

Dicta and the Rule of Law

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I. INTRODUCTION

Just after eleven o'clock in the morning on October 29, 2012—a rainy Monday in D.C.—the Supreme Court heard oral argument in *Kirtsaeng v. John Wiley & Sons, Inc.*¹ The case raised important questions of copyright law, and discussions of statutory interpretation and policy took center stage.² Justice Elena Kagan, however, wanted to talk about whether a certain passage in a prior case, *Quality King Distributors, Inc. v. L'anza Research*

1. Transcript of Oral Argument, 132 S. Ct. 1905 (2012) (No. 11-697).

2. See Ronald Mann, *Argument recap: Justices skeptical of publisher's position in gray-market copyright case*, SCOTUSBLOG (Oct. 31, 2012, revised 3:20 PM), <http://www.scotusblog.com/?p=154545>.

International, Inc.,³ was mere “ill-considered dicta” that should be ignored. Representing the petitioner, Joshua Rosenkranz hesitated only a few seconds before answering: “To put it bluntly, yes,” he said.⁴ “That’s my ultimate position.”⁵ In *Kirtsaeng*, the importance of distinguishing between dicta and holding was clear. If the passage were treated as a holding, *Kirtsaeng* had already lost the case. If dicta, the question remained open.

Below, even the Second Circuit panel that ruled against *Kirtsaeng* had described the *Quality King* passage as dicta.⁶ Nonetheless, arguing for the respondent, former solicitor general Ted Olson would not let such a stark path to victory go untried. In his opening remarks, he referenced the passage and argued that “referring to it as dicta misstates what was going on, on [*sic*] the *Quality King* case.”⁷ Only then was he interrupted, by an incredulous Justice Samuel Alito, asking if he truly wanted to argue that the passage was not dicta.⁸ Olson assured Justice Alito he did, prompting the justice to ask pointedly, “It was the holding of the case?”⁹ Olson responded that the passage was a holding inasmuch as the Court felt it “necessary” to include it.¹⁰ He then retreated slightly by claiming he did not want to spend much time arguing about the definition of dicta.¹¹

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This Essay is about dicta. Like Olson, the Essay will not spend much time arguing about the definition of dicta. Rather, it analyzes rule of law issues as they pertain to dicta. Does the definition of dicta matter? Does reliance on dicta by subsequent courts raise rule of law concerns? The answer to both questions is yes.

## II. RULE OF LAW FUNDAMENTALS

Defining the term “rule of law” would not merely take a paper itself, or even a book. It is the work of a generation, and it may yet prove impossible. Nonetheless, competing definitions typically include several specific elements that no one sees fit to deny.<sup>12</sup> These concepts subserve the rule of

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3. 523 U.S. 135 (1998), *overruled in part by* *Kirtsaeng v. John Wiley & Sons, Inc.*, No. 11-697, 2013 WL 1104736 (S. Ct. Mar. 19, 2013).

4. *Id.*

5. *Id.*

6. *John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210, 217–18 (2d Cir. 2011).

7. Transcript of Oral Argument, *supra* note 1, at 24.

8. *See id.* at 25.

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* David Kinley, *Human Rights, Globalization, and the Rule of Law: Friends, Foes, or Family?*, 7 UCLA J. INT’L L. & FOREIGN AFF. 239, 247 (2002) (“Most, if not all, modern formulations of the rule of law have common base elements, even if their categorization, and the

law in vital but distinct ways.

#### A. *Procedural Rule of Law Safeguards*

In his seminal essay on the topic, Joseph Raz included among eight “guiding principles” to the rule of law the proposition that “[t]he making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules.”<sup>13</sup> More recently, Professor Erwin Chemerinsky cited the precept as “unassailable,” before beginning his own list of critical considerations with the statement that “[t]he rule of law requires the formation of general laws according to set procedures.”<sup>14</sup> Professor Chemerinsky’s second rule—“Laws must be general, prospective, and clearly stated”—dovetails nicely with the first.<sup>15</sup> Together, they establish, at a minimum, that lawmaking should be transparent, and laws clear and retrospective.

##### 1. Transparent Lawmaking According to Established Procedure

In addition to clearly outlining how laws are to be enacted—bicameral passage and presentment for legislation,<sup>16</sup> advice and consent of the Senate for treaties,<sup>17</sup> and Article V amendment protocols<sup>18</sup>—the United States Constitution contains the curious requirement that Congress “shall keep a Journal of its Proceedings, and from time to time publish the same.”<sup>19</sup> Along with the very design of the nation’s capitol building, with its large galleries that House proceedings may be viewed by the public,<sup>20</sup> the provisions demonstrate, as a historical matter, that Americans have always valued transparent lawmaking according to strict rules. While somewhat groundbreaking at the time, expectations of transparency and regularity have never waned and now stand as fundamental rule of law elements.

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reasons for such, differ between leading commentators. These are that the notion comprises rules of general application; that government is bound by rules; and, that rules are prospective and publicly accessible such that the legal implications of one’s future actions may be predicted.”)

13. Joseph Raz, *The Rule of Law and Its Virtue*, in *LIBERTY AND THE RULE OF LAW* 8 (Robert L. Cunningham ed., 1979).

14. *Toward a Practical Definition of the Rule of Law*, 46 No. 4 *JUDGES’ J.* Fall 2007, at 5.

15. *Id.*

16. U.S. CONST. art. I, § 7.

17. *Id.* at art. II, § 2.

18. *See id.* at art. V.

19. *Id.* at art. I, § 5.

20. *See* Akhil Reed Amar, *Addison C. Harris Lecture March 20, 2002*, 77 *IND. L.J.* 671, 674–76 (2002).

