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Preemptive Dicta: The Problem Created by Judicial Efficiency

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PREEMPTIVE DICTA: THE PROBLEM CREATED BY JUDICIAL EFFICIENCY

*Judith M. Stinson**

Judges regularly espouse dicta. Traditional obiter dicta, remarks that are clearly asides and not about issues considered in the case, can be easily ignored by subsequent courts. But one particular form of dicta is especially problematic because it is more difficult to ignore. Judicial efficiency dicta are statements in judicial opinions about issues involved in the case and likely to present themselves again, but not necessary for the outcome of the case. While those statements are often about issues actually considered and may contribute to judicial efficiency by saving courts time when reconsidering issues already litigated, just like obiter dicta, judicial efficiency dicta exceed courts' authority and are more likely than actual case holdings to be incorrect. Unlike obiter dicta, however, judicial efficiency dicta are difficult to identify. And most significantly, this particular form of dicta is more likely to be followed by subsequent courts, essentially being elevated to the position of holdings. Because it is more likely to become binding and cut off the natural development of the law, this "preemptive dicta" presents a significant concern.

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TABLE OF CONTENTS

I. INTRODUCTION.....	589
II. DICTA, COURTS' ROLES, AND JUDICIAL EFFICIENCY	591
A. Dicta.....	591
1. Dicta Exceed the Court's Authority	597
2. Dicta Are More Likely to Be Inaccurate than Holdings.....	600
B. The Roles of Various Courts	603
C. The Need for Judicial Efficiency	607
III. THE REAL PROBLEM WITH JUDICIAL EFFICIENCY DICTA: PREEMPTION	610
A. Difficult to Identify.....	611
B. Treated as Binding Even When Identified	612
1. Reliance	612
2. Deference to a Higher Court.....	614
3. Fear of Reversal	617
IV. CONCLUSION.....	618

I. INTRODUCTION

Much has been written about the problems dictum creates,¹ and almost all courts and commentators agree that dicta, as opposed to case holdings, are not binding.² Despite this, judges regularly espouse dicta.³ Yet little attention is paid to one particular type of dicta: that espoused for the purposes of judicial efficiency.

Judicial efficiency dicta are statements made in judicial opinions about issues involved in the case that are likely to present themselves in the future, but these statements are not necessary for the outcome of the particular case before the court.⁴ Those statements may contribute to judicial efficiency by saving courts time when reconsidering issues already litigated.⁵ If those issues were actually raised before the court, this type of dicta would fall into the category of “considered dicta.”⁶ These statements are contrasted with what is commonly thought of as dicta—obiter dicta.⁷ Obiter dicta are those off-handed statements about issues not directly before the court, and they are generally easy to identify; they are also more easily dismissed than considered dicta.⁸

Judicial efficiency is a laudable goal.⁹ Furthermore, when espousing dicta for judicial efficiency purposes, the court has likely considered the issue addressed (at least on some level), and some

1. See generally Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005) (analyzing the interplay between dicta and stare decisis); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994) (focusing on “the jurisprudential implications of Article III for determining how federal courts ought to distinguish between the holdings and dicta of past cases”); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249 (2006) (discussing “the increasing failure of courts to distinguish between dictum and holding”); Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219 (2010) (aiming to “identify the causes that lead to the repeated conflation of dicta with holding”).

2. See, e.g., Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 573 (1987) (“So long as the words of the past tell us how to view the deeds of the past, it remains difficult to isolate how much of the effect of a past decision is attributable to what a past court has *done* rather than to what it has *said*.”); Leval, *supra* note 1, at 1274 (arguing that even the “Supreme Court’s dicta are not law” because the issues addressed in the dicta “remain adjudicated”).

3. See, e.g., Leval, *supra* note 1, at 1250; David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2048 (2013).

4. See *infra* notes 33–55 and accompanying text.

5. See *infra* notes 146–50 and accompanying text.

6. See, e.g., Lisa M. Durham Taylor, *Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms*, 57 DRAKE L. REV. 75, 93–94 (2008).

7. Marc McAllister, *Dicta Redefined*, 47 WILLAMETTE L. REV. 161, 167 (2011).

8. Taylor, *supra* note 6, at 90–94.

9. See *infra* notes 131–45 and accompanying text.

arguments were likely made by the parties.¹⁰ Hence, at first blush, this form of dicta is arguably more likely to be accurate than traditional obiter dicta because the statements often relate to issues actually considered by the court, and many argue that it is the least problematic type of dicta.¹¹ This argument is misplaced, however.

Because judicial efficiency dicta are unnecessary to the outcome of the case, these statements, just like obiter dicta, exceed courts' authority by having judges essentially legislate the results in future disputes not before them.¹² These statements are also, as with obiter dicta, more likely than actual case holdings to be incorrect because they do not impact the result.¹³ In addition to suffering from the same problems as other forms of dicta, the conventional wisdom suggesting that this type of dicta is less problematic than traditional obiter dicta ignores one key fact: judicial efficiency dicta essentially bind judges in future proceedings.

When courts espouse these dicta in an attempt to provide guidance to the parties and future courts, the consequences are significant. The first problem is that subsequent courts are not likely to identify these statements as dicta¹⁴ and will therefore treat them as though they are binding—even though the issues were never properly before the court. Judges and scholars regularly comment on the difficulty in distinguishing between a court's holding and dictum,¹⁵ but judicial efficiency dicta are even more difficult to identify because they seem to be "rules" and often look like the considered judgment of the court, as opposed to the type of off-handed comments more easily labeled as dicta.

And even if the subsequent court identifies the statements as dicta and therefore recognizes it has the power to ignore them, the court also would recognize that doing so would be unwise. Courts will be reluctant to deviate from the espoused dicta in part because individuals may have relied on those statements,¹⁶ and even though those

10. McAllister, *supra* note 7, at 167.

11. *See infra* note 27.

12. *See infra* notes 60–85 and accompanying text.

13. *See infra* notes 86–96 and accompanying text.

14. *See infra* notes 152–61 and accompanying text.

15. *See, e.g.*, Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 25 (1989) (noting, with regard to the "distinction between holding and dictum," that "all lawyers are trained to acknowledge" the difference, but actually delineating dictum from holdings "proves in practice to be quite controversial").

16. *See infra* notes 162–76 and accompanying text.

statements are not technically binding, lower courts may simply defer to higher courts¹⁷ and will be loath to rule contrary to the previous dicta because doing so will very likely result in reversal.¹⁸ Therefore, because judicial efficiency dicta are most likely to cut off debate, stunt the natural progression of the law, and become binding, this “preemptive dicta”—dicta espoused for the purpose of judicial efficiency—is, in fact, a very troublesome form of dicta.

This Article proceeds in four parts. Part II defines dicta and summarizes the rationales for treating dicta differently than case holdings. It also explores the roles of various state and federal courts, including trial courts, appellate courts, and supreme courts, and explains the need for judicial efficiency. Part III explains why dicta espoused for judicial efficiency purposes, which I term “preemptive dicta,” intuitively appear less problematic than other forms of dicta. This Part demonstrates that in fact, this form of dicta should be considered some of the most troubling. Part IV concludes by suggesting a means of eliminating (or at least reducing) preemptive dicta and its harmful effects on the full and considered development of the law.

II. DICTA, COURTS’ ROLES, AND JUDICIAL EFFICIENCY

The distinction between holdings and dicta is significant because of the interdependent nature of our court system. When subsequent courts follow dictum as though it was the law, they upset foundational principles about the roles various levels of courts fulfill within our democracy. Despite this, the need for judicial efficiency results in judges regularly espousing dicta.¹⁹

A. Dicta

Dicta is generally defined as those parts of a judicial opinion that are not necessary to the result.²⁰ Dictum is the opposite of a court’s holding.²¹ And although in theory only one holding is necessary to the

17. See *infra* notes 177–94 and accompanying text.

18. See *infra* notes 195–203 and accompanying text.

19. McAllister, *supra* note 7, at 205–06.

20. See, e.g., Dorf, *supra* note 1, at 2003; Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. LEGAL EDUC. 431, 435 (1989); McAllister, *supra* note 7, at 166; Stinson, *supra* note 1, at 223–33, 236–40.

21. See, e.g., Abramowicz & Stearns, *supra* note 1, at 961 (“If not a holding, a proposition stated in a case counts as dicta.”); James Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41, 58

result of a case, for purposes of this Article, alternative holdings should be treated as holdings *as long as the outcome of each alternative holding is the same*. This is consistent with the view of most scholars.²² If the court purports to issue holdings that would result in conflicting outcomes, however—reverse for one reason, for example, yet affirm for a different reason—the “holding” that conflicts with the outcome is dictum and should have no precedential value. Of course, limiting an opinion to only those statements absolutely necessary to the outcome of the case is difficult, and most commentators agree that distinguishing between holding and dictum is easier in theory than in practice.²³

There are two main types of dicta: obiter dicta and considered dicta. Obiter dictum is what many think of when they hear the word “dicta”—those off-handed statements about what the outcome of the case would be if the facts were different.²⁴ This common form of dicta is relatively easy to identify, and courts tend to afford these statements no deference.²⁵

Contrasted with traditional obiter dicta is considered dicta,²⁶ sometimes referred to as judicial dicta.²⁷ Considered dicta are those statements made about issues the court actually considered, but because of the court’s ultimate ruling, those issues—and hence, those statements—are not necessary to the outcome of the case.²⁸ These

(1979) (describing the “customary usage” of every rule in a legal opinion being either holding or dictum); McAllister, *supra* note 7, at 166; Bradley Scott Shannon, *Overruled by Implication*, 33 SEATTLE U. L. REV. 151, 175 (2009).

22. See, e.g., Abramowicz & Stearns, *supra* note 1, at 959, 969 (noting the “general understanding” is that “alternative holdings in a case all count as holdings” and labelling these as “alternative possible justifications,” suggesting they all support the same result); Dorf, *supra* note 1, at 2044 (arguing that “judicial accuracy will not be undermined” by treating both alternative holdings as precedent). *But see* McAllister, *supra* note 7, at 166 (arguing that one form of dicta includes “statements that represent alternative grounds for a decision”).

23. See, e.g., Alexander, *supra* note 15, at 25; Note, *Dictum Revisited*, 4 STAN. L. REV. 509, 509 (1952) (“Every lawyer thinks he knows what [dictum] means, yet few lawyers think much more about it. Nonthinking and overuse combine to make for fuzziness.”).

24. McAllister, *supra* note 7, at 167.

25. KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 14 (Paul Gewirtz ed., Michael Ansaldi trans., 1989); McAllister, *supra* note 7, at 167; Taylor, *supra* note 6, at 93–94.

26. Taylor, *supra* note 6, at 93–94.

27. See, e.g., David Coale & Wendy Couture, *Loud Rules*, 34 PEPP. L. REV. 715, 727–28 (2007); McAllister, *supra* note 7, at 167 (noting that judicial dicta “are the product of a more comprehensive discussion of legal issues, and usually involve points briefed and argued by the parties”).

