

The Adjudicative Model of Precedent

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In most courts, a statement in an opinion is a holding only if it was necessary for the outcome of the case. Several state courts and one federal court of appeals, however, have a much broader definition of a holding, which this Article calls the “adjudicative model.” The adjudicative model defines a holding as any ruling expressly resolving an issue that was part of the case.

This Article offers the first empirical and normative assessment of the adjudicative model. It describes an empirical case study of the Ninth Circuit and finds that, after adopting the adjudicative model, that court was more likely to follow its precedent in cases involving disputes about the holding/dictum distinction. To the extent this finding can be generalized to other courts using the adjudicative model, it promotes consistency in a court’s stated rules of law and hastens the development of case law. But the adjudicative model also creates an incentive for judges to overreach, perhaps reducing the overall quality of a court’s decisions and giving greater influence to its outliers. Because these values are in tension, a court’s definition of a holding should ultimately depend on its particular institutional features—such as its size, decision-making processes, and the nature of its docket—which can amplify or diminish the adjudicative model’s relative costs and benefits.

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INTRODUCTION

The decisions of common law courts are authoritative in future cases.¹ They are authoritative, however, only with regard to the issues raised in the case. The distinction between holdings (the law a case establishes) and dicta (everything else it says) is therefore critical for determining the content of the law.² So how should courts distinguish between holdings and dicta?

In most jurisdictions, a court’s prior statement of law is a holding only if it was necessary for the outcome of the prior case. Unnecessary statements are dicta and needn’t be followed.³ Call

¹ See H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* 243, 261–66 (Oxford 1982); Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 Mich L Rev 1, 7 (2012); Frederick Schauer, *Authority and Authorities*, 94 Va L Rev 1931, 1943 (2008); Larry Alexander, *Constrained by Precedent*, 63 S Cal L Rev 1, 3 (1989). This Article focuses primarily on a court’s obligation to follow its own decisions (horizontal precedent), rather than the decisions of a higher court (vertical precedent). See Michael Abramowicz and Maxwell Stearns, *Defining Dicta*, 57 Stan L Rev 953, 957 (2005) (explaining the distinction).

² In the sense I intend here, a case “establishes law” whenever it resolves an issue that hasn’t previously been resolved. This definition is intentionally broad, and it includes both decisions that create legal rules in traditional common law fashion and decisions that merely interpret an enacted text.

³ See *Black’s Law Dictionary* 569 (West 11th ed 2019) (defining “obiter dictum” as a “judicial comment . . . that is unnecessary to the decision in the case and therefore not

this the “necessity model” of precedent. The necessity model is a natural extension of the view that a court’s primary function is dispute resolution, and its power to declare the law is merely a byproduct of that function.⁴

One problem for the necessity model is that it’s highly contestable what “necessary” means. The Supreme Court, for instance, has in recent years suggested that a case’s holding is (i) the proposition that the outcome follows from the facts of the case;⁵ (ii) the principal rationale for the outcome;⁶ (iii) any but-for condition for the outcome;⁷ and (iv) any proposition that was on the court’s analytical route to the outcome.⁸ And the Supreme Court isn’t unique; many courts are wildly inconsistent in how they go about determining the holdings of cases. Little wonder that the holding/dictum distinction’s malleability is a frequent trope in academic writing skeptical of the power of legal doctrine to constrain judges.⁹

precedential”). See also Melvin Aron Eisenberg, *The Nature of the Common Law* 52 (Harvard 1988); Paul J. Watford, Richard C. Chen, and Marco Basile, Book Review, *Crafting Precedent*, 131 Harv L Rev 543, 576 (2017); Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 Stan L Rev 795, 826 (2017); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 NYU L Rev 1249, 1256 (2006); Abramowicz and Stearns, 57 Stan L Rev at 1065–66 (cited in note 1); Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 Brooklyn L Rev 219, 223 (2010); Shawn J. Bayern, *Case Interpretation*, 36 Fla St U L Rev 125, 129 (2009); Randy Beck, *Trans temporal Separation of Powers in the Law of Precedent*, 87 Notre Dame L Rev 1405, 1429 (2012); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum L Rev 723, 764–65 (1988); James Hardisty, *Reflections on Stare Decisis*, 55 Ind L J 41, 57–58 (1979).

⁴ For more on the “dispute resolution model” of the judicial role, see Richard H. Fallon Jr., John F. Manning, Daniel J. Meltzer, and David L. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* 73–76 (Foundation 7th ed 2015). For criticisms of the dispute-resolution model, see Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 Harv L Rev 4, 51 (1982); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv L Rev 1281, 1288–1302 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 Harv L Rev 1, 17–29 (1979); Susan Bandes, *The Idea of a Case*, 42 Stan L Rev 227, 281–82 (1990); Girardeau A. Spann, *Expository Justice*, 131 U Pa L Rev 585, 585, 618–32 (1983); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv L Rev 603, 626–31 (1992).

⁵ See *Morrison v Olson*, 487 US 654, 690–91 (1988); Part I.A.

⁶ See *American Express Co v Italian Colors Restaurant*, 570 US 228, 235–36 & n 2 (2013); Part I.B.

⁷ See *United States v Windsor*, 570 US 744, 758–59 (2013); Part I.C.

⁸ See *National Federation of Independent Business v Sebelius*, 567 US 519, 548–58 (2012) (Roberts writing only for himself in this portion of the opinion); Part I.D.

⁹ See, for example, Jerome Frank, *Law and the Modern Mind* 159 (Brentano’s 1930); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L Rev 43, 63–64 (1993); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 Minn L Rev 1173, 1187 (2006); Michael C. Dorf, *Dicta and Article III*, 142 U Pa L

The necessity model is often assumed to be a fixed point in common law adjudication. But it's not. An entirely different model of precedent prevails in the state courts of Arizona, Illinois, Maryland, and Minnesota as well as in the US Court of Appeals for the Ninth Circuit. In these jurisdictions, a holding is any ruling expressly resolving an issue that was part of the case.¹⁰ Courts in these jurisdictions eschew a narrow focus on the *actual* outcome, looking instead to every issue that could have affected a *possible* outcome of the case. Call this the “adjudicative model” because the key question is whether an issue has been ruled on—that is, adjudicated—not whether that ruling was necessary. Unlike the necessity model, the adjudicative model embraces the courts’ law-declaration function, rather than viewing it as a regrettable side effect of dispute resolution.¹¹

To see how the two models differ in operation, consider the Supreme Court’s 2014 decision in *National Labor Relations Board v Noel Canning*.¹² That case concerned whether the Constitution’s Recess Appointments Clause allows the president to appoint federal officers during a three-day, intrasession recess of the Senate to positions that were vacant before the recess began.¹³ The Court first ruled that the president may appoint officers during intrasession recesses and fill positions that were vacant before the recess began.¹⁴ The Court ultimately concluded, however, that the president may not appoint officers during recesses as

Rev 1997, 2004–05 (1994); Monaghan, 88 Colum L Rev at 743 (cited in note 3); Richard H. Fallon Jr, *Foreword: Implementing the Constitution*, 111 Harv L Rev 54, 124–25 (1997); William N. Eskridge Jr, *Overruling Statutory Precedents*, 76 Georgetown L J 1361, 1370 (1988); Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi Kent L Rev 655, 713 (1999).

¹⁰ See Part II. The one caveat involves cases where a court finds that it lacks subject matter jurisdiction. A court without jurisdiction may not establish binding law, save for law pertaining to jurisdiction itself. See *River Park Inc v City of Highland Park*, 703 NE2d 883, 891 (Ill 1998) (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”), quoting *Steel Co v Citizens for a Better Environment*, 523 US 83, 94 (1998).

¹¹ See Randy J. Kozel, *Settled Versus Right: A Theory of Precedent* 70–91 (Cambridge 2017) (noting that a broader conception of precedent gives greater lawmaking power to courts of first impression); Randy J. Kozel, *The Scope of Precedent*, 113 Mich L Rev 179, 183 (2014) (same); Beck, 87 Notre Dame L Rev at 1417–18 (cited in note 3) (discussing the challenges involved with the “unnecessary resolution of legal issues” under the necessity model).

¹² 573 US 513 (2014).

¹³ *Id* at 519.

¹⁴ *Id* at 526–38 (conclusion on intrasession recesses); *id* at 538–49 (conclusion on pre-recess vacancies).

short as three days.¹⁵ Were the Court's first two rulings holdings? The necessity model would say "no" because they were unnecessary for the outcome. But the adjudicative model would say "yes" because each ruling could have affected a *possible* outcome of the case, even though neither affected the *actual* outcome.

The adjudicative model raises several empirical and normative questions, which this Article attempts to answer over the course of five Parts. Using a series of recent Supreme Court decisions, Part I illustrates the various, often inconsistent, ways that federal courts have parsed the necessity model. Part II explains the jurisprudence of the states that use the adjudicative model and then describes the Ninth Circuit's decision to adopt that model in a fascinating series of cases in the early 2000s.

Using a multi-method approach, Part III analyzes whether and how the behavior of judges can be expected to change after a court adopts the adjudicative model. I performed a quantitative analysis on the Ninth Circuit's treatment of its own precedent before and after it adopted the adjudicative model.¹⁶ And I supplemented that analysis with anonymous interviews of Ninth Circuit judges.¹⁷ The quantitative analysis suggests that, after adopting the adjudicative model, the Ninth Circuit was more likely to follow its own precedent in cases involving disputes about the holding/dictum distinction.¹⁸

Part IV considers the adjudicative model's normative implications for the federal appellate courts. Although a complete normative assessment of the adjudicative model is beyond the scope of this Article, I identify two considerations that are important for

¹⁵ Id at 557.

¹⁶ For a description of my quantitative methodology, see Part III.A.

¹⁷ For a description of the interviews, see note 98.

¹⁸ This Article thus contributes to a growing literature on the potentially stabilizing effects of doctrinal frameworks. See generally Fallon, 111 Harv L Rev 54 (cited in note 9); Michael A. Bailey and Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 Am Polit Sci Rev 369 (2008); Stefanie A. Lindquist and David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 L & Society Rev 135 (2006); Mark J. Richards and Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 Am Polit Sci Rev 305 (2002); Paul J. Wahlbeck, *The Life of the Law: Judicial Politics and Legal Change*, 59 J Polit 778 (1997); Howard Gillman, Book Review, *What's Law Got To Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 L & Soc Inquiry 465 (2001); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L J 1750 (2010); Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 Georgetown L J 1863 (2008).

such an assessment. On one hand, the adjudicative model promotes the law's clarity by providing a clear framework for identifying the holdings of cases and by expanding the set of propositions that qualify as binding law. On the other hand, the model gives judges an incentive to reach out to resolve issues more quickly, which may diminish the quality of individual legal rules and increase the influence of a court's outliers. Part IV concludes by explaining that these costs and benefits are amplified by a court's particular institutional features, such as its size, decision-making processes, and the nature of its docket.

Part V argues that the adjudicative model doesn't violate Article III of the Constitution. Article III allows federal courts to exercise jurisdiction over, and establish law concerning, any issue that's part of a properly brought case, even where an issue turns out not to have been necessary for the outcome. In this respect, Article III's limitations on a court's power to resolve legal issues are more flexible than some scholars have thought.¹⁹

Scholarly and judicial interest in the law of *stare decisis* is experiencing a resurgence. In 2019, the Supreme Court overruled two decades-old precedents²⁰ and considered overruling a third,²¹ prompting Justice Stephen Breyer to wonder "which cases the Court will overrule next."²² That criticism was framed in terms of precedent's strength—the deference a court should give to propositions understood to be precedential. But respect for precedent is also about scope—which propositions count as binding precedent in the first place. This is an opportune time to reconsider that question.

I. THE MANY FACES OF THE NECESSITY MODEL

The necessity model is ubiquitous; one finds it in countless federal appellate decisions.²³ Its ubiquity, however, masks a great

¹⁹ See Part V.B.

²⁰ See *Franchise Tax Board of California v Hyatt*, 139 S Ct 1485, 1492 (2019), overruling *Nevada v Hall*, 440 US 410 (1979); *Knick v Township of Scott, Pennsylvania*, 139 S Ct 2162, 2179 (2019), overruling *Williamson County Regional Planning Commission v Hamilton Bank of Johnson City*, 473 US 172 (1985).

²¹ See *Kisor v Wilkie*, 139 S Ct 2400, 2413–23 (2019) (declining to disapprove of *Auer v Robbins*, 519 US 452 (1997)).

²² *Hyatt*, 139 S Ct at 1506 (Breyer dissenting).

²³ See, for example, *Seminole Tribe of Florida v Florida*, 517 US 44, 67 (1996) (stating that "we are bound" by "those portions of the opinion necessary to th[e] result"); *Tyler v Cain*, 533 US 656, 663 n 4 (2001) (affirming the analysis in *Seminole Tribe* that binding precedent includes the final disposition and "the preceding determinations *necessary* to

deal of variety in how it has been applied. Using a series of Supreme Court cases, this Part illustrates that variety and argues that it undermines the rule-of-law values that precedent is intended to serve.

A. Facts Plus Outcome

One way of understanding the necessity model is that a holding is the proposition that the outcome of a case legally follows from its facts.²⁴ If the facts of the case were *X* and *Y*, and the outcome was *Z*, then the holding is the proposition that “if *X* and *Y*, then *Z*.”²⁵ On this view, more abstract propositions aren’t necessary for reaching the outcome because they can always be re-framed at a lower level of generality.

To illustrate, consider the hoary example of the statute prohibiting vehicles in the park.²⁶ Suppose, in case 1, a court vacates

that result”) (emphasis in original); *Wright v Spaulding*, 939 F3d 695, 697 (6th Cir 2019) (noting that “the holdings that bind future courts” are “the legal rules” that are “essential to” resolving disputes); *In re Friedman’s Inc*, 738 F3d 547, 552 (3d Cir 2013) (explaining that “[i]f a determination by our Court is not necessary to our ultimate holding, it properly is classified as *dictum*”) (quotation marks omitted); *Perez v Mountaire Farms, Inc*, 650 F3d 350, 373 (4th Cir 2011) (noting that a statement was “merely dicta” because it was “not necessary to the Court’s resolution of the factual issue that was the basis of its holding”); *Baraket v Holder*, 632 F3d 56, 59 (2d Cir 2011) (stating that “it is not substantive discussion of a question or lack thereof that distinguishes holding from dictum, but rather whether resolution of the question is necessary for the decision of the case”); *Ackerson v Bean Dredging LLC*, 589 F3d 196, 205 (5th Cir 2009) (explaining that “the court’s statements . . . were unnecessary . . . and constitute nonbinding dicta”); *Arcam Pharmaceutical Corp v Faria*, 513 F3d 1, 3 (1st Cir 2007) (explaining that “[t]he result, along with those portions of the opinion necessary to the result, are binding, whereas dicta is not”).

²⁴ See, for example, *Federal Election Commission v Wisconsin Right to Life, Inc*, 551 US 449, 465–67 (2007) (narrowly construing the rationale of *McConnell v Federal Election Commission*, 540 US 93 (2003), based on the evidentiary record); *United States v Vanover*, 630 F3d 1108, 1120–21 (8th Cir 2011); *id* at 1123–24 (Riley concurring in part and concurring in the judgment) (characterizing the majority opinion as restricting prior rulings through factual examination); *Getsy v Mitchell*, 456 F3d 575, 591 (6th Cir 2006); *Council on American Islamic Relations v Ballenger*, 444 F3d 659, 666 (DC Cir 2006).

²⁵ For academic proponents of the facts-plus-outcome approach, see Edward H. Levi, *An Introduction to Legal Reasoning 2* (Chicago 1949); Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L J 161, 168–69 (1930); Ruggero J. Aldisert, *Precedent: What It Is and What It Isn’t; When Do We Kiss It and When Do We Kill It?*, 17 Pepperdine L Rev 605, 631 (1990). Inverting this approach, Professor Adam N. Steinman has argued that the express rules stated by an earlier court should be binding, see Adam N. Steinman, *Case Law*, 97 BU L Rev 1947, 1977–84 (2017), but the proposition that the outcome follows from the facts should *not* be, see Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 Va L Rev 1737, 1760–66 (2013).

²⁶ See, of course, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv L Rev 593, 606–15 (1958).

a defendant's conviction for riding her tricycle in the park, concluding that human-powered objects aren't "vehicles" under the statute. On the facts-plus-outcome approach, a court in case 2 may uphold a *bicycle* rider's conviction, even though a bicycle is a human-powered object. The court respects the holding of case 1 so long as it can supply a rationale for deciding against the bicycle rider that would justify the outcome in the earlier case.²⁷ (The court may conclude, say, that tricycles fall outside of what the legislature was trying to prohibit because they reach lower maximum speeds than bicycles.)