## 2. Prospective Law

Another rule-of-law fundamental with a constitutional pedigree,<sup>21</sup> the requirement that laws not be applied retroactively relies on the idea that one cannot violate a nonexistent law and should not be punished for conduct contrary to a later-enacted law.<sup>22</sup> After all, “[o]ne cannot be guided by a retroactive law that does not exist at the time of action.”<sup>23</sup> But the Constitution’s prohibition of ex post facto laws is limited in two fundamental ways: it applies only to criminal law, and it applies only to legislatively enacted law.<sup>24</sup> Judicial lawmaking is exempted.<sup>25</sup> While this potentially raises rule of law concerns, it also makes sense because the common law necessarily has a retrospective element.<sup>26</sup>

Nonetheless, the very fiber of the common law method lays these fears to rest. The common law method relies on custom, history, precedent, and analogy to reach, through reasoned analysis, a rule that fits.<sup>27</sup> That is, ideally, the rule created is a rule that could conceivably be predicted by anyone who grasped related precedents.<sup>28</sup> The common law method is thus

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21. See U.S. CONST. art I, § 9–10.

22. *Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1798) (“[T]he plain and obvious meaning and intention of the prohibition is this; that the Legislatures of the several states, shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition considered in this light, is an additional bulwark in favour of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation.”).

23. Raz, *supra* note 13, at 7.

24. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 619 (1994).

25. *Id.*

26. See Jeremy Bentham, *A Comment on Commentaries*, in *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* 3, 50 (J.H. Burns & H.L.A. Hart eds., 1977) (“[T]he common law . . . is but a series of ex-post facto laws.”); Robert Rantoul, *Oration at Scituate*, in *AMERICAN LEGAL HISTORY* 317, 317 (Kermit L. Hall et al. eds., 1991) (“Judge-made law is ex post facto law.”).

27. See Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 *CONN. L. REV.* 737, 764 (2012) (“Common law adjudication is decision-making by courts based not on the constitution or on a statute, but instead on reasoning by analogy from precedents.”); THEODOR F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 307, 347–50 (5th ed. 1956) (identifying the importance of custom in the creation of the law and distinguishing between custom and precedent); Oliver Wendell Holmes, Jr., *The Common Law* (1881), in *THE COMMON LAW AND OTHER WRITINGS* 5 (1982) (“The customs, beliefs, or needs of a primitive time establish a rule or formula.”). *But see* Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 *TUL. L. REV.* 475, 486–87 (1933) (arguing that custom no longer plays an important role in the development of the common law).

28. Oliver W. Holmes, Jr., *Codes and the Arrangements of Law*, 44 *HARV. L. REV.* 725, 725 (1931) (reprinted from 5 *AM. L. REV.* 1 (1870) (“It is the merit of the common law that it decides the case first and determines the principle afterwards. . . . [L]awyers, like other men, frequently see well enough how they ought to decide on a given state of facts without being very clear as to the *ratio decidendi*.”). *But see* Henry P. Monaghan, *Our Perfect Constitution*, 56 *N.Y.U. L. REV.* 353, 390 (1981) (arguing that, at least in constitutional cases, stare decisis provides “all the predictability of a

not seen as a threat to the rule of law.<sup>29</sup>

### 3. Clear Law

Again, America's dedication to clear, accessible law is plainly demonstrated by the historical record. While the Founders chose to draft the Constitution in secrecy, a seeming violation of the policy favoring transparency, the decision was made to encourage unguarded discussion<sup>30</sup> and ultimately reinforced the primacy of the document's text.<sup>31</sup> The Constitution had to be clear enough "to speak for itself."<sup>32</sup> The text would govern rather than the intent of the Founders.<sup>33</sup> And, under closer inspection, the opaque proceedings had no rule-of-law implications. This is so because the lawmaking occurred with public debate and ratification and was thus eminently transparent.<sup>34</sup> Until nine states approved of it, the draft Constitution was a dead letter.<sup>35</sup>

Clarity in the law has since become a standard component of most every formulation of the rule of law.<sup>36</sup> The underlying premise is that "legal commands" should be "deductively applicable, and that vague norms—of the sort with which one is left if legal commands are not deductively applicable—are inconsistent with those basic [rule of law] values."<sup>37</sup> This

lighting bolt: it will strike on occasion but when and where can only be known after the fact").

29. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 142–43 (1921) ("Acquiescence in such a method has its basis in the belief that when the law has left the situation uncovered by any pre-existing rule, there is nothing to do except to have some impartial arbiter declare what fair and reasonable men, mindful of the habits of life of the community, and of the standards of justice and fair dealing prevalent among them, ought in such circumstances to do, with no rules except those of custom and conscience to regulate their conduct."). Cf. Raz, *supra* note 13 at 7 ("Sometimes it is known for certain that a retroactive law will be enacted, and when this happens retroactivity does not conflict with the rule of law . . .").

30. See Jared Sparks, *Journal* April 19, 1830 reprinted in MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 479 (1911).

31. Robert J. Pushaw, *Article III's Case/Controversy Distinction and the Dual Functions of the Federal Courts*, 69 *NOTRE DAME L. REV.* 447, 470–71 (1994).

32. *Id.*

33. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *HARV. L. REV.* 885, 903 (1985).

34. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 6 (2005); see also STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 12 (1996) ("The idea was that the entire people, through the mechanism of the convention and subsequent popular ratification, were the creators of the constitution.").

35. *Id.*; see also U.S. CONST. art. VII.

36. See, e.g., Raz, *supra* note 13, at 7 ("An ambiguous, vague, obscure, or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it.").

37. Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of*

erudite formulation may obfuscate the simple idea: Because clear laws lend themselves more readily to clear applications, they are more consistent with the rule of law than vague laws, which might be interpreted inconsistently. And, of course, if a law is unclear on its face such that one cannot guess how it might possibly be applied, there is no predictability.<sup>38</sup>

### B. Predictable Outcomes

While it may be true that legal realism—the cynical view that the outcome of any given case is likely to depend on what the judge had for breakfast<sup>39</sup>—is here to stay,<sup>40</sup> few would deny that predictability is a vital rule of law ingredient.<sup>41</sup> Indeed, Professor Michael C. Dorf, who seems quite resigned to indeterminacy in the law, points out that such uncertainty represents a conflict with the rule of law ideal.<sup>42</sup> But any number of scholars argue that legal realism or indeterminacy does not necessarily yield meaningful unpredictability.<sup>43</sup> Thus, legal realism is only incompatible with the rule of law depending on how one defines predictability,<sup>44</sup> and the question is not whether a jurisprudential approach can be denominated “legal realism,” but whether it creates significant unpredictability of outcomes.