28. Taylor, *supra* note 6, at 93–94.

statements are still clearly dicta.²⁹ Yet because they concern issues actually considered by the court, they tend to have much more impact on future decisions than obiter dicta.³⁰ Some argue considered dicta “should not be ignored, and are even entitled to great weight,”³¹ and at least one commentator argues that in the absence of conflicting indications of the law, considered dicta may “be regarded as conclusive.”³²

This Article focuses on a particular form of dicta—that espoused for purposes of judicial efficiency. Appellate courts are often faced with similar errors again and again; rather than simply addressing the narrow issue presented and explaining how the lower court “got it wrong,” it may save judicial resources to articulate how the lower courts can “get it right.”³³ Yet the case where the lower court “got it right” is not before the appellate court, and hence, those statements are dicta. They are quite often considered dicta, but they are still dicta and for the reasons explained below, they are still problematic.

Here is a concrete example of an appellate court generating this “judicial efficiency” dicta. In *State v. Kelly*,³⁴ the New Jersey Supreme Court reversed a lower court decision and remanded for a new trial because the trial court refused to permit testimony by an expert

29. Coale & Couture, *supra* note 27, at 727–28; McAllister, *supra* note 7, at 167–68.

30. Taylor, *supra* note 6, at 93–94 (noting that “the various gradations of dicta might best be envisioned on a spectrum, with the left end comprised of the court’s offhand remarks and side comments, referred to by some as obiter dicta, and the right end occupied by the court’s reasoned conclusions about the law, often labeled judicial dicta or considered dicta” and pointing out that the “further a particular statement of dictum falls toward the right end of the spectrum, the more likely it is to garner future precedential effect” (footnotes omitted)); McAllister, *supra* note 7, at 167–68.

31. *Goodson v. United States*, 151 F. Supp. 416, 420 (D. Minn. 1957) (citations omitted) (“The dicta we have considered here are dicta which the Minnesota court considered, and, therefore, they are entitled to great weight and should be followed unless it can be shown that there is good reason why the Minnesota court would not follow them when presented with the issue.”); *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975) (citations omitted) (“[A] distinction should be drawn between ‘obiter dictum,’ which constitutes an aside or an unnecessary extension of comments, and considered or ‘judicial dictum’ where the Court, as in this case, is providing a construction of a statute to guide the future conduct of inferior courts. While such dictum is not binding upon us, it must be given considerable weight and cannot be ignored in the resolution of the close question we have to decide.” (footnotes omitted)); Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 589 (2006) (arguing that considered dicta “are properly given substantial, even controlling, weight”).

32. CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 395 (7th ed. 2011).

33. The efficiency rationale becomes even more compelling when individuals impacted by the lower courts’ errors are incarcerated.

34. 478 A.2d 364 (N.J. 1984).

witness.³⁵ The defendant was charged with murder, claimed self-defense, and sought to introduce expert testimony about the battered-woman's syndrome to support her self-defense claim.³⁶ The trial court determined the expert testimony was irrelevant and therefore refused to permit it, and the appellate court affirmed.³⁷

The state's supreme court reversed, holding that the testimony was relevant,³⁸ that the defendant should have been given the opportunity to demonstrate the proposed witness was qualified as an expert,³⁹ and that the testimony satisfied the appropriate standard for scientific evidence.⁴⁰ Rather than simply remanding to the lower court, however, the court spent another half page explaining the limits on that testimony with this introduction: "Since a retrial is necessary, we think it advisable to indicate the limit of the expert's testimony on this issue of reasonableness."⁴¹ Despite no testimony ever being offered at trial, the court then explained what opinions the expert could state and what opinions she could not state.⁴²

Because the expert witness was not allowed to testify at trial, however, the court's direction to the trial court in terms of permissible and impermissible testimony was dicta. It may have been considered dicta, although it is not clear how much information the court had on this issue because the witness was precluded from testifying. And it is

35. *Id.* at 368.

36. *Id.*

37. *Id.*

38. *Id.* at 379.

39. *Id.* at 380–81.

40. *Id.* at 380–82.

41. *Id.* at 378. These types of pronouncements are not limited to state supreme courts. The Arizona Court of Appeals reversed a defendant's armed robbery conviction on procedural grounds, but added this judicial efficiency dicta: "While this case must be reversed for failure to impanel a twelve member jury, we address ourselves to appellant's second issue because of the probability of reoccurrence upon retrial." *State v. Miguel*, 611 P.2d 125, 128 (Ariz. Ct. App. 1980). The court then went on to state that where "the evidence establishes beyond a reasonable doubt that the victim did not in fact consent to the taking of his property, and that he was physically unable to give such consent, whether from voluntary or involuntary causes, it will be presumed that the taking was against the victim's will"—indicating their approval of the conviction on substantive grounds, despite reversing his convictions. *Id.* at 129.

42. *Kelly*, 478 A.2d at 378. Furthermore, the court spent an additional four pages addressing other claims by the defendant and began that portion of the opinion with this caveat: "Although our disposition of this case makes it unnecessary to consider" five additional issues raised by the defendant, "we dispose of them briefly to assist the trial court in the event they surface again at the new trial." *Id.* at 382. The court then declared two additional points of error, which could easily be classified as alternative holdings. *Id.* at 382–85. The court also, however, expressed its agreement with the trial court on the three other claims, despite those issues contradicting the outcome of the case. *Id.* at 383–85.

quite understandable why the New Jersey Supreme Court would seek to provide guidance to the lower court in this case: the defendant had been convicted of a crime and sentenced to five years in prison⁴³ and was presumably serving that sentence while this appeal was pending. It took four years for the court to reverse and remand the case for a new trial.⁴⁴ The trial court and appellate courts were wrong, and the state supreme court decided to tell them how to do it “right.” But in doing so, the court espoused dicta, and that is problematic.

This “judicial efficiency dictum” is also present in trial court opinions.⁴⁵ For example, a federal district court dismissed a case without prejudice and ostensibly expected the case to be refiled.⁴⁶ In *Rannels v. Hargrove*,⁴⁷ the plaintiff sued the Pennsylvania Secretary of Banking, alleging that a Pennsylvania bank violated a number of laws including the federal Age Discrimination Act (ADA) by providing a higher interest rate to customers over the age of fifty.⁴⁸ The defendant moved to dismiss some claims on jurisdictional grounds and others for failure to state a claim.⁴⁹ The court granted the defendant’s motion and dismissed the case, allowing the plaintiff thirty days to file an amended complaint.⁵⁰

Despite dismissing the suit, the trial court spent over a page discussing whether the ADA prohibits “reverse age discrimination,”⁵¹ meaning whether the Act protects young people against discrimination as well as older persons.⁵² The opinion expressly states the following: “I thus *hold* that the ADA covers discrimination on the basis of age,

43. *Id.* at 385.

44. *Id.* at 364, 381.

45. Judicial efficiency dicta espoused by trial courts are, of course, less problematic than dicta espoused by appellate courts because subsequent courts will never be technically bound to follow the rules articulated by the trial court. But those statements can still impact the ultimate results in that particular case and, consistent with appellate court dicta, can influence the development of the law; in addition to failing to identify the earlier statements as dicta, later courts may acknowledge that the trial judge making the statements considered the issue, especially in the same court or district, and may face pressure to be consistent. Party reliance is extreme here, and the judge later would be very unlikely to change the result. This is true even though the statements were not necessary to the initial decision and hence, exceeded the court’s authority in the first instance and are more likely to be inaccurate. For these reasons, even trial court judicial efficiency dicta are problematic, as they still can cut off the natural development of the law.

46. *Rannels v. Hargrove*, 731 F. Supp. 1214, 1227 n.19 (E.D. Pa. 1990).

47. 731 F. Supp. 1214 (E.D. Pa. 1990).

48. *Id.* at 1216.

49. *Id.* at 1216–17.

50. *Id.* at 1217, 1226–27.

51. *Id.* at 1220; *see id.* 1220–21.

52. *Id.* at 1220.

whether against the old or the young, and hence encompasses Rannels' claim."⁵³ The next three paragraphs of the opinion, however, explain that because the plaintiff's complaint did not allege he had exhausted his administrative remedies, "I shall therefore dismiss his ADA claims."⁵⁴

Because the court expressly dismissed the ADA claim, the entire discussion about reverse age discrimination was not necessary to the outcome of the case and was therefore dicta.⁵⁵ It was considered dicta, as opposed to merely obiter dicta—but dicta nonetheless. Because the plaintiff could refile the case, it is understandable that the trial court would want to provide some guidance. But in light of the express outcome of the case—dismissal—the entire discussion and purported "holding" on the issue of whether reverse discrimination violates the ADA was unnecessary.

Most courts and commentators agree that dictum is problematic,⁵⁶ and it is not binding.⁵⁷ Although there is substantial debate about where the precise holding/dictum line should be drawn,⁵⁸ even under the most liberal definition of "holding" (and hence, most restrictive

53. *Id.* at 1221 (emphasis added).

54. *Id.* The opinion stated that due to the lack of exhaustion, the court "lack[ed] jurisdiction over the ADA claims," although it is not entirely clear that the statutory requirement to exhaust ADA's administrative remedies is jurisdictional. *Id.* The court also, in an alternative holding, concluded it lacked subject-matter jurisdiction over the ADA claim because the plaintiff failed to allege that the defendant received federal funding, a requirement of the statute. *Id.* at 1221–23.

55. The court's purported holding that the ADA prohibits reverse age discrimination does not fit within the "alternative holdings" category because the outcome on that issue directly contradicts the outcome on the ADA claim—dismissal. *See supra* note 22 and accompanying text.

56. *See, e.g.,* *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173–74 (9th Cir. 2004); *Patel v. Sun Co.*, 141 F.3d 447, 462 (3d Cir. 1998); *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988); Alexander, *supra* note 15, at 25; Dorf, *supra* note 1, at 2000–05; Greenawalt, *supra* note 20, at 433–34.

57. *See, e.g., Crawley*, 837 F.2d at 292 (explaining that "a dictum is not authoritative" and "is the part of an opinion that a later court, even if it is an inferior court, is free to reject"); Abramowicz & Stearns, *supra* note 1, at 957; Dorf, *supra* note 1, at 2004; Leval, *supra* note 1, at 1250, 1259. Dicta can, of course, be persuasive, as can any well-reasoned argument, regardless of its source. Dorf, *supra* note 1, at 2053 n.199.

58. The arguments range from "the actual *holding* must be stated quite narrowly: The holding is no more than the precise point at issue (rarely all issues in a dispute) that the case decided, either for the plaintiff or the defendant," LLEWELLYN, *supra* note 25, at 14, to "statements that are not asides should be treated as a spectrum or scalar." Andrew C. Michaels, *The Holding-Dictum Spectrum*, 70 ARK. L. REV. 661, 664, 688–93 (2017). A number of additional formulations exists; as noted by one scholar, "[u]nder a strict interpretation, the only statement truly necessary to decide a case is the order of the court, which potentially makes the entire opinion dicta." McAllister, *supra* note 7, at 168; *see also* CHARLES R. CALLEROS & KIMBERLY Y.W. HOLST, *LEGAL METHOD AND WRITING I: PREDICTIVE WRITING* 267 (8th ed. 2018) (stating the holding, "[n]arrowly defined, . . . is the court's resolution of an issue before it, limited to the material facts of that dispute").

view of dicta),⁵⁹ failure to distinguish between a court’s holding and the dictum espoused by that court—even considered dictum, including judicial efficiency dictum—creates a significant problem for two reasons: it exceeds the court’s judicial authority, and it is less likely to be accurate.

