriro*,[89] a recent case in the District of Arizona. *Stern* considered whether a federal court could grant habeas corpus relief when the petitioner had not appealed his conviction to the Arizona Supreme Court.[90] The court ruled that because discretionary review with the highest state court was not pursued, the petitioner's claims were procedurally barred.[91]

To justify this result, the court in *Stern* relied on language from a 1999 Ninth Circuit case, *Swoopes v. Sublett.*[92] The issue in *Swoopes* was similar to that in *Stern*: whether the petitioner was entitled to federal habeas relief despite not pursuing a discretionary appeal with the Arizona Supreme Court.[93] In contrast to the ruling in *Stern*, the Ninth Circuit in *Swoopes* held that, despite not filing a petition for review with

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[83] *Mackay Radio*, 304 U.S. at 336, 348, 351.

[84] *Id.* at 345-46, 347.

[85] *Id.* at 336, 348, 351.

[86] *Id.* at 346-47.

[87] *Id.* at 343.

[88] *See, e.g.*, NLRB. v. Int'l Van Lines, 409 U.S. 48, 50 (1972) (citing *Mackay Radio* for the proposition that it is "settled that an employer may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements"); NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379 (1967).

[89] No. CV 06-16-TUC-DCB, 2007 WL 201235 (D. Ariz. Jan. 24, 2007).

[90] *Id.* at *5.

[91] *Id.* at *6.

[92] *Id.* at *5 (citing Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999)).

[93] *Swoopes*, 196 F.3d at 1008.

the Arizona Supreme Court, the petitioner had properly exhausted his state appeal rights and the habeas petition should be considered on the merits.[94] The different results in *Stern* and *Swoopes* were based on differences in the underlying sentences of the petitioners; the petitioner in *Stern* had been given a life sentence, and the petitioner in *Swoopes* had not received a life sentence.[95]

Although the petitioner in *Swoopes* had not received a death sentence or life imprisonment, and hence any language about those sentences was unnecessary to the result, the Ninth Circuit in *Swoopes* quoted the following language from a 1984 Arizona Supreme Court case[96]: "[i]n cases *other than those carrying a life sentence* or the death penalty, a decision by the court of appeals . . . exhausts a defendant's right of appeal in this jurisdiction."[97]

This dictum in *Swoopes* about a life sentence or the death penalty was not only unnecessary—it was legally incorrect at the time *Swoopes* was decided.[98] Ten years earlier,

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[94] *Id.* at 1011. The petitioner had properly appealed to the Arizona Court of Appeals, and that court denied his requested relief. *Id.* at 1009.

[95] *Id.* at 1010-11. Swoopes had also not received the death penalty.

[96] State v. Shattuck, 684 P.2d 154, 157 (Ariz. 1984). The issue in *Shattuck* was whether defense counsel had adequately pursued his client's appeal rights by appealing to the state's intermediate court of appeals or whether he was required to petition for discretionary review with the Arizona Supreme Court. *Id.* at 156. In determining that the lawyer had no obligation to file the discretionary appeal, the court stated the following: "In cases other than those carrying a life sentence or the death penalty, a decision by the court of appeals and its search for error exhausts a defendant's *right* of appeal in this jurisdiction." *Id*. at 157.

At the time *Shattuck* was decided, controlling statutory law provided that appeals in cases involving a life sentence or the death penalty proceeded directly to the Arizona Supreme Court; the court of appeals was without jurisdiction to hear appeals in either of those instances. 1974 Ariz. Laws, Ch. 7, § 2 (codified as amended at ARIZ. REV. STAT. ANN. § 12-120.21(A)(1)) (providing appellate jurisdiction in the court of appeals in all actions "except criminal actions involving crimes for which a sentence of death or life imprisonment has actually been imposed"); 1974 Ariz. Laws, Ch. 7, § 3 (codified as amended at ARIZ. REV. STAT. ANN. § 13-4031 (1977)) (providing that appeals for "crimes for which a sentence of death or life imprisonment has actually been imposed may only be appealed to the supreme court"). The defendant in *Shattuck* was sentenced to ten years in prison, 684 P.2d at 155, and hence, his appeal to the court of appeals was sufficient.

[97] *Swoopes*, 196 F.3d at 1010 (emphasis added).

[98] The dictum was, although a dictum, an accurate statement of the legal test at the time Shattuck was decided. *See supra* note 96. But it was not the legal standard at the time *Swoopes* was decided—or by the time *Stern* was decided. *See infra* note 99 and accompanying text.

At least one court has sharply criticized the *Swoopes* dicta and catalogued a significant number of courts that have relied upon that same language, despite the fact that it misstates current law. Crowell v. Knowles, 483 F. Supp. 2d 925, 929-31 (D. Ariz. 2007). The court in *Crowell* noted that the "dictum in *Swoopes* was nevertheless repeated in dictum in *Castillo v. McFadden*, 399 F.3d 993 (9th Cir. 2004)." *Id.* at 930.

the Arizona Legislature amended the statutes that provided for exclusive Arizona Supreme Court appellate jurisdiction in cases of life imprisonment and granted that jurisdiction to the state court of appeals.[99] And although the statement had no effect in *Swoopes*, it proved problematic in *Stern*.

Citing *Swoopes*, the district court in *Stern* stated the following, with no indication that the statement was anything other than *Swoopes*' holding: "State prisoners, except those sentenced to death or life imprisonment, exhaust state court remedies by presenting their claims to the Arizona Court of Appeals."[100] The court then added the following sentence,

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Furthermore, the court noted the "dictum in *Swoopes* was also repeated in a series of district court cases," citing both *Stern* and a case from 2005 where the issue of life imprisonment was relevant, and a series of cases where it was not relevant to the outcome yet the dicta was repeated:

> *See Saiers v. Schriro*, 2007 U.S. Dist. LEXIS 9350, at *7-8, 12-13, 2007 WL 473682, at *3, 5 (D. Ariz. Feb. 8, 2007) (involving a petitioner sentenced to 59 years in prison); *Stern v. Schriro*, 2007 U.S. Dist. LEXIS 5504, at *13, 16, 2007 WL 201235, at *5-6 (D. Ariz. Jan. 22, 2007) (involving a petitioner sentenced to life in prison); *Moyaert v. Steames*, 2006 U.S. Dist. LEXIS 93729, at *3, 7, 2006 WL 3808080, at *1-2 (D. Ariz. Dec. 20, 2006) (4.5-year sentence); *Batista de la Paz v. Elliott*, 2006 U.S. Dist. LEXIS 82734, at *4, 6, 2006 WL 3292474, at *1-2 (D. Ariz. Nov. 9, 2006) (6-year sentence); *Alston v. Schriro*, 2006 U.S. Dist. LEXIS 79926, at *2, 17, 2006 WL 3147650, at *1, 5 (D. Ariz. Oct. 31, 2006) (10-year sentence); *Hurley v. Gaspar*, 2006 U.S. Dist. LEXIS 64008, at *9, 31, 2006 WL 2460918, at *2, 4 (D. Ariz. June 20, 2006) (17-year sentence); *Tindall v. Schriro*, 2006 U.S. Dist. LEXIS 60909, at *3, 10, 2006 WL 2361721, at *1, 6 (D. Ariz. June 5, 2006) (20-year sentence); *Lange v. Frigo*, 2006 U.S. Dist. LEXIS 44984, at *2, 14, 2006 WL 1735270, at *1, 5 (D. Ariz. May 1, 2006) (26-year sentence); *Casner v. Gaspar*, 2006 U.S. Dist. LEXIS 10075, at *4, 16 (D. Ariz. Jan. 31, 2006) (same) (not reported in Westlaw); *Benson v. Haynes*, 2005 U.S. Dist. LEXIS 27197, at *1, 4, 2005 WL 2978604, at *1-2 (D. Ariz. Oct. 13, 2005) (10-year sentence); *Alvarez v. Schriro*, 2005 U.S. Dist. LEXIS 35319, at *2, 12-13, 2005 WL 3501409, at *1, 4 (D. Ariz. Dec. 20, 2005) (22-year sentence); *Lucero v. Savage*, 2005 U.S. Dist. LEXIS 40536, at *2, 10 (D. Ariz. Dec. 7, 2005) (sentence of 20 years plus life) (not reported in Westlaw); *Greer v. Schriro*, 2005 U.S. Dist. LEXIS 38889, at *2, 10 (D. Ariz. Nov. 16, 2005) (12-year sentence) (not reported in Westlaw); *Lopez v. Schriro*, 2005 U.S. Dist. LEXIS 28060, at *1, 3, 2005 WL 3005603, at *1 (D. Ariz. Nov. 8, 2005) (5-year sentence); *Woods v. Schriro*, 2005 U.S. Dist. LEXIS 38984, at *4, 9 (D. Ariz. Oct. 21, 2005) (36-year sentence) (not reported in Westlaw); *Benson v. Haynes*, 2005 U.S. Dist. LEXIS 27197, at *1, 4, 2005 WL 2978604, at *1-2 (D. Ariz. Oct. 13, 2005) (10-year sentence); *Ross v. Schriro*, 2005 U.S. Dist. LEXIS 35314, at *2, 13 (D. Ariz. Aug. 18, 2005) (13.25-year sentence) (not reported in Westlaw); *McCoy v. Stewart*, 2001 U.S. Dist. LEXIS 23689, at *3, 9 (D. Ariz. Apr. 4, 2001) (15-year sentence) (not reported in Westlaw).

Crowell, 483 F. Supp. 2d at 930 n.4.

[99] 1989 Ariz. Laws, ch. 58, § 1 (codified as amended at ARIZ. REV. STAT. ANN. § 12-120.21(A)(1)); 1989 Ariz. Laws, ch. 58, § 2 (codified as amended at ARIZ. REV. STAT. ANN. § 13-4031).