The primacy of predictability is readily apparent—those governed by

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*Legal Argument by Analogy*, 109 HARV. L. REV. 925, 992–93 (1996).

38. See MICHAEL FOUCAULT, *DISCIPLINE AND PUNISH* 95 (2d ed. 1995). Under the heading, “The rule of perfect certainty,” Foucault writes, “The laws that define the crime and lay down the penalties must be perfectly clear, so that each member of society may distinguish criminal actions from virtuous actions.” *Id.* (internal quotations and citations omitted).

39. See Karl N. Llewellyn, *On Reading and Using the New Jurisprudence*, 40 COLUM. L. REV. 581, 592 (1940).

40. Or, as the cliché goes, “we’re all legal realists now.” See, e.g., Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267 (1997); see also Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity & Authority*, 142 U. PA. L. REV. 549, 579 n.54 (1993) (“Only ordinary citizens, some jurisprudes, and first-year law students have a working conception of law as determinate.”).

41. See, e.g., 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 73 (3d ed. 2000) (citing “predictability” along with “stability” and “reliance” as “‘rule of law’ values”); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (citing the importance of “predictability” before noting its pedigree: “Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law”).

42. See Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 877 (2003); see also KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 12 (1960) (noting that the advent of legal realism seemed to place rule of law in doubt).

43. See, e.g., Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915 (2005).

44. See Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 349–50 (1996) (“The rule of law concern goes to whether people can predict how the legal system is likely to come to bear on them, and the sociological aspects of the indeterminacy thesis demonstrate that a high degree of predictability, with respect to some or even many legal propositions, is compatible with the indeterminacy thesis.”).

the law should understand how it will apply to them before being subjected to it.<sup>45</sup> In a sense, such predictability is the name of the game:

The reason why [lawyering] is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted [*sic*] to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.<sup>46</sup>

In a global economy, as companies spread across different nations and necessarily entangle themselves with various legal systems, the importance of predictability has become paramount.<sup>47</sup> For this reason, it can be argued that rule of law *is* legal predictability.<sup>48</sup> Given that other indispensable Rule of Law elements listed in Part II.A all yield more predictability in the law, such a conclusion is not far-fetched.

### III. FOLLOWING THE DICTATES OF DICTA

#### A. *Defining Dicta*

While defining dicta is surely easier than defining the rule of law, Black's Legal Dictionary comes up short,<sup>49</sup> and there is no real consensus on

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45. See Oliver Wendel Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897); Raz, *supra* note 13, at 7–8; see also Judge Samuel L. Bufford, *Defining the Rule of Law*, 46 NO. 4 JUDGES' J., Fall 2007, at 20 (“It is especially important that individuals whose conduct is impacted by a law have reasonable access to the text of the law so that they can conform their actions to the law’s requirements.”).

46. Holmes, *supra* note 45, at 457.

47. See generally James R. Maxeiner, *Some Realism About Legal Certainty in the Globalization of the Rule of Law*, 31 HOUS. J. INT’L L. 27, 30 (2008).

48. *Id.*

49. Michael Abramowicz & Maxwell Steams, *Defining Dicta*, 57 STAN. L. REV. 953, 959 (2005). Black’s Law Dictionary defines dicta as “1. A statement of opinion or belief considered authoritative because of the dignity of the person making it. 2. A familiar rule; a maxim.” BLACK’S LAW DICTIONARY 485 (8th ed. 2004).

the correct definition.<sup>50</sup> Rather than endeavoring to define the term, I will trot out a pair of definitions for consideration. Classically, dicta is regarded as any portion of the opinion that is inessential to the outcome.<sup>51</sup> Observing that some cases are decided in a less linear fashion—and often even with twin rationales, neither of which is necessarily superior—Professors Michael Abramowicz and Maxwell Stearns propose a more narrow definition in their thorough treatment of the topic:<sup>52</sup> “A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta.”<sup>53</sup> Courts that distinguish between “judicial dicta” and “obiter dictum,” and find the former binding (or nearly so) seem to follow a similar definition of dicta.<sup>54</sup> As we shall see, and perhaps counter-intuitively, broader definitions of dicta seem to yield more predictability than the classic, narrow definition, which is impossible to apply consistently.

### B. Article III Limitations

Under a different system, giving dicta the force of law might present no rule of law concerns. Under the American system, however, as a precedential and prudential matter, dicta cannot serve as binding precedent.<sup>55</sup> As Chief Justice John Marshall explained:

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this

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50. *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) (describing dictum as “a term variously defined”).

51. *See, e.g.*, JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 261 (1921) (“In order that an opinion may have the weight of a precedent, . . . it must be an opinion the formation of which is necessary for the decision of a particular case; in other words, it must not be *obiter dictum*.”).

52. *See generally* Michael Abramowicz & Maxwell Stearns, *supra* note 49.

53. *Id.*

54. *See, e.g.*, *Cerro Metal Products v. Marshall*, 620 F.2d 964, 979–80 & n.39 (3d Cir. 1980); *United States v. Bell*, 524 F.2d 202, 206 (1975) (“[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 can not be ignored in the resolution of the close question we have to decide.”); *Gabbs Exploration Co. v. Udall*, 315 F.2d 37, 39 (D.C. Cir. 1963); *Malcolm v. Honeoye Falls-Lima Educ. Ass’n*, 678 F. Supp. 2d 100 (W.D.N.Y. 2010).