1. Dicta Exceed the Court’s Authority

All dicta exceed the courts’ authority.⁶⁰ Most dictum is likely unintentional, but some instances of judicial efficiency dicta may be what has been described as “judicial dicta-planting,”⁶¹ whereby judges intentionally “plant dicta into their opinions to subtly influence the law’s development.”⁶² Judicial dicta-planting “will continue precisely because it is effective.”⁶³

Dicta exceed courts’ authority even when the reasons for espousing the dictum are understandable and the result of good intentions.⁶⁴ Our common law system demands an incremental approach to the law.⁶⁵ The law develops progressively, in steps, from one issue to another until, over time, broader principles—rules—

59. Arguably, in debates about where the holding/dicta line should be drawn, the wise course is to err on the side of calling the questionable statements dicta; subsequent courts would still be free to adopt that rule, but this would prevent courts from deciding issues not properly before them, increasing the likely accuracy of judicial decision and preventing courts from exceeding their authority. Regardless of where that line is drawn, however, the thesis of this Article remains unchanged: dicta espoused for purposes of judicial efficiency, preemptive dicta, is one of the most problematic forms of dicta.

60. See, e.g., Alexander, *supra* note 15, at 14 (arguing that precedent courts have “authority only to decide cases and no authority to legislate rules binding on other courts”); Dorf, *supra* note 1, at 2067 (acknowledging that the “case-or-controversy norms rooted in notions of limited judicial legitimacy and competence counsel against giving the judiciary carte blanche to pronounce authoritative rules of conduct outside the context of a concrete case” and therefore, “the tension between the demands of the rule of law and the limits of judicial authority produces the need for a holding/dictum distinction”); Leval, *supra* note 1, at 1263 (“Among the most common manifestations of disguised dictum occurs where the court ventures beyond the issue in controversy to declare the solution to a further problem—one that will arise in another case, or in a later phase of the same case.”).

61. McAllister, *supra* note 7, at 176 (“Not only do judges have little to lose by the use of dicta, they also have much to gain. Once a dictum has been planted, it is likely to achieve its desired effect. History shows that dicta are not lightly disregarded, and that courts frequently cite to and rely upon dicta as support for their holdings.” (footnotes omitted)).

62. *Id.* at 177.

63. *Id.*

64. See *supra* note 33 and accompanying text.

65. Klein & Devins, *Dicta, Schmicta*, *supra* note 3, at 209 (“[T]he more strictly courts distinguish between holding and dictum, the more closely we can expect the system of precedent to correspond to a traditional view of common law judging. In this view, the law-making power of the precedent-setting court is more circumscribed, and law develops more flexibly.”).

emerge.⁶⁶ This occurs within the context of courts' mandate to resolve particular, individual cases.⁶⁷ Espousing dictum that circumvents or expedites that natural progression of the law is beyond the authority of the courts. Judges must therefore be especially wary of exceeding their authority.⁶⁸ And in appropriate situations, legislatures can intervene if there is a will to change the law that is developing in the courts.⁶⁹ Because the statements are not needed to resolve the case or controversy before the court, they are not necessary to the result and a court exceeds its authority by espousing dictum, whether for judicial efficiency purposes or otherwise.⁷⁰

That dictum becomes especially problematic when it is blindly followed by a subsequent court. In that instance, the earlier court has exceeded its judicial authority,⁷¹ and the subsequent court has abdicated its judicial authority.⁷² Separation of powers principles dictate that courts are empowered to resolve the cases before them, and legislatures are empowered to enact prospective laws.⁷³ Despite

66. *Id.* at 2026.

67. *See, e.g.,* Abramowicz & Stearns, *supra* note 1, at 1018–19 (agreeing with the proposition that “the legal system should restrain judges from conclusively resolving issues not meaningfully presented by the material facts of the particular case”).

68. *See infra* notes 71–85 and accompanying text.

69. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 118 (1999); Abramowicz & Stearns, *supra* note 1, at 1066 (concluding that the authors' analysis “is consistent with the premises that courts and legislatures have distinct lawmaking functions and that judicial decisionmaking is legitimated by the passive quality of resolving cases presented by actual litigants”).

70. McAllister, *supra* note 7, at 183 (“By dismissing the disputed issues as superfluous, yet extensively commenting upon those very issues, the majority’s opinion is reminiscent of an unwarranted advisory opinion.”).

71. Leval, *supra* note 1, at 1250 (“[J]udges regularly undertake to promulgate law through utterance of dictum made to look like a holding—in disguise, so to speak. When we do so, we seek to exercise a lawmaking power that we do not rightfully possess.”).

72. *Id.* (“[Judges] accept dictum uttered in a previous opinion as if it were binding law, which governs our subsequent adjudication. When we do so, we fail to discharge our responsibility to deliberate on and decide the question which needs to be decided.”).

73. *See, e.g.,* Dorf, *supra* note 1, at 2003 (noting that “both the adversary system and the premise that courts have less authority to prescribe general-purpose rules than do legislatures are so firmly rooted in American legal practice as to rank as axiomatic” (footnote omitted)); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 314 (1985) (“The separation of powers slogan is in fact a label for three different political ideals. All three share the common conclusion that the legislature should make the laws and the courts merely apply them. Each of these ideals reached this conclusion a bit differently, however.”); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 400–03 (1996).

judges not having legislative powers,⁷⁴ when they control future disputes with their dicta, they are for all practical purposes legislating.⁷⁵ In addition to legislatures being the appropriate body to enact prospective laws, legislatures occupy a better position in which to do this. They can hold hearings, hear from a variety of experts, and seek broad input from an array of stakeholders.⁷⁶ They can consider future disputes beyond the confines of a narrow case that may come before a particular judge based on one controversy, where the information presented is specifically limited to that case.

It is true, of course, that our common law system results in courts creating binding law;⁷⁷ in order to not exceed their inherent authority, however, that law should be limited to the specific issue necessary to resolve the case before that court.⁷⁸ A basic tenet of our common law system is that courts may decide the issues properly before them and *only* those issues.⁷⁹ Because stare decisis results in judicial opinions having an impact broader than just on the litigants directly involved in the case, judges should be cognizant of the potential reach of their purported rulings.⁸⁰ For stare decisis to have any validity, judges must refrain from attempting to resolve issues not necessary to the outcome of the cases directly before them. This “judicial minimalism” approach avoids many of the problems inherent in the use of dicta; it also helps

74. See, e.g., Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. REV. 1165, 1230 (2016) (arguing that to avoid usurping the legislative role when interpreting statutes, judges considering previous judicial opinions should “separate holding and dicta along traditional lines”).

75. But see Shawn J. Bayern, *Case Interpretation*, 36 FLA. ST. U. L. REV. 125, 150 (2009) (arguing that the holding/dictum distinction does not serve the goal of limiting courts’ power).

76. See, e.g., Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1733–35 (2002) (discussing the extensive information, both through formal channels and informal channels, available to legislators and noting that “the information cumulates over many years, often, if not typically, long before a particular measure is debated and enacted”).

77. See *infra* note 91 and accompanying text.

78. See, e.g., Abramowicz & Stearns, *supra* note 1, at 1021–23 (noting that the distinction between holding and dicta should serve two functions: “delaying resolution of issues until judges can properly consider them and encouraging judges to focus on the issues before them”); Stinson, *supra* note 1, at 228. But see LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 26–30 (2013) (“It has long been understood that American judges exercise, at least occasionally (and at the Supreme Court level much more than occasionally), a legislative or policymaking role . . .”).

79. LLEWELLYN, *supra* note 25, at 14.

80. Leval, *supra* note 1, at 1259 (“[I]t was not the purpose of stare decisis to increase court power. To the contrary, the rule was intended as a limitation on the courts. It was designed to keep courts principled and consistent—to prevent courts from acting arbitrarily or capriciously” (emphasis omitted)).

ensure judges do not exceed their authority.⁸¹ This allows lower courts to develop the law incrementally, on a case-by-case basis, as many argue the common law system intended.⁸²

And when federal court judges promulgate dicta by fashioning rules unnecessary for the outcome of the case, they exceed their constitutional authority.⁸³ Article III expressly limits judges' power to "Cases" and "Controversies."⁸⁴ They cannot create law beyond the confines of the case-or-controversy requirement.⁸⁵ Although this constitutional restriction admittedly does not apply to state courts, the problems described above still exist—and are significant—when state court judges issue dicta.

2. Dicta Are More Likely to Be Inaccurate than Holdings

In terms of accuracy, dictum is less likely to be accurate than the court's actual holding.⁸⁶ When judges espouse dicta—even for reasons of judicial efficiency, and even when the court has actually considered the issue—they are simply more likely to be inaccurate because the statements have no impact on the outcome of the case.⁸⁷ "[W]hen

81. SUNSTEIN, *supra* note 69, at 3–4. *But see* Dorf, *supra* note 1, at 2005–09 (distinguishing between an "aside," which would violate Article III, and rationales reflected in statements of "legal principle broader than the narrowest proposition that can decide the case," which he argues can be legitimate); Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 7 (2009) (arguing that the United States Supreme Court's opinions ought to reach broadly for a variety of reasons).

82. *See, e.g.*, Klein & Devins, *Dicta, Schmicta*, *supra* note 3, at 2027, 2031–32 (commenting that when the holding/dictum distinction is preserved, the "system of precedent" corresponds to a "traditional view of common law judging" where the "law-making power of the precedent-setting court is more circumscribed, and law develops more flexibly").

83. *But see* Dorf, *supra* note 1, at 1998 (defending "a view of the holding/dictum distinction that attributes special significance to the rationales of prior cases, rather than just their facts and outcomes" and therefore concluding broad statements about the rationale for a decision would generally not violate Article III (emphasis omitted)).

84. U.S. CONST. art. III, § 2, cl. 1.

85. F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 91 (2015) (arguing that the Supreme Court views "the case or controversy provisions of Article III" as "'defin[ing] the role assigned to the judiciary in a tripartite allocation of power' among the judiciary, the President, and Congress"); McAllister, *supra* note 7, at 183.

86. *Patel v. Sun Co.*, 141 F.3d 447, 462 n.11 (3d Cir. 1998) (positing that dicta should not be given weight because "it may not have been as fully considered as it would have been if it were essential to the outcome"); Dorf, *supra* note 1, at 2000 (describing accuracy as "the primary virtue that the holding/dictum distinction serves" according to Chief Justice Marshall).