A real-world example is the Supreme Court's 1988 decision in *Morrison v Olson*,²⁸ which forced the Court to confront its 1935 decision in *Humphrey's Executor v United States*.²⁹ In the earlier case, the estate of a former commissioner of the Federal Trade Commission (FTC) sought back pay because his dismissal by President Franklin Roosevelt hadn't complied with a federal statute limiting the reasons for which FTC commissioners could be dismissed.³⁰ The Court concluded that limitations on the president's authority to remove FTC commissioners were constitutional because the commissioners exercised "quasi-judicial and quasi-legislative" duties, rather than "purely executive" authority.³¹

Morrison involved a similar set of questions. It presented a constitutional challenge to the Ethics in Government Act of 1978, which allowed the appointment of an independent counsel that only the attorney general could dismiss for reasons listed in the statute.³² In light of *Humphrey's Executor*, many expected the challenge to succeed; after all, the Act limited the president's authority to remove an officer exercising *purely executive* authority.³³ The Court, however, eschewed the rationale of *Humphrey's Executor*.³⁴ "[T]he real question," the Court wrote, "is whether the

²⁷ Scholars have criticized the facts-plus-outcome approach for allowing courts to "evade precedents that cannot fairly be distinguished." Dorf, 142 U Pa L Rev at 1999 (cited in note 9). See also Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 Minn L Rev 612, 639 (2006); Andrew C. Michaels, *The Holding-Dictum Spectrum*, 70 Ark L Rev 661, 674–75 (2017).

²⁸ 487 US 654 (1988).

²⁹ 295 US 602 (1935).

³⁰ Id at 618.

³¹ Id at 618–28.

³² *Morrison*, 487 US at 663, citing 28 USC § 596(a)(1).

³³ See id at 662.

³⁴ Id at 689 ("[T]he determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'").

removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."³⁵ And since the Court concluded that the independent counsel provisions didn't do so, the challenge failed. Importantly, in the Court's view, *Humphrey's Executor* was still good law because nothing said in *Morrison* would have required *Humphrey's Executor* to come out the other way.³⁶

B. Rationale for the Outcome

A second take on the necessity model is that the holding is the *rationale*—the court's primary reason for the outcome.³⁷ A single court may establish a prospective legal rule, but once it has said enough to explain the outcome, its authority to establish law is at an end.³⁸ The holding of the tricycle-in-the-park case, for instance, would include the proposition that human-powered objects aren't "vehicles," because that was the court's reason for decision, but it wouldn't include anything else the court said.

A real-world example is the Supreme Court's 2013 decision in *American Express Co v Italian Colors Restaurant*,³⁹ which involved a small-claim class action brought by several merchants against American Express (AmEx).⁴⁰ The merchants cited a line of cases beginning with the Court's 1985 decision in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*,⁴¹ which had observed that Sherman Act claims are arbitrable so long as the litigant "*effectively may vindicate* its statutory cause of action in the arbitral forum."⁴² Citing *Mitsubishi* and its progeny, the merchants contended that the arbitration clause in their contract with AmEx

³⁵ Id at 691.

³⁶ *Morrison*, 487 US at 689–91 (recasting the reasoning of *Humphrey's Executor*). For a similar treatment of *Morrison*, see Dorf, 142 U Pa L Rev at 2020–22 (cited in note 9).

³⁷ See, for example, *Pruitt v Levi Strauss & Co*, 932 F2d 458, 465 (5th Cir 1991); *WWC Holding Co, Inc v Sopkin*, 488 F3d 1262, 1271 n 6 (10th Cir 2007). See also K.N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 45 (Oceana 1951); A.W.B. Simpson, *The Ratio Decidendi of a Case and the Doctrine of Binding Precedent*, in A.G. Guest, ed, *Oxford Essays in Jurisprudence* 148, 161 (Oxford 1961) ("[O]nly a rule (or rules) acted upon in court can rank as a binding rule.").

³⁸ One well-known problem for this approach is that it has difficulty explaining alternative rationales. Since both rationales are sufficient, neither is necessary, suggesting counterintuitively that neither rationale is a holding. See Abramowicz and Stearns, 57 Stan L Rev at 1056–58 (cited in note 1); Williams, 69 Stan L Rev at 826–27 (cited in note 3).

³⁹ 570 US 228 (2013).

⁴⁰ Id at 231.

⁴¹ 473 US 614 (1985).

⁴² Id at 637 (emphasis added).

was unenforceable because it prevented them from bringing their claims on a class-wide basis and therefore prevented them from “effectively vindicating” their statutory rights.⁴³ In particular, they argued they would “have no economic incentive to pursue their antitrust claims individually in arbitration” because the cost of doing so would exceed their potential recovery.⁴⁴

The Court disagreed, observing that *Mitsubishi*’s statement about “effective vindication” was “dictum” because the Court had ultimately “[d]ismiss[ed] concerns that the arbitral forum was inadequate.”⁴⁵ Writing in dissent, Justice Elena Kagan argued the effective-vindication rule was “a core part of *Mitsubishi*” because it was an “essential condition” for the Court to find that arbitration was an appropriate forum.⁴⁶ But that didn’t matter, the majority concluded, because the effective-vindication rule wasn’t the affirmative reason for the Court’s ruling.⁴⁷

C. But-for Condition for the Outcome

A third way of parsing the necessity model defines a holding as any proposition of law that was an essential condition for the outcome.⁴⁸ To determine whether a statement is a holding, ask whether the court would have reached the same result had it asserted the statement’s opposite. If so, the statement is dictum; if not, the statement is a holding.⁴⁹ In the tricycle-in-the-park example, the proposition that human-powered objects aren’t “vehicles” is a holding because the outcome would have been different had the court determined that the parkgoer was riding a non-human-powered vehicle.

⁴³ *American Express*, 570 US at 235–36.

⁴⁴ *Id.* at 235.

⁴⁵ *Id.* The same went for each of the subsequent cases that had cited *Mitsubishi* for its effective-vindication rule. *Id.*

⁴⁶ *Id.* at 247 (Kagan dissenting).

⁴⁷ See *American Express*, 570 US at 235–36 (majority).

⁴⁸ See, for example, *Tyler*, 533 US at 663 n 4; *Díaz-Rodríguez v Pep Boys Corp.*, 410 F3d 56, 60 (1st Cir 2005); *In re Hearn*, 376 F3d 447, 453–54 (5th Cir 2004); *California Public Employees’ Retirement System v WorldCom, Inc.*, 368 F3d 86, 106 n 19 (2d Cir 2004); *DaimlerChrysler Corp v United States*, 361 F3d 1378, 1384–85 (Fed Cir 2004); *Figg v Schroeder*, 312 F3d 625, 643 n 14 (4th Cir 2002); *PDV Midwest Refining, LLC v Armada Oil and Gas Co.*, 305 F3d 498, 510 (6th Cir 2002); *In re Tuttle*, 291 F3d 1238, 1242–43 (10th Cir 2002); *In re McDonald*, 205 F3d 606, 612 (3d Cir 2000); *United States v Eggersdorf*, 126 F3d 1318, 1322 n 4 (11th Cir 1997); *Robinson v Norris*, 60 F3d 457, 460 (8th Cir 1995).

⁴⁹ See Eugene Wambaugh, *The Study of Cases* § 13 at 18 (Little, Brown 2d ed 1894); Leval, 81 NYU L Rev at 1257 (cited in note 3).

A real-world example is Justice Antonin Scalia's 2013 dissent in *United States v Windsor*,⁵⁰ which involved a constitutional challenge to the Defense of Marriage Act's (DOMA) exclusion of same-sex partners from the definition of a "spouse."⁵¹ Although the federal government continued to enforce DOMA—for instance, by refusing Edith Windsor certain spousal tax benefits—President Barack Obama had publicly stated that the statute was unconstitutional and had instructed the Justice Department not to defend it in court.⁵² Because of that position, there was some question whether the parties were sufficiently adverse to support Article III jurisdiction.

In 1983, the *Immigration and Naturalization Service v Chadha*⁵³ case reached the Court in a similarly odd procedural posture. There, the Immigration and Naturalization Service (INS) had argued that the relevant immigration statute's so-called "legislative veto" provision was unconstitutional but indicated that it intended to follow the statute in the absence of a contrary court order.⁵⁴ When the case reached the Supreme Court, one question was whether the parties were sufficiently adverse for Article III jurisdiction because they had taken the same position on the merits. The Court concluded there was adversity: first, because the House of Representatives had intervened to defend the statute; and second, because the INS had said it "would have deported Chadha" notwithstanding its view of the one-chamber veto.⁵⁵

In *Windsor*, the majority cited *Chadha* for the proposition that the executive branch's refusal "to provide the relief sought . . . preserve[s] a justiciable dispute."⁵⁶ But in dissent, Justice Scalia maintained that *Chadha's* second rationale had been "the purest dictum" because "congressional intervention" had put "the required adverseness beyond doubt."⁵⁷ In other words, *Chadha's* discussion of the INS's intention to enforce the law was dictum

⁵⁰ 570 US 744 (2013).

⁵¹ *Id.* at 752.

⁵² *Id.* at 754. See also Peter Baker, *For Obama, Tricky Balancing Act in Enforcing Defense of Marriage Act* (NY Times, Mar 28, 2013), archived at <https://perma.cc/MGM4-7GCL>.

⁵³ 462 US 919 (1983).

⁵⁴ *Id.* at 928, 939.

⁵⁵ *Id.* at 930 n 5, 939.

⁵⁶ *Windsor*, 570 US at 759, citing *Chadha*, 462 US at 939.

⁵⁷ *Windsor*, 570 US at 784 (Scalia dissenting) (quotation marks omitted).

because it was superfluous—the outcome would’ve been the same even if the INS hadn’t been willing to enforce the law.

D. On the Analytical Route to the Outcome

A fourth way of articulating the necessity model posits that a statement is a holding if it was along the analytical route to the outcome.⁵⁸ This view recognizes that, because certain legal doctrines are lexically ordered, certain grounds of decision can be reached only after first resolving other legal questions.

A recent illustration is *National Federation of Independent Business v Sebelius*⁵⁹ (*NFIB*). That case involved, among other things, a constitutional challenge to the Affordable Care Act’s individual mandate, which required most Americans to purchase health insurance on pain of paying a “penalty” to the Internal Revenue Service.⁶⁰ The federal government argued it had the constitutional authority to enact the individual mandate as an exercise of its power to regulate interstate commerce and its power to raise taxes.⁶¹

Writing for himself—but making similar arguments to the four other conservatives—Chief Justice John Roberts first observed that, on its most natural reading, the individual mandate wasn’t a tax-raising measure.⁶² On that reading, the statute’s constitutionality would depend entirely on Congress’s power to regulate interstate commerce. He then concluded that the individual mandate wasn’t a valid exercise of the commerce power because it forced individuals to enter the stream of commerce against their

⁵⁸ Both Professor Michael C. Dorf and Professors Michael Abramowicz and Maxwell Stearns offer similar approaches. For Dorf, a statement of law is a holding if “[i]t forms an *essential ingredient* in the *process* by which the court decides the case.” Dorf, 142 U Pa L Rev at 2045 (emphasis added) (cited in note 9). Similarly, Abramowicz and Stearns posit that 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.” Abramowicz and Stearns, 57 Stan L Rev at 1065 (cited in note 1).

⁵⁹ 567 US 519 (2012).

⁶⁰ *Id.* at 539.

⁶¹ *Id.* at 536–37. See also US Const Art I, § 8, cl 3 (commerce power); US Const Art I, § 8, cl 1 (tax power).

⁶² *NFIB*, 567 US at 562–63 (Roberts writing only for himself in this portion of the opinion). The Court’s four other conservatives concluded that the individual mandate was not a tax. *Id.* at 661–69 (Scalia, Kennedy, Thomas, and Alito dissenting).

will.⁶³ In a section of the opinion joined by the four liberals, however, Chief Justice Roberts explained that the individual mandate could be charitably construed as a tax and that, so construed, it was a valid exercise of Congress's power to raise taxes.⁶⁴

Did the Court *hold* that the individual mandate wasn't a valid exercise of Congress's power to regulate interstate commerce? Justice Ruth Bader Ginsburg didn't think so. Her partial dissent called that portion of Chief Justice Roberts's opinion a "Commerce Clause essay" and said there was "no reason to undertake a Commerce Clause analysis that is not outcome determinative."⁶⁵ But the chief justice thought otherwise. In his view, the individual mandate was most naturally read as "a command to buy insurance."⁶⁶ It was "only because the Commerce Clause does not authorize such a command that it [was] *necessary* to reach the taxing power question."⁶⁷ Notice, however, that the chief justice's argument for the necessity of the Commerce Clause ruling doesn't employ the same sense of "necessity" as any of the approaches discussed above.⁶⁸ Instead, the Commerce Clause ruling was "necessary" in the sense that it was an integral part of the Court's process of reasoning toward the outcome. *NFIB* thus puts forward yet another way of understanding the necessity model.

E. Necessity Model Carveouts

Federal jurisprudence on the holding/dictum distinction also contains several lines of doctrine that cannot easily be squared with the necessity model.⁶⁹ Consider, for example, cases brought under 42 USC § 1983 where a defendant asserts qualified immunity. To defeat the assertion of qualified immunity, the plaintiff must establish not only that an officer's conduct violated her constitutional rights but also that the right was clearly established

⁶³ Id at 575 (Roberts writing only for himself in this portion of the opinion). The other four conservatives also concluded that the individual mandate was not valid under the Commerce Clause. Id at 649–60 (Scalia, Kennedy, Thomas, and Alito dissenting).

⁶⁴ Id at 574 (majority).

⁶⁵ Id at 623–24 & n 12 (Ginsburg concurring in part, concurring in the judgment in part, and dissenting in part).

⁶⁶ *NFIB*, 567 US at 574 (Roberts writing only for himself in this portion of the opinion).

⁶⁷ Id (emphasis added).

⁶⁸ See Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 Wash U L Rev 1, 24–34 (2013) (noting various senses in which the Commerce Clause ruling could be considered "necessary").

⁶⁹ See Nancy Leong, *Rethinking the Order of Battle in Constitutional Torts: A Reply to John Jeffries*, 105 Nw U L Rev 969, 977–78 (2011).

at the time the conduct occurred.⁷⁰ Thus, a defendant who has violated a plaintiff's constitutional rights will prevail if the plaintiff cannot show that the right was clearly established at the time of the relevant events. Nonetheless, the Supreme Court has said that a judicial decision can establish that particular police conduct is unconstitutional even where the officer isn't ultimately held liable.⁷¹ In other words, constitutional rulings can establish law, even when they're unnecessary for the judgment. As the Court wrote in *Camreta v Greene*,⁷² "[t]he constitutional determinations that prevailing parties ask us to consider in [] cases [involving § 1983] are not mere dicta or 'statements in opinions.' . . . [T]hey are rulings self-consciously designed to [affect public officials' conduct] by establishing controlling law and preventing invocations of immunity in later cases."⁷³ Indeed, for a time the Court even required lower courts deciding qualified immunity cases to opine on the constitutionality of an officer's conduct before addressing whether the asserted constitutional right had been clearly established.⁷⁴

Similarly, in cases involving claims of harmless error, the Supreme Court has suggested that courts should decide whether an error occurred before determining whether the error was harmless.⁷⁵ And in cases involving the good faith exception to the exclusionary rule, it has stated that courts may determine that a particular law enforcement officer's conduct was in fact constitutional, even if it ultimately concludes that the officer believed it to be so in good faith.⁷⁶ Under each of these bodies of doctrine, the Supreme Court appears to believe that judicial opinions can establish law even when they aren't necessary for the outcome. But the Court has never explained how the development of case law in these subject areas can be reconciled with its broader adherence to the necessity model.

⁷⁰ *Harlow v Fitzgerald*, 457 US 800, 818 (1982).

⁷¹ *Camreta v Greene*, 563 US 692, 702–03 (2011).

⁷² 563 US 692 (2011).

⁷³ *Id.* at 704–05. See also *Pearson v Callahan*, 555 US 223, 236 (2009).

⁷⁴ *Saucier v Katz*, 533 US 194, 200–07 (2001), overruled by *Pearson*, 555 US at 236.

⁷⁵ *Lockhart v Fretwell*, 506 US 364, 369 n 2 (1993) ("Harmless-error analysis is triggered only *after* the reviewing court discovers that an error has been committed.") (emphasis in original).

⁷⁶ *United States v Leon*, 468 US 897, 924–25 (1984).

* * *

The picture of the necessity model that emerges is one of wide-ranging inconsistency both in determining the holdings of cases and in articulating a jurisdiction's substantive rules of law. Indeed, it is common for a court to proclaim a principle for identifying the holding of one case only to violate that principle in the next case. That inconsistency undermines the rule-of-law values that precedent is intended to serve. It diminishes the law's finality by giving litigants an incentive to relitigate previously adjudicated issues in the hope that a court will treat an earlier ruling as dicta.⁷⁷ It diminishes the law's predictability by changing the test that a court will use to determine the content of existing case law.⁷⁸ And it diminishes the law's fairness by changing its content based on the particular framework for determining a case's holding that a court happens to use in any particular case.⁷⁹

⁷⁷ Precedent is often said to promote finality by taking issues off the table. See *Kimble v Marvel Entertainment, LLC*, 135 S Ct 2401, 2409 (2015); Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (Yale 1921); Farber, 90 Minn L Rev at 1177 (cited in note 9); Frederick Schauer, *Precedent*, 39 Stan L Rev 571, 572–73 (1987); Richard H. Fallon Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 NYU L Rev 570, 581 & n 46 (2001); Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L Rev 422, 430–33 (1988); Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 NC L Rev 643, 648–53 (2000); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 Chi Kent L Rev 93, 102 (1989).