[100] Stern v. Schriro, No. CV 06-16-TUC-DCB, 2007 WL 201235, at *5 (D. Ariz. Jan. 24, 2007).

followed by an "*id.*" cite referring to *Swoopes*: "When a life sentence has been imposed, the 'complete round' requires a defendant to seek discretionary review of his claims by the Arizona Supreme Court."[101]

This rule is in fact not the law, and it was never even the holding of any court before *Stern* in 2007.[102] It was dicta, repeated over and over again, until it gained the force of law in a dispute where the statement actually mattered.

This repetition of dicta, time after time, suggests courts are simply not concerned when that dicta has no practical effect in the case before them. As Judge Leval put it, "the court paid no price, and consequently paid little attention."[103]

III. IDENTIFYING REASONS FOR THE PROBLEM

With a plethora of judicial decisions and scholarly articles addressing the subject, why does the distinction between holding and dicta remain blurry? Arguably the imprecise definition of holding (and therefore dicta) compounds the issue, and that problem is not likely to be solved anytime soon.[104] But examples abound of courts and lawyers confusing dicta and holding under *any* definition, suggesting that the lack of a uniform definition is not the sole reason for the problem.

This confusion exists for three main reasons. First, confusion is bound to breed more confusion; as long as some judges, some lawyers, or some scholars blur the distinction that lack of clarity will spread. Second, lower courts appear to be emulating the United States Supreme Court, and that Court is more likely to issue dicta and is simultaneously less restrained by the holding/dicta distinction. Third, the emphasis on words, phrases, and quotations, in lieu of focusing on the underlying facts, issues, and holdings of judicial opinions, almost ensures lawyers and judges will confuse holdings and dicta.

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[101] *Id.*

[102] *Id.* at *6.

[103] Leval, *supra* note 1, at 1263.

[104] *See generally* Dorf, *supra* note 2. Even when definitions appear clear, as with appellate standards of review, applying them in practice can be challenging.

A. The Ripple Effect

Judges are not the only participants in the legal system who treat dicta like holding. Lawyers do it.[105] Law students do it.[106] Some non-judges might be doing it because they are modeling the behavior of judges.[107] If the judge thinks the distinction is irrelevant, why should the lawyer or law student care about the potential distinction? But lawyers may also influence judges to ignore the distinction.[108] If the hired advocates are unwilling or unable to accurately identify holding versus dicta, the judge can hardly be faulted for not independently making the distinction.[109]

The bottom line is this: there is a ripple effect that occurs when any of the players demonstrates an inability or an unwillingness to distinguish between holding and dicta.[110]

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[105] Judge Leval would counsel practitioners as follows:

> [I]n arguing to courts, you will need to be keenly aware what is holding and what is dictum. It is often the best way to undermine unfavorable language in a prior opinion. By the same token, it can alert you that your argument is built on a house of cards.

Leval, *supra* note 1, at 1282.

[106] Similarly, Judge Leval suggests it is the responsibility of law school professors to ensure our students "understand and are alert to the distinction between holding and dictum—and its importance." Leval, *supra* note 1, at 1282. He adds that the distinction "is not something to be discussed only in a brief, first-year intro-to-law lecture. Students who graduate without a grasp of it are not well trained for the profession." *Id.*

[107] *See, e.g.*, Gerald Lebovitz et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 239, 278 (2008).

[108] Steven A. Reisler, *Teaching the Commons*, 65 GUILD PRAC. 19, 20 (2008).

[109] This is especially true at the trial court level, where judges routinely decide issues without the benefit of law clerks or an extensive court staff. Although trial court opinions are less problematic, as they are not binding on future courts, they are perhaps some of the biggest contributors to lawyer confusion. These are the rulings lawyers may see most often, and the sheer number of trial court rulings provides them with ample power to influence the practicing bar.

At the appellate level, the judge's clerks will research the issue, but they may be no clearer on the holding/dicta distinction than the lawyers who filed the briefs. Our adversarial system suggests the lawyer potentially harmed by a failure to distinguish holding from dicta should point that out to the court, and in cases where the stakes are high enough and the resources are sufficient, that might happen. But if the lawyers have not focused on or are not clear about the distinction, it is unlikely they will aid the court in making that determination.

[110] The chicken and egg problem is also present here; it does not matter whether the confusion starts with scholars (who influence law school teaching), lawyers, or judges. As long as there is confusion with any group, it is bound to affect the others.

This concept is loosely related to the principle of "progressive distortion" that Justice Frankfurter described when lamenting the elevation of dictum to holding: "These decisions do not justify today's decision. They merely prove how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision." United

Judges are confused by lawyers' arguments characterizing holding as dicta and vice versa. Similarly, lawyers are confused by court opinions that fail to delineate the distinction, as well as by courts' treatment of dicta as holding (or holding as dicta).[111] This recursive cycle is difficult to break.

But it might not all be confusion; after all, a lawyer's job is to advocate for her client.[112] There is incentive to think of the law in amorphous terms. Most of what lawyers do is to persuasively argue that prior decisions should be read broadly (or narrowly)—and that invites arguments that the point from an earlier case is non-binding dicta (rather than binding holding) or is binding holding (rather than only potentially persuasive dicta).[113] Furthermore, judges may prefer to create rules even when the case before them does not directly require them to decide the issue.[114] But whether accidental or intentional, the combination of actors and their reliance on each other creates a ripple effect that is difficult to break.

B. Emulating the Supreme Court

The United States Supreme Court occupies a unique position in our legal system. In direct contrast to the theories of judicial restraint that underlie stare decisis,[115] many advocate

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States v. Rabinowicz, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting), *overruled by* Chimel v. California, 395 U.S. 752, 753, 760 (1969).

[111] And ironically, the problem may be further compounded by scholars attempting to clarify the distinction. *See, e.g.*, Greenawalt, *supra* note 2, at 442.

[112] *Id*. As Greenwalt notes,

> [S]imple dichotomies such as holding-dictum and overruling-distinguishing do not adequately capture our complex practices. Lawyers who want to use concepts in a way that will persuade may not need to worry too much about these subtleties, but for scholars who seek to illuminate what the practices are really like finding an appropriate terminology is difficult.

Id.

[113] This ripple effect also plays into the third cause of confusion, that of overreliance on words and quotations. *See, e.g.*, Leval, *supra* note 1, at 1256. Lawyers and judges routinely drop quotations into their briefs and opinions, often without explanatory parentheticals or any other means of providing context for the reader. Without understanding the facts, issue, and holding of the prior case, it is difficult to understand how the quotation should apply to the case at bar. Yet lawyers and judges appear to follow this tactic on at least a somewhat regular basis.

[114] *See, e.g.*, People v. Williams, 788 N.E.2d 1126, 1136 (Ill. 2003) ("[T]oday's dicta should become tomorrow's ruling.").

[115] The United States Supreme Court has repeatedly acknowledged the force and necessity of stare decisis, but because of its special position in making policy, the Court has also found occasion to overrule their prior decisions. *E.g.*, Lawrence v. Texas, 539 U.S. 558, 577-78 (2003) (stating that "*stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law," yet overruling

that the Supreme Court is not only able to act without restraint,[116] but sometimes obligated to do so.[117] The Supreme Court is also not generally considered an "error-correcting" court, as the courts of appeals are.[118] Rather, its function is to decide cases that "involve[] principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court."[119]

Bowers v. Hardwick, 478 U.S. 186 (1986)); Hohn v. United States, 524 U.S. 236, 251-53 (1998) (overruling House v. Mayo, 324 U.S. 42 (1945)); Payne v. Tennessee, 501 U.S. 808, 827-30 (1991) (stating that stare decisis is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," yet overruling *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989)).

Lower courts are generally more constrained. *See, e.g.*, Tate v. Showboat Marina Casino P'ship, 431 F.3d 580, 582 (7th Cir. 2005). In *Tate*, Judge Posner argued that stare decisis "imparts authority to a decision . . . merely by virtue of the authority of the rendering court and independently of the quality of its reasoning. The essence of *stare decisis* is that the mere existence of certain decisions becomes a reason for adhering to their holdings in subsequent cases." *Id*. at 583 (citations omitted). The "adherence to precedent should be the rule and not the exception." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921). But it arguably ought to also "be in some degree relaxed." *Id.* at 150.

[116] *See, e.g.*, Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951 (2005). Siegel discredits the theory that the United States Supreme Court follows a "minimalist" approach, deciding cases on "the narrowest and shallowest grounds reasonably open to them." *Id.* at 1963.

[117] *See, e.g.*, Chemerinsky, *supra* note 5, at 1069 (debunking the analogy between Supreme Court Justices and baseball umpires, noting that although "both make decisions, it is hard to think of a less apt analogy. An umpire applies rules created by others; the Supreme Court, through its decisions, creates rules that others play by"); Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1 (2009) (arguing the "Court should therefore make the most of the cases it does hear by issuing broad decisions that govern a wide range of cases in the lower courts"); Siegel, *supra* note 116, at 2015 ("[O]ften the Justices have a duty to resolve important constitutional questions, especially those implicating the fundamental rights of individuals. This obligation is more important than the rule-of-law values of stability, consistency, predictability, and (I would add) sincerity.") (citations omitted). Siegel describes this obligation as an "essential part of the Supreme Court's role—and comparative advantage—in our constitutional system of separate but interrelated powers." *Id.* Further, as compared to Congress and the President, and to the states, "the Justices are more insulated from the pressures of majoritarian politics and therefore better equipped to protect minority rights." *Id.*

[118] Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View From the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 92 (2006) ("[T]he Supreme Court does not generally determine whether the lower courts have correctly disposed of a particular case. . . . Rather than correcting errors, then, the Supreme Court is charged with providing a uniform rule of federal law in areas that require one."); *see also infra* note 119.

