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## ARTICLE

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### THE VANISHING COMMON LAW JUDGE?

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*The common law style of judging appears to be on its way out. Trial courts rarely shape legal policymaking by asserting decisional autonomy through distinguishing, limiting, or criticizing higher court precedent. In an earlier study, we demonstrated the reluctance of lower court judges to assert decisional autonomy by invoking the holding–dicta dichotomy. In this Article, we make use of original empirical research to study the level of deference U.S. district court judges exhibit toward higher courts and whether the level of deference has changed over time. Our analysis of citation behavior over an eighty-year period reveals a dramatic shift in judges’ practices. In the first fifty years included in our study, district court judges were not notably deferential to either their federal court of appeals or the U.S. Supreme Court. District court judges regularly assessed the relevance and scope of precedents from those higher courts and asserted their prerogative to disregard many of them. Since then, judges have become far more likely to treat a given higher court precedent as dispositive. In so doing, lower courts have embraced a hierarchical view of judicial authority at odds with the common law style of judging. The causes of this shift are multifold and likely permanent; we discuss several of them, including dramatic changes in legal research, the proliferation of law clerks throughout the legal system, the growing docket of lower court judges, the growth of the administrative state, and the Supreme Court’s increasing embrace of judicial hierarchy.*

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## INTRODUCTION

This Article will document and offer some explanations for the decline of what we call the common law style of judging, a way of approaching precedent and decisionmaking that once was fundamental to the American legal system. While we are not the first to suggest that common law judging is in decline,<sup>1</sup> we back up this claim with original evidence of the changing behavior of trial judges vis-à-vis higher courts. In our view, the evidence of change is so striking—and the change potentially so consequential—that the subject merits considerably greater attention than it has received from scholars and practitioners until now.

The common law style of judging is an approach that gives pride of place to precedent, but in a specific way: Occasionally, an individual precedent has the capacity to determine the outcome of numerous cases. But typically, it must be read and understood as part of a set of related precedents. Doctrine generally emerges not from a single decision, but rather from repeated efforts to grapple

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<sup>1</sup> See Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 768 (2004) (arguing that “judicial discretion” at the federal and state levels is being supplanted “by the Federal Sentencing Guidelines and their numerous state counterparts”); Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1188 (2007) (noting that American common law is “becoming increasingly textual” and less about what judges “think or . . . say during the proceedings before them” (emphasis omitted)).

with a particular problem. It therefore tends to develop incrementally. Because trials are the testing grounds of emerging doctrine, a central feature of common law judging is the willingness of trial judges to question the application of precedents that could lead to poor results. When trial judges resist the application of precedents from higher courts—for instance, by distinguishing a precedent or treating language in a higher court opinion as dicta—they, at least temporarily, slow the movement of the law in a particular direction and may succeed in diverting it down another path. Because trial judges hear so many more cases than appellate judges do, they as a group have tremendous potential to shape the law. But to what extent do they seize their opportunities to shape the law, and to what extent does the role that trial judges play today differ from the one they played in the past? These are the questions addressed by this study.

In an earlier study, we considered lower court invocations of the holding–dicta distinction.<sup>2</sup> We found that lower courts hardly ever refuse to follow a statement from a higher court because it is dictum.<sup>3</sup> Specifically, federal courts of appeals meaningfully invoke the distinction in about 1 in 4000 cases, federal district courts in about 1 in 2000 cases, and state courts in about 1 in 4000 cases.<sup>4</sup> In this Article, we consider the more basic question of lower court adherence to precedent. We address this principally by analyzing U.S. district court judges’ treatment of precedents from the Supreme Court and courts of appeals across an eighty-year span. We conclude that today’s district court judges play a far less active role in shaping the law than their predecessors did. From 1932 to 1972, district court judges resisted a substantial proportion of higher court precedents. But since 1982, and especially over the past twenty years, they have become much more likely simply to follow the precedents they cite.

This fundamental shift in lower court decisionmaking alters both the balance of authority and the practice of law in our federal system. In part, the demise of the holding–dicta distinction and the increasing uncritical reliance on higher court precedent suggest that district court judges see themselves as subordinates, not partners, in the legal policymaking enterprise. More than that, the causes of this shift are varied and enduring. The internet has fundamentally altered legal research, lower court judges have increasingly looked to law clerks to help them manage an ever-growing docket, the rise of big government has shifted lawmaking power away from courts and to lawmakers and regulators, and the U.S. Supreme Court increasingly has backed a hierarchical model of judging.

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<sup>2</sup> See David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2025 (2013) (setting out “the first systematic study of how lower courts treat higher court dicta”).

<sup>3</sup> *Id.* at 2036.

<sup>4</sup> *Id.* at 2041.

This Article proceeds in three parts. Part I highlights the central role of common law judging in the American system and notes recent questioning of its continued vitality. Part II, the heart of this Article, details our empirical study on district court citation practices. Part II also contains a discussion of other relevant empirical work, including our 2013 holding–dicta study and studies of federal courts of appeals’ adherence to Supreme Court precedent. These studies strengthen our conclusions about federal district court judges. They also suggest that our conclusions extend to the hierarchical relationship between the U.S. Supreme Court and lower-level appellate courts (federal courts of appeals and state appellate courts). Part III speculates on the causes of the decline of common law judging. It suggests that those causes are enduring, and, as such, common law judging is largely dead. Part III also considers the ramifications of our findings, including a snapshot of arguments defending and critiquing common law judging.

## I. COMMON LAW JUDGING AND THE AMERICAN LEGAL SYSTEM

“[T]he most significant feature of the common law,” Chief Justice Harlan Stone once observed, is “the fact that it is pre[e]minently a system built up by gradual accretion of special instances.”<sup>5</sup> This image of fact-sensitive and incremental judging was once widely embraced.<sup>6</sup> Consider this description of procedure from a legal scholar writing near the end of the nineteenth century:

[Analogous] cases are scrutinized, classified, [and] distinguished . . . . [T]he decision in each case is a step in the growth of the law, a new *datum* for future reasoning. As this process goes on, fought over at every step by trained counsel and scrutinized by the court, there is a constant shaping of the law. A principle which lay vaguely in the cases takes a more definite form, its boundaries on the one side and the other are determined, and it becomes eventually as fixed and precise as a statutory enactment.<sup>7</sup>

Under this view, as Karl Llewellyn put it, a “court can decide nothing but the legal dispute before it . . . . Everything . . . said in an opinion is to be read

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<sup>5</sup> Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 6 (1936).

<sup>6</sup> The common law system was inherited from England and provided the basis for the American judicial system. Even when statutes started playing a major role in the judicial system, the common law provided the base and background for disputes in the courts. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 5 (1982) (noting that pre–New Deal codifications of the law “were so general that common law courts could continue to act pretty much as they always had”).