55. *See, e.g.*, *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 626–27 (1935); *Cohens v. Virginia*, 19 U.S. 264, 399–400 (1821).

maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.<sup>56</sup>

It is now widely accepted that the rule is of constitutional dimension—by limiting the judiciary’s power to actual cases and controversies, Article III divests judges any power to issue advisory opinions.<sup>57</sup> Dicta is, at bottom, a form of advisory opinion for future cases.<sup>58</sup>

Because of the Article III and precedential limitations on the power of judges to make binding law via dictum, courts and lawyers rightly distinguish between holding and dictum when conducting legal analysis.<sup>59</sup>

56. *Cohens*, 19 U.S. at 399–400.

57. See Judge Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1259 (2006); Michael Abramowicz & Maxwell Steams, *Defining Dicta*, 57 STAN. L. REV. 953, 1067 & n.355 (2005); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2049 (1994); see also Robert J. Pushaw, *supra* note 31, at 447 (noting that Article III “justiciability presupposes that a federal judge’s primary function is to resolve disputes, not to declare the law”). But see Shawn J. Bayern, *Case Interpretation*, 36 FLA. ST. U. L. REV. 125, 151–52 (2009) (expressing “skepticism” that Article III limits federal judges from using dicta to make law).

58. The aptness of equating dicta and advisory opinions is revealed in *United States v. Fruehauf*, 365 U.S. 146 (1961), wherein Justice Felix Frankfurter described advisory opinions as:

advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests . . . .

*Id.* at 157. Justice Frankfurter could just as well be describing dicta. But see Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 21 (1998) (distinguishing dicta from advisory opinions). Professor Krotoszynski’s conclusion seems to rely on the following syllogism:

All dicta is constitutional.

And no advisory opinions are constitutional.

Thus, no advisory opinions are dicta.

While the logic holds up, the simplistic premises birth simplistic analysis. The question should turn on the force of law given, not whether it can be dubbed an “advisory opinion” or “dicta.” When dicta is given the force of law, it is transmuted into an impermissible advisory opinion. And when an ostensible advisory opinion is not given the force of law, it is unproblematic dicta. Thus, just as a judge “cannot transmute dictum into decision by waving a wand and uttering the word ‘hold,’” *United States v. Rubin*, 609 F.2d 51, 69 n.2 (1979) (Friendly, J., concurring), and just as labeling dicta an “advisory opinion” alters its propriety “not one whit,” Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 51 HARV. L. REV. 605, 650 (1992), so too, calling an opinion “advisory” does not transform it into a violation of Article III’s case or controversy requirement.

59. See, e.g., *Barbour v. Int’l Union*, 594 F.3d 315, 321–22 (4th Cir. 2010) (concluding portions

Being relegated to a lower status, dicta ostensibly does not have the force of law, is therefore not *expected* to have the force of law, and is thus rightly not relied on as law.<sup>60</sup>

### C. When Dicta Dictates

If courts are not treating dicta as governing law, this paper is a purely academic exercise. But, arguably, dictum governs in at least two fairly common circumstances. First, the Ninth Circuit has adopted a view of dicta narrow enough that Judge Pierre N. Leval on the Second Circuit has accused it of overstepping Article III's boundaries, writing that, under the Ninth Circuit approach, "a court has the power to make binding law, at least on an issue argued by the parties, simply by announcing a rule, irrespective of whether the rule plays any functional role in the court's decision of the case—a very considerable power, and without constitutional justification."<sup>61</sup> Second, dicta and holding are regularly conflated. In all circuits, dictum is often inadvertently treated as binding authority. Judges fail to perceive the difference between dicta and holding and consequently treat the former as the latter. Finally, the jurisprudence of Justice William Brennan suggests that a judge, taking the long view, can use dicta to purposely shape the law through suspect means. This Part considers the rule of law implications of both the Ninth Circuit's narrow view of dicta and the commonplace conflation of dicta and holding before examining Justice Brennan's technique of loading opinions with calculated dicta later relied on as precedent.

#### 1. The Ninth Circuit: A Case Study

##### a. *The definition of dicta tested*

In the Ninth Circuit, the Chief Judge is exasperated.<sup>62</sup> Dicta's got him down.<sup>63</sup> Over the course of several years, and several cases, he has waged

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of a previous Fourth Circuit case represented "classic judicial dictum" and that, therefore, the case was not binding); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 762–63 (11th Cir. 2010) (declining to follow dicta from a previous Eleventh Circuit opinion); *see also* RUGGERO J. ALDISERT, *WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT* 261 (2d ed. 2003) (noting that appellate judges inquire whether a cited proposition "originated in a thorough, well-reasoned opinion that was itself based on binding precedent").

60. *See, e.g.*, *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) ("[A] dictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject.").

61. Leval, *supra* note 57, at 1251.

62. John Roemer, *9th Circuit Dukes it Out Over Dicta*, DAILY J., Feb. 26, 2010, available at <http://www.nonpublication.com/roemer2.26.10.htm>.

63. *See id.*

war with Judge A. Wallace Tashima over what constitutes binding precedent. While a survey of Ninth Circuit cases illustrate that he is winning the debate, Judge Tashima disregards such holdings—as dicta. The first skirmish took place in *United States v. Johnson*,<sup>64</sup> in which a majority of the Ninth Circuit panel joined Judge Kozinski’s concurrence purporting to define dicta, as contradistinguished from the position taken in Tashima’s concurrence in the same opinion. Kozinski fired the opening salvo:

Judge Tashima’s concurrence raises a fundamental question concerning the development of our circuit law: To what extent is a later panel bound by statements of law contained in opinions of an earlier panel? Judge Tashima would hold that a later panel is free to ignore statements in an earlier opinion—even statements supported by reasoned analysis—if the later panel concludes that the earlier ruling is not necessary to the result reached.<sup>65</sup>

Note that Judge Tashima’s definition of dicta essentially captures the classic definition—that which is not necessary to the holding is dicta.<sup>66</sup> Indeed, Tashima recognizes that his definition “reflects the centuries-long development of the common law.”<sup>67</sup> That a majority of the en banc panel disagree matters not because:

By definition, dictum is an unnecessary statement made by the majority; unless a statement is made by a majority, there is no need to engage in an analysis of whether that particular statement is dictum or a holding. . . . [And], an ipse dixit labeling a statement as a “holding” does not make it so.<sup>68</sup>

Of course, Judge Kozinski did not view the conclusion of the concurrence as mere ipse dixit. Rather, it fit perfectly his definition—“where a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.”<sup>69</sup> Because the discussion of holding and dicta was germane to the eventual resolution of the case, because it was

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64. *United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001).