[119] William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2-3 (1925) (arguing the Court should hear cases challenging the constitutionality of federal statutes, raising individual liberties, interpreting federal statutes if of wide enough magnitude, questions regarding federal jurisdiction, and circuit split cases effecting large numbers of people). *But see* Paul D.

In addition to this exclusive constitutional position, the Court's current practice is vastly different from that in any other court.[120] The Supreme Court now hears only approximately eighty cases a year.[121] This gives the Court an incentive to reach broadly with each decision; and, because they are so long, Supreme Court opinions simply have more space to include dicta.[122] Supreme Court cases are generally more complex and take longer to resolve than other courts' cases,[123] but each Justice typically authors only nine majority opinions.[124] Comparatively, appellate court judges author

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Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 594 (2009) ("Excessive independence for Justices in a position of lawmaking is taken by many as an offense against the traditions of democratic self-government."). Carrington and Cramton add: "The Supreme Court of the United States has in the last century largely forsaken responsibility for the homely task of deciding cases in accord with preexisting law and has settled into the role of a superlegislature devoted to making new law to govern future events." *Id.* at 587.

[120] Breyer, *supra* note 118, at 94 (noting the United States Supreme Court is "similar" to state supreme courts "in that all of our cases raise significant matters of law," but pointing out that the United States Supreme Court confronts "a steady diet of federal constitutional cases. This workload also differs from my work as a judge on a federal court of appeals, where we intermittently considered constitutional questions, but nothing approaching the broad range of constitutional questions that reaches the Supreme Court"); F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 659-64 (2009) (pointing to some of the characteristics necessary for an effective Supreme Court, and noting some of those features are not essential for lower courts). *But see* Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439 (2009) (suggesting the Supreme Court should increase in size and hear cases in panels).

[121] Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1368 (2006); George, *supra* note 120, at 1441 (noting the Court decided, with signed, written opinions, only seventy-two cases in 2007); Siegel, *supra* note 116, at 1958. This equals approximately one percent of the cases where certiorari petitions are filed. *Id.* The Court does, of course, spend significant time determining which cases to accept. *See, e.g.*, POSNER, *supra* note 2, at 142.

[122] *See supra* notes 61-62 and accompanying text. Judicial efficiency suggests reducing anticipated future conflicts would provide both predictability and stability.

In 1983, the average majority Supreme Court opinion was 4,700 words, as opposed to 3,100 in federal courts of appeals opinions. *See infra* note 149.

[123] POSNER, *supra* note 2, at 142. In contrast to the fewer than a hundred cases per year on the Supreme Court's docket, the federal courts of appeals handled almost 50,000 cases in 1995 alone. *Id*. at 61 tbl.3.2.

[124] *Id.* at 141. The problems created by law clerks, *see infra* notes 142-52 and accompanying text, are present at the Supreme Court level as well. Each Justice has more law clerks than each appellate court judge, and there are more clerks per opinion drafted in the Supreme Court. *See, e.g.*, POSNER, *supra* note 2, at 141-43 (noting that the "length and scholarly apparatus of Supreme Court opinions" suggest the Justices have been transformed from draftsmen to editors).

substantially more opinions with substantially less assistance.[125]

Yet despite these differences, the lower courts appear to be emulating the Supreme Court.[126] Judge Leval connects the "gradual change in the self-image of courts"[127] to the confusion between holding and dicta: "Once, the perception of the judicial function was relatively modest—to settle disputes under an existing body of rules. . . ."[128] In that system, "judges were not seen as *making law* through their opinions, but rather as *finding* the common law, which existed already, waiting only to be discovered."[129] Over time, "and with the central role courts have increasingly played in resolving important social questions, we have come to see ourselves as something considerably grander—as lawgivers, teachers, fonts of wisdom, even keepers of the national conscience. This change of image has helped transform dicta from trivia into a force."[130]

C. The Emphasis on Words over Concepts

Despite the Supreme Court's admonition that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute,"[131] lawyers and judges

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[125] *See generally* POSNER, *supra* note 2, at 139-43.

[126] Because the Supreme Court is more apt to issue dicta—because the Justices have more time for each opinion, because their dicta has more effect than that of a lower court, and because their cases have a broader reach than the average case—lower courts emulating the Supreme Court are also more apt to issue dicta.

Dicta by the United States Supreme Court carries more weight than dicta by lower courts, however. Some courts describe it as "highly persuasive" and some claim it generally "must be treated as authoritative." *See, e.g.*, Winslow v. FERC, 587 F.3d 1133, 1135 (D.C. Cir. 2009); Galli v. N.J. Meadowlands Comm'n, 490 F.3d 265, 274 (3d Cir. 2007). But neither courts nor commentators seriously suggest that dicta from other courts, often including state supreme courts, should have any binding effect. *See, e.g.*, Eady v. Morgan, 515 F.3d 587, 600 (6th Cir. 2008) (denying habeas relief when the defendant's lawyer failed to raise Tennessee Supreme Court dicta, noting that although the lower court could be persuaded by the dicta, it was not binding law); Taylor, *supra* note 2, at 104-13.

[127] Leval, *supra* note 1, at 1255.

[128] *Id.*

[129] *Id.* In contrast, he describes a court of appeals chastising a district court judge for "failing to follow its earlier dictum," quoting the appellate court as follows: "[O]ur articulation [in *Quinn*] . . . became law of the circuit, regardless of whether it was in some technical sense 'necessary' to our disposition of the case. The [lower court was] . . . required to follow [it]." *Id.* at 1251 (alteration in original).

[130] *Id.* at 1256.

[131] Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979); *see also* Aldisert, *supra* note 2, at 607 (indicating a court is not bound by the rationale; subsequent courts are bound by "what the court *did*, not what it *said*"); Goodhart, *supra* note 2, at 162, 179, 182 (arguing that the reasons given for the decision and the rule articulated in the

increasingly rely on the *words* found in judicial opinions rather than the underlying components of those judicial decisions—facts, issues, holdings, and outcomes.[132] Yet this is almost sure to confuse the holding/dicta distinction, and that makes the promulgation of dicta a dangerous practice.[133]

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decision are not part of the holding; rather, the holding "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").

[132] Understanding these components is essential to understanding a case's holding. Leval, *supra* note 1, at 1269.

[133] As the Ninth Circuit noted: "*Stare decisis* is the policy of the court to stand by precedent . . . . [T]he word '*decisis*' . . . means, literally and legally, the decision. Nor is the doctrine *stare dictis*; it is not 'to stand by or keep to what was said.'" *In re* Osborne, 76 F.3d 306, 309 (9th Cir. 1996).

In spite of this clear direction, some courts seem to expressly privilege judicial *statements*—which are far more likely to be dicta—over a case's holding. For example, in *Maine Yankee Atomic Power Co. v. United States*, 44 Fed. Cl. 372 (1999), the court correctly asserted that under principles of stare decisis, courts were not bound unless a prior court actually "heard and resolved" the issue. *Id.* at 376. The court went on, however, to state that "[i]n addition, a case will not be treated as binding precedent on a point of law where the holding is only implicit or assumed in the decision but is not announced." *Id.* The court cited a 1952 United States Supreme Court case in support of this proposition, yet what that Court actually said was: "The effect of the omission was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point." United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952).

The "announce" requirement created by *Maine Yankee Atomic Power Co.* emphasizes words—statements and articulations—suggesting that a holding is a holding only if the court states it clearly and labels it as such. But courts at times overstate their holding. They also, at times, fail to state their holding, even when they in fact do reach a holding, as is evident from the result or the rationale. More significantly, should courts have the power to declare the extent of their holdings? Or to avoid stare decisis and the binding nature of precedent by simply *refusing* to clearly state their holdings?

The Rules of the Supreme Court of Ohio have also struggled with this issue. Prior to 2002, Rule 1 of the Supreme Court Rules for the Reporting of Opinions stated that the syllabus of an Ohio Supreme Court decision—not the opinion itself—stated the "controlling points of law." The rule was amended effective May 1, 2002, and this was the committee's stated rationale:

> [T]he Supreme Court's historic "syllabus rule" may have outlived its usefulness. Over the last decade, there appears to have been declining use of the "syllabus" by some members of the Court, and one frequently finds much "good law" in an opinion—including even footnotes—which is never reflected in any syllabus paragraphs. If there is "disharmony" between the syllabus and the text, the syllabus would control.
>
> The current rule still focuses on "statements" of the law, but expands review beyond the syllabus:
>
> (B)(1) The law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including footnotes.
>
> (2) If there is disharmony between the syllabus of an opinion and its text or footnotes, the syllabus controls.

OHIO SUP. CT. R. FOR THE REPORTING OF OPINIONS R. 1 (2002), *available at* http://www.supremecourt.ohio.gov/LegalResources/Rules/reporting/Report.pdf.

This emphasis on words rather than concepts has arisen for a number of interrelated reasons. First, the changing nature of judicial opinion writing enforces this emphasis. The substantial increase in judicial caseloads,[134] combined with the increased reliance on law clerks,[135] suggests that a thorough review of all the potentially relevant law is simply unlikely to occur in most cases.

Second, the changing nature of legal research also encourages overreliance on words and quotations. Most legal researchers now conduct their research electronically,[136] where they can search for words rather than subjects, concepts, or legal principles. Using full-text word searching, they can now copy and paste quotations directly into their documents with remarkable ease.[137]

Third, changes to the citation rules over the past twenty-five years have resulted in a current emphasis on statements—words, phrases, and quotations—at the expense of holdings. This emphasis on statements favors quotations and paraphrased passages, and also makes it more difficult to discern the actual holding of a case cited in a brief or an opinion.