<sup>7</sup> Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172, 182–83 (1891) (footnote omitted).

and understood only in relation to the actual case before the court.”<sup>8</sup> This understanding is reflected in the concept of dicta. “It is not what the [higher court] intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification.”<sup>9</sup> In other words, the doctrine of dicta compels the judge deciding a case to make her “own decision.”<sup>10</sup>

Precedents have also been understood as provisional. As Benjamin Cardozo wrote, the rule of adherence to precedent should be “relaxed” when a decision “has been found to be inconsistent with the sense of justice or with the social welfare.”<sup>11</sup> Perhaps more telling, Llewellyn catalogued sixty-four possible ways to use precedent, including “[f]ollowing,” “[e]xpans[ion]” and “[r]edirect[ion],” and “[a]voidance.”<sup>12</sup> “Not only does this selection provide judges and advocates with a ready-made tool kit for use in daily practice; it also persuasively demonstrates that courts are not controlled or dictated by prior authority.”<sup>13</sup>

In this traditional view, lower courts “elaborate” on higher court precedent, reasoning by analogy and taking into account changing factual or policy developments.<sup>14</sup> Correspondingly, lower courts’ common law power to disavow or limit higher court precedent allows lower courts to respond to “changed conditions” when “convinced that the rule was originally erroneous or is no longer sound.”<sup>15</sup> Such resistance by the lower courts, moreover, is “often the only means of bringing the question anew to the attention of the appellate court, and thus affording opportunity for a correction of the blunder.”<sup>16</sup> In the common law style of judging, trial judges play an active role in shaping legal

<sup>8</sup> KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 14 (Paul Gewirtz ed., Michael Ansaldi trans., 1989) (emphasis omitted).

<sup>9</sup> EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 2-3 (2013).

<sup>10</sup> *Id.* at 3.

<sup>11</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 150 (1921).

<sup>12</sup> KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 77, 82, 84 (1960); *id.* at 77-91.

<sup>13</sup> Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 *YALE L.J.* 255, 259 (1961).

<sup>14</sup> Michael C. Dorf, *Prediction and the Rule of Law*, 42 *UCLA L. REV.* 651, 665 (1995) (emphasis omitted); *see also id.* (outlining the “elaboration model” of jurisprudence under which lower court judges “elaborate” on extradoctrinal reasons for their decisions (emphasis omitted)).

<sup>15</sup> James Wm. Moore & Robert Stephen Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 *TEX. L. REV.* 514, 539-40 (1943); *see also id.* at 515 (noting that “[n]o case is forever impregnable” and that “[n]o court can effectively command . . . obedience to a rule of law that departs too far from the norms of the times”).

<sup>16</sup> W.M. Lile, *Some Views on the Rule of Stare Decisis*, 4 *VA. L. REV.* 95, 101 (1916); *see also id.* at 105 (noting that the common law should “mould and adjust itself to new needs and new conditions and thus, by constant growth, without haste but without rest, . . . keep pace with the enlightened public opinion of the people by whom and for whom it has been fashioned”).

policy. Indeed, with trial judges deciding many more cases than appellate judges, trial judges can often play the defining role in legal policymaking.

Today, academic and other commentators increasingly call this picture into question, “expressing doubts . . . about federal courts fashioning law in the common law way.”<sup>17</sup> They write that the common law has “contracted”<sup>18</sup> and is in “rapid retreat.”<sup>19</sup> There are different aspects to this perceived contraction and retreat, some of which we return to in Part III.<sup>20</sup> The most relevant here is the perception that lower courts often accord greater authority to precedents or to specific language within those precedents than they are entitled to under the classical approach.<sup>21</sup> For instance, Allison Larsen has shown that while lower courts frequently cite the Supreme Court for statements of empirical facts, appellate courts’ statements of facts about the world are not traditionally understood as part of the law.<sup>22</sup> Randy Kozel similarly has spoken of the “inclusive view” of precedent where even “[g]eneralized, sweeping, and unnecessary propositions commonly exert forward-looking effect.”<sup>23</sup> Another manifestation of arguably excessive deference is lower courts’ willingness to treat nonessential “dicta” as binding “holdings,”<sup>24</sup>

<sup>17</sup> Peter L. Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, 53 ALA. L. REV. 891, 893 (2002). At the same time, some commentators suggest that the Supreme Court adheres to the common law tradition with respect to its own precedent, such that each generation refines past precedent to allow the Court to meet the demands of the current generation. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 43-45 (2010) (defending common law constitutionalism as an alternative to originalism); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 10-11 (1999) (noting that the Supreme Court often issues narrow, minimalist decisions from which doctrine develops over time). For our purposes, the critical question is not whether the vitality of common law judging is tied to higher-court lower-court hierarchy; rather, our primary focus is on documenting and analyzing a shift in the importance of higher court precedent, which does not turn on accepting a particular view of common law judging. See Adam Rigoni, *Common-Law Judicial Reasoning and Analogy*, 20 LEGAL THEORY 133, 134-35 (2014) (identifying different variations on common law judging).

<sup>18</sup> Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 CONN. L. REV. 737, 737 (2012).

<sup>19</sup> Schauer, *supra* note 1, at 765.

<sup>20</sup> See *infra* Section III.A.

<sup>21</sup> By focusing on common law judging, our concern is lower court lawmaking and, with it, the vertical relationship between lower and higher courts. Our project does not speak to the question of district court authority to manage cases, including efforts to force settlements or otherwise eliminate the need to run trials and issue opinions. On this question, there is reason to think that district court judges are quite assertive—perhaps, in part, to manage an ever-exploding docket. See Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 306 (2013) (showing that federal courts are increasingly disposing of cases prior to trial due to changes in “the judicial processing of civil cases”). For our discussion of the nexus between the decline of common law judging and docket size, see *infra* subsection III.A.3.

<sup>22</sup> See Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 62 (2013) (arguing that “lower courts . . . over-rely on Supreme Court opinions . . . to apply generalized statements of fact from old cases to new ones”).

<sup>23</sup> Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 198-99 (2014).

<sup>24</sup> Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2026 (1994); see also Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006) (arguing that “[j]udges do more than put faith in [dicta]; [dicta] are often treated as binding law”); Judith M.

a practice that frees higher courts “from limits imposed by the facts and questions presented by a particular case, thus enabling them to set their own agenda and quasi-legislate.”<sup>25</sup>

## II. THE DEMISE OF COMMON LAW JUDGING

Claims that lower courts increasingly treat higher court rulings as binding precedent are largely impressionistic and not specifically focused on the behavior of lower courts.<sup>26</sup> Systematic investigations of lower court behavior are needed. In our earlier study of the holding–dicta distinction, we sought to fill that gap in the literature through a comprehensive investigation of how lower courts treat higher courts’ dicta. We found that lower courts rarely reached conclusions at odds with higher court rulings by invoking the holding–dicta distinction; this was not only true of federal and state courts, but also of both trial and lower-level appellate courts.<sup>27</sup> In this study, we consider the related, more fundamental question of whether lower courts are willing to distinguish precedents or, instead, prefer an inclusive view of precedents, essentially seeking out ways for higher court precedent to bind them. We undertake a systematic examination of the practices of federal district court judges—in particular, their citations of higher court precedents. Our central questions are (1) to what extent district court judges assert their prerogatives to weigh the relevance of precedents and apply them with discrimination and (2) how much their willingness to assert these prerogatives has changed over time.