⁷⁸ Precedent is often believed to make the law more predictable. See Alexander, 63 S Cal L Rev at 13–14 (cited in note 1); Earl Maltz, *The Nature of Precedent*, 66 NC L Rev 367, 368–69 (1988); Randy J. Kozel, *Precedent and Reliance*, 62 Emory L J 1459, 1465–69 (2013); Waldron, 111 Mich L Rev at 4 (cited in note 1); Zenon Bankowski, D. Neil McCormick, Lech Morawski, and Alfonso Ruiz Miguel, *Rationales for Precedent*, in D. Neil McCormick and Robert S. Summers, eds, *Interpreting Precedents* 481, 487 (Dartmouth 1997); David Lyons, *Formal Justice and Judicial Precedent*, 38 Vand L Rev 495, 496 (1985); Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 Harv J L & Pub Pol 67, 70 (1988).

⁷⁹ Precedent is often thought to promote fairness by ensuring reasonable consistency across cases. See Henry M. Hart Jr and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 569 (Foundation 1994) (asserting that precedent secures “reasonable uniformity of decision”); Farber, 90 Minn L Rev at 1178–80 (cited in note 9); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 Const Comment 257, 259 (2005); Alexander, 63 S Cal L Rev at 9–10 (cited in note 1); Waldron, 111 Mich L Rev at 4 (cited in note 1); Ronald Dworkin, *Law's Empire* 225–75 (Harvard 1986). For criticism of the idea that equality is a sound reason for judicial action, see Christopher J. Peters, *Equality Revisited*, 110 Harv L Rev 1210, 1263 & n 84 (1997).

II. INTRODUCING THE ADJUDICATIVE MODEL

Outcome necessity isn't an inevitable feature of the holding/dictum distinction. A different approach—which I call the “adjudicative model”—prevails in Arizona, Illinois, Maryland, and Minnesota.⁸⁰ Courts in those jurisdictions treat a ruling as authoritative if it expressly resolved an issue that was part of the case.⁸¹ In Maryland, for example, a holding is any ruling on an issue that “was directly involved in the issues of law raised by the [case], and the mind of the Court was directly drawn to, and distinctly expressed upon the subject.”⁸² “[A]lthough the final judgment in the case may be rooted in another point also raised by the record,” an earlier ruling is “authoritative” because it was established through “an application of the judicial mind” to an issue raised in the case.⁸³ Courts in Illinois, Arizona, and Minnesota follow a similar rule, using slightly different terminology.⁸⁴

⁸⁰ Several other state courts have recently issued opinions espousing the adjudicative model, but it's too soon to tell whether the model will take hold. See *Leider v Lewis*, 394 P3d 1055, 1063 (Cal 2017); *Magee v Boyd*, 175 S3d 79, 101 (Ala 2015); *Jamerson v Heimgartner*, 372 P3d 1236, 1241–42 (Kan 2016). Further, one line of Wisconsin cases follows the necessity model, while another line follows the adjudicative model. Compare *State v Bruendl*, 483 NW2d 238, 241 (Wis App 1992); *State v Sartin*, 546 NW2d 449, 454–55 (Wis 1996), with *State v Sanders*, 737 NW2d 44, 51 (Wis App 2007); *State v Holt*, 382 NW2d 679, 686 (Wis App 1985). The state's high court has acknowledged, but not resolved, the apparent tension. See *Zarder v Humana Insurance Co*, 782 NW2d 682, 693 (Wis 2010). A glimpse of the adjudicative model can also be seen in one old Supreme Court decision: “It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter.” *Railroad Cos v Schutte*, 103 US 118, 143 (1880).

⁸¹ Professor Melvin Aron Eisenberg argued for a similar approach to stare decisis: “[T]he rule of a precedent consists of the rule it states, provided that rule is relevant to the issues raised by the dispute before the court.” Eisenberg, *Nature of the Common Law* at 55 (cited in note 3). See also Bayern, 36 Fla St U L Rev at 143–67 (cited in note 3) (building on Eisenberg's approach).

⁸² *Schmidt v Prince George's Hospital*, 784 A2d 1112, 1121 (Md 2001), quoting *Carstairs v Cochran*, 52 A 601, 601 (Md 1902).

⁸³ *Schmidt*, 784 A2d at 1121. See also *Brooks v Housing Authority of Baltimore City*, 984 A2d 836, 846 (Md 2009); *Piney Orchard Community Association v Maryland Department of the Environment*, 149 A3d 1175, 1191 (Md App 2016); *Bowers v State*, 133 A3d 1254, 1261 (Md App 2016); *Kaye v Wilson-Gaskins*, 135 A3d 892, 901–02 (Md App 2016).

⁸⁴ Those courts distinguish between “judicial dicta” (statements that decide an issue in the case that turns out not to be dispositive) and “obiter dicta” (statements that don't decide an issue in the case). While the latter aren't authoritative, the former are because they are “expression[s] emanating from the judicial conscience and the responsibilities that go with it.” *State v Rainer*, 103 NW2d 389, 396 (Minn 1960). See *State v Heinonen*, 909 NW2d 584, 589 n 4 (Minn 2018); *Ries v State*, 920 NW2d 620, 635 n 8 (Minn 2018); *Cates v Cates*, 619 NE2d 715, 717–18 (Ill 1993); *Exelon Corp v Department of Revenue*, 917 NE2d 899, 907 (Ill 2009); *Lebron v Gottlieb Memorial Hospital*, 930 NE2d 895, 907 (Ill

Before the turn of the century, the adjudicative model was a phenomenon limited to the state courts. But in the early 2000s, the Ninth Circuit rapidly adopted that model as the governing framework for determining the content of its own case law. The remainder of this Part tells the fascinating story of that transformation.⁸⁵

A. The Ninth Circuit Adopts the Adjudicative Model

Before 2001, the Ninth Circuit followed the necessity model.⁸⁶ But that approach began to change with the court's 2001 decision in *United States v Johnson*.⁸⁷ In that case, officers had entered a fenced yard while attempting to apprehend a third-party suspect. They smelled marijuana coming from a detached shed, obtained a search warrant, and found contraband.⁸⁸ The district court denied the shed owner's motion to suppress because the initial search occurred under exigent circumstances while the officers were in hot pursuit.⁸⁹ On appeal, the Ninth Circuit disagreed with those conclusions, but remanded the case to allow the district court to determine whether the initial search had occurred in the curtilage of the defendant's home.⁹⁰

In a separate opinion, a different six-judge majority opined that a court of appeals reviews de novo whether a search takes

2010); *Schweih's v Chase Home Finance, LLC*, 77 NE3d 50, 60–61 (Ill 2017); *Alejandro v Harrison*, 219 P3d 231, 235 (Ariz App 2009); *State v Fahringer*, 666 P2d 514, 515 (Ariz App 1983); *Phelps Dodge Corp v Arizona Department of Water Resources*, 118 P3d 1110, 1116 (Ariz App 2005).

⁸⁵ A handful of sources discuss the Ninth Circuit's unconventional jurisprudence in this area. See Bryan A. Garner, et al, *The Law of Judicial Precedent* 116 n 6 (Thomson Reuters 2016); Bayern, 36 Fla St U L Rev at 161–63 (cited in note 3); Ryan S. Killian, *Dicta and the Rule of Law*, 41 Pepperdine L Rev 1, 10–13 (2013); Leval, 81 NYU L Rev at 1251 (cited in note 3).

⁸⁶ See, for example, *Micro Star v Formgen, Inc*, 154 F3d 1107, 1113 (9th Cir 1998) (asserting that a statement in *Lewis Galoob Toys, Inc v Nintendo of America, Inc*, 964 F2d 965 (9th Cir 1992), was dicta because it was not necessary to the resolution of that case); *United States v Troescher*, 99 F3d 933, 935–36 (9th Cir 1996) (same with regard to *Fuller v United States*, 786 F2d 1437 (9th Cir 1986)); *United States v Enas*, 204 F3d 915, 920 (9th Cir 2000) (same with regard to *Means v Northern Cheyenne Tribal Court*, 154 F3d 941 (9th Cir 1998)); *Export Group v Reef Industries, Inc*, 54 F3d 1466, 1472 (9th Cir 1995) (same with regard to *Gregorian v Izvestia*, 871 F2d 1515 (9th Cir 1989)).

⁸⁷ 256 F3d 895 (9th Cir 2001) (en banc).

⁸⁸ Id at 900 (Ferguson majority).

⁸⁹ Id.

⁹⁰ See id at 898. If the search didn't occur in the curtilage, then it took place in an "open field," which isn't protected by the Fourth Amendment. See *Hester v United States*, 265 US 57, 59 (1924).

place within the curtilage of a home.⁹¹ This was a strange ruling because it announced the standard of appellate review for an issue the court *hadn't even reached*.⁹² On the necessity model, that ruling was dicta because it was unnecessary for the outcome. Indeed, Judge A. Wallace Tashima chastised the separate majority for their “mistaken assertion” that the ruling was a holding.⁹³ The court’s “musings about the standard of appellate review of curtilage determinations,” he wrote, “are *dicta* because the Court has *not* reviewed any curtilage determination.”⁹⁴

In response to Judge Tashima, four judges in a separate opinion explained why they believed the ruling on the standard of appellate review was a holding.⁹⁵ Those judges openly criticized the court’s inconsistency in applying the necessity model in prior cases.⁹⁶ That model, they argued, had created uncertainty for litigants because “lawyers advising their clients would have to guess whether a later panel will recognize a ruling . . . as [] having been necessary.”⁹⁷

The court’s inconsistency applying the holding/dictum distinction was also troubling to judges besides those on the *Johnson* panel. In interviews I conducted for this Article,⁹⁸ one judge observed that there was a general sentiment at the time that the

⁹¹ *Johnson*, 256 F3d at 913 (Kozinski majority).

⁹² Five judges would have held that the initial search took place outside the curtilage. *Id.* at 919 (Kozinski) (plurality). Judge Richard Paez, however, wanted the district court to address the curtilage issue in the first instance. See *id.* at 922 (Paez concurring).

⁹³ *Id.* at 919 (Tashima concurring).

⁹⁴ *Id.*

⁹⁵ The explanation of their view is contained in Part III.B of Judge Alex Kozinski’s opinion, which Judges Ronald Gould and Richard Paez didn’t join. See *Johnson*, 256 F3d at 914–16 (Kozinski) (plurality); *id.* at 921–22 (Gould concurring); *id.* at 922 (Paez concurring).

⁹⁶ *Id.* at 914 (Kozinski) (plurality).

⁹⁷ *Id.* at 915.

⁹⁸ In researching this Article, I conducted anonymous interviews with sixteen Ninth Circuit judges, for which I received Internal Review Board approval. I sent letters to thirty-five active and senior Ninth Circuit judges inviting them to participate. Sixteen accepted my invitation. I interviewed three in person and thirteen over the phone. I transcribed all responses on a computer. The interviewees weren’t a random sample, but they are diverse: appointed by presidents from both political parties and of different ages, races, genders, years of judicial service, and representative of a broad ideological spectrum on the Judicial Common Space. (For a description of the Judicial Common Space, see note 164.) Each interview lasted approximately thirty minutes and followed the same script of questions. I asked whether the interviewees were aware of the circuit’s adoption of the adjudicative model; whether the adjudicative model had been invoked in one of their cases, and if so, whether it had affected their decision-making; whether they had ever told a visiting judge about the adjudicative model; whether they agreed with the adjudicative model on the merits; whether they believe they are bound by the adjudicative model;

distinction had been “manipulated to get to where a [judge] wanted to go, in terms of the outcome of the case. [A judge] [would] ha[ve] a broad understanding of the holding, if [she] thought the [case] law was right. . . . And if [she] didn’t like the case [law], [she]’d think it was dicta.”⁹⁹ Further, these disagreements often seemed tinged with an ideological valence. It frequently appeared that “a liberal panel would write an opinion and a conservative panel could come along and say that’s all dicta. And vice versa.”¹⁰⁰

To solve this perceived problem, four judges on the *Johnson* panel proposed what I have called the adjudicative model: “[W]here 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.”¹⁰¹ In other words, “a decision on any issue that is part of the Article III controversy could be binding.”¹⁰² The opinion thus proposed a substantial “expansion of the concept of a holding.”¹⁰³

Johnson launched a four-year debate in the Ninth Circuit. Some judges began following the adjudicative model,¹⁰⁴ believing it supplied “a clear[er] rule”¹⁰⁵ and would make the court’s case law “more uniform[.]”¹⁰⁶ But other judges continued to follow the

whether they believe well-considered dicta is “clearly established law” in the Ninth Circuit; what they believe are the adjudicative model’s advantages and disadvantages; and whether they believe the adjudicative model has affected how Ninth Circuit judges write opinions. To protect anonymity, I use only female pronouns when referring to the judges; I omit the locations of the interviews; and I have given each judge a pseudonym—for example, Judge A, Judge B, etc. Although I structured the interviews by asking each judge the same set of questions, there’s always the possibility that the interviewees told me what they thought I wanted to hear or what they thought would be most flattering to them. I did not, however, reveal my own hypotheses to the judges, and they generally appeared to answer candidly.

⁹⁹ Telephone Interview with Judge M, Circuit Judge, US Court of Appeals for the Ninth Circuit (Dec 11, 2018) (notes for all interviews on file with author) (Judge M Interview).

¹⁰⁰ *Id.*

¹⁰¹ *Johnson*, 256 F3d at 914 (Kozinski) (plurality).

¹⁰² Telephone Interview with Judge O, Circuit Judge, US Court of Appeals for the Ninth Circuit (Jan 15, 2019) (Judge O Interview).

¹⁰³ Judge M Interview (cited in note 99).

¹⁰⁴ See, for example, *United States v Brandon P.*, 387 F3d 969, 974 (9th Cir 2004); *Universal Health Services, Inc v Thompson*, 363 F3d 1013, 1019 (9th Cir 2004); *Brand X Internet Services v FCC*, 345 F3d 1120, 1130 (9th Cir 2003); *Miranda B. v Kitzhaber*, 328 F3d 1181, 1186 (9th Cir 2003).

¹⁰⁵ Telephone Interview with Judge K, Circuit Judge, US Court of Appeals for the Ninth Circuit (Dec 12, 2018) (Judge K Interview).

¹⁰⁶ Telephone Interview with Judge D, Circuit Judge, US Court of Appeals for the Ninth Circuit (Jan 3, 2019) (Judge D Interview).

necessity model.¹⁰⁷ And a few labored to stay out of the fight entirely, explaining why particular statements in earlier cases were dicta “on any view of that concept.”¹⁰⁸

In a noteworthy flashpoint, Judge Stephen Reinhardt (joined by ten of his colleagues) excoriated a three-judge panel for reaching out to offer what he considered an “advisory opinion” on Arizona’s death penalty procedure.¹⁰⁹ And in a separate statement, five judges took issue with Judge Reinhardt’s opinion, observing that it was a “dangerous practice” for judges to advise the public “to ignore portions of an opinion that commands a majority of the panel.”¹¹⁰

The proponents of the adjudicative model eventually declared themselves the winners in 2005. The circuit’s decision in *Barapind v Enomoto*¹¹¹ involved how to interpret its earlier decision in *Quinn v Robinson*.¹¹² In *Quinn*, an Irish Republican Army member had challenged his extradition to the United Kingdom.¹¹³ The Ninth Circuit opined that a two-prong test determines whether the petitioner was eligible for the “political offense” exception to the relevant extradition treaty. And it ruled that he was extraditable because he couldn’t establish the first prong.¹¹⁴ The court then went on to clarify the analysis required under the second prong, setting out a rule of law that it hadn’t invoked to resolve the petitioner’s case.¹¹⁵ Nearly twenty years later in *Barapind*, the district court and the three-judge panel concluded that *Quinn*’s

¹⁰⁷ See, for example, *United States v Sarbia*, 367 F3d 1079, 1084 n 3 (9th Cir 2004); *Lombardo v Warner*, 353 F3d 774, 785–86 (9th Cir 2003) (B. Fletcher dissenting); *Lopez v Washington Mutual Bank, FA*, 302 F3d 900, 905 n 4 (9th Cir 2002); *Best Life Assurance Co of California v Commissioner of Internal Revenue*, 281 F3d 828, 834 (9th Cir 2002).

¹⁰⁸ *Coalition of Clergy, Lawyers, and Professors v Bush*, 310 F3d 1153, 1166 (9th Cir 2002) (Berzon concurring). See also *Cetacean Community v Bush*, 386 F3d 1169, 1173 (9th Cir 2004); *Cornejo-Barreto v Siefert*, 379 F3d 1075, 1082 (9th Cir 2004); *Parents Involved in Community Schools v Seattle School District, No 1*, 377 F3d 949, 978 & n 37 (9th Cir 2004); *Inlandboatmens Union of the Pacific v Dutra Group*, 279 F3d 1075, 1081 (9th Cir 2002).