Finally, changes to our society over the past thirty years are undoubtedly involved as well. We have become a "sound

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[134] POSNER, *supra* note 2, at 62 fig.3.1 (showing federal appeals courts' cases per year increased from less than 50,000 cases in 1904 to approximately 100,000 cases in 1967 to almost 300,000 cases in 1995).

[135] The Supreme Court began hiring law clerks in the 1930s; they increased to two clerks per Justice in 1947, three clerks per Justice in 1970, and four clerks per Justice in 1978. *Id*. at 139. The federal appellate courts also began hiring law clerks in the 1930s; they increased to two per judge in 1970 and three per judge in 1980. *Id.* There is also reason to believe that the increased use of law clerks has resulted in an increase in the number of precedents cited in each opinion, Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 535 (2010), as well as an increase in opinion length. POSNER, *supra* note 2, at 155 (noting a "large increase in the length of the Supreme Court's majority opinions" between 1969 and 1972, when the Justices "each became entitled to a third law clerk").

[136] 5 AM. BAR ASS'N, ABA LEGAL TECHNOLOGY SURVEY REPORT: ONLINE RESEARCH (2009) v-xiii [hereinafter ABA SURVEY REPORT] (reporting that 97% of private practice lawyers surveyed by the ABA conduct online legal research, which increased from 91% two years earlier). Only 51% of the respondents reported researching in print materials regularly, as opposed to 58% in 2006. *Id*. at v-xi. All of the lawyers under the age of forty reported conducting online research, and 92% of the lawyers over the age of sixty did as well. *Id*. at v-xiii. This trend is likely to continue. Daniel T. Willingham, *Have Technology and Multitasking Rewired How Students Learn?*, 34 AM. EDUC. 23, 23 (2010) ("[T]he average American between the ages of 8 and 18 spends more than 7.5 hours per day using a phone, computer, television, or other electronic device.").

[137] *See infra* note 161 and accompanying text.

bite society," characterized by short attention spans and multitasking.[138] It is hardly surprising that in this environment, a short quotation is often preferable to a lengthy discussion of a case's facts, issues, and holding.

1. The Changing Nature of Judicial Opinion Writing

Many have commented on the exponential increase in courts' caseloads.[139] With more opinions to write each year, less time can be devoted to each opinion.[140] Most significantly, each judge has proportionately less time than in the past to spend drafting and redrafting each opinion.[141] The solution to this problem has largely been to delegate the initial opinion drafting to law clerks.[142] Although once the province of the

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[138] JEFFREY SCHEUER, THE SOUND BITE SOCIETY: TELEVISION AND THE AMERICAN MIND 3 (1999) (arguing America's sound bite culture has "impoverish[ed] political debate"). Scheuer defines a sound bite society, such as the United States, as "one that is flooded with images and slogans, bits of information and abbreviated or symbolic messages—a culture of instant but shallow communication." *Id*. at 8. Sound bite societies are "indifferent to . . . serious discourse." *Id*. Scheuer also points out that within a sound bite society the "electronic culture fragments information into isolated, dramatic particles and resists longer and more complex messages," which interferes with abstraction and recognizing ambiguity. *Id*. at 9.

[139] *See, e.g.*, POSNER, *supra* note 2, at 132 ("There were 66 circuit judgeships in 1960; there are 167 today [1985]; there would be 886 if the number of judgeships were increased to the point necessary to maintain the same ratio of judgeships to cases as in 1960 (1:57)."); Ruggero J. Aldisert et al., *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 6-8 (2009); Harry T. Edwards, *A Judge's View on Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 259, 262 (1981); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 761-62 (1983) (noting that federal appeals increased by 400% between 1960 and 1981); *see also generally* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).

[140] POSNER, *supra* note 2, at 141 ("The biggest 'give' is in the time the judge devotes to the actual preparation of his opinions."); Leval, *supra* note 1, at 1256. This is true even with the growing number of "unpublished" opinions being released by the courts of appeals each year. Aldisert et al., *supra* note 139, at 6-9; Richman, *supra* note 139, at 275, 281-86.

[141] Judge Leval terms this "insufficient judicial scrutiny." Leval, *supra* note 1, at 1262. He notes that "assertions made in dictum are less likely to receive careful scrutiny, both in the writing chambers and in the concurring chambers. When a panel of judges confers . . . [they] generally focus on the outcome and on the reasoning upon which the outcome depends. Judges work under great time pressure." Furthermore, when the "concurring chambers receive the writing judge's draft for their review, they are likely to look primarily at whether the opinion fulfills their expectations as to the judgment and the reasoning given in support. There is a high likelihood that peripheral observations, alternative explanations, and dicta will receive scant attention." *Id.*

[142] This solution has also been discussed at length. *See, e.g.*, POSNER, *supra* note 2, at 139-59; Richman, *supra* note 139, at 288 ("It is widely assumed in the legal world that law clerks draft most opinions. There may be some debate about how widespread the phenomenon is, but there is agreement that it occurs to a significant

judge, law clerks now play a major role in creating the written work product generated by courts.[143] And it is this written work product that has precedential value. True, judges still direct the outcome.[144] But they seldom create the first draft of their opinions.[145]

As understandable as the reliance on law clerks is, it confuses the holding/dicta distinction even further. First, law clerks tend to be relatively recent law school graduates.[146] Not only as compared to judges, but also as compared to more seasoned lawyers, they are less likely to be confident in their understanding of the law and more fearful of misstating the law.[147] This makes them more likely to quote from existing precedent, which is much easier to do than to accurately determine a case's holding. As Judge Posner noted, law clerks "feel naked unless they are quoting and citing cases and other authorities."[148]

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extent with a large number of judges."); Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1423-24 (1995) (referring to law clerks as judges' "ghostwriters"); Alvin B. Rubin, *Views from the Lower Court*, 23 UCLA L. REV. 448, 455-56 (1976) (describing law clerks as "para-judges" and commenting that they are "not merely running citations in *Shepard's* and shelving the judge's law books").

[143] POSNER, *supra* note 2, at 140, 151 (commenting that judges "did their own research and writing before the workload pressures became overwhelming").

[144] *See generally* Posner, *supra* note 139.

[145] Judge Posner notes the risk that judicial opinions will lose legitimacy as it becomes "more apparent that an opinion is the work of the law clerk" as opposed to the judge. POSNER, *supra* note 2, at 149. "This will reduce the authority of judicial decisions as a source of legal guidance and will increase uncertainty and with it litigation." *Id.*; *see also supra* note 69 and accompanying text. Furthermore, he notes the effect that initial draft has on the final product: "the initial draftsman of a judicial opinion, as of any document, is likely to have a big impact on the final product, despite conscientious attention by the judge to his editorial responsibility." Posner, *supra* note 139, at 772.

Judge Wald acknowledges the criticism judicial clerks have garnered, but also opines that law clerks ultimately improve, rather than reduce, the overall quality of judicial opinions. Wald, *supra* note 2, at 1384.

[146] Christopher Avery et al., *The Market for Federal Judicial Law Clerks*, 68 U. CHI. L. REV. 793, 805 (2001); Sally J. Kenney, *Puppeteers or Agents? What Lazarus's Closed Chambers Adds to Our Understanding of Law Clerks at the U.S. Supreme Court*, 25 LAW & SOC. INQUIRY 185, 194 (2000) (discussing the Court's praise for "the use of recent law graduates as a way of bringing the latest legal thinking to sitting judges"); Richman, *supra* note 139, at 289. Recent law school graduates are also more likely to conduct electronic word searches than the judges who employ them. *See generally* Scott Stolley, *Shortcomings of Technology: The Corruption of Legal Research*, 46 FOR THE DEF. 39, 40 (2004).

[147] Posner, *supra* note 139, at 771 ("[L]aw clerks are inevitably timid jurists. . . . Hence, the heavy reliance . . . on quotations (too often wrenched out of context) from prior opinions . . . ."). Determining the holding in opinions like these is not easy; "[t]o pare down such an opinion in search of the hard analytical core is too often like peeling an onion." *Id.*

[148] POSNER, *supra* note 2, at 148.

Law clerks also draft longer opinions.[149] Longer opinions mean the writer includes more, and that "more" is often dicta.[150] In the process, generally sound and familiar writing advice such as, "go easy on quotations," is regularly ignored by judges and especially by law clerks.[151] Consequently, the proliferation of longer opinions coupled with the trend toward relying more extensively on quotations has become a "substitute for thought"[152]—and without rigorous thought, the holding/dicta distinction is destined to remain obscure.

2. The Changing Nature of Legal Research

Young lawyers and most law students spend day after day in "Google-search" mode—looking for answers to their questions by typing a word or short phrase into a search box

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[149] Posner, *supra* note 139, at 770-71 ("[T]he law clerk does not know what he can leave out. . . . [H]e tends naturally to err on the side of overinclusion."). The progressively expanding judicial opinions parallel the rise in reliance on law clerks. *See supra* note 135 and accompanying text. The average number of words in federal appellate decisions increased by over 40% between 1960 and 1983, POSNER, *supra* note 2, at 77 tbl.3.8, 153, which coincided with the increase in reliance on judicial clerks. *Id*. at 155. In 1960, for example, the average federal court of appeals opinion was 2,300 words; by 1983, it was 3,100 words. *Id*. at 153, tbl.5.2. An even more significant increase occurred in majority opinions by the Supreme Court. In 1960, the average Supreme Court majority opinion was 2,000 words; by 1983, the average had ballooned to 4,700 words. *Id*.