District court judges constitute only one segment of the American bench, but they are the proper focus of this inquiry for several reasons. First, they are at the heart of the federal judicial system, having decided 350,462 cases in 2013.<sup>28</sup> It is hard to imagine a more important single set of trial courts anywhere. In the vast majority of cases, moreover, district courts are courts of last resort. In the twelve-month period ending March 31, 2015, 54,244 cases were commenced in U.S. courts of appeals, which is a small fraction—only 15.5%—of district court

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Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 221 (2010) (claiming that the “ratcheting up of persuasive law into binding law is problematic” because “[t]o the extent that courts treat dicta as holding, they are more likely to reach incorrect decisions, to exceed their judicial authority, and to generate illegitimate results”).

<sup>25</sup> Wistrich, *supra* note 18, at 768. In this way, the common law process is made more future-oriented in that “a later [lower] court permits the earlier [higher] court to determine the effect of the earlier court’s decision.” *Id.*

<sup>26</sup> See, e.g., Kozel, *supra* note 23, at 198 (discussing lower courts’ expansive views of higher courts’ precedents); Leval, *supra* note 24, at 1250 (explaining the pervasive mistreatment of dicta as holding); Schauer, *supra* note 1, at 772 (observing the demise of common law judging).

<sup>27</sup> See Klein & Devins, *supra* note 2, at 2032–42 (showing how lower courts treat dicta). We will discuss those findings later in this Part. See *infra* text accompanying notes 80, 87, 9192.

<sup>28</sup> *Federal Judicial Caseload Statistics 2014*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014> [<https://perma.cc/J3J2-FDAJ>].

rulings in the previous year.<sup>29</sup> “In short, whether and to what degree district judges” follow or break ranks from “their supervising appellate courts [including the U.S. Supreme Court] can broadly impact litigants, judges, lawyers, and the public in terms of actions, perceptions, and shaping the law.”<sup>30</sup>

Second, good data is readily attainable for district courts going back many years; this is not true of many state courts.<sup>31</sup> Finally, district courts have a clear status as lower courts, allowing for straightforward analyses of our questions. In contrast, federal courts of appeals and state appellate courts are hybrids, acting as both precedent-setting higher courts and precedent-following lower courts. Indeed, it is not much of an overstatement to say that federal and state appellate courts are “the de facto (if not the de jure) venue for final appellate review.”<sup>32</sup> There are very few appeals to the U.S. Supreme Court each year and roughly eighty grants of certiorari.<sup>33</sup> In October Term 2014, for example, the odds of a federal court of appeals decision being reviewed by the Supreme Court was approximately 1 in 1000.<sup>34</sup> In any case, for reasons we will explain later in this Part, we strongly suspect that our findings on federal district courts also hold for state courts’ and for federal courts of appeals’ treatment of U.S. Supreme Court precedent.<sup>35</sup>

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<sup>29</sup> *Id.*; Table B-1. *U.S. Courts of Appeals Federal Judicial Caseload Statistics During 12-Month Period Ending March 31, 2015*, U.S. CTS., <http://www.uscourts.gov/file/9487/download> [<https://perma.cc/NP2L-8BY4>].

<sup>30</sup> Christina L. Boyd, *The Hierarchical Influence of Courts of Appeals on District Courts*, 44 J. LEGAL STUD. 113, 114 (2015); see also Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 848 (noting that lower federal courts, especially district courts, “perform the bulk of federal judicial work” and therefore should be the subject of empirical analysis).

<sup>31</sup> For cases decided prior to the late twentieth century, the extent and consistency with which they are included in Lexis and Westlaw databases is highly variable across states and across levels of court in the same state.

<sup>32</sup> VIRGINIA A. HETTINGER ET AL., *JUDGING ON A COLLEGIATE COURT* 89 (2006).

<sup>33</sup> See Table A-1. *Supreme Court of the United States (2009-2013)*, U.S. CTS., <http://www.uscourts.gov/file/14268/download> [<https://www.perma.cc/U7KT-H8JQ>] (providing data about the cases on the Supreme Court’s docket). There are roughly 9000 petitions for certiorari each year—just under 2000 paid petitions and approximately 7000 in forma pauperis. *Id.*

<sup>34</sup> The Supreme Court heard sixty-seven appeals from federal courts of appeals (which decided 54,000 cases during that same period). See *Circuit Scorecard*, SCOTUSBLOG, [http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB\\_scorecard\\_OT14.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_scorecard_OT14.pdf) [<https://perma.cc/48V8-9Y2M>]; Table B-1. *U.S. Courts of Appeals Federal Judicial Caseload Statistics During 12-Month Period Ending March 31, 2015*, *supra* note 29. Not surprisingly, relevant empirical studies find no evidence that fear of reversal drives appellate court decisionmaking. See DAVID E. KLEIN, *MAKING LAW IN THE UNITED STATES COURTS OF APPEALS* 126 (2002) (reporting empirical findings that there is “little evidence that anticipatory decision making occurs and essentially no evidence that it results from fear of reversal”); Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535, 557 (2011) (noting that “the handful of relevant empirical studies have failed to find evidence that fear of reversal drives lower court decisionmaking”). For additional discussion, see *infra* notes 79–80.

<sup>35</sup> As we show in Figure 1 *infra*, existing data on federal court treatment of Supreme Court precedent suggests increasing deference over time. With regard to state court practices, we did not independently

### A. *What's at Stake?*

To better see what is at stake in this inquiry, let us compare two hypothetical legal systems. In the first, lower court judges invariably follow precedents that appear to bear on the cases before them. When there are conflicting precedents, they cite and follow the precedent that they think is more closely related to the case at hand and ignore the other. In the second system, lower court judges routinely question the applicability of precedents and regularly distinguish the cases before them from potentially relevant precedents.

First consider the implications for individual cases. Judicial decisionmaking involves balancing the demands of justice in the individual case against the need for predictability in the law and uniformity in its application.<sup>36</sup> A decision that relies on precedent without taking adequate account of the specific circumstances of the case at hand may not pass basic tests of fairness. On the other hand, a decision that gives too much weight to specific facts about the events or litigants in the case risks injustice of another kind, where two actions that are identical in the most important respects are nevertheless treated differently under the law.<sup>37</sup>

At the level of the law writ large, the principal advantage of highly deferential lower court decisionmaking is predictability.<sup>38</sup> If behavior of a certain sort continually produces victories for plaintiffs complaining about that behavior, people will know not to engage in it. That said, this is a somewhat crude kind of predictability that might leave potential litigants unsure about whether other somewhat similar behavior is also legally risky. Lower courts may make outcomes more predictable. When lower courts explicitly consider and reject the application of precedents, they explain why they think the precedents do not fit. In doing so, they offer ways of understanding the logic behind those precedents. The more they do to clarify that logic, the more guidance they provide to lawyers and potential litigants.