87. *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) ("[I]nstead of asking what the word 'dictum' means we can ask what reasons there are against a court's giving weight to a passage found in a previous opinion. . . . One is that the passage was unnecessary to the outcome of the earlier case and therefore perhaps not as fully considered as it would have been if it were essential to the outcome."); Leval, *supra* note 1, at 1268 ("The dangers of dictum uttered without 'paying

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.”⁸⁸

Judicial efficiency dicta may, of course, be accurate. But the likelihood of a *more* accurate decision increases when the statements are essential to the outcome and the result of the full adversarial process, developing over time and tested at each turn.⁸⁹ When dicta impede this considered development of the law, the resulting rules are less likely to be correct.⁹⁰

As noted by Judge Leval, the conditions that “best favor lawmaking by courts are those where the dispute is framed by concrete facts. Two of the most difficult challenges in lawmaking are understanding the facts that call for regulation and understanding what effect the imposition of any rule will have on those facts.”⁹¹ On the other hand, “when a court asserts a rule of law in dictum, the court will often not have before it any facts affected by that rule. In addition, the lack of concrete facts increases the likelihood that readers will misunderstand the scope of the rule the court had in mind.”⁹²

Accuracy is also impacted by the nature of our adversarial system. That system depends on the parties fully advancing their own

the price’ are also present . . . when the court asserts there was no error as to some of the claims on appeal, but ultimately goes on to reverse on another basis” because none of the “assertions affects the judgment. They come for free. Because they have no consequences for the judgment, such pronouncements are often glibly uttered, without careful scrutiny, and are therefore often mistaken.”); Stinson, *supra* note 1, at 225–26 (“Even when a court has thoroughly considered the issue, if the statement has no impact on the merits, a court is more likely to be wrong. In these instances, the court has less incentive to ensure the ‘correct’ decision because it is not binding on the parties before the court, much less future litigants.” (footnotes omitted)).

88. Leval, *supra* note 1, at 1263.

89. *See, e.g.*, Abramowicz & Stearns, *supra* note 1, at 1049 (noting that “presumably the strongest argument” for limiting holdings to a facts-plus-outcome approach, and therefore defining non-binding dictum as those statements not necessary to the result, “is that its flexibility frees courts from strict adherence to the reasoning of their predecessors, thus allowing them to refine doctrine within a context of overall judicial constraint”).

90. Leval, *supra* note 1, at 1265 (positing that rather than creating new rules, “[w]ouldn’t the law have developed more sensibly had the Supreme Court simply decided cases as they arose?”).

91. *Id.* at 1262. Judge Leval adds that the accuracy of a decision depends on having those clear facts: “When the assertion of a proposition of law determines a case’s outcome, the court necessarily sees how that proposition functions in at least one factual context, at least with respect to the immediate result.” *Id.*

92. *Id.*; *see also* Abramowicz & Stearns, *supra* note 1, at 1021 (“[T]he expectation that judges explain how they reached their decisions encourages judges to pay considerable attention to those issues that are properly before them.”).

positions.⁹³ Parties have less incentive to fully litigate a particular claim or issue, however, if it will not change the outcome.⁹⁴ They may decide to not pursue all potentially relevant arguments or positions, and the court is therefore less likely to make a fully informed decision on that matter.

The inability to challenge incorrect rulings also diminishes accuracy. When a judge's statements are not necessary to the case's outcome, the ability to challenge those statements on appeal is severely curtailed, if not completely eliminated.⁹⁵ Litigants can only appeal adverse outcomes; therefore, even if the court's statements on non-determinative issues were considered part of the court's holding—and hence, binding on future courts—the prevailing party cannot appeal and has no incentive to appeal.⁹⁶

And accuracy matters. Our deliberative law-making process ensures more accurate rules. *Stare decisis* requires courts to follow the holdings of controlling courts,⁹⁷ so the effects of dicta are magnified when a subsequent court treats those statements as a court's actual holding. And courts regularly *do* follow dictum as if it were the law.⁹⁸

93. See, e.g., *Patel v. Sun Co.*, 141 F.3d 447, 462 n.11 (3d Cir. 1998) (noting that one of the reasons for not giving dictum weight is that “the dictum may lack refinement because it was not honed through the fires of an adversary presentation” (emphasis omitted)); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 316–17 (1989) (“When each side presents its best case, the decisionmaker has all the information he needs to reach a just result. When presentation of the case is left in the hands of the parties, the information- and motive-based rationales both suggest that each side will, indeed, present its best case.”).

94. Cost, for example, is a significant factor in litigation strategy, and litigation costs have been high for over fifty years. See, e.g., David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 76–77 (1983). The likelihood that litigants will subject themselves to increased costs in order to pursue a claim that will not affect the outcome of their case is minimal at best.

95. Leval, *supra* note 1, at 1262 (“Another weakness of law made through dicta is there is no available correction mechanism. No appeal may be taken from the assertion of an erroneous legal rule in dictum.”).

96. *Id.* (“[N]o party has a motive to try to get the bad proposition corrected. No party will even ask the court to reconsider its unfortunate dicta.”).

97. Abramowicz & Stearns, *supra* note 1, at 957.

98. See, e.g., Klein & Devins, *Dicta, Schmicta*, *supra* note 3, at 2048 (“[T]he distinction between holding and dictum is at once central to the American legal system and largely irrelevant. Lawyers, judges, and academics refer to ‘dicta’ and ‘dictum’ all the time. But lower courts appear quite reluctant to rest decisions on the ground that dictum is not holding when it really matters.”). The authors conclude that the holding/dictum distinction has less importance in practice than in theory because lower courts appear to regularly follow higher-court dicta. *Id.*; see also Leval, *supra* note 1, at 1250 (“The problem is that dicta no longer have the insignificance they deserve. They are no longer ignored. Judges do more than put faith in them; they are often treated as binding law. The distinction between dictum and holding is more and more frequently disregarded.”).

B. *The Roles of Various Courts*

Just as the distinction between holdings and dicta helps ensure courts act consistent with their authority and decisions are accurate, the structure of courts in the United States provides procedures that promote the considered division of responsibilities and correct outcomes. Courts can only address the explicit issues before them.⁹⁹ Appellate courts cannot proactively assert prospective rules; they are required to allow the issues and factual records to develop in the lower courts prior to reaching a decision.¹⁰⁰ This allows opportunities for a variety of well-conceived arguments to develop within a variety of factual contexts prior to the issues being ripe and being considered by a higher court. This slow, intentional, deliberative process is essential to our judicial model.¹⁰¹

State trial courts are courts of general jurisdiction tasked with resolving disputes in the first instance.¹⁰² Federal trial courts are also the “courts of first instance in criminal and civil matters,”¹⁰³ although federal jurisdiction must be established.¹⁰⁴ State and federal trial court decisions are rarely published,¹⁰⁵ and despite relatively high caseloads,¹⁰⁶ the vast majority of cases filed in federal and state trial courts settle, often without significant substantive rulings by a judge.¹⁰⁷ The increase in alternative dispute mechanisms such as

99. Dorf, *supra* note 1, at 1997.

100. Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1402 (2000).

101. See, e.g., Mitchell v. Wisconsin, 139 S. Ct. 2525, 2551 (2019) (Gorsuch, J., dissenting) (noting that “the Court today declines to answer the question presented. Instead, it upholds Wisconsin’s law on an entirely different ground—citing the exigent circumstances doctrine.” Justice Gorsuch pointed out that the “exigent circumstances doctrine in this area poses complex and difficult questions that neither the parties nor the courts below discussed. Rather than proceeding solely by self-direction, I would have dismissed this case as improvidently granted and waited for a case presenting the exigent circumstances question”).

102. See, e.g., Jeffrey A. Parness, *American General Jurisdiction Trial Courts: New Visions, New Guidelines*, 55 U. KAN. L. REV. 189, 204 n.118 (2006); LLEWELLYN, *supra* note 25, at 32.

103. LLEWELLYN, *supra* note 25, at 27.

104. See 28 U.S.C. §§ 1330–1369 (2018); see also LLEWELLYN, *supra* note 25, at 27.

105. LLEWELLYN, *supra* note 25, at 32.

106. See *infra* notes 131–32 and accompanying text.

107. See, e.g., Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 26–27 (1983) (noting that “30% of cases in American courts of general jurisdiction are not formally contested” and of those that are contested, the vast majority settle either through negotiation or mediation, especially criminal cases). Galanter argues that the “master pattern of American disputing is one in which there is actual or threatened invocation of an authoritative decision maker. This is countered by a threat of protracted or hard-fought resistance, leading to a negotiated or mediated settlement, often in the anteroom of the adjudicative institution.” *Id.*

arbitration¹⁰⁸ and mediation¹⁰⁹ has also impacted the role of trial courts. Despite these changes, trial court judges remain the pillars of our common law system; they hear the evidence, interact with the parties, instruct the juries, and develop the law—one case at a time.¹¹⁰ This “quintessential common law judging,” where “the law evolves incrementally, sacrificing something of both speed and predictability in the hope of resting decisions on more solid ground,” requires that “trial judges frequently assert their prerogative to exercise independent judgment by distinguishing higher court precedent or invoking the holding-dicta distinction to limit its scope.”¹¹¹

Federal and state intermediate appellate courts, on the other hand, serve a markedly different role from trial courts.¹¹² Appellate courts are error-correcting.¹¹³ Review by these courts is not discretionary,¹¹⁴ and rather than reconsidering the case from scratch, appellate court review is limited to questions of law and factual issues only to the extent that they are supported by the record.¹¹⁵ State appellate courts

108. See generally Thomas J. Stipanowich, *Arbitration: The “New Litigation”*, 2010 U. ILL. L. REV. 1 (detailing the increasing use of arbitration).

109. See, e.g., Art Hinshaw, *Regulating Mediators*, 21 HARV. NEGOT. L. REV. 163, 170–72 (2016) (“[M]ediation remains the undisputed dispute resolution method of choice for litigants, courts, administrative agencies, and major corporations.”).

110. Neal Devins & David Klein, *The Vanishing Common Law Judge?*, 165 U. PA. L. REV. 595, 598 (2017) (describing the process of common law as the “decision in each case is a step in the growth of the law, a new datum for future reasoning” (emphasis omitted)). In addition to developing the common law, trial court judges spend significant time interpreting statutes and regulations; unless the legislature or agency amends that statute or regulation, the judge’s decision becomes part of the law on that point. See, e.g., Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 356–57 (2012).

111. Devins & Klein, *The Vanishing Common Law Judge?*, *supra* note 110, at 606. This allows trial courts to “importantly influence the direction in which and the speed with which the law develops.” *Id.* The authors contrast this with instances “when lower courts take an expansive view of precedent” and therefore “have a reduced ability to propose refinements to legal doctrine or to slow the pace at which it grows and solidifies. In such a system, law moves at the speed and with the shape dictated by higher courts; more errors and greater overbreadth are tolerated as the price for greater immediate certainty and more hierarchical control.” *Id.*

112. LLEWELLYN, *supra* note 25, at 32–33.

113. See, e.g., Christina L. Boyd, *The Hierarchical Influence of Courts of Appeals on District Courts*, 44 J. LEGAL STUD. 113, 135 (2015) (“[T]he motivations behind trial judging are very different from those behind appellate judging . . .”).

114. Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 659 (2007) (noting that federal courts of appeal “perform a critical function within the federal judicial system by providing litigants with an appeal as of right from decisions rendered in district courts and administrative agencies”).