[150] Leval, *supra* note 1, at 1256 (accepting "dictum as if it were binding law" results "in some part from time pressures on an overworked judiciary [and] the ever-increasing length of judicial opinions, . . . which contribute to our taking previously uttered statements out of context, without a careful reading to ascertain the role they played in the opinion").

[151] Posner, *Judges' Writing Styles*, *supra* note 142, at 1423-24. Judge Posner contrasts the "pure" and "impure" judicial writing styles, noting that the "pure" style "quotes heavily from previous judicial opinions" and "conceals the author's personality." *Id.* at 1429. More current opinions follow this pattern. "Impure" stylists, on the other hand, such as Justice Oliver Wendell Holmes, "like to pretend that what they are doing when they write a judicial opinion is explaining to a hypothetical audience of laypersons why the case is being decided in the way that it is. These judges eschew the 'professionalizing' devices of the purist writer" including jargon, impersonality, excessive details, "truisms, the unembarrassed repetition of obvious propositions, [and] the long quotations from previous cases to demonstrate fidelity to precedent." *Id.* at 1430 (citations omitted).

[152] Posner, *Judges' Writing Styles*, *supra* note 142, at 1447.

> We tend to think that words enable thought. But words can also substitute for thought. The pure style [which relies heavily on quotations from prior opinions] is an anodyne for thought. The impure style forces—well, invites—the writer to dig below the verbal surface of the doctrines that he is interpreting and applying. . . . If the judge is lucky, he may find, when he digs beneath the verbal surface of legal doctrine, the deep springs of the law.

Id.

and performing an electronic search at the speed of light.[153] Many law firms no longer have a "library"—the libraries exist on each lawyer's desk in the form of a computer with an internet connection.[154]

Perhaps the most significant contribution electronic legal research has made is allowing greater flexibility than was possible with existing print sources. Print digests have inherent limitations;[155] electronic research provides more

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[153] *See, e.g.*, Robert Berring, *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 WASH. L. REV. 9, 31 (1994) (positing in 1994 that the "typical law student of today is not a product of the culture of the book and is just as likely to use an electronic source as a print source"); Linda Green Pierce, *X Lawyers Mark New Spot: Understanding the Post-Baby Boomer Attorney*, 61 OR. ST. B.J. 33, 33-34 (2001).

In terms of electronic legal research, Lexis, with full-text search capabilities, was introduced in 1973, and Westlaw followed suit in 1975. William R. Mills, *The Decline and Fall of the Dominant Paradigm: Trustworthiness of Case Reports in the Digital Age*, 53 N.Y.L. SCH. L. REV. 917, 923 (2009). Westlaw's initial searching was limited to headnotes, but by 1978, Westlaw also offered full-text searching. John Doyle, *WESTLAW and the American Digest Classification Scheme*, 84 LAW LIBR. J. 229, 229-30 (1992). Over the next twenty years, electronic legal research slowly increased, but when the internet became widely available and popular, "legal publishers moved many of their products to this medium." Carol A. Roehrenbeck, *Preparing Lawyers for Practice in the New Millennium*, 51 RUTGERS L. REV. 987, 995 (1999). "By the 1990s, computers and databases had become as much a part of the resources of the library as books." *Id.* at 996.

[154] ABA SURVEY REPORT, *supra* note 136, at v-x (noting that only 17% of private practice lawyers regularly conduct research in firm or public libraries; in contrast, 81% regularly conduct research in their offices, and 29% regularly conduct research at home). The transition from print to electronic sources does create some challenges. *See, e.g.*, Robert Berring, *Chaos, Cyberspace and Tradition: Legal Information Transmogrified*, 12 BERKELEY TECH. L.J. 189, 190 (1997) (describing, in 1997, the "series of problems" and "range of challenges" that transforming legal information from books to electronic media will create). Yet the advent of electronic legal research has brought many advantages. First, in terms of cost, Lexis and Westlaw have, in some sense, leveled the playing field. Small firms can now compete with larger firms, as they do not have to purchase and house a large physical library. The advent of free and low-cost internet search options has also provided benefits; for example, public service offices can now minimize expenses and provide more services to the needy. And for those unable to visit a bricks and mortar law library, the electronic availability of many legal sources, especially those available for free, has increased access to the law.

[155] Daniel Dabney argues that West's Key Number System, and hence the digest, "influences the law itself." Daniel Dabney, *The Universe of Thinkable Thoughts: Literary Warrant and West's Key Number System*, 99 LAW LIBR. J. 229, 230 (2007). He labels the phenomenon created by West as the "universe of unthinkable thoughts." *Id.* at 229-30. "If an idea doesn't correspond to something in the Key Number System, it becomes an unthinkable thought." *Id.* at 236. The argument is that the classification system necessarily limits the ways the classifier can think about the law, and hence, limits the law itself from evolving and expressing new ideas. *See, e.g.*, Berring, *supra* note 153, at 30; Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207, 208-09 (1989) (grouping the West Digest system with the Index to Legal Periodicals and the Library of Congress' subject heading system). Even John West, creator of the West Digest system, agreed that a "rigid" digest system would be

control and greater ability to customize searches. Lawyers can decide for themselves how to search for the information that may be most helpful.[156]

But Google-search mode also brings potentially bad research habits.[157] Rather than exhaustively researching an issue and reading everything available on a particular topic, we can find *a* good source—often boiling down to a few key quotes, and maybe a handful of useful cases or a summary that appears helpful.[158] In other contexts, this may be just fine; when looking for the phone number for a restaurant, as long as we find the number, we do not care if other sites report a different number. But understanding the breadth of precedent relevant to a particular legal issue is critical. Likewise, understanding the *holdings* of the controlling case law—not just finding a few choice quotations from a few key cases[159]—*is* essential to legal analysis.

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ineffective, and admitted that the "classification of today will be as inadequate in the future as the classification of the past is at this time." John B. West, *Multiplicity of Reports*, 2 LAW LIBR. J. 4, 7 (1909) (commenting, in 1909, on the myriad of problems created by the "multiplicity of reports" that result from the increasing number of courts and decisions).

[156] Berring, *supra* note 153, at 31 (recognizing that electronic word searching allows researchers to break free of "the constraints of the West digesting system"); Mills, *supra* note 153, at 928 ("Legal researchers rejoiced over the new full-text search and retrieval systems that liberated them from the strictures of the Key Number digest system.").

[157] In addition to the problem of overemphasizing words and quotations over concepts, the lack of "transparency of search protocols" is a "major problem." Berring, *supra* note 154, at 209. As Professor Berring asks, "Are electronic database users aware of the preemptive decisions being made for them by the system that they are using?" *Id.* He adds that lawyers are "no more likely to read directions than anyone else, and the industry standard for how much training and special skill acquisition one is willing to undergo seems to be dropping." *Id.* Perhaps because electronic word searching in the legal research context is so similar to internet searching, law students and lawyers feel less of a need to attend training and simply assume they are competent electronic researchers.

[158] *See, e.g.*, Fowler, *supra* note 2, at 140-41.

[159] Fowler describes this phenomenon:

> When you plug in the key words or phrases to do your Boolean search . . . you immediately get all the cases that satisfy your query. And you are taken directly to the part of the opinion where your key words or phrases are found. If, there on your computer screen, is a sentence that says what you want it to say, you may conclude your research is done. You may choose not to read the rest of the case to find out the specific issues that were the subject of the appeal. You may also choose not to look carefully at the remaining results of your research—even though those results may reveal a line of on-point precedents overlooked by the first case you found.

Id. at 141. Many electronic sources of legal information do not have full-text searching, so this problem is minimized. But the advantages of those sources are fewer as well. Mills, *supra* note 153, at 930.

Scholars have noted that electronic legal research encourages a focus on individual screens and snippets of text rather than documents as a whole; this devalues the significance of legal principles in favor of facts and rules taken out of context.[160] Electronic research combined with word processing allows writers to copy and paste language into briefs and judicial opinions with ease,[161] but without necessarily considering the context for that statement. This may result in more "tilting at windmills"—lawyers putting forward "marginal cases, theories, and arguments."[162]

This is not to suggest that electronic word searching is useless; on the contrary, it is a valuable addition to the available research tools.[163] But electronic word searching[164] emphasizes, by its very nature, particular words over concepts.[165] As noted by one commentator, a judge's particular

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[160] Carol M. Bast & Ransford C. Pyle, *Legal Research in the Computer Age: A Paradigm Shift?*, 93 LAW LIBR. J. 285, 297-98 (2001); Molly Warner Lien, *Technocentrism and the Soul of the Common Law Lawyer*, 48 AM. U. L. REV. 85, 88-90 (1998) (equating society's "sound-bite" culture with law students' and lawyers' "'law-byte' reasoning and hypertext analysis" and criticizing the "rapid rule extraction" electronic research facilitates).

[161] Bast, *supra* note 160, at 298.

[162] Katrina Fisher Kuh, *Electronically Manufactured Law*, 22 HARV. J.L. & TECH. 223, 226 (2008).

[163] In terms of the research strategies and research tools used by lawyers, legal researchers "tend to use more than one system, and often use several." Schanck, *supra* note 48, at 17. Some lawyers never use digests, *id.* at 18, and lawyers tend to focus more on facts "than on abstract doctrines." *Id.* Approximately 10% of all Westlaw searches are Key Number (the online digest) searches. E-mail from Daniel Dabney, Senior Director of Classification, ThomsonReuters, to Judith M. Stinson, Clinical Professor of Law, Sandra Day O'Connor College of Law at Arizona State University (Feb. 12, 2010, 02:15 MST) (on file with author).