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code state court decisionmaking, and there is no data set that speaks to state court treatment of higher court precedent. At the same time, our earlier study of the holding–dicta distinction suggests that state courts no longer adhere to the traditional common law model. See Klein & Devins, *supra* note 2, at 2042–43 (“[S]eeing a court disregard a significant statement from a higher court because it is dictum will literally be a once-in-a-lifetime experience.”). For additional discussion, see text accompanying note 87.

<sup>36</sup> For an incisive treatment of this subject, see generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992), which assesses the benefits of a legal system that focuses on justice in individual cases (standards) as compared to a system that provides *ex ante* instruction as to whether behavior is legal (rules).

<sup>37</sup> See Larry Alexander, “*With Me, It’s All er Nuthin*”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 534 (1999) (arguing that authoritative settlement solves coordination problems related to the uncertainty of knowing whether a legal ruling will apply in analogous cases).

<sup>38</sup> For this very reason, Larry Alexander and Fred Schauer argue that Supreme Court decisions should be deemed final and determinative in order to promote “stability.” See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1374, 1376–77 (1997) (stating that “an important . . . function of the law is the ability to settle authoritatively what is to be done”).

Perhaps more importantly, a high court's first attempt to address a problem might sweep too broadly or simply be mistaken.<sup>39</sup> Thoughtful pushback against the ruling from lower courts could prompt the high court to reexamine and improve it. Examples abound. In *MacPherson v. Buick Motor Co.*, the New York Court of Appeals embraced a foreseeability of harm standard in product liability cases, responding to lower court dissatisfaction with the then-existing "inherently dangerous" standard.<sup>40</sup> Specifically, lower courts would often find products to be inherently dangerous—so much so that it was impossible to discern the line separating "inherently dangerous" objects from objects that were part of "the ordinary intercourse of life."<sup>41</sup> In *MacPherson*, the Court of Appeals concluded both that the old rule was unworkable and that lower courts had established a foreseeability rule in its place.<sup>42</sup> *MacPherson* then embraced and formalized what had been happening in the lower courts.

Consider too how the U.S. Supreme Court responded in *Continental T.V., Inc. v. GTE Sylvania* to lower court resistance to an earlier ruling.<sup>43</sup> In that earlier ruling, *United States v. Arnold, Schwinn & Co.*, the Court had held that it was per se unreasonable under the Sherman Act "for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it."<sup>44</sup> In *Sylvania*, the Court described what ensued this way:

Since its announcement, *Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. The great weight of scholarly opinion has been critical of the decision, and a number of the federal courts confronted with analogous vertical restrictions have sought to limit its reach.<sup>45</sup>

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<sup>39</sup> This is why judicial minimalists argue that the Supreme Court should issue "narrow" and "shallow" decisions that allow political actors and lower courts to help shape the development of law through a dialogue with the U.S. Supreme Court. SUNSTEIN, *supra* note 17, at 121; *see also* Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1978 (1999) (book review) (concluding that Sunstein's "call for narrow and shallow decision-making is sound in critical respects").

<sup>40</sup> 111 N.E. 1050, 1054 (N.Y. 1916). *MacPherson* was written by then-New York Court of Appeals Judge Benjamin Cardozo; Cardozo is considered one of the great common law judges, and *MacPherson* is his most influential opinion. *See* RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 33 n.1 (1990); *see also* LEVI, *supra* note 9, at 24. For an excellent summary of the evolution of the *MacPherson* standard and the role of lower court decisionmaking in that evolution, *see* David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 852-57 (2007).

<sup>41</sup> Strauss, *supra* note 40, at 855. For a listing of lower court cases, *see id.* at 853-54.

<sup>42</sup> 111 N.E. at 1054. For discussion, *see* Strauss, *supra* note 40, at 855-56.

<sup>43</sup> 433 U.S. 36 (1977).

<sup>44</sup> 388 U.S. 365, 379 (1967).

<sup>45</sup> *Sylvania*, 433 U.S. at 47-48 (footnote omitted).

Rather than faulting the lower courts for their recalcitrance, the Court went on: “In our view, the experience of the past 10 years should be brought to bear on this subject of considerable commercial importance.”<sup>46</sup>

An examination of Shepard’s Citations between the time *Schwinn* was decided and 1976, the year before *Sylvania*, reveals that *Schwinn* was distinguished by lower courts more often than it was followed—thirty-five times versus twenty-three times. Among district courts specifically, it was distinguished nineteen times and followed sixteen times.

A similar pattern of lower court response and Supreme Court reexamination appears in an important area of Fourth Amendment law. In *United States v. Rabinowitz*, federal agents carrying a concededly valid arrest warrant but no search warrant arrested a printer at his office.<sup>47</sup> “[O]ver his objection [the agents] searched the desk, safe, and file cabinets in the office for about an hour and a half.”<sup>48</sup> They found forged stamps, and Rabinowitz moved to suppress the evidence on the grounds that the search incident to arrest was too far-reaching to be reasonable.<sup>49</sup> The Court upheld the search, pointing to some specific facts favoring admission of the evidence.<sup>50</sup> However, the Court also employed more sweeping language.<sup>51</sup> The Court stated, for instance, that the power to search an area following an arrest derived “not only from the acknowledged authority to search the person, but also from the longstanding practice of searching for other proofs of guilt within the control of the accused found upon arrest.”<sup>52</sup>

The courts of appeals appeared to be moderately comfortable with this broad reading of the arresters’ authority to search. According to Shepard’s Citations, they followed *Rabinowitz* thirteen times between 1950 and 1969, while distinguishing it five times. However, the district courts were notably resistant, distinguishing it seven times and following it only four times. The skeptical position won out in the end. The Supreme Court overruled *Rabinowitz* in 1969, holding that a search incident to arrest can extend only to “the area into which an arrestee might reach in order to grab a weapon or evidentiary items.”<sup>53</sup>

There is no way to know whether the lower courts’ resistance in any of these examples influenced the Supreme Court’s actions; perhaps the Court would have overruled the earlier decisions when it did even without prodding from the lower courts. Still, we have the Court’s own word that it paid attention to

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<sup>46</sup> *Id.* at 48-49.

<sup>47</sup> 339 U.S. 56, 58-59 (1950), overruled by *Chimel v. California*, 395 U.S. 752 (1969).

<sup>48</sup> *Id.* at 59.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 61.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Chimel v. California*, 395 U.S. 752, 763 (1969).

the lower courts' reactions to *Schwinn*.<sup>54</sup> And even if we did not, it would be hard to imagine a high court simply ignoring all feedback from lower courts.<sup>55</sup> Assuming that high courts take note of lower courts' feedback at least some of the time, critical responses to precedent at least give lower courts a chance to shape the path of the law, whereas acquiescence or even silent disapproval do not.