65. *Id.* at 914 (Kozinski, C.J., concurring).

66. *See supra* note 52 and accompanying text.

67. *Johnson*, 256 F.3d at 920 (Tashima, J., concurring).

68. *Id.* at 921.

69. *Id.* at 914 (Kozinski, C.J., concurring).

resolved after reasoned discussion, and because it appeared in a published opinion, it constituted a holding—not because it was labeled as such.

Interestingly, Judge Kozinski relied on rule of law fundamentals in fashioning this broad definition. Observing that “judges often disagree about what is and is not necessary to the resolution of a case,” and that they “often confront cases raising multiple issues that could be dispositive, yet [] find it appropriate to resolve several, in order to avoid repetition of errors on remand or provide guidance for future cases,” and that they “occasionally find it appropriate to offer alternative rationales for the results they reach,” Chief Judge Kozinski reasoned that Judge Tashima’s narrow definition would leave litigants and their attorneys at a loss when attempting to predict the law:

If later panels could dismiss the work product of earlier panels quite so easily, much of our circuit law would be put in doubt. No longer would the question be whether an issue was resolved by an earlier panel. Rather, lawyers advising their clients would have to guess whether a later panel will recognize a ruling that is directly on point as also having been necessary. We decline to introduce such uncertainty into the law of our circuit.<sup>70</sup>

Four years later, in *Barapind v. Enomoto*, the debate repeated itself, except this time the definition of dicta was applied in a traditional majority opinion.<sup>71</sup> Moreover, the en banc panel purported to expressly overrule a prior Ninth Circuit case with a narrower definition of dicta.<sup>72</sup> The stakes had been raised. But Judge Tashima remained unmoved, declaring, “the discussion about dicta is dicta.”<sup>73</sup>

While *Barapind* is essentially a recapitulation of the competing theories advanced in *Johnson*, an intervening case in which the judges squabbled across concurring opinions offers less abstract evidence that Chief Judge Kozinski’s definition might advance the rule of law ideal better than Judge Tashima’s. In 2003, an en banc panel of the Ninth Circuit decided *Miller v. Gammie*,<sup>74</sup> devoting the final portion of the opinion to a determination of whether it was necessary for an en banc panel to overrule an opinion that

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70. *Id.* at 914–15.

71. *See* 400 F.3d 744, 750–51 (9th Cir. 2005) (en banc).

72. *See id.* at 750 n.8.

73. *See id.* at 758 (Tashima, J., concurring) (“We are now sitting en banc, and therefore can declare the law as we believe it to be regardless of what we have previously held. This is so no matter whether a particular part of a prior opinion was necessary to its decision or not. Thus, there is no point to holding that *Quinn*’s ‘incidental to’ discussion is, or is not, dicta; instead, we can, and should, decide whether its discussion is now the law of the circuit because it ought to be, and whether the district court got it right or wrong.”).

74. 335 F.3d 889 (9th Cir. 2003).

had been thoroughly rejected, but not expressly overruled, by the Supreme Court.<sup>75</sup> The court's determination was clear: "We hold that the issues decided by the higher court need not be identical in order to be controlling."<sup>76</sup>

It was not lost on Judge Tashima that this "holding," while important for guiding lower courts, was not necessary to the resolution of the case. Concurring, he wrote that the final part, "while technically dicta, is nonetheless authoritative and binding precedent for this circuit."<sup>77</sup> The nature of the court in its en banc form, exercising a "supervisory role," led Judge Tashima to conclude that:

When, as here, the guidance of the en banc court is necessary to ensure that future three-judge panels will act consistently regarding the binding effect of precedent, it is eminently appropriate for the en banc court to address matters that, while not necessary to the decision of the case, are vital to "the administration and development of the law of the circuit."<sup>78</sup>

Thoroughly unimpressed, Chief Judge Kozinski wrote that Judge Tashima's approach to dicta had "just flunked its first reality-check."<sup>79</sup> Kozinski's chief criticism of Tashima's view was that it turned the inquiry into a guessing game, arguing that "[t]hese infinitely amorphous inquiries undermine the guidance litigants are entitled to expect from our en banc opinions."<sup>80</sup>

*b. Rule of law implications*

Although there is room for debate regarding whether the Ninth Circuit majority approach comports with the Constitution's cases and controversies requirement,<sup>81</sup> or whether it conflicts with Supreme Court precedent,<sup>82</sup> it

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75. *See id.* at 899–900.

76. *Id.* at 900.

77. *See id.* at 902 (Tashima, J., concurring).

78. *See id.* at 903–04 (quoting *United States v. Am.-Foreign S. S. Corp.*, 363 U.S. 685, 689 (1960)).

79. *See id.* at 900 (Kozinski, C.J., concurring).

80. *See id.* at 901.

81. *See, e.g.,* Leval, *supra* note 58, at 1251.

82. Ironically, the Ninth Circuit's definition of dicta may be invalid, by *its* definition. The Supreme Court has adopted the broad view of dicta—that which is not necessary to the decision is dicta. *See, e.g.,* *Cent. Green Co. v. United States*, 531 U.S. 425, 431 (2001) (reasoning that a prior proposition by the Court "was unquestionably dictum because it was not essential to our disposition

seems to be more compatible with the rule of law than the narrow definition of dicta proposed by Judge Tashima. As discussed above, the rule of law demands predictability above all else. But under the Tashima approach, distinguishing between dicta and holding—and thus identifying binding law—can be a fool’s errand. As Kozinski observed, even judges sometimes cannot tell what portions are necessary to the resolution of the case.<sup>83</sup> And Tashima’s willingness to create a new exception to his rule illustrates its failings.