115. LLEWELLYN, *supra* note 25, at 28, 32, 38. They can also determine whether a fact finding at the trial court level was “clearly erroneous,” but they cannot, in general, substitute their judgment for that of the trial court on findings of fact. *Id.* at 28.

are sometimes criticized for “dispensing a somewhat mechanical justice” based on the volume of cases they hear and the recognition that their state supreme court has the final say in correcting errors.¹¹⁶ Federal circuit courts, on the other hand, are more heavily staffed,¹¹⁷ and, for most practical purposes, are the courts of last resort for all but a very small percentage of litigants.¹¹⁸ State supreme courts also exercise an error-correcting function, and their review is generally discretionary.¹¹⁹ As with intermediate appellate courts, they only review, other than in narrow circumstances, questions of law.¹²⁰

Finally, although their function is somewhat akin to state supreme courts, the United States Supreme Court holds a unique position in the American justice system. First, it is primarily a constitutional court.¹²¹ As such, its rulings significantly impact and restrict all state courts.¹²² In addition, the Court hears fewer than ninety cases per year¹²³ and focuses far more on policy than error correction.¹²⁴ Debate over the Court’s proper role is plentiful,¹²⁵ and many commentators argue that even dicta from the Supreme Court are binding.¹²⁶ But as the final

116. *Id.* at 33.

117. *See infra* notes 142–43 and accompanying text.

118. Lindquist, *supra* note 114, at 659 (“[G]iven the Supreme Court’s limited docket, the circuit courts constitute the court of last resort in the federal system for the vast majority of appeals.”).

119. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 246 n.96 (1985).

120. LLEWELLYN, *supra* note 25, at 33.

121. *See, e.g.*, Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 239–41 (2002) (“The Constitution is law; it is the Supreme Court’s province—its duty—to say what the law is; therefore it is the Supreme Court’s province and duty to answer all constitutional questions.” (emphasis omitted)); Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 854 (2005). Although each state supreme court may set policy for that state, no state supreme court enjoys the breadth of power that the Supreme Court of the United States possesses.

122. Maltz, *supra* note 100, at 1402.

123. Grove, *supra* note 81, at 57.

124. *See, e.g.*, Joseph Callanan, *Rare Supreme Court Reversal for Error Correction*, A.B.A. (Aug. 21, 2014), <https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2014/rare-supreme-court-reversal-for-error-correction/>.

125. *See, e.g.*, Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 34–35 (2005) (“[T]o the extent the Court is a constitutional court, it is a political body.”).

126. *See, e.g.*, Maltz, *supra* note 100, at 1418–20; Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 683 (1986) (reviewing BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* (1985)) (“Fine distinctions between holding and dicta are rarely relevant; indeed, the very question of what the Court held at all becomes increasingly less important as we follow an opinion down the hierarchy. For when we are in the pit of actual application, we will discover that it is not what the Supreme Court held that matters, but what it *said*.”). At least one Justice, however, appears to be concerned by this claim:

court of review for all federal courts and state courts on federal law issues¹²⁷ and by virtue of its supervisory power,¹²⁸ the Court is at least arguably entitled to take a more expansive view of its role in defining federal law.¹²⁹ For these reasons, this Article does *not* address judicial efficiency dicta issued by the Supreme Court.¹³⁰

I write separately to address the troubling dicta with which the Court concludes its opinion. . . . Given the majority's ominous words about late-arising death penalty litigation . . . one might assume there is some legal question before us concerning delay. Make no mistake: There is not. The majority's commentary on once and future stay applications is not only inessential but also wholly irrelevant to its resolution of any issue before us.

Bucklew v. Precythe, 139 S. Ct. 1112, 1146 (2019) (Sotomayor, J., dissenting).

127. LLEWELLYN, *supra* note 25, at 29; *see also* Taylor, *supra* note 6, at 104–06 (“Arguably, it should be acceptable for the lower courts to follow Supreme Court advice—even in dictum—given the Court’s role as the final arbiter on open questions of federal law and the strict limitations on its ability to resolve them, notwithstanding their numerosity, variability, and complexity.”).

128. James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1451 (2000) (“The text of Article III confirms both the idea of judicial independence and the notion that a single supreme court was to exercise supervisory authority over any inferior tribunals that Congress chose to create.”).

129. Grove, *supra* note 81, at 8–9 (arguing for a “maximalist” Supreme Court with “effective means of communicating its views on federal law to the lower courts—at least within its sphere of appellate jurisdiction”). Grove also criticized Chief Justice Roberts’s minimalist approach to judging, including his analogy of judges to baseball umpires (stating that judges, like umpires, “don’t make the rules, they apply them”), asserting that “judges frequently make rules of law in the course of adjudication.” *Id.* at 2–3; *see also* Posner, *supra* note 125, at 34–35 (distinguishing between “aggressive” and “modest” “political judging” and arguing for the Court to be “a pragmatic decision maker of the ‘modest’ kind”).

130. The Supreme Court is arguably the court most likely to issue preemptive dicta. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 163–66 (1973); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973); *Miranda v. Arizona*, 384 U.S. 436, 467–74 (1966). And dicta creating this type of “prophylactic remedy” in general are the focus of this Article. *See* Foster Calhoun Johnson, *Judicial Magic: The Use of Dicta as Equitable Remedy*, 46 U.S.F. L. REV. 883, 902 (2012); *see also* People v. Williams, 788 N.E.2d 1126, 1136 (Ill. 2003) (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”). This practice has been criticized even by members of the Court, however, including Justices Stewart, Douglas, Brennan, and Marshall, who commented that: “Having determined that Florida’s current pretrial detention procedures are constitutionally inadequate, I think it is unnecessary to go further by way of dicta. In particular, I would not, in the abstract, attempt to specify those procedural protections that constitutionally need not be accorded incarcerated suspects awaiting trial.” *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (Stewart, J., concurring); *see also* Leval, *supra* note 1, at 1274 (arguing that the Supreme Court “is but a court” and it “may make law only in the ways in which a court may make law”; hence, “the Supreme Court’s dicta are not law”). Because of their role as a policy-making court in ways the lower courts (and even state supreme courts) are not, however, judicial efficiency dicta issued by the United States Supreme Court is exempted from this Article.

C. *The Need for Judicial Efficiency*

Judicial efficiency is important. Judges are overworked. Federal courts of appeal, for example, “are in a long-term crisis of volume.”¹³¹ Data from federal and state courts demonstrate that although caseloads fluctuate, the workload for federal and state judges is high.¹³²

The structure of our judicial system includes a number of features that promote judicial efficiency. *Stare decisis*, for example, creates efficiency in the judicial process.¹³³ In addition to ensuring consistency and fairness, resolving cases the same way prior cases have been resolved can save time and resources. Similarly, courts of appeal are designed to be efficient; those courts do not retry cases, but instead defer to judges or juries on fact findings and generally review only questions of law.¹³⁴

And within these confines, a number of mechanisms contribute to a more efficient process—even if leading to a less accurate outcome. For example, waiver rules prohibit litigants from appealing issues not raised below.¹³⁵ More significantly, the “harmless error” doctrine allows state and federal courts to ignore clear mistakes in the court below¹³⁶ for the sake of efficiency.¹³⁷ This is arguably true even in

131. Shay Lavie, *Appellate Courts and Caseload Pressure*, 27 STAN. L. & POL’Y REV. 57, 58–59 (2016) (pointing out that “in the last few decades there has been ‘a 500% increase in filings, and a 77% increase in judgeships’”). Increasing court dockets, especially in the federal courts, has been a concern for many years. See, e.g., Harry T. Edwards, *The Rising Work Load and Perceived “Bureaucracy” of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 877 (1983).

132. See, e.g., CHIEF JUSTICE JOHN G. ROBERTS, JR., 2018 YEAR-END REPORT ON THE FEDERAL JUDICIARY 13 (2018), <https://www.supremecourt.gov/publicinfo/year-end/2018year-endreport.pdf> (noting that “[c]ivil case filings in the U.S. district courts rose six percent” and criminal filings “increased 13 percent”); ARIZ. SUP. CT., COURT ANNUAL CASE ACTIVITY: NARRATIVE SUMMARY 1 (2019), <https://www.azcourts.gov/Portals/39/2018DR/SWCaseActivity.pdf?ver=2019-08-07-151218-403> (noting that from 2017 to 2018, “[c]ase filings in Arizona’s courts increased by 2.2%”).

133. See, e.g., Schauer, *Precedent*, *supra* note 2, at 599–601 (noting that “when a rule external to the decisionmaker compels reliance on the decisions of others, it frees the decisionmaker from these responsibilities” and he or she “may justifiably ‘relax,’ in the sense of engaging in less scrutiny of the case”; “the net product will be a substantial reduction in decisionmaking effort” and, “[i]n this respect, efficiency may justify a rule of precedent”).

134. See *supra* notes 113–20 and accompanying text.

135. LLEWELLYN, *supra* note 25, at 38.

136. See, e.g., William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 14 (1997) (pointing out that “even when defendants win on the merits of the claim, they can lose cases if appellate courts find errors harmless”).

137. See, e.g., Charles S. Chapel, *The Irony of Harmless Error*, 51 OKLA. L. REV. 501, 502 (1998) (noting the purposes of the doctrine are: “(1) to preserve judicial resources, and (2) to preserve and protect public confidence in our justice system”). Chapel argues that “[i]t is not

criminal cases when the error is of a constitutional nature,¹³⁸ as long as the evidence aside from the error “establishes guilt, the error is said not to have affected the verdict and it is therefore harmless.”¹³⁹

The dramatic rise in unpublished opinions has been another significant move toward judicial efficiency,¹⁴⁰ but not without controversy.¹⁴¹ The use of law clerks to assist judges and even draft judicial opinions¹⁴² is another efficient, but sometimes controversial, practice.¹⁴³ And political difficulty in appointing federal judges at various points in our nation’s history has not helped the situation;¹⁴⁴

uncommon for an appellate court to acknowledge multiple errors in a single trial and conclude each is harmless because the record established guilt.” *Id.* at 505.

138. *Id.* at 503–04 (arguing that the Supreme Court has shifted “the emphasis of the analysis under the harmless error rule away from the error and towards the guilt of the accused,” and the Court considers the “due process requirement of a fair trial” met, “notwithstanding serious trial error, if the record indicates evidence of guilt”). *But see* Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117, 2119 (2018) (pointing out that “[j]udges and commentators sharply disagree about which (and even whether) constitutional errors can be harmless”).

139. Chapel, *supra* note 137, at 504.

140. *See, e.g.*, David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1673 (2005) (noting that the “debate over publication and citation practices will not ebb until the root problem of the workload of our appellate courts is better understood and addressed”); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 119 (1994) (pointing out that “[i]n response to the ‘crisis of volume,’ state and federal appellate courts have been restricting the opinions they write” to those that establish, “expand, alter, or modify” a rule of law; “involve a legal issue of continuing public interest;” “criticize existing law;” or “resolve a conflict of authority”; opinions that do not meet these requirements “are limited to brief statements of the reasons for the decision, go unpublished, and generally carry a prohibition against their being cited as precedent”).