In a system where trial judges frequently assert their prerogative to exercise independent judgment by distinguishing higher court precedent or invoking the holding–dicta distinction to limit its scope, they can importantly influence the direction in which and the speed with which the law develops. This, of course, is quintessential common law judging—the law evolves incrementally, sacrificing something of both speed and predictability in the hope of resting decisions on more solid ground.<sup>56</sup> In contrast, when lower 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. In such a system, law moves at the speed and with the shape dictated by higher courts; more errors and greater overbreadth are tolerated as the price for greater immediate certainty and more hierarchical control.

The aim of this Article is to determine whether district courts adhere to the independent judgment or deference regimes and whether this has changed over time. We recognize at the outset that statements about precedents in

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<sup>54</sup> *Cont'l T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 47–48 (1977) (footnote omitted). *Garcia v. San Antonio Metropolitan Transit Authority*, a 1985 federalism case, is another example of the Supreme Court overruling one of its decisions in the face of lower court criticism. 469 U.S. 528, 531 (1985). Unlike the other cases examined in this Article, however, *Garcia* was not responding to lower court complaints that the earlier standard led to unjust results. The complaint, instead, was that the earlier standard was too difficult to apply faithfully. Specifically, *Garcia* overturned *National League of Cities v. Usery*, a 1976 decision holding that the Commerce Clause does not empower Congress to enforce federal standards against the states in “areas of traditional government functions.” *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976), overruled by *Garcia*, 469 U.S. at 540. But the meaning of “traditional government function” was elusive and subject to criticism for this very reason. This standard ultimately resulted in a patchwork of inconsistent lower court interpretations. In *Garcia*, the district court voiced what the Supreme Court dubbed a “common concern: ‘Despite the abundance of adjectives, identifying which particular state functions are immune remains difficult.’” 469 U.S. at 538 (quoting *San Antonio Metro. Transit Auth. v. Donovan*, 557 F. Supp. 445, 447 (W.D. Tex. 1983)). Recognizing, moreover, that no alternative standard “appear[ed] manageable,” the Court concluded that it was fruitless to think “that case-by-case development would lead to a workable standard.” *Id.* at 540, 543. For commentary on the unworkability of *Usery*, see Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623, 1633 (1994) and Linda Greenhouse, *Court Takes the Glow Off the 10th Amendment*, N.Y. TIMES, Mar. 13, 1983, at E9. For commentary on difficulties faced by federal agencies in interpreting *Usery*, see NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 66–69 (2004).

<sup>55</sup> See Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 915 (2014) (examining the role of lower court precedent in U.S. Supreme Court decisionmaking and observing that “[i]nvocations of support from the lower courts are not unusual, but neither are they routine”).

<sup>56</sup> For a general review of the origins and function of common law decisionmaking, see KYLE SCOTT, *DISMANTLING AMERICAN COMMON LAW* 1–14 (2007).

judicial opinions do not tell the whole story of how judges decide their cases. A judge who cites and follows several circuit court precedents might have ignored others that were inconvenient. By the same token, a judge's decision to distinguish a precedent is not necessarily a powerful act of autonomy; it could be that just about everyone would agree that the cited case is irrelevant to the one being decided. Nevertheless, what judges say about precedents in their opinions is of great importance. Judges who silently evade precedents they do not like can make individual cases come out the way they want. But through their silence, they forfeit much of their power to influence the development of the law. And while a judge's decision to distinguish a precedent might have no independent effect on the case outcome, the more often lower court judges decline to follow precedents from above, the more firmly they entrench a norm of independent judgment.

### B. *Data*

Our analyses of judges' treatments of precedents rely primarily on the coding in Shepard's Citations.<sup>57</sup> Beginning with 1932 and continuing with every tenth year until 2012, we randomly selected two hundred district court cases per year from all district court cases reported on Lexis, whether officially published or not.<sup>58</sup> Data come from each case's table of authorities, which indicates how each precedent cited in that case's opinion was treated. So, for instance, our analysis of cases from 1932 reveals how courts in 1932 treated precedents they cited—not how cases decided in 1932 were treated later.

The Shepard's service assigns a code to every case mentioned in an opinion. By far, the most common code is "Citing," indicating that the opinion in the case of interest mentioned another case but did not clearly apply it or engage in an analysis of its applicability. A few other codes, such as "Explaining," are also used for neutral treatments, though only when a precedent is discussed more fully. "Citing" and the other neutral codes provide no useful information for our purposes. Our question is how often

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<sup>57</sup> Like any coding endeavor, Shepard's Citations have limitations, some of which we address below. But they are also unusually well-established and successful. In careful analyses of their validity and reliability, James Spriggs and Thomas Hansford have demonstrated that Shepard's Citations have considerable value for scholars seeking to understand how courts respond to precedents. See THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* 46-50 (2006). See generally James F. Spriggs II & Thomas G. Hansford, *Measuring Legal Change: The Reliability and Validity of Shepard's Citations*, 53 POL. RES. Q. 327, 333-38 (2000). This is particularly true where, as here, researchers seek to make judgments about the judicial system as a whole rather than about individual cases.

<sup>58</sup> Lexis assigns each decision it reports a unique number in the format [Year] U.S. Dist. Lexis [Number]—for example, 2012 U.S. Dist. Lexis 46140. For our study, after identifying the set of available numbers for each year, we used a random number generator to choose two hundred of them.

judges refuse to follow a precedent that is arguably controlling. The neutral citation neither indicates that the precedent is arguably controlling nor tells us whether the judge thought it should be followed. Furthermore, including “Citing” in our analyses could produce seriously misleading results, for frequency of citation is a function of taste and practice, which change over time. In our data, district court judges cited an average of 0.8 court of appeals cases per opinion in 1932, 2.4 per opinion in 1982, and 6.8 per opinion in 2012. Many of the citations in later years are string citations. Including neutral citations in the baseline would cause us to underestimate contemporary district court judges’ willingness to choose resistance when it is an option. Therefore, we omit neutral citations from the analyses that follow.

There are two classes of citations included in our analyses. On the one hand are those coded as “Following” and flagged with a green symbol, indicating that the citing court treated the cited case as controlling precedent. On the other hand, there are Shepard’s codes that indicate at least some level of resistance to the application of a precedent. All such treatments are flagged with red or yellow symbols. Red-flagged treatments normally would be especially notable, as they indicate that the citing court refused to recognize the cited case as authoritative law. It turns out, though, that the few red-flagged treatments in our dataset are not meaningful. In each, the lower court noted that a precedent was no longer good law because it had been superseded by a statute or overruled by either the court that decided it or by a higher court. Although in such instances lower court judges refused to apply the precedents, they did not assert any independent authority to do so; they simply recognized that a higher authority had already nullified the precedent. Accordingly, we omit those cases from our analysis. In the end, then, all of the resisting treatments that we analyze are yellow-flagged. Those that appear in our dataset are defined by Shepard’s as follows:

- *Criticizing*: “The citing opinion disagrees with the reasoning/result of the [cited] case . . . , although the citing court may not have the authority to materially affect its precedential value.”<sup>59</sup>
- *Distinguishing*: “The citing case differs from the [cited] case . . . , either involving dissimilar facts or requiring a different application of the law.”<sup>60</sup>
- *Limiting*: “[T]he citing opinion restricts the application of the [cited] case . . . , finding its reasoning applies only in specific, limited circumstances.”<sup>61</sup>

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<sup>59</sup> See *Alphabetical List of Shepard’s® Editorial Phrases*, LEXISNEXIS, <https://web.lexis.com/help/research/shepeditorialmappings.htm> [<https://perma.cc/F2DU-PZAY>].