Kozinski’s approach is adequately transparent and clear because it requires “*reasoned consideration in a published opinion.*”<sup>84</sup> Published opinions, by their nature, receive more attention than unpublished opinions, and the “reasoned consideration” prong requires judges to explain to lawyers, fellow judges, and the people how they reached their conclusion. Further, the procedure for making law is thus established.

By contrast, Tashima’s approach establishes no procedure for making law. Whether law has been made or not is a backward-looking inquiry, and it has nothing to do with the process. Instead judges and lawyers must analyze the prior case and determine what portions of the analysis were necessary to its final disposition. Under Tashima’s approach, broad swaths of important opinions like *Marbury v. Madison*<sup>85</sup> and *National Federation of Independent Business v. Sebelius*<sup>86</sup> are likely dicta. Further, his consistent

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of any of the issues contested in” the case). One would think that the Ninth Circuit would accord at least as much deference to Supreme Court statements as it would to statements made in the Ninth Circuit, meaning that the “law of the circuit” should include statements made by the Supreme Court that satisfy the narrow definition of dicta. This is especially true given that, as a rule, Supreme Court dicta is given “great weight,” even when recognized as not binding. *Coeur D’Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 683 (9th Cir. 2004). Under the Ninth Circuit view of dicta, however, the Supreme Court’s broad view of dicta should possibly govern—if the definition of dicta was “an issue germane to the eventual resolution of the case” and was resolved “after reasoned consideration.” See *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (Kozinski, C.J., concurring). This potentially creates an endless feedback loop: if the Ninth Circuit’s majority approach to dicta controls, it is invalid pursuant to contrary Supreme Court precedent; and if it is invalid, the Supreme Court’s statements on the matter are also dicta, meaning the Ninth Circuit is free to impose the Kozinski rule.

83. *Johnson*, 256 F.3d at 914.

84. *Id.*

85. 5 U.S. (1 Cranch) 137 (1803).

86. 132 S.Ct. 2566 (2012). Because the statute at issue was ultimately rescued via a saving construction that found it valid under Congress’s taxing power, the discussion that it was invalid under the Commerce Clause was, arguably, not necessary to the case and thus dicta. Or so the argument goes. See, e.g., Ilya Somin, *Do the Court’s Commerce Clause and Necessary and Proper Clause Rulings in the Individual Mandate Case Matter?*, THE VOLOKH CONSPIRACY (June 29, 2012, 2:44 PM), <http://www.volokh.com/2012/06/29/do-the-courts-commerce-clause-and-necessary-and-proper-clause-rulings-in-the-individual-mandate-case-matter/>. It should come as no surprise, that academics argue over whether this is true. See, e.g., Jonathan Adler, *Lose the battle, win the war?*, SCOTUSBLOG (June 28, 2012 6:10 PM), <http://www.scotusblog.com/2012/06/lose-the-battle-win-the-war/> (arguing that the discussion is not dicta because the “analys[i]s form[s] an essential predicate to [Roberts’] ultimate conclusion that the mandate could be upheld as a tax”).

refusal to acquiesce to the majority view means that the state of the law in any given area may depend on who is on the panel, a proposition antithetical to predictability. Creating confusion as to the law is not consistent with the rule of law, and that is exactly what Tashima's approach threatens to do.

## 2. Unprincipled Conflation

### a. Inadvertent Conflation

The most banal use of dicta may also be the most pernicious. In some cases, dicta is cited as law with no apparent realization by the judge that the adversarial process has played no significant role in producing a rule based on reason and adequately considered precedent.

Later this term, the Supreme Court will consider *The Standard Fire Insurance Co. v. Knowles*,<sup>87</sup> a class action case examining the pre-certification fiduciary duties of class attorneys—specifically, whether they may stipulate to damages of less than \$5 million in order to circumvent the Class Action Fairness Act of 2005's (CAFA) removal provisions.<sup>88</sup> *Knowles* is an odd case in that it went straight from an Arkansas district court to the Supreme Court. The Eighth Circuit declined to grant the defendant's interlocutory appeal because the issue had already been settled in the circuit. But it had never been adequately considered.

In *Bell v. Hershey Co.*,<sup>89</sup> the question was what standard of proof governed questions of CAFA removal.<sup>90</sup> After ruling that removal had been merited, Judge Diana E. Murphy unnecessarily wrote that, to prevent removal, "Bell could have included a binding stipulation with his petition stating that he would not seek damages greater than the jurisdictional minimum upon remand; it is too late to do so now."<sup>91</sup> Though the statement was dicta under any definition, three years later it worked itself into a rule statement in *Rolwing v. Nestle Holdings, Inc.*<sup>92</sup> While the issue was

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87. No. 11-1450, *cert. granted* (U.S. Aug. 31, 2012).

88. The Supreme Court, 11-1450 *Standard Fire Insurance Company v. Knowles: Question Presented* (Aug. 31, 2012), [www.supremecourt.gov/qp/11-01450qp.pdf](http://www.supremecourt.gov/qp/11-01450qp.pdf); see also Ryan S. Killian, *An Illusion of Sacrifice: The Incompatibility of Binding Stipulations in CAFA Cases*, 40 PEPP. L. REV. 111, 133 (2012).

89. 557 F.3d 953 (8th Cir. 2009).

90. See *id.* at 956–57.

91. *Id.* at 958.