141. Martineau, *supra* note 140, at 119 (summarizing the criticisms as “loss of judicial accountability, the difficulties of appellate review, the problems of predicting precedential value, the inequalities of parties’ access to unpublished opinions, and the illusory nature of the claims of judicial and litigant economy”).

142. *See, e.g.*, Albert Yoon, *Law Clerks and the Institutional Design of the Federal Judiciary*, 98 MARQ. L. REV. 131, 143–44 (2014) (arguing that due to workload increases, judges are relying more heavily on their clerks); Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (and Should We Care)?*, 32 FLA. ST. U. L. REV. 1077, 1081 (2005) (pointing out that many believe law clerks draft the majority of opinions and some judges draft their own, and that either way, the “production of judicial opinions is a joint venture between the judges and their staffs—for purposes of opinion writing, the law clerks”).

143. *See, e.g.*, Todd C. Peppers et al., *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 ALB. L. REV. 623, 629 (2008) (“Other authors, however, have challenged the clerkship institution on the ground that it permits law clerks to exercise too much control over the legal process. Challengers to this institutional practice argue that law clerks are writing judicial opinions and wielding an inappropriate level of influence over judicial outcomes.”).

144. *See generally* Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2234 (2013) (noting that the federal bench “appointments predicament” is caused by “the persistent vacancies dilemma” caused by “soaring dockets” and the political battle

almost 10 percent of the Article III federal judgeships are currently vacant.¹⁴⁵

In light of this need for efficiency, it is not surprising that judges occasionally espouse dicta in an attempt to avoid reconsidering issues at a later date, even when disposing of those issues is not necessary to resolve the actual matter before the court. Judicial efficiency dicta, on some level, make sense. After all, when an issue arises over and over and the lower courts continue to miss the mark, it is much easier to simply advise them how to hit the target than to draft opinion after opinion explaining how they erred.¹⁴⁶ Similarly, when a case is likely to return, it may be more efficient to explicitly address all of the potential issues when they are first raised than to wait until they are all germane to the case's ultimate outcome. Federal judges are even instructed to consider including this guidance for efficiency reasons.¹⁴⁷

In both instances, the impulse to preserve scarce judicial resources and rule on the non-dispositive issues is completely understandable. After all, the issues are fresh in the judges' minds, and the court actually considered them; this is not simply obiter dicta.¹⁴⁸ Furthermore, in the appellate context, there is something incredibly unsatisfying about being able to say the lower court erred but not being

resulting from “conflicting Republican and Democratic control of the White House and Senate that commenced about a quarter century ago”).

145. *Current Judicial Vacancies*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (last visited Nov. 22, 2020) (noting that there were eighty-one total vacancies in the Federal Judiciary on Feb. 5, 2020; the number of vacancies changes frequently, of course).

146. *See, e.g.*, *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (noting in an opinion by Judge Kozinski that appellate courts “often confront cases raising multiple issues that could be dispositive, yet they find it appropriate to resolve several, in order to avoid repetition of errors on remand or provide guidance for future cases”).

147. FED. JUD. CTR., *JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES* 17 (2d ed. 2013). The manual explicitly states:

Issues not necessary to the decision but seriously raised by the losing party should be discussed only to the extent necessary to show that they have been considered. The line between what is necessary to the decision and what is not, however, is not always clear. Occasionally, a full explanation of the rationale for a decision may be enhanced by discussion of matters not strictly a part of the holding. Moreover, *a judge may find it efficient to address issues not necessary to the decision if the judge can thereby provide useful guidance for the lower court on remand.*

Id. (emphasis added).

148. *See supra* notes 24–32 and accompanying text.

able to dictate what the court should do to “get it right.”¹⁴⁹ Yet courts should exercise restraint and avoid taking that approach,¹⁵⁰ primarily because of the effects of judicial efficiency dicta.

III. THE REAL PROBLEM WITH JUDICIAL EFFICIENCY DICTA: PREEMPTION

Judicial efficiency dictum suffers from the same problems as other types of dictum: it exceeds the court’s authority, and it is less likely to be correct.¹⁵¹ But the real problem with judicial efficiency dictum is that it is “preemptive dictum”—it is essentially binding in future proceedings, which upsets the roles of the courts and interrupts the natural development of the law. This is true for two main reasons. First, judicial efficiency dicta are difficult to identify as dicta, making it far more likely that subsequent courts will follow that dicta because the language appears to be binding rather than simply persuasive. Second, even when a subsequent court identifies the statements as dicta, courts are very likely to follow them because others may have relied on the dicta; courts are likely to defer to a higher court’s pronouncements, even when those statements are dicta; and judges attempt to minimize having their rulings reversed.

149. Stinson, *supra* note 1, at 230–31 (“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. Because the case where they got it ‘right’ is not actually before the court, however, the court’s opinions about permissible conduct are dicta.”).

150. *Johnson*, 256 F.3d at 920 (Tashima, C.J., concurring) (criticizing Judge Kozinski’s characterization of a rule “unnecessary to our disposition of the case” as holding, and instead identifying it as non-binding dictum). Judge Tashima points out that this definition of dictum “reflects the centuries-long development of the common law”; Judge Kozinski’s view that the accepted approach is “difficult” ignores the “wholly subjective and completely unworkable standard of ‘deliberate’ and ‘due consideration’ versus ‘casual,’” resulting in “no standard at all.” *Id.* (citations omitted); *see also* *Alcoa Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 796 (9th Cir. 2012) (Tashima, C. J., concurring) (stating Tashima’s views on dicta “are adequately set forth in my concurring opinion in *Johnson*”); *Spears v. Stewart*, 283 F.3d 992, 1005 (9th Cir. 2002) (Kozinski, J., statement) (arguing that “there can be very good reasons to resolve issues that, after all is said and done, turn out not to have been strictly necessary to the outcome,” including “judicial efficiency and stability” in order to save “future judges and litigants the burden and uncertainty of ploughing the same legal ground”).

151. *See supra* notes 60–96 and accompanying text.

A. Difficult to Identify

The difficulty distinguishing between holding and dicta in the first place means judges may not even recognize the problem.¹⁵² Quite often, litigants and courts can easily recognize traditional obiter dicta as an aside that has no controlling effect. In those circumstances, dicta have no real effect.

Judicial efficiency dicta, on the other hand, are much harder to identify, primarily because they are often considered.¹⁵³ When a court spends ample time discussing an issue and the opinion includes statements that look like rules, subsequent courts are not likely to identify this language as dictum that they can choose to follow or not follow. Furthermore, the court espousing the dictum can create confusion with carefully constructed language;¹⁵⁴ the court in the *Rannels* case did exactly that¹⁵⁵ by prefacing the dictum with “I thus hold”¹⁵⁶ and engaging in a thorough discussion of the scope of the ADA—despite dismissing that claim.¹⁵⁷

Workload pressures can also contribute to this result.¹⁵⁸ Judges are busy and parsing through each relevant opinion with the level of detail necessary to distinguish holding from dictum is difficult.¹⁵⁹ This is complicated even further when law clerks, as opposed to the judges, are conducting most of the research and potentially creating first drafts

152. Leval, *supra* note 1, at 1253 (“What is problematic is not the utterance of dicta, but the failure to distinguish between holding and dictum.”).

153. *See supra* notes 26–32 and accompanying text.

154. Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL’Y 811, 849 (2003). Shannon points out that the real problem occurs when “what is actually dicta is announced as if it were holding.” *Id.* Despite it being “understandable that a judge might want to announce such prospective rules of law, as such statements might then appear to have the force of law. . . . there are dangers in according dicta the status of holding that relate to the reasons courts recognize a distinction between holding and dicta in the first instance.” *Id.*

155. *Rannels v. Hargrove*, 731 F. Supp. 1214, 1221 (E.D. Pa. 1990).

156. *Id.*

157. *Id.*

158. *See supra* notes 131–32 and accompanying text.

159. Leval, *supra* note 1, at 1269 (“Determining whether a statement of law is 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.”). Judge Leval then pointed out that it is “[f]ar easier to have the magic carpet of computer research whisk you straight to the pertinent sentence of the prior opinion and to write, ‘In such and such case, the court held’ We do it unaware.” *Id.*; *see also supra* note 23 and accompanying text (noting that “distinguishing between holding and dictum is easier in theory than in practice”).

of the opinions.¹⁶⁰ Ironically, the need for judicial efficiency dicta in the first place is one of the main reasons this dictum is so problematic.

And although the litigant who would be harmed by the dicta has an incentive to identify it as such and raise that issue with the court, it requires far more work on the lawyer's part to adequately determine whether the statement is, in fact, dicta. The overemphasis lawyers place on words and phrases to the exclusion of legal principles¹⁶¹ means this will not happen as often as it should.

B. Treated as Binding Even When Identified

Even when a court actually identifies judicial efficiency dictum as dicta, that language is still likely to be followed and therefore control the subsequent dispute. This is true for three reasons: first, reliance interests create incentives for courts to follow the earlier dicta; second, lower courts often defer significantly to higher courts' statements and perceived preferences; and third, the fear of reversal will likely prevent subsequent courts from disregarding the dicta, even if that court would rule to the contrary in the absence of that dicta.

1. Reliance

Lawyers and their clients rely on statements in judicial opinions,¹⁶² especially when those statements appear to be thoughtful and look like case holdings. Hence, the parties in a subsequent case may have relied on judicial efficiency dicta espoused by a previous

160. Yoon, *supra* note 142, at 143–44 (noting that judges' increased reliance on law clerks gives clerks "an increasing role in the development of the common law"). Law clerks, who are generally inexperienced recent law school graduates, will likely have more difficulty than judges identifying dicta; they may also, in their role as opinion drafters, include more dicta in judicial opinions in the first place.

161. Stinson, *supra* note 1, at 222.

162. See, e.g., Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 216 (2014) (pointing out that reliance can manifest itself "in terms of public expectations or private decisionmaking (or both)" and noting that "[s]takeholders may make forward-looking decisions" based on both holdings and dicta (footnotes omitted)); Jack M. Beermann, *Crisis? What Crisis?*, 80 NW. U. L. REV. 1383, 1387–88 (1986) (reviewing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985)) (asserting that lawyers should be able to rely on the "broad holdings" of judicial opinions and that those opinions should "reflect the views of the judges" so that they can "provide an accurate gauge for lawyers to predict what the court is likely to do in the next case"; Beermann also remarks that "[u]npredictability in the law creates additional costs, as parties pay more in legal fees for lawyers to construct their transactions and purchase insurance against more possible problems").

court,¹⁶³ especially because it may be difficult to identify the prior statements as dicta.¹⁶⁴ This reliance suggests that courts, when deciding a current case, should consider the parties' reliance on previous dicta "even if the precedent court's decision was (in the constrained court's view) incorrect, and even if the precedent court had no authority to lay down general rules binding on future courts."¹⁶⁵ Just as this reliance value suggests judges should avoid overturning existing precedent even when the rule no longer appears correct,¹⁶⁶ the same underlying expectation concerns suggest judges should follow language in prior opinions, even if not binding, when others have relied on that language.¹⁶⁷ Consistency and dependability are often treated as more important than reaching the "right" outcome.