[164] Electronic searches are generally either Boolean searches or Natural Language searches. When conducting a Boolean search, the researcher essentially creates his or her own indexing system. Berring, *supra* note 153, at 30. But Boolean searching is inherently based on the particular words used by judges; furthermore, Berring notes that researchers are not likely "adept at Boolean searching." *Id.*

Natural Language searching uses "algorithms to retrieve cases that [are] statistically likely to be relevant, based on the words entered in search statements devised by the researcher." Mills, *supra* note 153, at 920. Mills notes that "[n]atural language search[es] proved even more popular than Boolean search[es]"—likely because of the similarity between a Natural Language search and Google or other basic internet searching. *Id.* The searcher does not have to think about the relationship between terms; he simply lets the computer default system decide those matters. For this reason, Natural Language searches are generally less effective and less efficient than Boolean searches.

[165] "The efficiency of word-based searches depends on the probability that the searcher and the court have used the same word or phrase for the concept in question." Delgado, *supra* note 155, at 220-21. Because the computer, when running a Boolean or Natural Language search, is looking for the specific words entered by the user, language becomes key. *See, e.g.*, Mills, *supra* note 153, at 921. Concepts that can be expressed in more than one way—as many legal concepts can—are not best suited to

statement of the law is "mere dictum."[166] Judges are "not bound by the statement of the rule of law made by the prior judge even in the controlling case."[167] Case law is contrasted with statutes for this purpose: "What a court says is dictum, but what a legislature says is a statute."[168]

As noted by one scholar, "[w]hile online full-text retrieval was developed to free searchers from the limitations of editorially indexed cases, it also minimized the assistance to be gained from editorial judgment."[169] Furthermore, word searches, without reading the entire opinion in which a sentence appears, do not reveal whether the statement reflects the court's holding or is merely dictum.[170]

At least one commentator has suggested that electronic legal research has "devalued the holding/dictum distinction."[171]

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word searches. Even with concepts usually expressed in a phrase, word searching may miss key relevant authorities. For example, if a researcher looks for "parol evidence rule" but the court terms the rule "the rule on parole evidence," the researcher may not find the source. True, a carefully crafted search is more likely to capture alternative phrasings for the same concept. But sometimes judges do not use the words one might most expect to be used.

"[T]he computer is ill-suited for finding concepts. It is great for finding discrete words or specific cases, but that's just data collection. . . . Law is concept-oriented, and concepts are best found in sources that are categorized by concept, such as digests." Stolley, *supra* note 146, at 40.

[166] LEVI, *supra* note 46, at 2.

[167] *Id.*

[168] *Id.* at 6.

[169] Doyle, *supra* note 153, at 230.

[170] Fowler, *supra* note 2, at 141. Although easy, the attraction to quotes is puzzling. Quotes are like statistics; you can find one to say anything you want. I am reminded of the student who returned from his summer clerkship experience with a large law firm. When I asked whether his research skills were up to par with his colleagues, he advised me that his most frequent research project was of this sort: "find me a case that says *X*." When the goal is to find cases that *say X*, rather than *hold X*, it is easy to see why word searching is so popular.

[171] *Id.* at 140-41.

More significantly, changes in 2010 to Westlaw and LexisNexis will make those platforms resemble, to a much greater degree, Google. Those new platforms, WestlawNext and Next Lexis, emphasize Natural Language searching. Jill Schachner Chanen, *Exclusive: Inside the New Westlaw, Lexis & Bloomberg Platforms*, ABA J. LAW NEWS NOW, Jan. 24, 2010, *available at* http://www.abajournal.com/news/article/exclusive_inside_the_new_westlaw_lexis_bloomberg_platforms. These new platforms will bring a number of improvements, and may help decrease, at least somewhat, the problems inherent in word searching; for example, WestlawNext relies on an algorithm that adds "synonyms, . . . terms of art, generic names, and legal relationship terms—so your search terms don't have to match the judge's terms verbatim." THOMSON REUTERS, THE WESTLAW NEXT CASELAW 22-STEP EDITORIAL PROCESS 1 (2010). In addition, it uses the key number system—the foundation for digests—and automatically analyzes search patterns on your issue. THOMSON REUTERS, CONFIDENCE. EFFICIENCY. PRODUCTIVITY. 1 (2010).

But the "hunt for a good quotation" made easier by electronic word searching may persist, and the recent releases of Google Scholar and Bloomberg Law,

In addition, Judge Leval notes that the "acceptance of prior dictum as if it were binding law" comes, in part, from the "precision-guided weaponry of computer research," which contributes to "our taking previously uttered statements out of context, without a careful reading to ascertain the role they played in the opinion."[172]

3. Changes to Citation Rules

Even our dominant citation rules emphasize the words in judicial opinions over case holdings. In theory, lawyers and judges must indicate when they cite a case for anything other than the case's holding.[173] Yet in practice, the citation rules as currently framed suggest that a case's holding is less significant than the *statements* made by the same court—even though statements can be and often are dicta.[174]

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and the increase of sites such as FastCase.com and TheLaw.net make clear that word searching is the dominant mode of conducting research. *Id.*; *see also About Google Scholar*, GOOGLE SCHOLAR, http://scholar.google.com/intl/en/scholar/about.html (last visited Sept. 10, 2010) ("Google Scholar provides a simple way to broadly search for . . . court opinions."); BLOOMBERG LAW, https://www.bloomberglaw.com (last visited Sept. 10, 2010) ("It's the first and only real-time research system for the 21st century legal practice."); FASTCASE, http://www.fastcase.com/ (last visited Feb. 22, 2010) ("Fastcase is a next-generation, Web-based legal research service, that puts the complete national law library on your desktop anywhere you have Internet access. Fastcase's smarter searching, sorting, and visualization tools help you find the best answers fast—and help you find documents you might have otherwise missed."); THELAW, http://www.thelaw.net/ (last visited Feb. 22, 2010) ("Case Law: Searchable, Citable, Checkable & Affordable").

[172] Leval, *supra* note 1, at 1256. He also notes that that it is "easier to have the magic carpet of computer research whisk you straight to the pertinent sentence of the prior opinion and write 'In such and such case, the court held . . . .'" *Id.* at 1269 (alteration in original).

[173] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.6.1(a), at 91 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005). That rule states: "When a case is cited for a proposition that is not the single, clear holding of a majority of the court (e.g., alternative holding; by implication; *dictum*; dissenting opinion; plurality opinion; holding unclear), indicate that fact parenthetically." *Id.* (emphasis added).

However, a writer may fail to identify when a case is cited for other than its holding—perhaps in a deliberate attempt to mislead, but perhaps because the writer herself is not clear about whether the proposition is the case's holding or simply dicta.

[174] The problem likely stems from the fact that *The Bluebook* was designed for scholarly, not practical, writing. *The Bluebook* is "[c]ompiled by the editors of the Columbia Law Review, the Harvard Law Review, the University of Pennsylvania Law Review, and the Yale Law Journal." THE BLUEBOOK, *supra* note 173, at iii. Those editors edit scholarly articles, not practitioners' documents.

Academics and students writing scholarly papers generally focus in more depth on secondary sources than on cases. And for secondary sources, as well as the three other common types of primary authority—constitutions, statutes, and administrative regulations—the actual language used is controlling. The reader needs to see the exact language used by the legislature, for example, and wants either the words or a paraphrased summary of a scholarly author's argument. But this same

The current problem lies in the rules regarding signals,[175] but this has not always been the case. In fact, previous versions of the signal rule—which one would think instinctually tells a reader when a cited source is not directly on point—did not elevate statements over holdings. The original Bluebook, in 1926, stated the following: "To indicate the *purpose of the citation*, use the following forms: (a) For a square holding, cite the case only at the page where it begins."[176] The next subsection addressed dicta: "For a dictum, put 'see' before the name of the case, and, after the initial page of the case, put a comma and the page where the dictum begins."[177] Early signal rules therefore emphasized judicial "holdings" and not simply judicial "statements."[178]

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reliance on language should not necessarily hold true with judicial opinions. The words used by a court are often of little significance; instead, the court's holding—which generally requires more complex legal analysis to determine—is of prime significance, as it is the only binding component of the opinion. *See id.* at 91; *see also supra* text accompanying note 159. Yet the signal rules in *The Bluebook* make no distinction between cases and other authorities.

[175] Although perhaps a subtle distinction, to the extent that some writers are well versed in the current citation rules—and law clerks, having been recent law review editors, are bound to be—these rules at least subconsciously tell writers what is more highly valued and what is less valued in terms of authority. *See supra* note 146 and accompanying text. It is true that citation rules likely have little effect on most judges. Richard A. Posner, *Law Reviews*, 46 WASHBURN L.J. 155, 158 (2006). But many lawyers, and likely a majority of law clerks, do pay attention to these rules.

[176] A UNIFORM SYSTEM OF CITATION: ABBREVIATIONS AND FORM OF CITATION R. I(A)(3)(a), at 1 (1st ed. 1926) (photo reprint William S. Hein & Co. 1998), *available at* http://www.legalbluebook.com/img/PastVersions/USC01.pdf.

[177] *Id.* R. I(A)(3)(b), at 2. This rule changed slightly, but the focus remained on holdings until the thirteenth edition was published in the 1980s. For example, under the tenth edition of *The Bluebook*, no signal was necessary if the writer was

> introduc[ing] any authority which directly upholds a proposition of either law or fact which is stated by the text [meaning the writer's text, not the case being cited]. Only authorities which unequivocally *hold* the stated proposition of law *or* explicitly make the statement or conclusion of law or fact which is made by the text should be cited as support without a signal.