¹⁰⁹ *Spears v Stewart*, 283 F3d 992, 999 (9th Cir 2002) (Reinhardt dissenting from the denial of rehearing en banc).

¹¹⁰ *Id.* at 1005–07 (Kozinski statement concerning the denial of rehearing en banc).

¹¹¹ 400 F3d 744 (9th Cir 2005) (en banc).

¹¹² 783 F2d 776 (9th Cir 1986).

¹¹³ *Id.* at 783–85.

¹¹⁴ *Id.* at 806–08.

¹¹⁵ *Id.* at 809–10.

discussion of the second prong was dicta because the case had been decided on the first prong alone.¹¹⁶

Several judges I interviewed said they voted to rehear *Barapind* en banc to clarify the court's framework for determining the holdings of earlier cases.¹¹⁷ And that's what the court did. The en banc panel criticized the district court for "operat[ing] under a mistaken understanding of what constitutes circuit law."¹¹⁸ *Quinn's* second prong was the "law of the circuit," the court observed, because *Quinn* had "addressed the issue . . . in an opinion joined in relevant part by a majority of the panel."¹¹⁹ And that was true whether or not *Quinn's* statements were "in some technical sense 'necessary' to [the] disposition of the case."¹²⁰ Finally, the opinion said the adjudicative model would thereafter "constitute[] authoritative circuit law."¹²¹

In partial dissent, Judge Pamela Rymer (joined by four colleagues) called the majority opinion "dicta [about] dicta."¹²² "We

¹¹⁶ See *Barapind*, 400 F3d at 750 (describing the extraditing court's order); *Barapind v Enomoto*, 360 F3d 1061, 1075 (9th Cir 2004) ("Barapind rests his argument entirely on the dicta in *Quinn*."), revd, 400 F3d 744 (en banc).

¹¹⁷ Judge M Interview (cited in note 99); In-Person Interview with Judge F, Circuit Judge, US Court of Appeals for the Ninth Circuit (Dec 10, 2018) (Judge F Interview).

¹¹⁸ *Barapind*, 400 F3d at 750.

¹¹⁹ *Id* at 750–51.

¹²⁰ *Id* at 751.

¹²¹ *Id* at 751 n 8. That particular declaration raises interesting questions about a court's authority to modify interpretive rules. Do federal judges have the authority to require their colleagues to follow a particular methodology when interpreting case law? Should they? See *Kisor v Wilkie*, 139 S Ct 2400, 2444 (2019) (Gorsuch concurring in the judgment) (questioning whether stare decisis applies to *Auer* deference for agencies' interpretations of their own rules). On one hand, creating interpretive frameworks can stabilize the process of legal interpretation. See note 18 and accompanying text. On the other, the power to create interpretive rules could allow a narrow majority to impose a controversial judicial philosophy on other judges. See Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 Tex L Rev 1125, 1148–51 (2019); Evan J. Criddle and Glen Staszewski, *Against Methodological Stare Decisis*, 102 Georgetown L J 1573, 1592 (2014). *Barapind* itself raises the specter of this concern. In that case, six judges purported to tell the rest of a roughly thirty-judge court how to interpret prior case law. And as one judge pointedly observed, the decision to do so may have had something to do with President George W. Bush's judicial nominees beginning to fill the federal bench in substantial numbers. Judge M Interview (cited in note 99). My own tentative view is that courts may create interpretive rules by incorporating them over time into the jurisdiction's common law. In other words, interpretive rules become part of the jurisdiction's law, not through the fiat of a majority in a single case, but through the slow accretion of cases applying those rules in a regular course of decisions. For a similar account of how interpretive rules can change, see William Baude and Stephen E. Sachs, *The Law of Interpretation*, 130 Harv L Rev 1079, 1138–39 (2017).

¹²² *Barapind*, 400 F3d at 758 (Rymer concurring in the judgment in part and dissenting in part).

are now sitting en banc,” she wrote, “and therefore can declare the law as we believe it to be regardless of what we have previously held.”¹²³ In her view, whether *Quinn*’s statements were holdings or dicta was irrelevant because the en banc panel could freely adopt whatever law on the merits it preferred, no matter what an earlier three-judge panel had said. Judge Rymer also believed the majority’s proposed framework was ill advised because it would “invite[] overwriting that may be difficult or impossible to cure.”¹²⁴ Finally, she maintained, the adjudicative model violated Article III’s case-or-controversy requirement.¹²⁵

B. The Adjudicative Model Sticks

The adjudicative model’s lasting significance was hardly a foregone conclusion the day *Barapind* was decided. Five judges dissented. And to this day, judges continue to think *Barapind* was “ridiculous[ly]” wrong.¹²⁶ Further, there wouldn’t be much the proponents of the adjudicative model could have done, if their colleagues had decided to continue following the necessity model.¹²⁷

But that isn’t what happened. In dozens of cases, *Johnson*, *Barapind*, and their progeny have been cited for the proposition that the adjudicative model is the governing framework in the Ninth Circuit.¹²⁸ In fact, nearly every judge who disagreed with

¹²³ *Id.*

¹²⁴ *Id.* at 759.

¹²⁵ *Id.* (“We speak through panels of three, and as Article III judges[, we] have authority only to decide cases and controversies. Everything that ends up in F.3d cannot possibly be the law of the circuit.”). For a response to this constitutional concern, see Part V.

¹²⁶ Telephone Interview with Judge H, Circuit Judge, US Court of Appeals for the Ninth Circuit (Dec 3, 2018) (Judge H Interview). See also Telephone Interview with Judge J, Circuit Judge, US Court of Appeals for the Ninth Circuit (Dec 14, 2018); Telephone Interview with Judge B, Circuit Judge, US Court of Appeals for the Ninth Circuit (Dec 14, 2018) (Judge B Interview); Telephone Interview with Judge E, Circuit Judge, US Court of Appeals for the Ninth Circuit (Dec 19, 2018) (Judge E Interview); Telephone Interview with Judge I, Circuit Judge, US Court of Appeals for the Ninth Circuit (Dec 12, 2018) (Judge I Interview).

¹²⁷ Although adopting the adjudicative model was a controversial move, I don’t detect an ideological pattern in the votes to adopt it. Combining the votes in *Johnson* and *Barapind*, nine judges approved of the adjudicative model; seven were Democratic appointees and two were Republican appointees. Twelve judges declined to join opinions in favor of the adjudicative model; nine were Democratic appointees and three were Republican appointees.

¹²⁸ See, for example, *United States v Tydingco*, 909 F3d 297, 303 (9th Cir 2018); *Hornish v King County*, 899 F3d 680, 693 (9th Cir 2018); *Snapp v United Transportation Union*, 889 F3d 1088, 1099 (9th Cir 2018); *Scott v Gino Morena Enterprises, LLC*, 888 F3d 1101, 1109 (9th Cir 2018); *Lenz v Universal Music Corp.*, 815 F3d 1145, 1154 (9th Cir 2016); *United States v Boitano*, 796 F3d 1160, 1164 (9th Cir 2015); *Ayala v Wong*, 756 F3d 656, 687 n 22 (9th Cir 2014); *United States v Vidal-Mendoza*, 705 F3d 1012, 1016 n 5 (9th Cir

the adjudicative model in *Johnson* and *Barapind* has subsequently written or joined opinions invoking it as the governing framework.¹²⁹

The interviews told a similar story. Most interviewees said the adjudicative model is the proper way to determine the holding of a Ninth Circuit case.¹³⁰ Some mentioned *Johnson* or *Barapind* by name and said those cases are “binding,”¹³¹ “established now for . . . years,”¹³² “settled” law,¹³³ the “consensus approach,”¹³⁴ and

2013); *Scott v Chappell*, 547 F Appx 815, 816 (9th Cir 2013); *United States v Esparza*, 489 F Appx 204, 204 (9th Cir 2012); *Marshall Naify Revocable Trust v United States*, 672 F3d 620, 627 (9th Cir 2012); *Oshodi v Holder*, 671 F3d 1002, 1008 n 4 (9th Cir 2012); *Gray v Bank of America Home Loans*, 667 F3d 1325, 1329 (9th Cir 2012); *United States v Parker*, 651 F3d 1180, 1184 (9th Cir 2011); *Levi Strauss & Co v Abercrombie & Fitch Trading Co*, 633 F3d 1158, 1167 (9th Cir 2011); *United States v Luong*, 627 F3d 1306, 1310 (9th Cir 2010); *Garcia v Holder*, 621 F3d 906, 911 (9th Cir 2010); *Morales-Garcia v Holder*, 567 F3d 1058, 1064 (9th Cir 2009); *United States v Cruz*, 554 F3d 840, 849 n 13 (9th Cir 2009); *United States v Bond*, 552 F3d 1092, 1096 (9th Cir 2009); *In re Tippett*, 542 F3d 684, 691–92 (9th Cir 2008); *Seven Up Pete Venture v Schweitzer*, 523 F3d 948, 953 (9th Cir 2008); *Sanchez v Mukasey*, 521 F3d 1106, 1110 (9th Cir 2008); *United States v Ingham*, 486 F3d 1068, 1078 n 8 (9th Cir 2007); *United States v Boulware*, 470 F3d 931, 934 (9th Cir 2006); *Sinotes-Cruz v Gonzales*, 468 F3d 1190, 1203 (9th Cir 2006); *United States v Salazar-Gonzalez*, 458 F3d 851, 856 n 2 (9th Cir 2006); *United States v Curtin*, 443 F3d 1084, 1091 n 1 (9th Cir 2006); *Sosa v DIRECTV, Inc.*, 437 F3d 923, 928 n 3 (9th Cir 2006); *Padilla v Lever*, 429 F3d 910, 916 (9th Cir 2005); *United States v Davis*, 428 F3d 802, 809 (9th Cir 2005) (Callahan dissenting in part); *United States v Dupas*, 419 F3d 916, 921 (9th Cir 2005); *United States v Cassel*, 408 F3d 622, 633 n 9 (9th Cir 2005); *Moreno v Baca*, 400 F3d 1152, 1173 (9th Cir 2005); *Brandon P.*, 387 F3d at 974; *Luong v Circuit City Stores, Inc.*, 356 F3d 1188, 1198 (9th Cir 2004) (Kozinski dissenting); *Brand X Internet Services*, 345 F3d at 1130; *Miranda B.*, 328 F3d at 1186.

¹²⁹ See, for example, *Vidal-Mendoza*, 705 F3d at 1016 n 5 (Tallman and Tashima joining the majority); *In re Tippett*, 542 F3d at 691–92 (Rawlinson joining the majority); *Boulware*, 470 F3d at 934 (Rymer joining the majority); *Marshall Naify Revocable Trust*, 672 F3d at 627 (Callahan joining the majority); *Ingham*, 486 F3d at 1078 n 8 (Gould) (majority); *United States v Aguila-Montes de Oca*, 655 F3d 915, 950–51 (9th Cir 2011) (en banc) (Berzon concurring in the judgment).

¹³⁰ There were a few exceptions. See, for example, Judge E Interview (cited in note 126) (“I think the idea that a rule emerged [is] a . . . very controversial proposition.”).

¹³¹ Telephone Interview with Judge A, Circuit Judge, US Court of Appeals for the Ninth Circuit (Nov 30, 2018) (Judge A Interview); In-Person Interview with Judge L, Circuit Judge, US Court of Appeals for the Ninth Circuit (Dec 10, 2018) (Judge L Interview) (“I think I would [be bound].”); Judge K Interview (cited in note 105) (“I think it would be [binding]. And if we don’t like [the dicta rule], then we take that en banc.”); Telephone Interview with Judge P, Circuit Judge, US Court of Appeals for the Ninth Circuit (Jan 23, 2019) (Judge P Interview) (“I think I am bound by it.”); In-Person Interview with Judge N, Circuit Judge, US Court of Appeals for the Ninth Circuit (Jan 11, 2019) (Judge N Interview) (“I’m in the category that—if that’s the rule we’ve been told we’re supposed to follow, then we should follow it.”).

¹³² Judge B Interview (cited in note 126).

¹³³ Judge F Interview (cited in note 117).

¹³⁴ *Id.*

“the rule of decision.”¹³⁵ Several judges said they could remember cases where their view of an issue had turned on the circuit’s broad definition of a holding.¹³⁶ Indeed, without going into specifics, two judges said they had pending cases that were like this.¹³⁷ One judge said she makes a point of educating her law clerks on the topic each year.¹³⁸ Another said her first law clerk, who had previously clerked for a different Ninth Circuit judge, taught *her* about the *Barapind* framework when she joined the court.¹³⁹ Several said they had mentioned the framework to visiting judges, who would likely be unfamiliar with it.¹⁴⁰ Finally, one judge said she believes the adjudicative model is unconstitutional, but nonetheless acknowledged that the *Barapind* framework is the law of the Ninth Circuit in the sense that her colleagues treat it that way.¹⁴¹

III. EMPIRICALLY TESTING THE ADJUDICATIVE MODEL

The Ninth Circuit’s decision to adopt the adjudicative model is striking. “How many courts,” after all, would “go en banc to decide a procedural issue like this”—let alone succeed in convincing a critical mass of judges to go along with that change?¹⁴² Indeed, several interviewees said visiting judges often find it strange that

¹³⁵ Judge B Interview (cited in note 126).

¹³⁶ See, for example, Judge F Interview (cited in note 117); Telephone Interview with Judge C, Circuit Judge, US Court of Appeals for the Ninth Circuit (Dec 14, 2018) (Judge C Interview).

¹³⁷ See Judge M Interview (cited in note 99) (“I’m in a fight right now over that very thing.”); Judge P Interview (cited in note 131). Similarly, in one noteworthy case I found, all of the judges on a panel concurred in a separately filed opinion because they didn’t want to “include [their thoughts] in the precedential opinion.” *Dela Cruz v Mukasey*, 532 F3d 946, 949 n 1 (9th Cir 2008) (Graber concurring). See also *Meras v Sisto*, 676 F3d 1184, 1193 (9th Cir 2012) (Bea concurring in part and concurring in the judgment) (declining to join the majority opinion because of its dicta and noting that “in the Ninth Circuit, [dicta] can have precedential effects”).

¹³⁸ See Judge F Interview (cited in note 117).

¹³⁹ See Judge P Interview (cited in note 131).

¹⁴⁰ See Judge L Interview (cited in note 131); Judge F Interview (cited in note 117); Judge M Interview (cited in note 99); Judge B Interview (cited in note 126). See also Judge P Interview (cited in note 131):

[W]e have so many visiting judges—so it is an issue that comes up where we have a visiting judge recommend something that says that this was dicta in this case so we can ignore it, and we have to say back—that this isn’t the rule in our circuit. I’ve had that happen at least a couple of times.

¹⁴¹ Judge H Interview (cited in note 126).

¹⁴² See Judge M Interview (cited in note 99).

the Ninth Circuit “mess[ed] around with” a doctrine as fundamental as the holding/dictum distinction.¹⁴³ But the mere announcement of a new framework doesn’t necessarily mean that judges will change the way they make decisions or write opinions. This Part investigates whether they did. And it finds that, after adopting the adjudicative model, the Ninth Circuit was more likely to follow its own precedents in cases involving disputes about the holding/dictum distinction.

A. Hypothesis and Data Collection

Some judges voted to adopt the adjudicative model so that three-judge panels would be more likely to follow the court’s prior statements of law. The idea was that the adjudicative model would promote adherence to earlier precedent by expanding the set of a court’s prior statements that constitute binding law.

To test whether the court’s behavior changed in this fashion, I first collected a sample of cases where the Ninth Circuit invoked the holding/dictum distinction by running a search query on Westlaw for published Ninth Circuit decisions.¹⁴⁴ I reviewed cases from 1993–2013, eight years before the 2001 *Johnson* decision and eight years after the 2005 *Barapind* decision. Using full-text searches of judicial opinions as a sampling method relies on judges to acknowledge explicitly that a case involved the holding/dictum distinction. It may therefore introduce bias by omitting those cases where the distinction is genuinely at issue but where the opinion doesn’t use words matching my search query. This method nonetheless seemed the best available option for compiling the dataset. A comprehensive review of all cases over a certain period would have turned up too many false positives to sort at reasonable cost. And a random sample of, say, 2 percent of all opinions over the same period wouldn’t have produced a sufficiently large dataset of relevant cases.¹⁴⁵

¹⁴³ Judge L Interview (cited in note 131). See also Judge B Interview (cited in note 126).

¹⁴⁴ I ran the following query: “dicta dictum ‘not a holding’ ‘not the holding’ 106k92.” I included the term “106k92” because it’s the Westlaw headnote associated with the topic “dicta.” I chose such a broad search to ensure a fairly comprehensive dataset, though it came at the cost of sorting through numerous irrelevant cases.