92. 666 F.3d 1069, 1072 (8th Cir. 2012) ("We have previously stated that a binding stipulation limiting damages sought to an amount not exceeding \$5 million can be used to defeat CAFA jurisdiction.").

briefed,<sup>93</sup> Judge Raymond Gruender turned the dicta of *Bell* into the law of the circuit.<sup>94</sup> Thus, the defendants’ arguments were unavailing; principles of stare decisis governed the outcome. This two-step process represents a paradigmatic example of dicta transmuted into law, without so much as the wave of a wand.<sup>95</sup>

*b. Justice Brennan and the art of surreptitious lawmaking*

In 1978, Justice Lewis F. Powell, Jr., circulated a cautionary memo to his clerks: “I know from experience that [Justice William Brennan] has a demonstrated ability (that I admire) to shape future decisions by the inclusion of general language unnecessary to the present opinion but apparently free from serious objection.”<sup>96</sup> Other members of the Supreme Court likewise “learned to watch for the seemingly innocuous casual statement or footnote—seeds that would be exploited to their logical extreme in later cases.”<sup>97</sup> While, in theory, Justice Brennan opposed reliance on dicta as much as anyone,<sup>98</sup> artful dicta is now regarded as a hallmark of his jurisprudence.<sup>99</sup>

While it is perfectly possible (and indeed likely) that examples abound, it seems no one has undertaken to identify actual instances of Brennan’s ingenious disingenuity at work. Unable to point to “classic” examples, a parsing of his opinions is necessary. *Goldberg v. Kelly*<sup>100</sup> seems to offer a fine specimen. In that case, the issue was “whether the Due Process Clause requires that the recipient [of welfare benefits] be afforded an evidentiary

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93. See Brief of Defendant-Appellant at 11–23, *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (8th Cir. 2012) (No. 11–3445), 2011 WL 6073918, at \*11–23.

94. See *Rowling*, 666 F.3d at 1072 (“We have previously stated that a binding stipulation limiting damages sought to an amount not exceeding \$5 million can be used to defeat CAFA jurisdiction.”).

95. As I have observed elsewhere, for whatever reason this specific CAFA-related issue seems to invite this mistake. See Killian, *supra* note 89, at 139 & n.170 (describing the Sixth Circuit’s “recognition” of the right to stipulate to lower damages in a case that did not involve binding stipulations—dictum that became law when the panel did have occasion to consider the question).

96. SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 444 (2010).

97. *Id.* at 343.

98. See, e.g., *Duro v. Reina*, 495 U.S. 676, 700 n.1 (1990) (Brennan, J., dissenting) (accusing the majority of “transmuting [] dictum into law”); *Quern v. Jordan*, 440 U.S. 332, 352–54 (1979) (Brennan, J., concurring) (calling it “deeply disturbing . . . that the Court should engage in today’s gratuitous departure from customary judicial practice and reach out to decide an issue unnecessary to its holding” and maintaining that the purported holding at issue is “patently dicta”).

99. Frank B. Cross, *The Ideology of Supreme Court Opinions and Citations*, 97 IOWA L. REV. 693, 740 (2012); Adam Liptak, *Souter’s Exit Opens Door for a More Influential Justice*, N.Y. TIMES, May 7, 2009, available at <http://www.nytimes.com/2009/05/08/us/08court.html> (“Justice Brennan [] took the long view, planting seeds in bland footnotes in the hope they would take root in other cases years later.”).

100. 397 U.S. 254 (1970).

hearing before the termination of benefits.”<sup>101</sup> Writing for the majority, Brennan cited to a footnote in *Shapiro v. Thompson*<sup>102</sup> for the proposition that a “constitutional challenge cannot be answered by an argument that public assistance benefits are “a ‘privilege’ and not a ‘right.’”<sup>103</sup> The footnote was one he had authored the year prior. And it relied, in turn, on *Sherbert v. Verner*,<sup>104</sup> which he had penned six years before. *Goldberg* thus represents an example of Brennan citing Brennan. This, of itself, is no cause for concern. Given the lengthy tenures of most Supreme Court justices and the number of opinions they produce in that time, such self-citations are inevitable. But a close reading of these opinions suggests that this is no ordinary, incidental self-citation.

The statement in *Shapiro* was plainly a dictum. In *Shapiro*, the Court considered the constitutionality of state laws requiring one year of residency before local inhabitants could be eligible for welfare benefit.<sup>105</sup> The case was argued twice and, on reargument, the respondents’ primary theory was that “the statutory prohibition of benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws.”<sup>106</sup> Brennan appended a footnote to this formulation of the appellees’ position, which read: “This constitutional challenge cannot be answered by the argument that public assistance benefits are a ‘privilege’ and not a ‘right.’”<sup>107</sup> And only afterward did the legal analysis begin. Footnote 6 was a dictum, an aside that preemptively brushed off any arguments based on whether welfare is a right or a privilege. It was not a holding reached through reasoned analysis; nor was it integral to the opinion.

To be fair to Brennan, it is important to examine the quality of the dictum cited in *Shapiro*. After all, if perfectly good law, it does not lose force by the path through which it finds its way into a given opinion. To illustrate, a circuit court’s articulation of the pleading standard in federal courts that fails to cite *Twombly* and *Iqbal* is not rendered meaningless in any practical sense.<sup>108</sup> In *Sherbert*, where the phrase originated, Brennan used it for the uncontroversial purpose of explaining that a rights/privilege

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101. See *id.* at 260.

102. 394 U.S. 618 (1969).

103. See *Goldberg*, 397 U.S. at 262.

104. 374 U.S. 398 (1963).

105. See *Shapiro*, 394 U.S. at 621–22.

106. *Id.* at 627.

107. See *id.* at 627 n.6.

108. But good luck finding a case that takes that approach.

dichotomy with regard to unemployment benefits was irrelevant in a case that, at bottom, concerned religious freedom.<sup>109</sup> Thus Brennan took a statement that was true enough in one case, plucked it out of context and plugged it into a footnote in a second case, then relied on it as a point of law in a third case.<sup>110</sup>

*c. Rule of law implications*

The threat to rule of law in cases such as these is plain. The primary difference between inadvertent conflation and Brennan's surreptitious lawmaking is intent. In the former case, dictum becomes law through oversight. With Brennan, dicta became law through calculated maneuvering.