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

- *Questioning*: “The citing opinion questions the continuing validity or precedential value of the [cited] case . . . because of intervening circumstances, including judicial or legislative overruling.”<sup>62</sup>

### C. *Preliminary Analysis*

Overall, there are only 116 instances in our dataset of district court judges resisting the application of precedents from their courts of appeals.<sup>63</sup> The vast majority of these, 100, distinguish the precedent. Of the remainder, thirteen are coded as questioning and one each as not following, limiting, and criticizing. There are 177 instances of district court judges distinguishing cases from the Supreme Court, along with seventeen questioning, five criticizing, and two limiting.

To judge whether those numbers are large or small, we need to view them against a denominator, the total set of cases that district court judges treated as arguably controlling (that is, the sum of cases in the yellow-symbol categories listed above plus those cases coded by Shepard’s as “followed” and flagged with a green symbol). Let us begin with the two most recent years in our dataset, 2002 and 2012. One hundred eighty times in those two years, district courts engaged in substantive discussions of the force and implications of Supreme Court decisions. On one of those occasions, the district court judge “criticized” the Supreme Court decision, according to Shepard’s. On another occasion, the precedent was “questioned,” and twenty-eight times the precedent was distinguished. On the other 150 occasions (83% of the total), the district court judge followed the Supreme Court precedent. Over the same two years, there were 291 substantive non-neutral treatments of cases from the district court judge’s controlling court of appeals. Of these, 268 followed precedent, twenty-two distinguished it, and one questioned the precedent. Thus, in 8% of the total treatments of circuit court cases, the district court judge resisted applying the precedent.

A system in which judges raised doubts about most of the precedents they confronted would be woefully inefficient. And it would be strange to see since there is no good reason to expect judges to disagree so often with what other judges did before them. So even in a system where lower court judges acted with a great deal of autonomy, there would be nothing surprising about seeing resistance to precedents in only a minority of cases. That said, these results seem to indicate a notably high degree of deference in district court judges’ decisions, especially vis-à-vis precedents from their circuit courts.

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<sup>62</sup> *Id.*

<sup>63</sup> In five instances, Shepard’s coded a case in the table of authorities as both distinguished and followed. For our purposes, a case should only be regarded as distinguished if the lower court refuses to treat it as authoritative. Therefore, after reading the cases to make sure that the higher court precedent was expressly followed, we recoded those as followed, not distinguished.

We can get a better sense of how notable these results are by tracing practices over time and determining whether they represent a change from past practices. As shown in Table 1, the results do, in fact, show quite a dramatic change. In the first part of our period, 1932 to 1972, district court judges typically resisted precedent in about *half* of all substantive treatments. (As in 2002 and 2012, the vast majority of the resisting treatments were distinguishing: 122 out of 135 for Supreme Court cases; 45 out of 55 for court of appeals cases.) By 1982 there was a clear shift toward even greater deference, a trend that accelerated markedly after 1992.

**Table 1: Federal District Court Treatments of Cited Precedents from Their Circuit Courts of Appeals and from the Supreme Court**

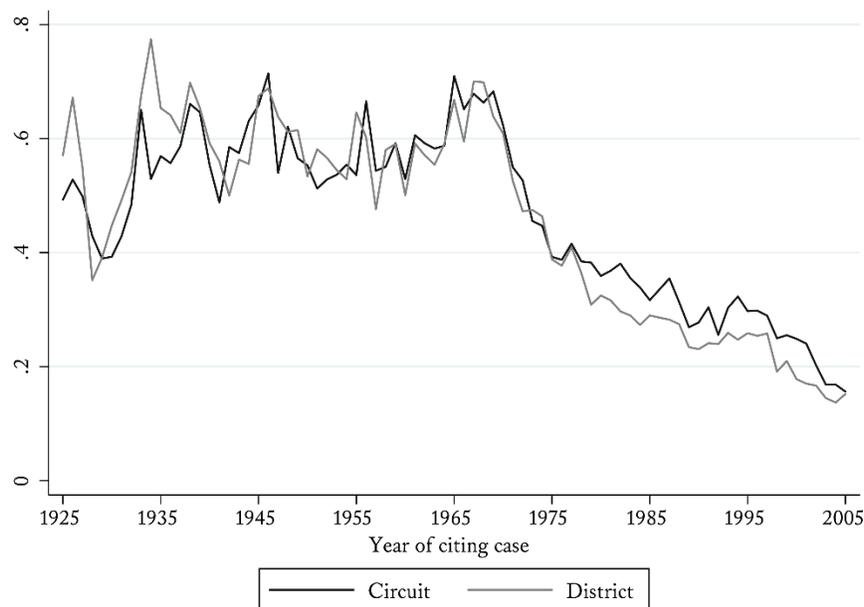
Year	Resisting Circuit	Following Circuit	% Resisting Circuit	Resisting Supreme Court	Following Supreme Court	% Resisting Supreme Court
1932	8	10	44	35	23	60
1942	8	4	67	24	17	59
1952	9	8	53	18	15	55
1962	13	6	68	25	24	51
1972	17	13	57	32	37	46
1982	14	23	38	18	40	31
1992	21	56	27	19	67	22
2002	16	110	13	23	65	26
2012	10	157	6	7	85	8
All Years	116	387	23	201	373	35

Note that this is not a matter of a change in the raw numbers of resisting treatments; district courts did not distinguish or question many more higher court decisions in earlier years. What changed is how often district courts relied on higher court decisions, especially from circuit courts, for guidance. In the earlier years, district court judges made their own decisions without much reference to higher courts, and when they did mention precedents from above, they were as likely to resist them as to go along with them. Opinions from more recent years give a much stronger impression of subordinates looking for direction from their superiors.

We will explore explanations for this trend in the next Part. First, though, we turn briefly to two other sources of information about citations as a means of validating and refining the emerging picture. James Spriggs, with others, has

collected data on citations to every Supreme Court decision from 1791 to 2005.<sup>64</sup> Figure 1 displays annual citation data for both district courts and circuit courts from 1925 through 2005—specifically, resisting citations as a proportion of all citations either resisting or following. The pattern—steady and rather high rates of resisting treatments in early years, followed by a steep decline starting in the 1970s—is virtually identical for circuit court and district court citations to Supreme Court decisions. Correspondingly, potential causes of this decline discussed in Section III.A apply with equal force to courts of appeals and district courts.<sup>65</sup> This enhances our confidence that what we are seeing is a systemic development.