In the *Kelly* example above,¹⁶⁸ future litigants will likely expect New Jersey trial courts to follow the New Jersey Supreme Court's dicta in terms of the scope of permissible testimony about the battered-woman's syndrome.¹⁶⁹ This is true even though the trial court in *Kelly* never permitted the expert witness to testify about the battered-woman's syndrome,¹⁷⁰ and hence, the New Jersey Supreme Court had no facts before it about the scope of permissible testimony. Future courts are still likely to feel constrained to meet those expectations. This "reliance value"¹⁷¹ results in the previous dicta binding future decisions.¹⁷²

163. See, e.g., Alexander, *supra* note 15, at 14 ("[R]ational people will take into account the precedent court's decision and its opinion in predicting what other courts will do. Thus, some people, despite the lack of any formal practice of precedent following, will justifiably rely on the precedent court's opinion and will modify their behavior in response to it."); Kozel, *supra* note 162, at 216 ("[I]f protecting reliance expectations can furnish practical benefits, those expectations should not be dismissed as inapposite merely because they attached to a passage that might technically be defined as dicta.").

164. See *supra* notes 153–61 and accompanying text.

165. Alexander, *supra* note 15, at 14.

166. Dorf, *supra* note 1, at 2004.

167. Kozel, *supra* note 162, at 186 (noting that even when a judge is "quite confident that the applicable precedent is incorrect," he or she "may still choose to abide by the precedent based on her belief that overruling it would create substantial transition costs and upset settled expectations").

168. See *supra* notes 34–43 and accompanying text.

169. See *supra* notes 41–42 and accompanying text.

170. *State v. Kelly*, 478 A.2d 364, 368 (N.J. 1984).

171. Alexander, *supra* note 15, at 13 (describing the limitations this places on the court and defining reliance value as "the value of fulfilling expectations on which people have acted otherwise to their detriment").

172. *Id.* ("If the decision in the precedent case has generated expectations of similar future decisions on which people have relied . . . and a decision that the constrained court would otherwise

The reliance concern is even stronger within the same case.¹⁷³ In addition to the judge being unlikely to spend much time reconsidering a ruling he or she has already made, even the judge lacked the authority to pronounce the rule in the first instance,¹⁷⁴ the parties have relied on the statement. Consider the *Rannels* example above.¹⁷⁵ In that case, the court concluded in dicta that the ADA prohibits reverse discrimination by protecting the young as well as the old but dismissed the claim.¹⁷⁶ If the plaintiff could successfully meet the procedural requirements and refile, he could reasonably expect that his case would not be dismissed on the grounds that the statute does not protect him as a younger person. And even if the judge subsequently realized the earlier conclusions were incorrect—perhaps because they were not essential to the case’s outcome, so they had not been thoroughly debated—he cannot now rule to the contrary because the parties in that case have justifiably relied on that earlier dicta.

2. Deference to a Higher Court

Lower courts inherently defer to higher courts¹⁷⁷ because of the structure of our judicial system.¹⁷⁸ This “hierarchical influence”¹⁷⁹ means that, not surprisingly, trial court judges are most deferential.¹⁸⁰ Stare decisis—of course—requires deference to holdings issued by

find correct would dash those expectations, then the opposite decision may in fact be the correct one.”); Kozel, *supra* note 162, at 216.

173. Alexander, *supra* note 15, at 13 (arguing that this reliance value is especially strong when “the parties now litigating before the constrained court were among those who relied” (emphasis added)).

174. This is true for two reasons: judicial efficiency, and because the judge may erroneously believe he or she had the authority to make the holding in the first place, as it appears the judge in the *Rannels* case believed when prefacing the dictum with “I thus hold.” *Rannels v. Hargrove*, 731 F. Supp. 1214, 1221 (E.D. Pa. 1990).

175. See *supra* notes 46–55 and accompanying text.

176. *Rannels*, 731 F. Supp. at 1220–21.

177. See, e.g., Boyd, *supra* note 113, at 114–15 (arguing that, in the federal court context, “district judges are greatly affected in their decision making by their place at the bottom of the federal judicial hierarchy and their role as agent to their courts of appeals’ colleagues”).

178. See, e.g., Susan B. Haire et al., *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC’Y REV. 143, 146 (2003) (arguing that, as agents of the higher courts, lower courts attempt to discern higher courts’ policy preferences); see also *supra* notes 99–120 and accompanying text (describing the tiered structure of the state and federal judiciary).

179. Boyd, *supra* note 113, at 115–20.

180. Haire et al., *supra* note 178, at 147 (“[G]iven the circuit’s ability to supervise and correct district court judgments, the influence of vertical stare decisis, and the modest sanction associated with reversal (and remand), district court judges will often conform their decisions to circuit court preferences.”); Boyd, *supra* note 113, at 115.

higher courts.¹⁸¹ But lower courts also appear to be motivated to defer to higher courts' policy preferences, even when not directly required by binding precedent.¹⁸²

The use of dictum to signal those preferences results in lower courts generally deferring to those statements.¹⁸³ Some scholars argue that lower court judges affirmatively *ought to* rely on “well-considered dicta” from higher courts because those statements offer “extremely probative evidence” of the higher court’s “likely future ruling,” and following this language will promote “hierarchy values.”¹⁸⁴ In an attempt to discern the practical effect of higher court dicta on lower court decision making, Professors Klein and Devins conducted an empirical study of lower courts’ use of the holding/dictum distinction and concluded that “lower courts cede much of their common law power to higher courts.”¹⁸⁵ The authors attribute the results of their

181. See, e.g., Dorf, *supra* note 1, at 2025 (explaining that under principles of vertical stare decisis, a “lower court must always follow a higher court’s precedents” and pointing out that horizontal stare decisis, where courts must follow their own precedents, is “extremely complex” (emphasis omitted)); Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 369–70 (2007).

182. See, e.g., Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 1, 7 (1994) (arguing that “lower courts in the judicial hierarchy” should generally “interpret various data to predict how their superior court would decide the same matter” and then “defer to predicted future superior court rulings”); Haire et al., *supra* note 178, at 145–49.

183. Klein & Devins, *Dicta, Schmicta*, *supra* note 3, at 2048 (arguing that “the distinction between holding and dictum is at once central to the American legal system and largely irrelevant”; although “[l]awyers, judges, and academics refer to ‘dicta’ and ‘dictum’ all the time,” in practice, “lower courts appear quite reluctant to rest decisions on the ground that dictum is not holding when it really matters”). The authors conclude that the holding/dictum distinction has less importance in practice than in theory because lower courts appear to regularly follow higher-court dicta. *Id.*; see also Leval, *supra* note 1, at 1250 (“We judges regularly undertake to promulgate law through utterance of dictum made to look like a holding-in disguise, so to speak. . . . Also, we accept dictum uttered in a previous opinion as if it were binding law, which governs our subsequent adjudication.”).

184. Caminker, *supra* note 182, at 66–67. Professor Dorf seems to share this view at least partly, noting that because the distinction between holding and dictum is not clear, “declaring a prior statement dictum is quite similar to overruling a previously established legal principle.” Dorf, *supra* note 1, at 2027. He then points out the predicament lower court judges find themselves in:

Thus, a lower court judge may experience cognitive dissonance when faced with an argument that a higher court’s statement is dictum. In one sense, the lower court judge is asked only to say what the law is (or, more precisely, what it is not). This she may freely do. Yet the judge recognizes that in another sense she is being asked to overrule a principle of law established by a higher court, which she lacks the power to do. This tension may underlie the disagreement about whether a lower court must follow a higher court’s dicta.

Id.

185. Klein & Devins, *Dicta, Schmicta*, *supra* note 3, at 2021. Klein and Devins also noted that this was “true regardless of whether lower courts voluntarily embrace dicta or follow it

study, “at least partially, to frequent decisions to abide by statements from higher courts even though they are recognized as dicta.”¹⁸⁶ The authors then point out the broader impact of this phenomenon:

In making these decisions, judges profoundly affect hierarchical dynamics in courts. They also shape the way in which law is produced and developed in the judicial system as a whole. They move the legal system away from the shared, incremental decision making envisioned in traditional conceptions of common law judging and by contemporary minimalists, and they enable bold law making dominated by higher courts.¹⁸⁷

This deference can be extreme. Some courts go so far as to “take the position that all considered statements of a higher court are binding.”¹⁸⁸ Not all lower courts hold this view, of course, but even when concluding the prior statements are dicta and not binding, subsequent courts often defer nonetheless.¹⁸⁹

Designating an opinion as “unpublished”¹⁹⁰ can reduce the reliance on judicial efficiency dicta; that designation signals the case is not intended to be binding,¹⁹¹ and the court may have spent less time considering the issues.¹⁹² Virtually all state supreme court opinions are published, however.¹⁹³ And even when an intermediate appellate court

unwillingly.” *Id.* at 2044; *see also* Leval, *supra* note 1, at 1250 (“[Dicta] are no longer ignored. Judges do more than put faith in them; they are often treated as binding law.”).

186. Klein & Devins, *Dicta, Schmicta*, *supra* note 3, at 2044.

187. *Id.*

188. Dorf, *supra* note 1, at 2026.

189. *See id.* at 2026 n.107.

190. *See, e.g.*, K.K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397, 397–98 (2001) (noting that, in 2001, the “selective designation of some opinions as unpublished is a fairly recent phenomenon for courts” but that even twenty years ago, “almost every circuit court, and many of the state intermediate level appellate courts across the country, use unpublished opinions extensively to handle heavy caseloads efficiently”). The vast majority of federal intermediate appellate opinions are now unpublished. *See, e.g.*, Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. REV. 808, 810 (2018); *see also* Ben Grunwald, *Strategic Publication*, 92 TUL. L. REV. 745, 753–58 (2018).

191. *See, e.g.*, Boyd, *supra* note 113, at 119.

192. *See, e.g.*, Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 VT. L. REV. 555, 557–58 (2005) (noting that judges “respond to heavy case loads that make it impossible for appellate judges to issue careful and detailed written opinions in every case they decide” by using “summary procedures for deciding routine cases, often providing explanations of those decisions via lightly edited memos written by clerks and staff attorneys”).

193. Joshua M. Silverstein, *Using the West Key Number System as a Data Collection and Coding Device for Empirical Legal Scholarship*, 34 J.L. & COM. 203, 286 n.443 (2016).

opinion is designated as “unpublished,” it can often still be cited.¹⁹⁴ And more importantly, it still signals the court’s position. Hence, lower courts may still be inclined to follow that dicta out of deference to a higher court.

3. Fear of Reversal

Even when not inclined to defer to higher courts, lower courts will justifiably be loath to deviate from a higher court’s dicta because of the threat of reversal.¹⁹⁵ Judges are human. They prefer to be right¹⁹⁶ and prefer to not have others point out when they may be wrong.¹⁹⁷ Judges are also often aware that being reversed can impact their opportunities for future advancement to a higher court.¹⁹⁸ So this “threat of reversal by a higher court” acts as a “constraint” on judges.¹⁹⁹

194. FED. R. APP. P. 32.1(a); *see also* Beske, *supra* note 190, at 810 (noting that, despite lacking “precedential effect,” “litigants can cite to these opinions”).