¹⁴⁵ Other empirical studies of precedent have used similar methods for compiling their datasets. See Stefanie A. Lindquist and Frank B. Cross, *Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent*, 80 NYU L Rev 1156, 1180–81 & n 120 (2005) (describing a full-text search to find cases of first impression); David Klein and Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision*

The initial search was, by design, overinclusive. It turned up 1,512 cases. Along with two Stanford Law School students, I reviewed each case and determined whether the passage triggering the search hit was one where the Ninth Circuit had been asked to defer to one of its precedents. If not, I excluded it.¹⁴⁶ I also excluded an initial opinion where my search also included an amended opinion in the same case. After excluding irrelevant cases, the dataset contained 408 cases.¹⁴⁷

Each member of the research team reviewed each case and coded it with one of three values. A case was coded FOLLOW where the court adopted the proposition asserted in the earlier case. It was coded CONTRAVENE where the court rejected the proposition on the ground that it was nonbinding dictum.¹⁴⁸ And a case was coded DISTINGUISH where the court concluded a proposition asserted in an earlier case was irrelevant due to factual differences between the earlier and later cases.¹⁴⁹

Making, 54 Wm & Mary L Rev 2021, 2035 (2013) (describing a full-text search to find cases involving the holding/dictum distinction).

¹⁴⁶ The irrelevant cases generally fell into one of five categories: (1) cases involving the decision of another circuit, a state court, or the Supreme Court; (2) cases involving the law-of-the-case doctrine; (3) cases regurgitating the basic tenet of habeas corpus law that “[c]learly established Federal law refers to the holdings, as opposed to the dicta, of the Supreme Court’s decisions,” *Winzer v Hall*, 494 F3d 1192, 1196 (9th Cir 2007) (quotation marks omitted); (4) cases mentioning the word “dicta” only in a brief parenthetical observation; and (5) cases where a concurring or dissenting opinion accused the majority of writing nonbinding dicta. Examples of each of these categories of excluded cases are on file with *The University of Chicago Law Review*.

¹⁴⁷ Several decisions contained treatments of multiple earlier cases. I treated each of these as a single event in the dataset, rather than multiple events, because that was the more conservative approach.

¹⁴⁸ A case could fall into this category for several reasons. In some cases, the court declined to follow an earlier case because it concluded the court’s earlier statement wasn’t necessary for the outcome. In others, the court concluded the earlier court had merely made an offhand remark and therefore had not expressly resolved the relevant issue. Yet others involved opinions on issues not even raised in the earlier case. Thus, some of the cases coded as CONTRAVENE would count as dicta on some theories of precedent but not on others, while other cases would count as dicta on any theory of precedent.

¹⁴⁹ Examples of each category are on file with *The University of Chicago Law Review*. Many empirical legal studies focus on case dispositions—investigating, for example, whether plaintiffs prevail more frequently than defendants or employers more frequently than employees under certain conditions. See, for example, Emery G. Lee III, *Horizontal Stare Decisis on the U.S. Court of Appeals for the Sixth Circuit*, 92 Ky L J 767, 779–80 (2003); Donald R. Songer and Reginald S. Sheehan, *Supreme Court Impact on Compliance and Outcomes: Miranda and New York Times in the United States Courts of Appeals*, 43 W Polit Q 297, 302 (1990). A limitation of these studies is that they ignore other important aspects of judicial decision-making, such as the court’s opinion. See Lee Epstein and Jack Knight, *The Choices Justices Make* 22–51 (Congressional Quarterly 1998); Jack Knight, *Are Empiricists Asking the Right Questions About Judicial Decisionmaking?*, 58 Duke L J

When all three reviewers applied the same code, I accepted it. When we initially applied different codes, we reviewed the case for a second time. Preliminary coding discrepancies occurred in approximately 16 percent of cases, and all were resolved during a second look. There was no discernible pattern to initial discrepancies or to the codes the cases were eventually assigned.

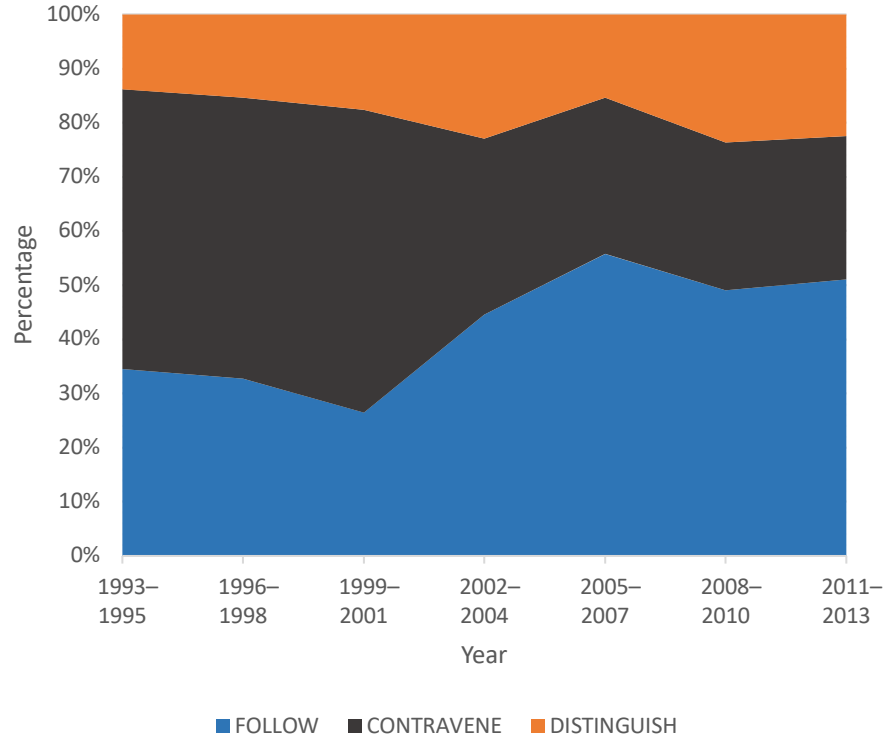
B. Initial Results

If the Ninth Circuit's behavior didn't change, we'd expect no significant change over time in the distribution of the three codes. But if the Ninth Circuit became more likely to follow its precedents, we'd expect to observe an increase in the frequency of cases coded FOLLOW. Figure 1 shows the percentages of cases in each year assigned each code.¹⁵⁰

1531, 1532–33 (2009). My analysis contributes to a nascent literature investigating the role that opinions play in judicial reasoning. See, for example, Barry Friedman and Andrew D. Martin, *Looking for Law in All the Wrong Places: Some Suggestions for Modeling Legal Decision-Making*, in Charles Gardner Geyh, ed., *What's Law Got to Do with It? What Judges Do, Why They Do It, and What's at Stake* 143, 165–66 (Stanford 2011); Cliff Carubba, Barry Friedman, Andrew D. Martin, and Georg Vanberg, *Who Controls the Content of Supreme Court Opinions?*, 56 *Am J Polit Sci* 400, 401 (2012). Of course, it's meant as a complement to, not a substitute for, other types of research.

¹⁵⁰ Information about how each case was coded is on file with *The University of Chicago Law Review*.

FIGURE 1: PERCENTAGE OF NINTH CIRCUIT CASE TREATMENTS, BY YEAR



The frequency of FOLLOW cases significantly increased and the frequency of CONTRAVENE cases significantly decreased over the period studied. While I had anticipated a noticeable spike in the frequency of FOLLOW cases around 2005, when *Barapind* was decided, what I in fact observed was a steady increase starting in 2002—the year after *Johnson* was decided. I therefore measured the statistical significance of the change in frequency of the three codes before and after the beginning of 2002 and found that it was highly significant.¹⁵¹

The change in the Ninth Circuit's behavior nicely illustrates the sometimes-subtle relationship between a court's patterns of interpretation and its declaration of interpretive rules. The judges I interviewed spoke as if *Barapind* had worked a change

¹⁵¹ Using a Pearson's chi-squared test to measure the significance of the difference between the distribution of values in the 1993–2001 period and the 2002–2013 period, $\chi^2(2, N = 408) = 24.9$; $p < 0.00001$.

to the Ninth Circuit's jurisprudence. And at least one judge remembers voting to rehear the case en banc to effect that change.¹⁵² But the data suggest that, by 2005, a change in the way Ninth Circuit judges distinguished between holdings and dicta was well underway. If one believes that "the law of interpretation"¹⁵³ can slowly emerge from a "regular course of decisions,"¹⁵⁴ then it's possible that by the time *Barapind* was decided the adjudicative model had, in a sense, already become nascent circuit law. *Barapind* may simply have been the first en banc panel to say so.¹⁵⁵ On this view, *Barapind* didn't win the battle over the scope of stare decisis so much as it memorialized the terms of surrender.

Over the period I studied, there was also a statistically significant increase in the frequency of DISTINGUISH cases.¹⁵⁶ That finding is consistent with the conjectures of several interviewees, who believed their colleagues had become more likely to *distinguish* earlier cases after the court adopted the adjudicative model.¹⁵⁷ Indeed, one judge wryly remarked that the adjudicative model hadn't "really cramp[ed her] style" because she could often find a way to distinguish a precedent case.¹⁵⁸

The increase in DISTINGUISH cases shouldn't surprise us. A judge who seeks to circumvent an earlier case can do so in one of three ways: (1) overrule it, (2) say that the relevant portion of the case is dicta, or (3) distinguish the case on its facts.¹⁵⁹ In the Ninth

¹⁵² See note 117 and accompanying text.

¹⁵³ See generally Baude and Sachs, 130 Harv L Rev 1079 (cited in note 121).

¹⁵⁴ Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va L Rev 1, 15 (2001).

¹⁵⁵ See Baude and Sachs, 130 Harv L Rev at 1139 (cited in note 121) ("As [legal] sources evolve by slow accretion, . . . eventually some court will be the first to say so. . . . But . . . it's simply a mistake to treat this first court decision as the actual source of the underlying rule.") (citations omitted); A.W.B. Simpson, *The Common Law and Legal Theory*, in *Legal Theory and Legal History: Essays on the Common Law* 359, 366–67 (Hambleton 1987).

¹⁵⁶ I ran a logistic regression with DISTINGUISH as a binary dependent variable. The time variable *post-Johnson*, which takes 1 if after 2001 and 0 otherwise, is a statistically significant predictor of whether a case was assigned that code. See Appendix B. That result doesn't change when controlling for the ideological leanings of the later panel, the earlier panel, the interaction between the ideologies of the earlier and later panels, or the subject matters of the cases. See *id.* For a description of how I determined the ideological leanings of each panel, see Part III.D.

¹⁵⁷ Judge A Interview (cited in note 131); Judge B Interview (cited in note 126); Judge E Interview (cited in note 126); Judge F Interview (cited in note 117); Judge I Interview (cited in note 126); See Judge K Interview (cited in note 105); Judge N Interview (cited in note 131).

¹⁵⁸ Judge D Interview (cited in note 106).

¹⁵⁹ For a discussion of the latter method of avoiding precedent, see Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 Georgetown L J 921, 951–53 (2016);

Circuit, option (1) is unavailable because three-judge panels may not overrule prior Ninth Circuit decisions. That leaves options (2) and (3). The adjudicative model limits the circumstances in which a court can use option (2), which one might predict would increase the frequency with which judges will use option (3). And that's what the data suggest. Nonetheless, the DISTINGUISH cases don't simply replace the cases that would have been coded CONTRAVENE under the necessity model. Indeed, as explained more fully below, the increase in FOLLOW cases alone was highly significant, suggesting that a substitution of CONTRAVENE cases for DISTINGUISH cases isn't the whole story.

C. Comparison with Other Circuits

The timing of the increase in cases coded FOLLOW suggests that change may have had something to do with the *Johnson* decision. There are, however, other possible explanations. The change, for example, may have been due to a structural or jurisprudential shift happening across the federal courts around 2001.

To test this possibility, I performed the same coding exercise on cases from two control circuits, which both follow the necessity model.¹⁶⁰ Because a court's propensity to follow precedent may be a function of its internal norms and culture, I chose the Second Circuit—a court with a reputation for collegiality and strict adherence to precedent. A court's propensity to follow precedent could also be a function of the size and nature of its docket. I therefore selected the Fifth Circuit because, like the Ninth Circuit, it has a large docket with a relatively high number of criminal and immigration appeals.¹⁶¹ An increase in FOLLOW cases in

Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 Colum L Rev 1861, 1867–74 (2014); Aziz Z. Huq, *Removal as a Political Question*, 65 Stan L Rev 1, 19 (2013); Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 Georgetown L J 1, 32–33 (2010); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo Wash L Rev 68, 98–109 (1991).

¹⁶⁰ See, for example, *Baraket v Holder*, 632 F3d 56, 59 (2d Cir 2011) (“[I]t is not substantive discussion of a question or lack thereof that distinguishes holding from dictum, but rather whether resolution of the question is necessary for the decision of the case.”); *Ackerson v Bean Dredging LLC*, 589 F3d 196, 205 (5th Cir 2009) (“[T]he court’s statements . . . were unnecessary . . . and constitute nonbinding dicta.”). My sample included 314 decisions from the Second Circuit and 275 decisions from the Fifth Circuit.

¹⁶¹ During the twelve-month period ending March 31, 2013, for example, the Fifth and Ninth Circuits disposed of 4,634 and 8,158 cases on the merits, respectively. In that year, their respective criminal dockets contained 1,869 and 1,208 decisions on the merits. For comparison, the Tenth Circuit disposed of 1,461 cases on the merits, 380 of which were

either circuit would suggest the change observed in the Ninth Circuit wasn't solely the product of the adjudicative model. But the frequency of FOLLOW cases didn't significantly change in the Second or Fifth Circuit, suggesting the change in the Ninth Circuit wasn't the product of some force influencing all of the federal circuit courts.

D. Controlling for Case Type and Panel Ideology

The increase in FOLLOW cases in the Ninth Circuit could also be the product of selection effects related to the subject matters of or the ideological leanings of the judges assigned to the cases in the dataset.¹⁶² Perhaps judges are more likely to follow precedent in, say, immigration cases; or perhaps conservatives (or liberals) are more likely to meticulously follow precedent; or perhaps judges are more likely to follow precedents written by ideologically similar judges.¹⁶³ If any of these correlations holds, then the change I observed in the Ninth Circuit could have been influenced by a related selection bias.

criminal cases. *Federal Judicial Caseload Statistics 2013* (United States Courts, 2013), archived at <https://perma.cc/F8FN-TXX4>.

¹⁶² Gluck, 119 Yale L J at 1821 (cited in note 18). Political scientists have established that judicial ideology (often called "attitudinal preferences") is a significant extralegal influence on judicial decision-making. See, for example, Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* 86–97 (Cambridge 2002); Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* 81–83 (Cambridge 1993); Lindquist and Cross, 80 NYU L Rev at 1178 (cited in note 145); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 Nw U L Rev 251, 265, 275–79 (1997); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 Just Sys J 219, 224–29 (1999); Lee Epstein, Andrew D. Martin, Kevin M. Quinn, and Jeffrey A. Segal, *Ideology and the Study of Judicial Behavior*, in Jon Hanson, ed, *Ideology, Psychology, and Law* 705, 705–06 (Oxford 2012); Cass R. Sunstein, David Schkade, Lisa M. Ellman, Andres Sawicki, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* vii (Brookings Institution 2006); Max M. Schanzenbach and Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U Chi L Rev 715, 732–36 (2008); Thomas J. Miles and Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U Chi L Rev 761, 776–84 (2008). Some scholarship, however, suggests that political ideology "may interfere with . . . the law less in the lower [federal appellate] courts than in the U.S. Supreme Court." Gluck, 119 Yale L J at 1821 (cited in note 18). See Thomas J. Miles and Cass R. Sunstein, *The New Legal Realism*, 75 U Chi L Rev 831, 844 (2008); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 Cal L Rev 1457, 1479–82 (2003); Thomas J. Miles and Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U Chi L Rev 823, 859–63 (2006).

¹⁶³ One judge said in the interviews that, if she is considering a ruling "from an ideologue on the [court's other] wing, [she] will treat the rul[ing] with a grain of salt." Judge N Interview (cited in note 131).

To investigate this possibility, I collected additional data on the subject matters of and the ideological leanings of the judges assigned to each case in the dataset.¹⁶⁴ Using a logistic regression analysis, I then determined whether either case type or ideology was a significant predictor of whether a case was coded FOLLOW. Neither case type nor single panel ideology was a significant predictor.¹⁶⁵ In other words, I didn't find evidence that liberals or conservatives are more likely to follow precedent in the abstract or that judges are more likely to follow precedent in particular types of cases.¹⁶⁶

By contrast, the relationship between the ideology of the later court and the ideology of the earlier court was a significant predictor of whether a case was coded DISTINGUISH. A panel's propensity to distinguish a precedent correlates with the relationship between its political leanings and the political valence of the precedent. That finding won't surprise legal realists, since it suggests that one good predictor of whether a panel will look for ways to circumvent an earlier statement of law is whether the panel is ideologically similar to the court that authored the earlier statement.¹⁶⁷

Notwithstanding that finding, the *timing* of a decision relative to *Johnson* remained a highly significant predictor of

¹⁶⁴ For the case types, I used Westlaw's subject-matter categorization. I first determined which case categories were represented in at least forty of the cases in the dataset. There were four such categories: (1) criminal; (2) immigration; (3) employment and labor; and (4) corporate governance. I then recorded whether each case fell within those categories.