A UNIFORM SYSTEM OF CITATION: FORMS OF CITATION AND ABBREVIATIONS R. 27:2:1, at 85 (10th ed. 1958) (emphasis added), *available at* http://www.legalbluebook.com/img/PastVersions/USC10.pdf. Under this rule, no signal was required if either a case was cited for its holding or if a case was cited for an explicit statement, conclusion of law, or conclusion of fact. *Id.*

[178] The rules in the eleventh edition were similar; no signal was required when the "[c]ited authority directly *supports*" the writer's "statement in [the] text." A UNIFORM SYSTEM OF CITATION: FORMS OF CITATION AND ABBREVIATIONS R. 26:1, at 86 (11th ed. 1967) (emphasis added), *available at* http://www.legalbluebook.com/img/PastVersions/USC11.pdf. The twelfth edition rules were more comprehensive, but still recognized that when a case was cited for its holding, no signal was required. A UNIFORM SYSTEM OF CITATION R. 2:3(a), at 6 (12th ed. 1976), *available at* http://www.legalbluebook.com/img/PastVersions/USC12.pdf. That rule stated that no signal was required when the "[c]ited authority: (i) directly *supports* statement in text, (ii)

However, the rule requiring a "see" signal became more statement-based with the thirteenth edition. A signal was required unless the cited authority, "(i) *state*[*d*] the proposition; (ii) identifie[d] the source of a quotation; or (iii) identifie[d] an authority referred to in text."[179]

This emphasis on "statements" carried through subsequent editions of *The Bluebook*[180] and has become even stronger. The fifteenth edition required no signal when the cited authority "*clearly states* the proposition."[181] This emphasis is not added; it is in *The Bluebook*'s rule. And the sixteenth edition eliminated the first prong relating to a "proposition" altogether—requiring a signal unless the cited authority identified the "source of a quotation" or identified "an authority referred to in the text."[182] Hence, *The Bluebook* made it clear that statements—not holdings, and not even propositions—mattered for purposes of citation.

The current rule regarding "see" once again includes "propositions," but requires that a signal be provided unless the cited authority "directly states the proposition."[183] Following this rule, a signal is required, even for a holding, if it is not "directly stated" in the opinion.[184] This seems, frankly, nonsensical.[185]

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identifies source of a quotation, or (iii) identifies an authority referred to in text." *Id.* (emphasis added).

[179] A UNIFORM SYSTEM OF CITATION R. 2.2(a), at 8 (13th ed. 10th prtg. 1985) (emphasis added), *available at* http://www.legalbluebook.com/img/PastVersions/USC13.pdf.

[180] *See, e.g.*, A UNIFORM SYSTEM OF CITATION R. 2.2(a), at 8 (14th ed. 1986), *available at* http://www.legalbluebook.com/img/PastVersions/USC14.pdf.

[181] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a)(i), at 22 (Columbia Law Review Ass'n et al. eds., 15th ed. 12th prtg. 1995) (emphasis in original), *available at* http://www.legalbluebook.com/img/PastVersions/USC15.pdf. That rule also retained the prongs requiring no signal if the citation identified the source of a quotation or identified authority referred to in the text. *Id.*

[182] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 22 (Columbia Law Review Ass'n et al. eds., 16th ed. 3rd prtg. 1996).

[183] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 54 (Columbia Law Review Ass'n et al. eds., 19th ed. 1st prtg. 2010) (emphasis added). That rule also provides that a signal is not required if the cited authority "identifies the source of a quotation" or "identifies an authority referred to in the text." *Id.* The comment contained in this rule emphasizes quotations and paraphrased information even further: "Use '[no signal],' for example, when directly quoting an authority or when restating numerical data from an authority." *Id.*

[184] *Id.*

[185] In contrast, citation rules under the ASS'N OF LEGAL WRITING DIRS. & DARBY DICKERSON, ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION (4th ed. 2010) eliminate this problem. Under that citation manual, which is designed for practitioners rather than academics, no signal is used when the "cited authority directly *supports* the stated proposition." *Id.* R. 44.2(a)(1), at 370 (emphasis added). A "see" signal is proper under the ALWD Citation Manual "when the cited authority (a)

The Bluebook's signal rules suggest that what the courts say is more relevant than what they do. Regardless of the definition one chooses for holding, commentators agree that not every statement within a judicial opinion is binding.[186] *The Bluebook* rule implies all holdings are clearly articulated, and what is articulated is a holding. Anyone who has practiced law for any length of time knows that neither of those propositions are accurate.[187]

4. Societal Changes

American society has evolved into a culture that relies on quick sound bites rather than deeper analysis for much of its information.[188] Current generations are increasingly characterized by their short attention spans.[189] As a profession, the legal community appears to be aware of these societal changes; for example, a number of lawyers and judges have focused on this evolution for purposes of persuading courts,[190] juries,[191] and the public (through the media).[192] But the legal

supports the stated proposition implicitly or (b) contains dicta that support the proposition." *Id.* R. 44.3, at 371. Hence, when a case is cited for its holding—whether articulated or not—no signal is used. A court's statements are not the triggering event; a court's holding is.

[186] *See supra* note 26.

[187] *But see* Maine Yankee Atomic Power Co. v. United States, 44 Fed. Cl. 372, 376 (1999) ("[A] case will not be treated as binding precedent on a point of law where the holding is only implicit or assumed in the decision but is not announced.").

[188] Generational changes may influence these developments as well. "Baby boomers" are those born between 1946 and 1964. Press Release, U.S. Census Bureau, Oldest Baby Boomers Turn 60! (Jan. 3, 2006), *available at* http://www.sec.gov/spotlight/seniors/oldestboomers2007.htm. That generation grew up without computers, and many without television. Instead, baby boomers "learned technology as it was invented." Pierce, *supra* note 153, at 33. In contrast, those born between the mid-1960s and the late 1970s, termed "Generation X," "grew up with computers" and "process information differently. The spurts of immediate information provided by computers and television . . . created a generation accustomed to getting information and education quickly and in sound bites." *Id.* This group is identified by a "short attention span, which may arguably limit focus," but which also "enhances the ability to do multiple tasks. A range of available information through the media and computers has enhanced this generation's ability to draw conclusions from readily available sources." *Id.* "Generation Y," also termed the "Millennial Generation," are those born between 1982 and 2002. *Is Your Firm Ready for the Millennials?*, KNOWLEDGE@EMORY (Mar. 8, 2006), http://knowledge.emory.edu/article.cfm?articleid=950. This generation is apt to be risk averse, *id.*, and this in turn may further complicate the problem of overreliance on quotations.

[189] *See, e.g.*, Pierce, *supra* note 153, at 33.

[190] *See, e.g.*, Julie A. Oseid, *The Power of Brevity: Adopt Abraham Lincoln's Habits*, 6 J. ASS'N LEGAL WRITING DIR. 28 (2009); Cathy R. Silak, *From the Bench: All the World's a Stage*, 31 LITIG. 3 (2005).

[191] *See, e.g.*, H. Mitchell Caldwell et al., *The Art and Architecture of Closing Argument*, 76 TUL. L. REV. 961, 1034 (2002).

community does not appear to be thinking deeply about how these broader societal changes might be affecting our ability to conduct and communicate complex legal analysis. More specifically, there is no discussion about the effect these changes may have on the fundamental distinction between holding and dicta.

Society's growing reliance on sound bites and the ever decreasing attention span of its members contribute to the inability of lawyers, judges, and law students to distinguish between holding and dicta.[193] We refuse to engage in the deep thinking necessary to determine a particular case's holding. It is simply easier to find and quote some appealing language, even when the quoted phrase has little or nothing to do with the court's holding.[194]

Furthermore, psychologists argue that "cognitive fluency"[195] suggests we believe that what is easy is correct, and conversely, what is more difficult is likely incorrect.[196] Applying this theory to the holding/dictum distinction, it is far easier to extract seemingly relevant quotations from complex judicial opinions than it is to read and understand their actual holdings. Under principles of cognitive fluency, this is not only the easy answer, but also normatively correct. And with a society predisposed to the siren song of media sound bites and without the attention span to read and reread lengthy opinions

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[192] *See, e.g.*, Michelle DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS 1259 (2009); Eric M. Van Horn & Nancy B. Rapoport, *Restructuring the Misperception of Lawyers: Another Task for Bankruptcy Professionals*, AM. BANKR. INST. J., Sept. 2009, at 44 (providing a number of tips, with the first being: "Speak in sound bites. When was the last time you had a decent attention span?").

[193] *See, e.g.*, Aldisert et al., *supra* note 139, at 2 ("Unfortunately, readers and users of judicial opinions—litigants, lawyers, other judges, clerks, researchers, and law students—tend to be very busy. As a result, they have highly selective reading habits.").

[194] Fajans & Falk, *supra* note 30, at 170. Multitasking also contributes to this problem; one article points to the ten point drop in functioning IQ that occurs when workers are distracted by e-mail and phone calls. Karen Erger, *Mono-Mania: The Case Against Multitasking*, 94 ILL. B.J. 206, 207 (2006); *see also* Daniel T. Willingham, *Have Technology and Multitasking Rewired How Students Learn?*, 34 AM. EDUC. 23, 25 (2010) ("[W]hen you do two things at once, you don't do either one as well as when you do them one at a time.").

[195] *See generally* Tedra Fazendeiro et al., *How Dynamics of Thinking Create Affective and Cognitive Feelings*, *in* SOCIAL NEUROSCIENCE 271, 271-89 (Eddie Harmon-Jones & Piotr Winkielman eds., 2007). Cognitive fluency is "a measure of how easy it is to think about" a topic. Drake Bennett, *Easy = True: How 'Cognitive Fluency' Shapes What We Believe, How We Invest, and Who Will Become a Supermodel*, BOSTON GLOBE, Jan. 31, 2010, *available at* http://www.boston.com/bostonglobe/ideas/articles/2010/01/31/easy_true?mode=PF.

[196] Bennett, *supra* note 195.

to accurately determine courts' holdings, an overreliance on words, phrases, and quotations inescapably compounds the confusion between holding and dicta.