**Figure 1: Proportion of Resisting Citations to Supreme Court Among All Resisting or Following Citations, by Year and Level of Court**



<sup>64</sup> See Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 520; Frank B. Cross & James F. Spriggs II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 EMORY L.J. 407, 430 (2010); James H. Fowler et al., *Network Analysis and the Law: Measuring the Legal Importance of Supreme Court Precedents*, 15 POL. ANALYSIS 324, 326 (2007).

<sup>65</sup> These causes include changes in legal research, growing caseloads, increasing reliance on law clerks, the Supreme Court's assertion of its status as law declarer, and the rise of the administrative state. See also *infra* notes 104–107 (noting the rise of federal court of appeals law clerks) and 109–111 (describing the rise of federal court of appeals docket).

The second additional source comes from the West reporting service. (Shepard's Citations are found in the Lexis reporting service.) West includes its own codes for treatments of precedents. On the one hand, unlike Shepard's codes, these do not indicate whether a precedent was treated positively or negatively. On the other hand, they provide more information about how extensively a precedent was discussed. If Shepard's Citations and our reading of the patterns they depict are accurate, we should find evidence in West's codes that, over time, district court judges have paid more serious attention to decisions from higher courts, especially their courts of appeals.

West's KeyCite feature includes four codes for "[d]epth of treatment," as follows:<sup>66</sup>

- *Examined (four stars)*: The citing case contains an "[e]xtended discussion of the cited case, usually more than a printed page of text."<sup>67</sup>
- *Discussed (three stars)*: The citing case contains a "[s]ubstantial discussion of the cited case, usually more than a paragraph but less than a printed page."<sup>68</sup>
- *Cited (two stars)*: The citing case contains "[s]ome discussion of the cited case, usually less than a paragraph."<sup>69</sup>
- *Mentioned (one star)*: The citing case contains "[a] brief reference to the cited case, usually in a string citation."<sup>70</sup>

Because citations coded as "mentioned" can be utterly devoid of substance, we disregard them here. Figure 2 displays, by year and by cited court, the number of decisions cited, discussed, or examined per hundred citing decisions. So, for instance, we see that in 1932, about two hundred Supreme Court cases were cited with at least some discussion per 100 district court opinions (i.e., about two per opinion). What jumps out from the figure is the huge—roughly tenfold—growth in substantive references to a district court's governing court of appeals from 1932 to 2012. The number of references to "other," meaning other federal circuits, state courts, or the district court itself, is also striking. In stark contrast to citations of the district court's own circuit, these are present in large numbers throughout the entire time period. They even outnumber citations to U.S. Supreme Court opinions by quite a bit.

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<sup>66</sup> See *KeyCite Depth of Treatment Stars*, WESTLAW, [http://www2.westlaw.com/CustomerSupport/Knowledgebase/Technical/WestlawCreditCard/WebHelp/KeyCite\\_Depth\\_of\\_Treatment\\_Stars.htm](http://www2.westlaw.com/CustomerSupport/Knowledgebase/Technical/WestlawCreditCard/WebHelp/KeyCite_Depth_of_Treatment_Stars.htm) [<https://perma.cc/F767-5WT2>].

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

**Figure 2: Number of Precedents Cited, Discussed, or Examined per 100 District Court Opinions, by Precedent-Setting Court**

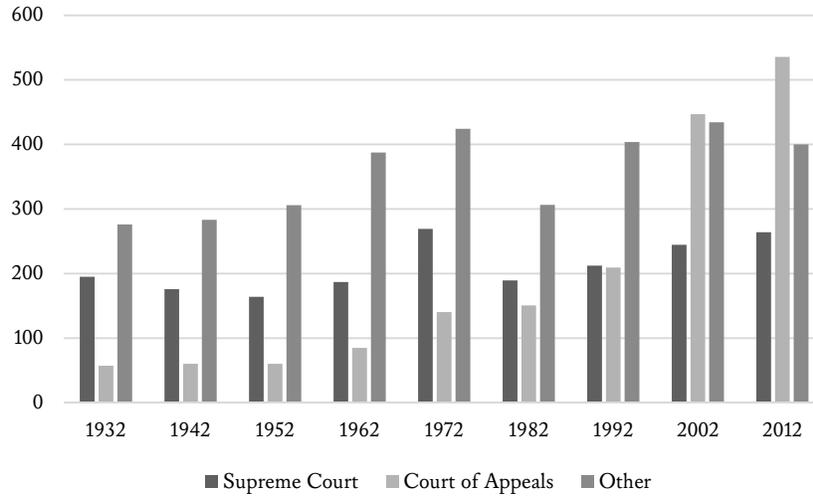
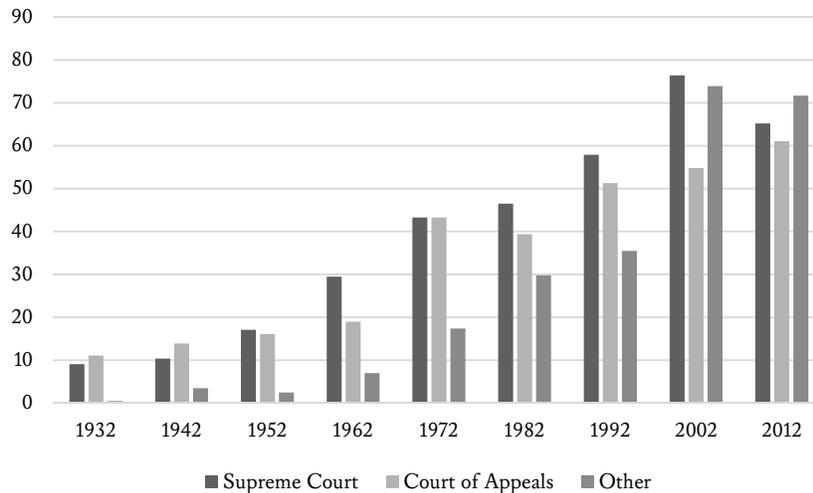


Figure 3 omits the “cited” category, narrowing the focus to precedents that received substantial enough treatment to be coded as “discussed” or “examined.” From 1932 to 1952, district courts appeared to pay virtually no attention to the decisions of their circuits; this neglect is especially apparent in comparison with the treatment of other courts. But by the end of the eighty-year period, the district’s circuit court has become the most important source of precedent.

**Figure 3: Number of Precedents Discussed or Examined per 100 District Court Opinions, by Precedent-Setting Court**



#### D. *How Real Is the Change?*

Taken together, the data from Shepard's and West's KeyCite suggest basic changes in how district courts treat precedent, especially from their own circuits. But perhaps judges today approach higher court precedents similar to the way they did in the past, and it is something about the cases or the situations judges find themselves in that has changed. Investigating this will require more complex analyses that control for other variables. We turn to those now, focusing on citations to circuit courts where the change in behavior has been most dramatic.