For judicial ideology, I used the Judicial Common Space (JCS). The JCS is a database for estimating the ideology of federal appellate judges and justices. See generally Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, and Chad Westerland, *The Judicial Common Space*, 23 J L Econ & Org 303 (2007). Where a panel included a visiting federal district court judge, I used Professor Christina L. Boyd's data on district court judges developed using the same methodology as the JCS. See Christina L. Boyd, *Federal District Court Judge Ideology Data* (2015), archived at <https://perma.cc/LZT2-5253>. I was unable to obtain JCS scores for a handful of judges whose permanent positions are on a court for which there is no JCS data—such as the US Court of International Trade. For those judges, I averaged the JCS scores of the two other panel members. Finally, three of the earlier cases were decided before the earliest year for which there is JCS data. For those cases, I used the median score of all Ninth Circuit judges as of the time of this writing.

¹⁶⁵ The regression table is produced in Appendix A.

¹⁶⁶ Appendix B does suggest, however, that conservative judges were less likely to distinguish earlier cases and that criminal cases were less likely to be distinguished in my sample.

¹⁶⁷ Nor will it surprise some of the judges I interviewed. See Judge N Interview (cited in note 131) (“[W]hether [a judge] want[s] to be bound by well-considered dictum depends a lot on the composition of the court [she is] dealing with.”); Judge P Interview (cited in note 131) (“Maybe some of the reason that people have liked th[e *Barapind*] rule is that they have liked the dicta.”).

whether a case was coded FOLLOW even after controlling for ideology. The analysis thus ruled out the possibility that the change in the Ninth Circuit's decision-making was merely the product of selection bias related to the subject matters of or the judges assigned to the cases in my dataset. Indeed, the predicted probability that the average case would be coded FOLLOW (that is, when holding the ideology-related variables at their means) increased by 19 percentage points after *Johnson* was decided.

Over the period I studied and in cases involving disputes over the holding/dictum distinction, the Ninth Circuit became substantially more likely to follow its earlier statements of law and slightly more likely to distinguish its earlier cases. Those changes in the court's behavior correlate with a change in the circuit's stare decisis jurisprudence that the judges I interviewed regard as significant. Further, several plausible competing explanations for the change that I observed have been ruled out.

These facts, of course, don't allow one to make causal claims. Most notably, the adoption of the adjudicative model isn't exogenous. The actors who chose to change the circuit's stare decisis framework are the very same actors that applied it in the cases I studied. It's therefore possible that the circuit's adoption of the adjudicative model and the change I observed in the Ninth Circuit's behavior aren't cause and effect but are rather both the effects of a common cause.¹⁶⁸ This limitation is significant, but it was inherent to the question I sought to answer and was therefore unavoidable. Moreover, the Ninth Circuit is just one court and accordingly doesn't hold all the answers for thinking about how the scope of precedent could affect other appellate courts. Consequently, one must be cautious about extrapolating from the findings of this Part to conclusions about how other courts would behave if they adopted the adjudicative model. Still, the quantitative analysis does have some "cash-value."¹⁶⁹ It provides

¹⁶⁸ There are, however, a few contrary indications. First, as noted, several of the interviewees reported that the adjudicative model has influenced the way they have decided some cases, and some even had pending cases that fit that description. See notes 136–37. Second, all but one of the judges who initially disagreed with the adjudicative model eventually joined opinions that used it, giving some support to the idea that the adoption of the doctrine changed their behavior. See note 129. Third, the Ninth Circuit has continued to use the adjudicative model even as the membership of the court has changed, suggesting that its use wasn't simply the product of the particular personalities that happened to occupy the court in the early 2000s.

¹⁶⁹ See William N. Eskridge Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U Chi L Rev 671, 676 n 11 (1999) ("To have a cash-value, evidence does not

some evidence, and should raise our confidence, that a court will more frequently follow, and may more frequently distinguish, its precedent when using the adjudicative model rather than the necessity model.

That tentative finding is partly realist and partly formalist. The data suggest that some judges began distinguishing earlier cases more frequently after the court adopted the adjudicative model. In other words, after the adjudicative model thwarted the strategy of relegating certain earlier statements of law to the status of nonbinding dictum, they found another way of circumventing earlier statements they didn't like. It also showed that Ninth Circuit judges were more likely to follow precedents authored by ideologically similar judges. In fact, interviewees admitted to me that the adjudicative model doesn't typically stand in their way when they *really* want to reach a particular outcome.

But the data also present a hopeful story about the efficacy of legal rules. When the court changed the rules for determining the law established by earlier cases, the judges on the Ninth Circuit appear to have changed the way they did so, at least in the mine-run of cases. And that finding will likely surprise those who think that doctrinal rules don't influence the reasoning of courts.

IV. NORMATIVE IMPLICATIONS

How should we think about the adjudicative model from a normative perspective? Is it better than the necessity model? While a complete normative assessment of the adjudicative model is beyond the scope of this Article, this Part explains two cross-cutting implications of the model that are important for such an assessment.

On one hand, the adjudicative model promotes the law's clarity by making the test for determining a case's holding more straightforward and by broadening the set of propositions that qualify as binding law. On the other hand, the adjudicative model creates an incentive for judges to reach out to resolve issues more quickly, which may diminish the quality of individual legal rules and increase the influence of a court's outliers. Ultimately, the advisedness of the adjudicative model depends greatly on the institutional features of the court in which it is used. And that's

have to dispel all doubt; a story that changes my probability assessment from 35 percent to 40 percent has a significant cash-value.”).

because features such as a court's size, decision-making processes, and the nature of its docket can amplify or mitigate the adjudicative model's relative costs and benefits vis-à-vis the necessity model.

A. Clarity of Case Law

The adjudicative model tends to clarify the content of a court's case law. This is so for two reasons.

First, the adjudicative model provides a more rule-like definition of a case's holding than the necessity model. Accordingly, it provides a definition whose application is less likely to be the subject of plausible disagreement among judges.¹⁷⁰ That's an improvement over the necessity model, which (as Part I illustrated) is the source of regular and substantial disagreement in the federal courts.

Increasing the consistency with which a court goes about determining the content of its case law entails several subsidiary benefits. For starters, it reduces judicial doublespeak about the content of the law, which in turn promotes a court's perceived neutrality. Litigants with similar claims and arguments expect that their cases will be decided under the same legal standards.¹⁷¹ When a court takes an inconsistent approach to interpreting its own case law, it feeds the narrative that judges often choose the approach that allows them to reach particular outcomes—that judging resembles looking over the crowd and picking out one's friends.¹⁷² It's therefore not “healthy,” as one judge observed, for a court to state a principle for determining the holding of a case only to say in the next case, “[W]ell, we can just ignore that.”¹⁷³ By contrast, when a court applies legal standards more consistently across cases, it acts as if the law is more than what a majority of

¹⁷⁰ Before conducting my case study of the Ninth Circuit, I thought litigation over whether a statement was necessary for the outcome of an earlier case may simply morph into litigation over whether a particular issue had been “decided by” or “part of” an earlier case. But in the 408 cases in my dataset, I saw very little disagreement over whether issues had genuinely been decided or genuinely involved in earlier cases.

¹⁷¹ See Gluck, 119 *Yale L J* at 1767–68 (cited in note 18).

¹⁷² See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 *Iowa L Rev* 195, 214 (1983) (making a similar point about statutory interpretation methodology). See also Abramowicz and Stearns, 57 *Stan L Rev* at 1024 (cited in note 1) (“As the distinction between holding and dicta becomes increasingly vague, past precedents can be increasingly manipulated.”).

¹⁷³ Judge D Interview (cited in note 106).

judges say it is at any one moment,¹⁷⁴ and thus promotes the perception that the court is a “disinterested interpreter” of the law.¹⁷⁵

By providing a more consistent approach to determining the content of a court’s case law, the adjudicative model also enhances the law’s predictability. If a party doesn’t know which test a court will use to determine the holding of a precedent case, it may be difficult to predict how the precedent will affect her case. Consider, for example, President Obama’s perspective before *Windsor*. As noted, he hoped the courts would hold DOMA unconstitutional. The question was whether to direct the Justice Department to advance that position in court. While that approach aligned with the president’s view on the merits, it posed the risk of depriving the federal courts of Article III jurisdiction and thus the opportunity to opine on the statute’s constitutionality. The Supreme Court had offered guidance on the Article III issue in *Chadha*, but its inconsistent methodology for determining the scope of its own case law made *Chadha*’s significance uncertain. Indeed, three justices believed *Chadha* hadn’t established binding law on the question of Article III adversity.¹⁷⁶ And if two more had agreed, the president’s goal of positioning the Court to hold DOMA unconstitutional could have been thwarted.

Second, the adjudicative model promotes the law’s clarity by expanding the set of prior statements that must be treated as authoritative. Under the necessity model, a court may not establish law except to the extent that doing so is necessary to reach a case’s outcome. Any issue of law will therefore be resolved by the first court to confront it in a case that requires its resolution. The adjudicative model, by contrast, gives courts discretion to resolve an issue in any case where it’s raised. As a consequence, the adjudicative model can remove questions “from the sphere of reasonable debate” more quickly than the necessity model.¹⁷⁷ As one judge said, because the adjudicative model “provides guiding law for more than just the issues that were essential or elemental to

¹⁷⁴ Judge M Interview (cited in note 99) (noting that the adjudicative model made the Ninth Circuit act more like a court). As noted, this was why some judges initially voted for the adjudicative model and prefer it to this day.

¹⁷⁵ Jerold H. Israel, *Gideon v. Wainwright: The “Art” of Overruling*, 1963 S Ct Rev 211, 218. See also Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis L Rev 467, 484. Precedent is often thought to promote neutrality. See Monaghan, 88 Colum L Rev at 752 (cited in note 3); Cross, 92 Nw U L Rev at 262 (cited in note 162); Neil Duxbury, *The Nature and Authority of Precedent* 170 (Cambridge 2008).

¹⁷⁶ *Windsor*, 570 US at 783–84 (Scalia dissenting).

¹⁷⁷ Kozel, 113 Mich L Rev at 205 (cited in note 11).

the case[,] . . . [courts] have more law to apply.”¹⁷⁸ The model can thus help parties better understand their legal rights and obligations and thereby avoid litigation.¹⁷⁹

This benefit can be seen most clearly, though by no means exclusively, in areas where the clarity of the law is a condition for providing relief. Some circuit courts, for instance, won’t find “plain error” unless a trial court violated the holding of an earlier case.¹⁸⁰ Similarly, federal habeas petitioners and plaintiffs in cases brought under § 1983 can prevail in their cases only if a ruling in their favor is compelled by clearly established law.¹⁸¹ The speed with which judicial case law crystallizes the content of the law can thus be vitally important, even in matters of life and death.¹⁸²

¹⁷⁸ Judge B Interview (cited in note 126). See also Judge N Interview (cited in note 131). Along similar lines, Professor John C. Jeffries Jr has argued that one benefit of the Supreme Court’s qualified immunity jurisprudence is that it allows judges to announce the existence of constitutional rights even in cases where the judges don’t want to provide a remedy to the criminal defendant. See John C. Jeffries Jr, *The Right-Remedy Gap in Constitutional Law*, 109 Yale L J 87, 93–95 (1999).

¹⁷⁹ The drive toward clarity, however, is likely not uniform throughout all areas of the law. Depending on the texture and contours of a court’s existing jurisprudence, the adjudicative model may obfuscate its case law by exacerbating legal “gluts”—that is, areas of the law where the proliferation of decisions has made it more difficult for a lawyer to determine how the law applies to her client’s cases. Indeed, one judge speculated that the adjudicative model may have led to a few specific lines of circuit law that she thinks are in considerable tension. See Judge F Interview (cited in note 117).

¹⁸⁰ See *United States v Whren*, 111 F3d 956, 960–61 (DC Cir 1997) (“[I]t is not a plain error for a trial court not to follow a mere dictum of the court of appeals.”); *United States v Segura*, 747 F3d 323, 330 (5th Cir 2014) (similar). When reviewing for plain error, a court of appeals may not reverse a lower court unless it made an error that was “clear or obvious.” *Puckett v United States*, 556 US 129, 135 (2009); *United States v Olano*, 507 US 725, 734 (1993).

¹⁸¹ In § 1983 cases, an officer may not be held liable unless the officer’s conduct violated “clearly established law.” See *White v Pauly*, 137 S Ct 548, 551–52 (2017). In federal habeas cases, petitioners are entitled to relief only if they can show that they were tried in violation of a federal constitutional right that was clearly established by a holding of the US Supreme Court at the time of the violation. See *Williams v Taylor*, 529 US 362, 412 (2000); 28 USC § 2254(d)(1).

¹⁸² In its 2014 decision in *White v Woodall*, 572 US 415 (2014), for instance, the Supreme Court divided over whether *Estelle v Smith*, 451 US 454 (1981), had held that the same procedural protections required in the guilt phase of a criminal trial are also required in the penalty phase of a capital-murder trial. *White*, 572 US at 420–24. Three justices concluded that it had. *Id.* at 428–29 (Breyer dissenting). They therefore believed the trial judge’s failure to admonish the jury not to draw adverse inferences from Robert Woodall’s decision not to testify in the penalty phase entitled Woodall to a new trial, potentially sparing him from the death penalty. *Id.* at 428. But the other six justices believed *Estelle*’s statement was dicta and therefore concluded the petitioner’s death sentence should stand. *Id.* at 423–24 (majority).

B. Quality of Case Law

While the adjudicative model may increase the law's clarity, it may also reduce the law's quality. This is again for two reasons.¹⁸³

First, by increasing the speed with which case law develops, the adjudicative model may make courts less likely to arrive at efficient rules. A court that resolves an issue earlier in time will have less information.¹⁸⁴ All else being equal, we should therefore expect the court to develop lower-quality legal rules than if it had decided the issue later in time. Moreover, decisions are less likely to be revised under the adjudicative model because unnecessary rulings are unlikely to be appealed,¹⁸⁵ and because, in future cases, a later court cannot simply relegate an unwise statement of law to the status of nonbinding dictum.¹⁸⁶ Many errors will thus go uncorrected due to the law's inherent path dependence.¹⁸⁷

Second, the adjudicative model may reduce the law's quality by increasing the relative influence of a court's jurisprudential outliers, thus making the law less representative of the judicial mainstream. To see this, begin by noticing that the adjudicative model, like all rules of precedent, allocates power within the judiciary.¹⁸⁸ In particular, as compared to the necessity model, it shifts power to courts acting earlier in time and takes power away from courts acting later in time.

¹⁸³ Of course, to say that the adjudicative model will lower the average quality of a court's individual rules isn't to say that the corpus of a court's case law will be worse as a whole at any given moment. The benefits of establishing well-functioning rules earlier in time must be weighed against the cost of a lower average quality of rules.

¹⁸⁴ See Cass R. Sunstein, *One Case At a Time: Judicial Minimalism on the Supreme Court* 3–4 (Harvard 1999); Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 Colum L Rev 1454, 1520 (2000) (“Narrow judicial decisionmaking . . . is defensible . . . as a means of reducing the risk of judicial error.”); Nelson, 87 Va L Rev at 59 (cited in note 154) (“[L]ater courts often have the benefit of experience; they have more information about how the rule chosen by their predecessors has worked in practice.”).

¹⁸⁵ See Leval, 81 NYU L Rev at 1262 (cited in note 3).

¹⁸⁶ See Neal Devins and David Klein, *The Vanishing Common Law Judge?*, 165 U Pa L Rev 595, 606 (2017) (“[W]hen [] courts take an expansive view of precedent, they have a reduced ability to propose refinements to legal doctrine or to slow the pace at which it grows and solidifies.”). See also Dorf, 142 U Pa L Rev at 2053 (cited in note 9) (noting that critics of his more “wooden” approach to precedent prefer an “imprecise holding/dictum distinction [which] permits [a later court] to bend precedent without breaking it”).

¹⁸⁷ See Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 Iowa L Rev 601, 622–25 (2001); Lee, 78 NC L Rev at 654 (cited in note 77).

¹⁸⁸ See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 182–83 (Oxford 1991) (observing that rules of precedent allocate authority between courts across time).