IV. TENTATIVE PROPOSALS AND CONCLUSION

Regardless of how one defines holding (and therefore dicta), it is clear that judges and lawyers routinely confuse the two. Most significantly, dictum is regularly elevated to holding. This article identifies a number of reasons underlying this confusion—the ripple effect, courts' tendency to emulate the Supreme Court, and the overemphasis on words, especially in the form of quotations. While this list may not be exhaustive, these underlying causes of the confusion can serve as a starting point for articulating proposals that may stop the repeated conflation of holding and dicta.

First, increasing education regarding the distinction is bound to help. That education could occur in law schools,[197] in continuing legal education seminars for practicing lawyers,[198] and at judicial training conferences.[199] Within law schools, students should be warned about the dangers of relying on the words and phrases they find in judicial opinions, especially when taken out of context.[200] Although it is true that law students are regularly asked to identify the holding of a case, they are often not told whether their response is correct.[201] Further, they are rarely asked to identify dicta; without consciously distinguishing between the two, their understanding of these concepts is bound to be limited.[202]

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[197] *See supra* note 106.

[198] Judy M. Cornett, *The Ethics of Blawging: A Genre Analysis*, 41 LOY. U. CHI. L.J. 221, 245 n.155 (2009) (noting that many states require their lawyers to complete mandatory training each year).

[199] For example, all judges in Arizona are required to complete "[e]ducational requirements," which include "a minimum of sixteen hours of approved course work each year, including . . . attendance at an annual judicial conference designated by the supreme court." ARIZ. CODE OF JUDICIAL ADMIN. § 1-302(J)(1)(b), *available at* http://www.azcourts.gov/Portals/0/admcode/pdfcurrentcode/1-302_Amended_01-2008.pdf. By court rule, "[j]udicial education shall address relevant areas such as judicial competence, performance, case management, opinion writing, and administration," *id.* § 1-302(J)(3)(a), and education programs for judges are "designed to impart knowledge, improve skills and techniques and increase the understanding of judges regarding their responsibilities and their impact on the judicial process, the people involved, and society." *Id.* § 1-302(J)(3)(b).

[200] *See supra* Part III.C.

[201] Although the Socratic Method offers many pedagogical advantages, it does not remedy the lack of explicit instruction in the distinction between holding and dicta.

[202] Law students tend to "summarize and paraphrase" rather than engage in the more difficult work of analyzing. *See* Fajans & Falk, *supra* note 30, at 170.

Instead, students should be forced to engage in the difficult analytical task of expressly identifying both holdings and dicta.[203] But identification is not sufficient. They should also be required to *apply* the distinction in hypothetical situations. This could occur, for example, in an employment law course, where students could be required to articulate *Mackay Radio*'s[204] holding—and its dicta.[205] They could then be required to presume *Mackay Radio* was the only case on the topic, and to articulate arguments for and against requiring an employer to reinstate a striking employee.[206] The students would learn to use dicta appropriately and argue its persuasive effect.[207] Similarly, assignments in legal method courses could require students to expressly confront the holding/dicta distinction and to draft persuasive arguments for either adopting the dicta or for rejecting it.

Lawyers and judges would also benefit from explicit education on the distinction between holding and dicta. Just as law students ought to be cautioned against the overreliance on words, phrases, and quotations, lawyers and judges could also benefit from that reminder.[208] For example, a hypothetical scenario with a few short cases could be created, and participants could discuss which parts of each case are holding and which parts are dicta. Continuing legal education seminars for the practicing bar could also include debate on how to effectively, and ethically,[209] use dicta. Judicial seminars could cover these topics as well, and address the dangers of drafting opinions that mirror those issued by the Supreme Court. And perhaps most significant to the bench, special training could be

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[203] Requiring students to rethink their research strategies might also be fruitful. By using other research tools in tandem with electronic word searching, the legal researcher is much more likely to understand case holdings and to be able to accurately articulate what a case holds, rather than merely what it states. *See supra* Part III.C.2.

[204] NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

[205] *See supra* notes 81-88 and accompanying text.

[206] *See supra* notes 83-88 and accompanying text.

[207] *See* Lien, *supra* note 160, at 128-29 (arguing that "in the art of persuasion, an effective lawyer must . . . understand and use the contexts in which rules arise to bring the audience to the conclusion that fairness and justice dictate that a person in the client's situation must prevail"). Of course, persuasion also includes debating the breadth or narrowness of a particular decision, and therefore arguing about what is—versus what is not—the case's holding in the first place.

[208] Law practice is busy. But when lawyers take the time to expressly distinguish between a case's holding and its dictum, they can then argue more persuasively about the impact of that case on their client's situation.

[209] *See infra* notes 219-23 and accompanying text.

developed for new law clerks[210] to help them distinguish between holding and dicta.

Second, reducing judicial caseloads would make it easier for judges and their clerks to spend the time necessary to distinguish between holding and dicta—both in the opinions they read and in those they write. The current demands on judges (and therefore by necessity on their law clerks) limit the amount of time that can be spent on any one case.[211] Research time is especially limited, because the opinion has to be written regardless of time pressures.[212] If counsel mislabels dicta as holding, the court, without adequate time to fully vet counsel's assertion, might rely on that characterization and erroneously elevate the dicta to holding. But with adequate time to research and analyze the relevant authorities, courts could more readily distinguish between dicta and holding.[213]

In addition to allowing judges and their clerks to distinguish between holding and dicta in the cases cited by counsel, decreasing judicial caseloads would also enable judges and their clerks to expressly distinguish, in their *own opinions*, holding from dicta. For example, courts could expressly identify when they are relying on dicta and explain why they find it persuasive. This, in turn, would result in less confusion for lawyers and other judges, effectively breaking the cycle created by the ripple effect.

Third, changes to a few key rules—citation rules and ethical rules—could help minimize the confusion between holding and dicta. For example, citation rules could require a parenthetical explanation[214] for all case citations indicating whether the author's statement reflects either the particular case's holding or its dicta.[215] This requirement would force the writer to consciously identify, for every case cited, both the holding and the dictum. With this explicit identification, readers would have a significant head start in determining for

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[210] *See supra* notes 142-52 and accompanying text.

[211] *See supra* notes 134, 139-41 and accompanying text.

[212] *See supra* note 140 and accompanying text.

[213] Inadequate judicial resources generally result in lower quality opinions. *See, e.g.*, Hessick, *supra* note 51, at 900 n.8, 927-28 (arguing against presumptively treating statutory limitations as jurisdictional and pointing out that the resources argument cuts both ways because increased jurisdiction has inherent costs as well).

[214] *See, e.g.*, THE BLUEBOOK, *supra* note 173, R. 10.6.1, at 91.

[215] Although current rules require the writer to indicate when a case is cited for its dicta, that rule is rarely followed, in large part because the writer often does not bother to consider whether the statement for which the case is being used reflects its holding or is dicta. *See id.* R. 10.6.1(a), at 91; *see also supra* note 173.

themselves whether the proposition is a holding or a dictum, and the ripple effect could become a positive phenomenon.

Similarly, the current citation rule regarding signal usage[216] could be improved. Specifically, the rule could distinguish between case authority and other types of authority. For cases, a "*see*" signal could be required if the case's holding does not directly support the proposition asserted by the writer.[217] For other authorities—including constitutions, statutes, rules, and secondary sources—the "statements" made in those authorities are in fact significant,[218] and no signal would be needed when quoting, paraphrasing, or summarizing those statements. Only within the realm of case law do we confront the dicta problem; for that reason, it makes sense to distinguish between cases and other authorities for purposes of signals.

Ethics rules could also be improved and could explicitly address the holding/dicta distinction. Current model rules require both candor toward the court[219] and some level of truthfulness when representing clients.[220] And both of those rules expressly address false statements of law.[221] Yet neither the model rules nor the comments to those rules address the holding/dicta distinction.[222] The comments acknowledge that advocacy implies some level of creative argumentation.[223] But

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[216] THE BLUEBOOK, *supra* note 173, R. 1.2, at 46-48.

[217] *The Bluebook*'s focus on scholarly writing makes the signal rule illogical when citing case authority. *See supra* note 174.

[218] *See supra* note 174.

[219] AM. BAR ASS'N, MODEL RULES OF PROFESSIONAL CONDUCT R. 3.3(a)(1) (2007) ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal . . . ."). *Id*.

[220] *Id*. R. 4.1 ("[A] lawyer shall not knowingly . . . make a false statement of material fact or law to a third person . . . .").

[221] *Id*. R. 3.3, 4.1.

[222] Rule 3.3(a)(2) requires a lawyer to disclose to the court controlling legal authority "known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel," but makes no distinction between holding and dicta. *Id.*

[223] Rule 3.3 provides:

> Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. . . . The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Id. R. 3.3 cmt. [4]; *see also* R. 3.3 cmt. [2] (noting that the special duty of a lawyer as an officer of the court is to "avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate . . . has an obligation to present

the rules and comments could be clearer. For example, they could explicitly state that when citing a case for other than its clear holding, the lawyer is obligated to point out that fact to opposing counsel and to the court.

The proposals briefly introduced here demonstrate the breadth of actors with an ability to address the problem: law schools, lawyers, judges, bar associations, legislatures, *Bluebook* editors, and the American Bar Association. With the concerted effort of even a few of these actors, we can close the gap on the confusion that results when dicta is mistaken for holding. That, in turn, will help stop the negative ripple effect.

These tentative proposals are likely not the only solutions to this problem, and each has its own limitations. The next step is to generate and fully evaluate more concrete proposals. But by identifying the likely *causes* of the confusion between holding and dicta, we can begin the debate about how to solve the problem.

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the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal.").