Rather than transparent lawmaking according to established procedure, this is opaque lawmaking by accident or subterfuge. The lawmaking is accurately characterized as opaque because you cannot see it when it happens. Only later, when a follow-up judicial opinion gives a mere aside the force of law, does it occur. This sort of lawmaking is, of course, in contravention to the established procedure, given that all judges, scholars, and professionals agree that, under the American system, if you can conclude that a passage is dicta, you must also conclude that it is not the law.<sup>111</sup> The approach leads to a lack of clarity in the law because one can never be sure when it will strike. Should lawyers counsel their clients to treat adverse asides as authoritative, just in case they take on the mantle of law later?

The tension between the retroactive law inherent in a common law system and the rule of law ideal is at its ebb when, as should always be the case, new law proclaimed in a holding is a natural extension of what came before, based on due consideration of adversarial arguments.<sup>112</sup> When these safeguards—particularly the adversarial system and reasoned analysis—are not present, retroactive law becomes inconsistent with the rule of law. Litigants and their lawyers simply cannot adequately predict the law in such cases.

That judges should be careful with how they employ dicta is true. But dictum is inevitable. It is subsequent judges who turn it into law. Thus, to be consistent with the rule of law ideal, judges should ensure that propositions they are prepared to cite as law make up the holding of a prior case. It goes

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109. See *Sherbert*, 374 U.S. at 404.

110. See Randy Lee, *Twenty-Five Years After Goldberg v. Kelly: Traveling from the Right Spot on the Wrong Road to the Wrong Place*, 23 CAP. U. L. REV. 863, 887–88 (1994).

111. See, e.g., LLEWELLYN, *supra* note 42, at 20 (“Cases have authority, dictum can be and is to be marked off from holding.”).

112. See *supra* notes 21–30 and accompanying text.

without saying that Supreme Court justices should not resort to the tactics ascribed to Justice Brennan. But if they do, their colleagues should learn from Justices Brennan and Powell. They should be wary of problematic dicta when joining opinions and should ensure that it is not cited as law in subsequent opinions. These steps would help the American judiciary get one step closer to the rule of law ideal.

#### IV. CONCLUSION

By definition (whichever you choose), dicta exist in every opinion. Otherwise, opinions would be all holding. Therefore, describing dicta as a threat to the rule of law is inaccurate. What matters is that dicta and holding be distinguishable and distinguished. In the Ninth Circuit, the classic, narrow definition of dicta threatens rule of law ideals because reasonable jurists and attorneys can disagree on whether a given proposition is essential to the holding, because it has already proven concededly unworkable in at least one case, and because it represents a minority approach that fractures the circuit. The metamorphosis of dicta into law, whether by oversight or calculated intent, is even more dangerous because it represents lawmaking without key safeguards—adversarial proceedings followed by reasoned analysis. Not only is such lawmaking contrary to established procedure, it yields unpredictability because of its ex post nature. Therefore, judges should be mindful of the vital but often overlooked distinction between holding and dicta and refrain from treating the latter as the former.

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When Ted Olson stated before the Supreme Court that he did not want to argue about the definition of dicta, Justices Stephen Breyer and Elena Kagan challenged him in rapid succession, suggesting that, even by his narrow definition of dicta, the passage qualified.¹¹³ Arguing on behalf of the government as *amicus curiae* (and in favor of the respondent), the first question Malcolm Stewart fielded was from Justice Ruth Bader Ginsburg about “what has been called ‘dictum’ in *Quality King*.”¹¹⁴ Stewart had no problem calling the passage a dictum in his response, making Olson the only advocate or judge willing to construe it as a holding.¹¹⁵ Nonetheless, it remained to be seen how the Court would treat the proposition. Giving it the weight of the holding—thus determining the outcome of the case—would

113. Transcript of Oral Argument, *supra* note 4, at 25–26.

114. *Id.* at 42.

115. *See id.* at 43.

have been problematic for all of the reasons discussed in Part III.C.2. Taking the opportunity to define dicta and remind lower courts of the importance of carefully making the distinction between dicta and holding would put the United States judiciary one step closer to the rule of law ideal.

In the end, the Court took an inconsequential baby step, paving no new ground but reiterating that dictum has no *stare decisis* effect.¹¹⁶ Indeed, in this regard, an otherwise fractured Court was unanimous. Dissenting, Justice Ginsburg wrote that she would have followed *Quality King*'s dictum because she found it persuasive, but conceded that it was "dictum in the sense that it was not essential to the Court's judgment."¹¹⁷

The dissent thus suggests that Justice Ginsburg adopts the traditional definition of dicta. And Justice Breyer's majority opinion impliedly rejects the majority Ninth Circuit approach to dicta. In his view, the *Quality King* passage is not binding *because* it is "pure dictum."¹¹⁸ That the passage embraced an issue not raised by the case, not briefed and argued, and not fully analyzed represented collateral support that it should be given little "legal weight."¹¹⁹ Under the Ninth Circuit approach, these considerations would, of course, have been the very considerations that made it dictum in the first place. While any definition of dicta in the majority opinion would have likely been just that (dicta), Justice Breyer's naked conclusion that the *Quality King* assertion is a dictum leaves lower courts no better off in distinguishing dicta and holding than they previously were. So it goes.

Ryan S. Killian *

116. See *Kirtsaeng v. John Wiley & Sons, Inc.*, No. 11–697 (Mar. 19, 2013) Slip. Op. at 27–28.

117. See *id.* at 5 (Ginsburg, J., dissenting).

118. See *id.* at 27 (majority opinion).

119. See *id.*

* J.D. Candidate, 2013, Pepperdine University School of Law; Lead Articles Editor, *Pepperdine Law Review*; B.S. in Radio-Television-Film and B.J. in Journalism, 2008, University of Texas. I would like to thank Judge Deanell Reece Tacha and Justice Allen Linden for shaping my understanding of the rule of law and providing support and feedback during the process of writing this essay.