This feature of the model will tend to amplify a judge's opinion-writing proclivities. In particular, it will tend to make the minimalist judge write more cautiously and the maximalist judge write more ambitiously.¹⁸⁹ In the interviews, one judge said the *Barapind* framework makes her write cautious opinions because, "if [the court] do[es] reach a question, it cannot [later] be dismissed as dicta."¹⁹⁰ On the other hand, for the judge who seeks to imprint her political preferences on the law, the adjudicative model creates an incentive to reach out to decide as many issues as possible as broadly as possible. Several interviewees said the adjudicative model may encourage "strategic judge[s]" to "do more than [they] ha[ve] to do" when they "ha[ve] the votes."¹⁹¹ One said that the adjudicative model "encourages judges to lay down a whole bunch of law [] as if [the court] were Congress writing the healthcare bill."¹⁹² And several mentioned the late Judge Stephen Reinhardt as someone for whom the adjudicative model was "an arrow in the quiver."¹⁹³ As one colorfully put it: "People would ask me, 'What's wrong with [the Ninth Circuit's] assignment system—Judge Reinhardt is on all the big cases?' [And] I . . . say, . . .

¹⁸⁹ In this respect, the adjudicative model is related to the large literature on judicial minimalism. See generally Sunstein, *One Case at a Time* (cited in note 184); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv L Rev 4 (1996); Peters, 100 Colum L Rev 1454 (cited in note 184); Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 Va L Rev 1753 (2004); Neal Kumar Katyal, *Judges as Advicegivers*, 50 Stan L Rev 1709 (1998); Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 Cornell L Rev 1 (2009).

¹⁹⁰ Judge F Interview (cited in note 117). See also Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 Seton Hall L Rev 736, 741 & n 19 (1993) (suggesting that a judge's limited ability to anticipate the consequences of overly broad holdings might provide an incentive to limit ambitious judicial opinions); Farber, 90 Minn L Rev at 1179 (cited in note 9) (noting that the common law imposes "discipline [] on decision making by the knowledge that a decision will function as a precedent").

¹⁹¹ Judge C Interview (cited in note 136). See also Judge A Interview (cited in note 131) (explaining that "if you have strong views on what the law should be in an area . . . it is quite tempting to write things that are not essential to the holding . . . that [] nonetheless will be viewed or arguably will be viewed as binding later"); Leval, 81 NYU L Rev at 1263–64 (cited in note 3) (noting that judges sometimes try to "preempt colleagues who might later decide [an] issue in a manner not to [their] liking"). But see Judge L Interview (cited in note 131) ("[Initially,] I thought, if we had that kind of rule, people are going to go out of their way to say things that are dicta, but they are going to be seriously treated. But I haven't seen too much of that.").

¹⁹² Judge H Interview (cited in note 126).

¹⁹³ Judge E Interview (cited in note 126); Judge M Interview (cited in note 99); Judge N Interview (cited in note 131).

“There is nothing wrong with [our] assignment system—Judge Reinhardt *makes* big cases!”¹⁹⁴

Further, the judges most inclined to write broadly on particular issues may also tend to be outliers on those issues. Assuming a normal distribution of judicial preferences, an outlier judge will have fewer opportunities to sit with other judges of similar sensibilities and preferences, so she may feel increased pressure to seize rare opportunities to wield the majority pen.

C. Context Sensitivity

Given the relative costs and benefits discussed in the previous two Sections, should the rest of the federal appellate courts adopt the adjudicative model? And if not, should the Ninth Circuit fall back in line with the rest? Reasonable minds can disagree about the answers to those questions, and the relevant considerations ultimately depend on a particular court’s institutional features. That’s because those features amplify the adjudicative model’s costs and benefits.

To begin, the clarity of a court’s definition of a holding is more valuable in large courts that regularly hear cases in randomly drawn panels than in small courts or in courts that always hear cases en banc. As the size of a court that hears cases in panels increases, so does the probability that a later panel will be ideologically dissimilar to the panel that decided a relevant precedent and thus so does the incentive for the later court to manipulate the holding/dictum distinction to avoid the precedent.¹⁹⁵ By contrast, the value of a rule-like definition of a holding is diminished in courts that always hear cases en banc because such courts exhibit greater consistency of personnel from case to case. As one

¹⁹⁴ Judge F Interview (cited in note 117) (emphasis added). One can’t help but notice that another extremely vocal judge—Judge Kozinski—was the author of the separate opinion in *Johnson* that first launched the circuit down this path. It’s thus possible, as one judge speculated, to view the adjudicative model as a kind of “truce” among judicial maximalists in which they would “let each other” “writ[e] dicta intentionally and then build[] on it.” Judge P Interview (cited in note 131).

¹⁹⁵ See Brian T. Fitzpatrick, *Disorder in the Court* (LA Times, July 11, 2007), archived at <https://perma.cc/6L29-VNMF>. See also D.H. Kaye, *On a Mathematical Argument for Splitting the Ninth Circuit*, 48 *Jurimetrics* 329, 332–33 (2008) (agreeing that increasing the size of a circuit increases the chance of outlier judges constituting a panel majority); Abramowicz and Stearns, 57 *Stan L Rev* at 1009–10 (cited in note 1) (noting that “panels are the product of random draws of three among a larger set of members of the court. The randomness exacerbates the problem of doctrinal instability by increasing the probability that panels that do not represent accurately the membership of the court as a whole will decide cases”).

judge said in the interviews, “The danger of a big circuit . . . is that you don’t have the kind of continuity that” smaller courts have.¹⁹⁶

Much the same may be true of a court’s geographical dispersity and informal norms of collegiality. Judges on the DC Circuit, for example, see one another far more frequently than judges on, say, the Eighth Circuit, which includes states as far north as North Dakota and as far south as Arkansas. As a consequence, informal modes of social influence may create greater consistency from panel to panel.

The size and nature of a court’s docket also affects the magnitude of the adjudicative model’s relative costs and benefits.¹⁹⁷ The clarity of a court’s preexisting legal rules is more valuable when applied to a docket dominated by large numbers of routine appeals than it is applied to a docket dominated by a small number of normatively complex cases of first impression.¹⁹⁸ Similarly, the cost of reaching suboptimal legal rules is reduced to the extent that those rules are created largely at the interstices of well-established doctrine and is magnified to the extent the court regularly decides issues of great national significance. Sometimes “it is more important that the applicable rule of law be settled than that it be settled right,”¹⁹⁹ and sometimes the opposite is true.

A related consideration is how likely a court’s decisions are to be corrected—either by rehearing at the same court or on review by a higher court. The more that a court’s decisions are subject to additional layers of review, the more that it can afford the possibility of additional error. As one judge said in the interviews, one reason why Ninth Circuit judges largely aren’t bothered by the breadth of judicial power under the adjudicative model is that the

¹⁹⁶ Judge D Interview (cited in note 106).

¹⁹⁷ See Cass R. Sunstein and Adrian Vermeule, *Interpretation and Institutions*, 101 *Mich L Rev* 885, 890–913 (2003) (arguing that statutory interpretation practices should take institutional resources and capacities into account); Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 *Cornell L Rev* 433, 470 (2012) (similar).

¹⁹⁸ Insofar as the adjudicative model helps courts deal with large numbers of cases more efficiently, it is of a piece with other changes to the rules of precedent, such as the rule that three-judge panels may not overrule the decisions of other three-judge panels, see *Miller v Gammie*, 335 F3d 889, 899–900 (9th Cir 2003) (en banc), or the rule allowing courts to issue nonprecedential opinions, see *Hart v Massanari*, 266 F3d 1155, 1163 (9th Cir 2001).

¹⁹⁹ *Burnet v Coronado Oil & Gas Co*, 285 US 393, 406 (1932) (Brandeis dissenting).

court's relatively active en banc practice allows the court a "way to fix" decisions when "judges [] go really out of their lane."²⁰⁰

Reasonable minds can disagree about how the foregoing considerations are best balanced in any particular court. But one conclusion seems fairly clear: the adjudicative model is better suited to large, intermediate appellate courts, like the Ninth Circuit, than to small appellate courts, especially those that have a regular diet of blockbuster cases of first impression, like the DC Circuit and the Supreme Court.

Of all the federal appellate courts, the Ninth Circuit has the largest number of judges regularly hearing cases,²⁰¹ it receives the highest number of visiting judges,²⁰² and it has the greatest degree of geographical dispersity. These facts suggest that the Ninth Circuit is in particular need of rules of precedent that will promote consistency between randomly assigned three-judge panels.²⁰³ As noted, the circuit also has a robust en banc practice for correcting the errors of three-judge panels.²⁰⁴ And while the circuit does issue its share of consequential rulings, the mine-run of cases are the numerous criminal and immigration appeals that require the court's careful attention but that, on average, don't generate much by way of new circuit law. Thus, more than any

²⁰⁰ Judge K Interview (cited in note 105). See also Abramowicz and Stearns, 57 *Stan L Rev* at 1010 (cited in note 1) ("En banc review protects against panel decisions that threaten over time to move doctrine away from the general preferences of the court as a whole.").

²⁰¹ As of the time of writing, the circuit has twenty-nine active judgeships and nineteen judges with senior status.

²⁰² In 2017, for example, the circuit received over sixty visiting judges who sat during approximately two hundred argument days. See *Judges Help Judges When Courts Face Heavy Caseloads* (United States Courts, Nov 8, 2018), archived at <https://perma.cc/9MRS-W7UX>.

²⁰³ See Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 *U Chi L Rev* 541, 544–47 (1989); Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in Arthur D. Hellman, ed., *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* 55, 56 (Cornell 1990).

²⁰⁴ See Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 *Fordham L Rev* 2001, 2015 n 128 (2014). The Ninth Circuit is the only circuit court in which less than the full court may sit to hear a case en banc. The parties may petition for the full court to rehear a case decided by an eleven-judge panel in what is sometimes called a "super en banc." See Elizabeth I. Winston, *Differentiating the Federal Circuit*, 76 *Mo L Rev* 813, 821 n 45 (2011); 9th Cir R 35-3.

other circuit, the Ninth Circuit's modus operandi isn't an idealized form of "[j]udicial deliberation" but rather the efficient resolution of cases with "reasonable dispatch."²⁰⁵

Now, contrast the Ninth Circuit with the Supreme Court and the DC Circuit: The Supreme Court is small and geographically concentrated, its membership is highly stable, it always sits en banc, and it hears fewer cases per year than any other federal court. Further, its docket consists mostly of difficult cases involving issues over which the federal circuit courts have already disagreed, and it sits at the apex of the federal judiciary, where there is no possibility of further review by another court. Much the same is true of the DC Circuit. That court is relatively small,²⁰⁶ geographically concentrated, and has a smaller docket than the other federal circuit courts.²⁰⁷ Moreover, as a function of statutes giving it exclusive appellate jurisdiction over certain matters involving the federal government, the circuit hears a regular diet of difficult, blockbuster cases affecting the entire country. Because of these features, the Supreme Court and the DC Circuit are in great need of rules of precedent that will tend to produce higher-quality decisions and in less need of rules that aim to improve consistency between different panels of the same court.²⁰⁸ Accordingly, they are less well suited to the adjudicative model than a court like the Ninth Circuit.

Notice, however, that these are contingent features of each of these courts. The Supreme Court today has a relatively small

²⁰⁵ Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 BU L Rev 1049, 1051, 1053 (2006).

²⁰⁶ As of the time of writing, the circuit has only eleven active judgeships and seven judges with senior status.

²⁰⁷ During the twelve-month period ending March 31, 2013, for example, the DC Circuit disposed of only 637 cases on the merits. See *Federal Judicial Caseload Statistics 2013* (cited in note 161).

²⁰⁸ See Grove, 95 Cornell L Rev at 22 (cited in note 189) ("Because the [Supreme] Court has almost complete control over its docket, it can spend more time on each case than a court of appeals with mandatory appellate jurisdiction or a single district court judge, who may process several hundred cases in a given year.") (citations omitted). This assertion isn't necessarily in tension with the conclusion of several scholars that, in the vertical context, the Supreme Court may need "to stretch the definition of holding given the Court's unique role in judicial administration." Abramowicz and Stearns, 57 Stan L Rev at 1067 (cited in note 1). See also Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 Ind L J 335, 358–59 (2002). It's possible that a broad conception of precedent is appropriate for lower courts interpreting the decisions of the Supreme Court, but that a narrow conception is appropriate when the Supreme Court interprets its own decisions.

docket because the Court has discretion over the cases that it accepts, and today's justices have chosen to grant certiorari sparingly. But if Congress so desired, it could choose to give the Supreme Court mandatory appellate jurisdiction over a large number of relatively straightforward appeals and thereby reduce the significance of the average Supreme Court case.²⁰⁹ Similarly, the Court today always hears cases en banc and is composed of nine justices who serve exclusively on the Supreme Court. But these too are contingent institutional features. Scholars have proposed to increase the size of the Supreme Court,²¹⁰ to require it to sit in panels,²¹¹ and to compose it of judges who split their time between the Supreme Court and the courts of appeals.²¹² Adopting any of these proposals would increase the Court's need for a rule of precedent that aims to maintain consistency across panels of the Court and would thus make the adjudicative model more attractive than it currently is.

V. CONSTITUTIONAL OBJECTIONS

I have thus far assumed that the adjudicative model is constitutional, but is it?²¹³ Article III provides: "The judicial Power of

²⁰⁹ US Const Art III, § 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, . . . with such Exceptions, and under such Regulations as the Congress shall make.").

²¹⁰ See Jonathan Turley, *A Bigger, Better Supreme Court: The Case for Reform* (The Guardian, June 27, 2012) (proposing a nineteen-justice Supreme Court), archived at <https://perma.cc/9NYU-VM48>; Jacob Hale Russell, *The Supreme Court Doesn't Need 9 Justices. It Needs 27* (Time, July 16, 2018), archived at <https://perma.cc/M5VN-PLHW>; Tracey E. George and Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 Duke L J 1439, 1454–58 (2009) (recommending a fifteen-justice Supreme Court).

²¹¹ See George and Guthrie, 58 Duke L J at 1458–65 (cited in note 210). See generally Tracey E. George and Chris Guthrie, *"The Threes": Re-Imagining Supreme Court Decisionmaking*, 61 Vand L Rev 1825 (2008). Several state high courts, such as those in Arizona, Connecticut, Nevada, and Texas, routinely sit in panels of less than the full court.

²¹² See Daniel Epps and Ganesh Sitaraman, *How to Save the Supreme Court*, 129 Yale L J 148, 181–92 (2019).

²¹³ State courts aren't subject to Article III's requirements. See Jack L. Landau, *State Constitutionalism and the Limits of Judicial Power*, 69 Rutgers L Rev 1309, 1311 (2017); Helen Hershkoff, *States Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv L Rev 1833, 1842–75 (2001); F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 Nw U L Rev 57, 65–75 (2015). See also William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 Cal L Rev 263, 294–95 (1990) (arguing Article III's case-or-controversy requirement should apply in state courts when interpreting federal law). The objections explored here are therefore not generally applicable to the state courts. Several states' justiciability doctrine, however, mirrors that of the federal courts. See Landau, 69 Rutgers L Rev at 1314 (cited in note 213). The conclusions in the main text will therefore have relevance to those states.

the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”²¹⁴ This power, it continues, “shall extend” to certain types of “Cases” and “Controversies.”²¹⁵ These provisions, and the interpretive gloss the Supreme Court has given them, suggest several objections to the adjudicative model. First, the model may violate Article III, if the Vesting Clause is construed to incorporate a traditional conception of the judicial function. Second, perhaps the adjudicative model may violate Article III’s case-or-controversy requirement. This Part contends that these objections fail.²¹⁶

A. “Judicial Power”

One argument against the adjudicative model is that it violates a traditional conception of the judicial power. According to many historians, the modern doctrine of stare decisis—under which a single case may bind future courts—is an invention of the nineteenth century and therefore wasn’t firmly established until well after the Founding.²¹⁷ Instead, early American courts had a narrower understanding of precedent, according to which only a

²¹⁴ US Const Art III, § 1.

²¹⁵ US Const Art III, § 2.

²¹⁶ A third objection doesn’t argue that the adjudicative model is unconstitutional per se; rather, it says that it’s unconstitutional for an “inferior” federal court (like the Ninth Circuit) to use the adjudicative model because it contradicts the Supreme Court’s jurisprudence concerning precedent. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents*, 46 Stan L Rev 817, 828–34 (1994) (arguing the word “inferior” in Article III implies that the lower federal courts must follow the Supreme Court’s precedent). But see John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 Duke L J 503, 515 (2000) (“The more plausible reading is [] that lower courts are inferior in that they may be subjected to the Supreme Court’s appellate jurisdiction and are so subjected by the Constitution’s default rule.”). This argument fails because current doctrine doesn’t prohibit lower courts from adopting their own rules of precedent. Nor have the Supreme Court’s statements about its own precedent been consistent enough to support an inference to that effect.

²¹⁷ See, for example, Theodore F.T. Plucknett, *A Concise History of the Common Law* 350 (Little, Brown 5th ed 1956); Carleton Kemp Allen, *Law in the Making* 225–26 (Oxford 5th ed 1951); Frederick G. Kempin Jr, *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 Am J Legal Hist 28, 50 (1959); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand L Rev 647, 661 (1999); Jim Evans, *Change in the Doctrine of Precedent During the Nineteenth Century*, in Laurence Goldstein, ed, *Precedent in Law* 35, 46–72 (Oxford 1987); Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 Yale L J 1651, 1736–38 (1994); Thomas R. Lee and Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to “Unpublish” Opinions*, 77 Notre Dame L Rev 135, 166–68 (2001). But see Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 Oxford U Commonwealth L J 1, 12 (2003) (arguing that stare decisis emerged in England in the late eighteenth century).

series of cases could serve as presumptive evidence of the law.²¹⁸ From the fact that the practice of following precedent had become ubiquitous by the late eighteenth century, several scholars have inferred that the founding generation would have understood Article III's invocation of the "judicial Power" to require courts to follow precedent.²¹⁹ By parity of reasoning, perhaps Article III incorporates a traditional, narrow conception of a holding and a common law court's role.²²⁰ If so, the adjudicative model may be unconstitutional because it deviates from that conception.