195. Dorf, *supra* note 1, at 2026 (“Because the higher court can reverse the lower court for the latter’s failure to predict the former’s legal views, the prudent lower court may choose to follow dicta as a way to avoid being overruled.”); Klein & Devins, *Dicta, Schmicta, supra* note 3, at 2044 (“To the extent that judges follow dicta unwillingly, it is almost certainly because they wish to avoid being reversed by a higher court.”).

196. Haire et al., *supra* note 178, at 147 (“Many judges want to ‘get it right’ simply because they have internalized norms of stare decisis through their professional training and because judicial decisions must be rationalized on the basis of precedent . . .”).

197. Reversals are not uncommon. A comprehensive study of state trial court decisions on appeal found that the “reversal rate for plaintiff appeals is 21.5 percent, compared with 41.5 percent for defendant appeals. The reversal rate for jury trials is 33.7 percent, compared with 27.5 percent for bench trials.” Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUD. 121, 121 (2009). At the federal level, at least one scholar commented that the “most striking feature about appeals is the high rate of affirmance. Our work in a number of articles shows the affirmance rate for federal civil appeals to be about 80%.” Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1970 (2009). Even though this rate is higher than the state court affirmance rate, federal appellate courts are still reversing approximately one in every five cases.

198. Boyd, *supra* note 113, at 116; Haire et al., *supra* note 178, at 147 (“Frequent reversals could impede a judge’s ability to achieve these professional goals. Indeed, senatorial hearings often focus on the judge’s ‘track record’ in terms of affirmances and reversals, and thus judges interested in elevation may seek to conform their behavior to circuit court preferences . . .”); *see also* Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1196 (1978) (noting that, in the state court context, a “reversal is a far more decisive repudiation of a lower court’s reasoning or conduct than a statement of disapproval in an affirming opinion that upholds the result of the lower court’s decision”).

199. EPSTEIN ET AL., *supra* note 78, at 35; *see, e.g.*, Caminker, *supra* note 182, at 5 (“Less visibly [than candidly explaining their prediction of the higher court’s likely ruling] but probably much more frequently, inferior court judges engage sub silentio in predictive reasoning concerning their superior court’s future behavior in an effort to avoid subsequent appellate reversal.”).

This is true even when a lower court is debating whether to follow language that is clearly dicta, as in cases like *Kelly*; in that case, the court was explicit that its statements regarding the appropriate scope of expert witness testimony were not necessary to the outcome of the case and that they were simply advice.²⁰⁰ The court prefaced the discussion with this: “Since a retrial is necessary, we think it advisable to indicate the limit of the expert’s testimony on this issue of reasonableness.”²⁰¹ Despite not being technically required to follow this “advice” from a higher court, lower courts are unlikely to ignore it because, as noted by Justice Scalia in a 2010 concurring opinion:

Despite the Court’s insistence that it is agnostic about the proper test . . . , lower courts will likely read the Court’s self-described “instructive” expatiation . . . as a heavy-handed hint about how they should proceed. Litigants will do likewise In short, in saying why it is not saying more, the Court says much more than it should.²⁰²

The reason dicta is followed so frequently has been described as “obvious”: “[J]udges across all courts do not like to be reversed, and statements of higher courts, even those made in dicta, are excellent indicators of how a higher court views an issue.”²⁰³ In sum, “[f]rom a practicing lawyer’s perspective, next to nothing can be gained by asking a lower court to treat higher court language as nonbinding dicta.”²⁰⁴

IV. CONCLUSION

Despite courts’ best attempts at efficiency, the common law is simply not efficient—and it is not supposed to be. The principles underlying the common law, including *stare decisis*, require courts to follow the holdings of superior courts to promote predictability and

200. *State v. Kelly*, 478 A.2d 364, 378 (N.J. 1984).

201. *Id.* The same is true for the court’s discussion of the five additional issues that were “unnecessary to consider” in light of the court’s actual holding; the court prefaced that discussion by noting that “we dispose of them briefly to assist the trial court in the event they surface again at the new trial.” *Id.* at 382.

202. *City of Ontario v. Quon*, 560 U.S. 746, 768–69 (2010) (Scalia, J., concurring) (emphasis omitted); see also Leval, *supra* note 1, at 1269 (suggesting courts “accept earlier dicta as holding” to avoid harsh reactions from higher courts for rejecting their pronouncements as dicta).

203. McAllister, *supra* note 7, at 178–79.

204. Klein & Devins, *Dicta, Schmicta*, *supra* note 3, at 2048.

fairness.²⁰⁵ And “the distinction between holding and dicta helps to prevent judges from evading the principle of stare decisis.”²⁰⁶ The law develops over time, case by case, and is tested with each new set of facts, new arguments, new data, and new policies.

Judicial efficiency dicta create significant concerns. As with all forms of dicta, they exceed the court’s authority, and they are more likely to be incorrect, even if they are “considered.”²⁰⁷ Efficiency is a laudable goal, and it is therefore understandable that judges may be tempted to espouse judicial efficiency dicta. But because of its preemptive nature, dicta for judicial efficiency purposes undermine the basic precepts of our judicial system. This “preemptive dicta” cuts off the natural debate, arguments, and development of the law that are essential in our common law system.

But how can we encourage courts to avoid addressing issues that they have considered but that are not necessary to the outcome of the case? One solution is for courts to follow a two-step process when drafting their opinions. The first step would be for the court to clearly articulate the proposed outcome of the case. The second step would be to draft a discussion that supports or justifies that action. If the opinion discusses an issue that is not necessary for the outcome the judge ultimately orders, that discussion should be deleted from the opinion.²⁰⁸

So, for example, if a court decides to dismiss a case for lack of jurisdiction, the opinion should not include a discussion of the merits

205. *Id.* at 2031–32 (explaining that the “competing normative perspectives on judges’ role in the development of law imply different views of where the line between holding and dictum should be drawn. Judicial minimalists would likely embrace a narrower view of what constitutes a holding and, in so doing, categorize as dictum any language that is not necessary to the resolution of a dispute before the court.” Under the minimalist view, “lower courts have substantial authority to shape the development of law by enforcing the holding-dictum distinction and otherwise engage in common law judging. Formalists would likely prefer broad, authoritative judicial opinions and be more likely to treat such statements as part of the court’s holding. More fundamentally, formalists look for higher courts to lay down rules that will constrain the discretion of lower court judges”).

206. Abramowicz & Stearns, *supra* note 1, at 1093.

207. *See supra* notes 26–32 and accompanying text.

208. *See, e.g.,* Leval, *supra* note 1, at 1268 (pointing out the problems that occur when courts assert no error as to some claims, yet reverse the judgment). If the judge wanted to keep a draft of that discussion for future efficiency, that judge could do so. This would be akin to a judge having a clerk research a legal issue that is not pressing in any current case. Many of the problems noted with judges espousing dicta disappear when that dicta are not part of the actual opinion. However, the discussion is still less likely to be accurate because it would not affect the outcome of the case, so that draft discussion should form only the starting point for a future opinion on that issue; *see also supra* notes 86–92 and accompanying text (discussing how dictum is more likely to be inaccurate than holdings).

of the plaintiff's claim. Similarly, if a court decides to reverse a lower court's decision, the opinion should not elaborate on how the lower court did not err on other issues. Simply stating that those issues are not necessary for the decision should suffice. Alternative holdings would be permissible as long as they each resulted in the same result;²⁰⁹ if one "holding" would result in the case proceeding and another "holding" would result in the case being dismissed, the discussion should be limited to the reason for dismissal.

In the *Kelly*²¹⁰ case, the opinion would therefore be limited to explaining why the proposed expert testimony on battered-woman's syndrome was relevant—the reasons that support the outcome in that case, reversal—without providing guidance to the trial court on the parameters of that testimony once it is properly admitted.²¹¹ And in the *Rannels* case, the court's opinion relative to the ADA claim would address only the reasons for dismissal—failure to exhaust administrative remedies and lack of subject-matter jurisdiction over the named defendant, an alternative holding supporting the same result.²¹² The discussion claiming to hold that the act prohibits reverse age discrimination would be eliminated.²¹³

Telling an appellate court that it can only say what the lower court did wrong, without explaining to the lower court how to do it "right," is, of course, both unsatisfying and inefficient. But that is exactly what our common law requires. And the result is far more likely, in the end, to be correct. Otherwise, "dicta-planting will continue because particular persuasive dictum . . . can render additional decisions unnecessary, an efficient outcome for the issuing court."²¹⁴

It seems counter-intuitive to think of judicial efficiency dicta as one of the most problematic forms of dicta. After all, the court likely considered the issue, and judicial efficiency is a worthwhile goal. Yet as with all forms of dicta, judicial efficiency dicta still exceed courts' authority and are more likely than actual holdings to be incorrect.

209. See *supra* note 22 and accompanying text.

210. See notes 34–43 and accompanying text (describing the Kelly case).

211. *State v. Kelly*, 478 A.2d 364, 378 (N.J. 1984); see also *supra* notes 41–42 and accompanying text (describing the Kelly case dictum).

212. *Rannels v. Hargrove*, 731 F. Supp. 1214, 1221–23 (E.D. Pa. 1990); see also *supra* notes 50–54 (describing the *Rannels* case).

213. *Rannels*, 731 F. Supp. at 1220–21; see also *supra* notes 51–53 and accompanying text (discussing the *Rannels* case).

214. McAllister, *supra* note 7, at 180.

Judicial efficiency dicta are also difficult to identify, and even when lower courts recognize a statement as dictum, they generally treat it like a holding anyway.²¹⁵ Hence, because this particular form of dicta is more likely to become binding than other forms of dicta, judicial efficiency dicta are actually a significant problem. This “preemptive dicta” dislodges the role of the various courts²¹⁶ and stifles the natural debate and arguments that are necessary for the considered development of the law.²¹⁷ Advocacy is less robust because the result is predetermined. We are far better off allowing natural splits in the law, with different arguments and approaches; that is how we get to the *best* result.

215. See *supra* notes 152–204 and accompanying text.

216. See, e.g., Grove, *supra* note 81, at 25 (noting that broad reaching decisions by higher courts can “inhibit development of new legal theories in the lower courts and thereby undermine their capacity to serve as informational resources” for the higher court); Abramowicz & Stearns, *supra* note 1, at 1022–23.

217. Grove, *supra* note 81, at 6 (noting that the minimalist approach leaves “room for democratic debate on those issues”). Furthermore, this approach recognizes that it is the legislature’s prerogative to set policy going forward, not the courts; for example, the New Jersey legislature could have held hearings and heard from a broad array of relevant stakeholders and reached a conclusion about the appropriateness of expert testimony on the battered-woman’s syndrome, similar to rape shield laws enacted in many jurisdictions. Currently, a “number of states provide for the admission of the battered woman syndrome through legislation.” 2 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 12:1 n.3 (2019–2020 ed. 2019).