This argument—that the "judicial Power" implies particular rules of precedent—rests on an implausibly narrow construction of Article III. One cannot derive specific rules from either the present-day meaning or the original public meaning of the phrase "judicial Power." Nor is it plausible to think that the founding generation believed that the Constitution had cemented the rules of precedent then followed in American courts. Those rules were still largely in a state of flux when the Constitution was ratified. As Professors John McGinnis and Michael Rappaport explain, "a diversity of precedent rules, both horizontal and vertical, [have] governed judicial decisions both before and after the Constitution

²¹⁸ See John O. McGinnis and Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 Nw U L Rev 803, 809 (2009); William Baude, *Constitutional Liquidation*, 71 Stan L Rev 1, 37–38 (2019); Lee, 52 Vand L Rev at 668–69 (cited in note 217). The view was overdetermined by legal practices at the time: court reporters didn't keep accurate and comprehensive records of judicial decisions; courts typically issued seriatim opinions explaining each judge's view of the case rather than a single authoritative opinion; and courts regarded judicial decisions as evidence of the law, not as freestanding sources of law. See Kempin, 3 Am J Legal Hist at 31–36 (cited in note 217).

²¹⁹ See McGinnis and Rappaport, 103 Nw U L Rev at 807–22 (cited in note 218); Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 Notre Dame L Rev 1075, 1085–1101 (2003); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 BC L Rev 81, 89 (2000); Fallon, 76 NYU L Rev at 579 (cited in note 77) ("[F]amiliar sources can be adduced to suggest that 'the judicial Power' was understood historically to include a power to create precedents of some degree of binding force."); Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 Yale L J 281, 294 & n 51 (1987). But see Harrison, 50 Duke L J at 513–25 (cited in note 216) (criticizing this conclusion); Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W Va L Rev 43, 88–89 (2001) (arguing that stare decisis is not dictated by the understanding of "judicial power" as it existed at the Founding); Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv J L & Pub Pol 23, 29–30 (1994).

²²⁰ See *Anastasoff v United States*, 223 F3d 898, 900 (8th Cir 2000) (advancing a similar argument against the constitutionality of federal circuit courts issuing nonprecedential opinions); Erica S. Weisberger, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 Georgetown L J 621, 633–38 (2009) (same).

was enacted. It is hard to see how one could derive a single precedent approach from this diversity.”²²¹ It’s therefore implausible to read Article III to entail particular rules of precedent other than the most general rule that the federal courts should adhere to precedent simpliciter.

The argument also conflicts with current doctrine. Unlike Article II, which vests the “executive Power” in the president alone, Article III vests the “judicial Power” in each of the federal courts. If the “judicial Power” implies particular rules of precedent, Article III’s text suggests those rules should apply in every federal court.²²² But that’s not the law. Rules of precedent today vary widely based on the level of court deciding a case. The Supreme Court and the federal circuit courts follow horizontal precedent, but the federal district courts have never regarded their own decisions as binding.²²³ At one time, the federal circuit courts largely regarded their sister circuits’ precedents as binding, but today they don’t.²²⁴ Three-judge panels of the circuit courts are bound by an absolute rule of stare decisis, but circuit courts sitting en banc are not.²²⁵ And the circuit and district courts each have rules allowing them to decide whether to issue a published opinion or a nonprecedential memorandum disposition, but the Supreme Court does not.²²⁶ The idea that the “judicial Power” entails particular rules of precedent would throw a wrench into many of these rules and practices.

The varied nature of current doctrine reflects the constitutional status of rules of precedent. Instead of a fixed point of constitutional law, rules of precedent are common law, which can

²²¹ McGinnis and Rappaport, 103 Nw U L Rev at 827 (cited in note 218) (citations omitted). See also Lee, 52 Vand L Rev at 651 (cited in note 217) (concluding “that the modern muddle over stare decisis has been with us since the founding era”); Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 UC Davis L Rev 761, 803 (2004).

²²² See Harrison, 50 Duke L J at 515 & n 41 (cited in note 216) (attributing a similar observation to potential critics). But see Evan Caminker, *Allocating the Judicial Power in a “Unified Judiciary”*, 78 Tex L Rev 1513, 1515 (2000) (arguing that courts “enjoy somewhat different packages of judicial power . . . depending on their . . . placement” in the “hierarchical Article III system”).

²²³ See Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 Nev L J 787, 800–04 (2012); *Camreta*, 563 US at 709 n 7; James Wm. Moore, 18 *Moore’s Federal Practice* § 134.02[1][d] (Matthew Bender 3d ed 2019).

²²⁴ See Harrison, 50 Duke L J at 516 (cited in note 216).

²²⁵ See, for example, *United States v Allah*, 130 F3d 33, 38 (2d Cir 1997).

²²⁶ Academic commentators have criticized the practice of issuing unpublished decisions. See, for example, Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S Cal L Rev 755, 788–93 (2003).

change to accommodate a court's needs.²²⁷ They are “part of the internal operating procedures of the courts”²²⁸ and should vary based on “changes in the structure of the court system.”²²⁹ In other words, a particular court's rules of precedent should be sensitive to the court's capabilities, obligations, and institutional context.

B. “Cases” and “Controversies”

A second argument against the adjudicative model is that it runs afoul of Article III, § 2, which provides that the federal judicial power extends to “Cases” and “Controversies.” The case-or-controversy requirement has often been considered a key protection of our system of separated powers because it prevents the courts from establishing new law in the comprehensive and proactive manner characteristic of statutes.²³⁰ The federal courts have construed this clause to limit the exercise of their authority to live, concrete disputes between adverse parties.²³¹ A federal court may not opine on claims that have become moot, for instance, because doing so doesn't resolve a live dispute.²³² Nor may a federal court issue an advisory opinion (a legal declaration that cannot affect a party's rights) because doing so doesn't resolve a concrete dispute.²³³

One could argue that a model of precedent as broad as the adjudicative model violates the case-or-controversy requirement because, once a court has said enough to reach the outcome, it's

²²⁷ See John O. McGinnis and Michael B. Rappaport, *Originalism and the Good Constitution* 169–72 (Harvard 2013); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 Yale L J 1535, 1540 (2000); Harrison, 50 Duke L J at 525–30 (cited in note 216); Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 Wm & Mary L Rev 753, 768 (2013); Bayern, 36 Fla St U L Rev at 152 (cited in note 3).

²²⁸ Harrison, 50 Duke L J at 511 (cited in note 216).

²²⁹ Lee and Lehnhof, 77 Notre Dame L Rev at 166 (cited in note 217).

²³⁰ See *Flast v Cohen*, 392 US 83, 95 (1968) (stating that the case-or-controversy requirement ensures “the federal courts will not intrude into areas committed to the other branches of government”); Bandes, 42 Stan L Rev at 227 (cited in note 4) (explaining that “[t]he case requirement . . . distinguish[es] the territory of the federal courts from that of the political branches”) (citations omitted).

²³¹ See Robert J. Pushaw Jr, *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 Notre Dame L Rev 447, 453 (1994); Landau, 69 Rutgers L J at 1311–12 (cited in note 213); Hessick, 109 Nw U L Rev at 63 (cited in note 213); Jonathan R. Siegel, *A Theory of Justiciability*, 86 Tex L Rev 73, 77–78 (2007).

²³² See Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 Geo Wash L Rev 562, 567 (2009).

²³³ See *Fendon v Bank of America, N.A.*, 877 F3d 714, 716 (7th Cir 2017).

no longer deciding a “Case.”²³⁴ Or one could argue that a model of precedent that allows unnecessary holdings violates the prohibition on advisory opinions.²³⁵ After all, a court that could make binding pronouncements on matters unrelated to the case before it would have virtually the same unfettered lawmaking authority as a legislature.

Scholars have criticized the narrowness of the Court’s justiciability doctrine on numerous grounds.²³⁶ But even if we take it at face value, the argument goes wrong by misunderstanding the nature of the case-or-controversy requirement. That requirement determines whether a federal court has jurisdiction over a claim when the court makes its decision, not whether a ruling on a claim over which it had jurisdiction was authoritative. In other words, it is a limitation that operates at the threshold to determine whether the federal judicial power may be exercised at all.

Further, transforming the case-or-controversy requirement into a way of evaluating the authority of earlier decisions would conflict with several aspects of current federal practice. First, the Supreme Court has held that a government official may seek appellate review of a ruling that he violated the Constitution even where he ultimately prevailed on grounds of qualified immunity.²³⁷ In so holding, the Court rejected the argument that such appeals “present no case or controversy.”²³⁸ Instead, the officer retains a “personal stake” in the case because the ruling “may have prospective effect” that would force him to “change the way he

²³⁴ See Leval, 81 NYU L Rev at 1259 (cited in note 3); Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 Emory L J 207, 230–31 (2008); Klein and Devins, 54 Wm & Mary L Rev at 2027–28 (cited in note 145); Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 NC L Rev 847, 919–20 (2005).

²³⁵ See Williams, 69 Stan L Rev at 846–47 (cited in note 3); Eric Rasmusen, *Judicial Legitimacy as a Repeated Game*, 10 J L Econ & Org 63, 75 (1994); Alan J. Meese, *Reinventing Bakke*, 1 Green Bag 2d 381, 382 (1998) (describing dicta as “the functional equivalent of an advisory opinion”); Killian, 41 Pepperdine L Rev at 9 (cited in note 85) (arguing that “[d]icta is, at bottom, a form of advisory opinion”).

²³⁶ See Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* 171–77 (Yale 1997); Pushaw, 69 Notre Dame L Rev at 447–48 (cited in note 231); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan L Rev 1371, 1374 (1988); Gene R. Nichol Jr, *Ripeness and the Constitution*, 54 U Chi L Rev 153, 162–64 (1987); John A. Ferejohn and Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 NYU L Rev 962, 1009 (2002). But see Ann Woolhandler and Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich L Rev 689, 691 (2004) (contending that there was “an active law of standing in the eighteenth and nineteenth centuries”).

²³⁷ See *Camreta*, 563 US at 702.

²³⁸ *Id* at 701.

performs his duties.”²³⁹ But that could only be true if the ruling is part of the Article III “Case” and entitled to deference in future cases. After all, Article III says where there’s no “Case” (or “Controversy”), there’s no judicial power.

Second, consider the law-of-the-case doctrine. In complex cases, federal circuit courts commonly dispose of appeals on a single ground, remand to the district court for further adjudication on other issues, and provide guidance on the remaining legal questions in the case. The court’s guidance will typically be treated as the “law of the case” and thus binding on the parties. But it is hard to see how that could be so unless the circuit court’s guidance is part of the “Case.”

To be clear, the point isn’t that the scope of precedent *must* overlap with the scope of an Article III “Case” or “Controversy.”²⁴⁰ The point is that the case-or-controversy requirement doesn’t proscribe federal courts from giving precedential effect to rulings on issues that aren’t necessary for the outcome.²⁴¹ Instead, Article III allows federal courts to exercise jurisdiction over, and establish law concerning, any issue that is part of a properly brought case (even where the issue turns out not to have been necessary for the outcome).

This reading is consistent with the idea that the federal judiciary is a “reactive” institution “designed to answer” only those “questions that are posed to it.”²⁴² Courts may not establish law on topics that are unrelated to the cases before them. But current justiciability doctrine ensures that they don’t. If an earlier court didn’t have Article III jurisdiction over a claim at the time it made its decision, then a ruling on that claim can’t be precedential. As one judge said in the interviews, a ruling can be “binding” only if

²³⁹ *Id.* at 702–03.

²⁴⁰ Indeed, there may be good reasons for construing the application of preclusion doctrines more broadly than that of stare decisis. For example, the parties have had their day in court, affording them the opportunity to present their side of an issue, whereas future litigants, who may be bound by stare decisis, will not have had that opportunity.

²⁴¹ This observation may have implications for the precedential status of decisions where no opinion garners a majority. The controlling case regards the opinion that reaches the outcome on the narrowest ground as the controlling opinion. See *Marks v United States*, 430 US 188, 193 (1977). One way of approaching fractured decisions is to count any statement of law that received the assent of a majority of the court as a holding. See Williams, 69 *Stan L Rev* at 817–19 (cited in note 3). One criticism of this view is that it appears to conflict with the necessity model’s requirement that a holding be necessary for the outcome in the earlier case. *Id.* at 819. But if that requirement is subject to change, then it removes one objection to construing fractured decisions more broadly.

²⁴² Randy J. Kozel, *Precedent and Constitutional Structure*, 112 *Nw U L Rev* 789, 804 (2017).

it's "on an[] issue that is part of the Article III controversy."²⁴³ But the adjudicative model has no quarrel with this limitation on judicial lawmaking power or with the idea that the judicial power may be exercised only over claims raised as part of a concrete dispute between adverse parties.

CONCLUSION

Courts often talk as if there is just one way to determine the holding of a case—a holding is a proposition asserted in a decision that was necessary to reach the outcome. But there isn't just one way to think about precedential scope. Several important state courts and one federal court of appeals follow an entirely different approach. And in light of that alternative, we should occasionally pause to ask whether the existing rules of precedent are serving their purposes.

This Article is a step in that direction. It offers evidence that the choice of precedential regime really matters—that courts using one approach will tend to behave differently from courts following another. It presents a normative framework for evaluating the choice between precedent rules in particular institutional contexts. And it develops an account of the federal judicial power in which the authority to establish law is more than just a byproduct of the power to resolve disputes.

²⁴³ Judge O Interview (cited in note 102).

APPENDIX A

TABLE 1: PREDICTING FOLLOW (LOGIT)

	Model 1	Model 2	Model 3	Model 4	Model 5
(Intercept)	-0.80*** (0.17)	-0.80*** (0.16)	-0.79*** (0.16)	-0.82*** (0.22)	-0.83*** (0.23)
post_johnson	0.80*** (0.22)	0.79*** (0.21)	0.79*** (0.21)	0.80*** (0.22)	0.84*** (0.23)
panel_median	0.31 (0.27)	0.30 (0.27)	0.28 (0.28)	0.28 (0.27)	0.67 (0.70)
previous_panel_ median		-0.28 (0.35)	-0.24 (0.34)	-0.25 (0.34)	-0.26 (0.79)
panel_median: previous_ panel_median			1.62* (0.97)	1.57 (1.00)	1.63* (0.99)
criminally				0.08 (0.22)	0.08 (0.22)
immigrationy				-0.09 (0.35)	-0.07 (0.36)
laboremploymenty				-0.21 (0.26)	-0.20 (0.26)
corporategovern- ancey				0.41 (0.44)	0.39 (0.46)
author_ideology					-0.42 (0.39)
majority_ideology					-0.22 (1.11)
previous_author_ ideology					0.02 (0.38)
previous_majority_ ideology					-0.01 (1.11)
Log Likelihood	-268.94	-268.58	-267.15	-266.18	-263.27
Num. Obs.	408	408	408	408	408
***p < 0.01, **p < 0.05, *p < 0.1					

APPENDIX B

TABLE 2: PREDICTING DISTINGUISH (LOGIT)

	Model 1	Model 2	Model 3	Model 4	Model 5
(Intercept)	-1.69***	-1.70***	-1.73***	-1.64***	-1.66***
	(0.22)	(0.22)	(0.23)	(0.30)	(0.31)
post_johnson	0.36	0.37	0.37	0.38	0.35
	(0.28)	(0.28)	(0.28)	(0.28)	(0.29)
panel_median	-0.39	-0.37	-0.37	-0.41	-1.79***
	(0.40)	(0.40)	(0.44)	(0.43)	(0.65)
previous_panel_ median		0.20	0.05	0.12	0.60
		(0.43)	(0.49)	(0.48)	(1.12)
panel_median: previous_ panel_median			-2.45**	-2.57**	-2.57**
			(1.17)	(1.18)	(1.19)
criminally				-0.43*	-0.45*
				(0.25)	(0.26)
immigrationy				0.10	0.05
				(0.39)	(0.38)
laboremploymenty				0.31	0.33
				(0.21)	(0.22)
corporategovern- ancey				0.27	0.27
				(0.53)	(0.57)
author_ideology					0.60
					(0.50)
majority_ideology					1.44
					(1.06)
previous_author_ ideology					-0.45
					(0.56)
previous_majority_ ideology					-0.26
					(1.58)
Log Likelihood	-196.08	-195.95	-193.98	-191.70	-187.74
Num. Obs.	408	408	408	408	408
***p < 0.01, **p < 0.05, *p < 0.1					