The first variable we control for is the *age of the precedent* at the time it was cited. Because of changes in social and economic conditions, values and beliefs, and other aspects of the law itself, precedents typically depreciate in value over time.<sup>71</sup> This depreciation is reflected mainly in smaller numbers of both positive and negative citations as a precedent ages.<sup>72</sup> Still, it seems plausible that among cited cases, depreciation might result in more negative treatments of older precedents. The number of cases decided annually by courts of appeals has grown tremendously over the last several decades.<sup>73</sup> When courts of appeals decide more cases, the stock of recent precedents grows, and the average age of available precedents declines. For these reasons, greater deference over time—to circuit court decisions, at least—might simply reflect engagement with more youthful precedents.

The second control variable is *type of case*. Criminal cases are often thought to be simpler on average than civil cases. Habeas corpus cases might be expected to be simpler still because the cost-benefit analysis for desperate prisoners militates strongly in favor of bringing petitions whenever possible, especially when the prisoners do not have to pay for counsel. In easy cases, judges and clerks may see less need for careful analysis of precedent and may content themselves with a few cursory supporting citations. Therefore, if criminal or, especially, habeas cases have come to make up a larger proportion of the total over time, that trend could help explain more deferential citation patterns.<sup>74</sup>

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<sup>71</sup> William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 263 (1976).

<sup>72</sup> HANSFORD & SPRIGGS II, *supra* note 57, at 53.

<sup>73</sup> From 1932 to 1962, there was modest growth in federal courts of appeals dockets (2950 cases to 4823 cases). *U.S. Court of Appeals Caseload, 1892–2015*, FED. JUD. CTR., [http://www.fjc.gov/history/caseload.nsf/page/caseloads\\_courts\\_of\\_appeals](http://www.fjc.gov/history/caseload.nsf/page/caseloads_courts_of_appeals) [<https://perma.cc/J3WE-5USR>]. In 1962, 4823 cases were commenced in federal courts of appeals; in 1972, 14,535 cases were commenced; in 1982, 27,946 cases were commenced; in 1992, 47,013 cases were commenced; in 2002, 57,555 cases were commenced; and in 2012, 57,501 cases were commenced. *See id.*

<sup>74</sup> To test for this possibility, we include variables indicating whether the case was a *criminal* prosecution or a *habeas* petition, with civil cases as the omitted baseline category.

Assuming that judges are more likely to question precedents that they disagree with and that the disagreement is, in part, a function of the presiding judges' ideologies, then perhaps increasing deference to higher court decisions can be explained by decreasing ideological distance between precedent-setting courts and the judges considering those precedents. So, we include a control—albeit an imperfect one—for *ideological distance* between the deciding judge and precedent-setting judges.<sup>75</sup> Our measure is the proportion of judges in the majority on the precedent-setting panel who were appointed by a President of a different party from the President who appointed the district court judge.<sup>76</sup>

Our final control variable is district court *workload*. District courts now handle more cases than they used to, and critically evaluating a precedent often takes more time than simply noting and following it.<sup>77</sup> Therefore, it might be that changes in practice reflect narrower time constraints. Note that even if that were true, this would not mean that our findings of change are less real or consequential. However, it would mean that the older approach might still be alive in courts where caseloads are not so heavy and might reemerge in other courts if caseloads were to decline.<sup>78</sup>

Before turning to the analyses, we note one variable that we do not control for here—circuit court caseloads. Although these caseloads have grown, they cannot explain the citation patterns we have described. One important reason why judges might defer to precedents is to avoid being reversed by a higher court.<sup>79</sup> But reversing a district court requires more effort and attention from

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<sup>75</sup> A 2016 study (that one of us co-authored) finds that judges are likely to reach consensus on disputes that divide the general public and law students. Dan M. Kahan et al., “Ideology” or “Situation Sense”? An Experimental Investigation of Motivated Reasoning and Professional Judgment, 164 U. PA. L. REV. 349, 410-11 (2016). The study, based on survey data of 253 judges, suggests that ideology is not a driver of lower court judicial decisionmaking. *See id.* at 349.

<sup>76</sup> For instance, if the district court judge analyzing a precedent was appointed by a Democratic President, the precedential case was unanimously decided, and two of the three circuit court judges participating in it were Republicans, the ideological distance score for that precedent treatment would be 0.67. We would prefer to employ Judicial Common Space scores, which contain more nuanced information on ideology. *See generally* Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007). Unfortunately, these are not available for the entire period under study here.

<sup>77</sup> For additional discussion of the implications of district court workload to our study, see *infra* subsection III.A.3, which notes an inverse relationship between district court workload and the willingness of district court judges to distinguish higher court precedent.

<sup>78</sup> Philip Habel and Kevin Scott make a compelling case for workload measures that incorporate information about the types of cases being decided and the number of senior judges on a court who hear cases. *See generally* Philip Habel & Kevin Scott, *New Measures of Judges' Caseload for the Federal District Courts, 1964-2012*, 2 J.L. & CTS. 153 (2014). Unfortunately, the dataset that they have made publicly available covers only a portion of the period studied here. Our measure, total cases commenced per active judge, is the next best available. Even this measure is not available for 1932; therefore, we present analyses including this measure but excluding 1932 cases, and including all years but excluding this measure.

<sup>79</sup> Fear of reversal is often mentioned as an important reason lower courts adhere to higher court rulings, including the refusal to invoke the holding–dicta distinction. *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 77-78

a circuit court than affirming does, so district court judges should, if anything, feel safer and see less need to defer as circuit courts' workloads grow.<sup>80</sup> The fact that deference to circuit court precedents has grown at the same time that circuit judges have become busier only deepens the mystery.

Table 2: Logit Analysis of District Court's Choice to Follow (0) or Resist (1) Precedent<sup>81</sup>

Variable	Coeff.	St. Error	Sig.	Coeff.	St. Error	Sig.
Year Decided	-.042	.006	<.001	-.053	.009	<.001
Precedent Age	.000	.016	.99	.012	.015	.44
Criminal Case	-1.10	.558	.05	-1.22	.567	.03
Habeas Case	.439	.567	.44	.252	.692	.72
Ideological Distance	-.091	.372	.81	-.040	.381	.92
Court Workload				-.001	.001	.24
Constant	83	13		104	17	
			N = 503			N = 482

(1994) (relying on “anecdotal evidence” to conclude that lower court judges fear reversal on appeal). *But see* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 398 (2007) (“[I]t is unclear to what extent fear of reversal motivates district courts to comply with Supreme Court precedent.”). For reasons detailed in our study of the holding–dicta distinction and in other writings of ours, we question this “fear of reversal” rationale. Klein & Devins, *supra* note 2, at 2044–47. *See generally* David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 L. & SOC'Y REV. 579 (2003).

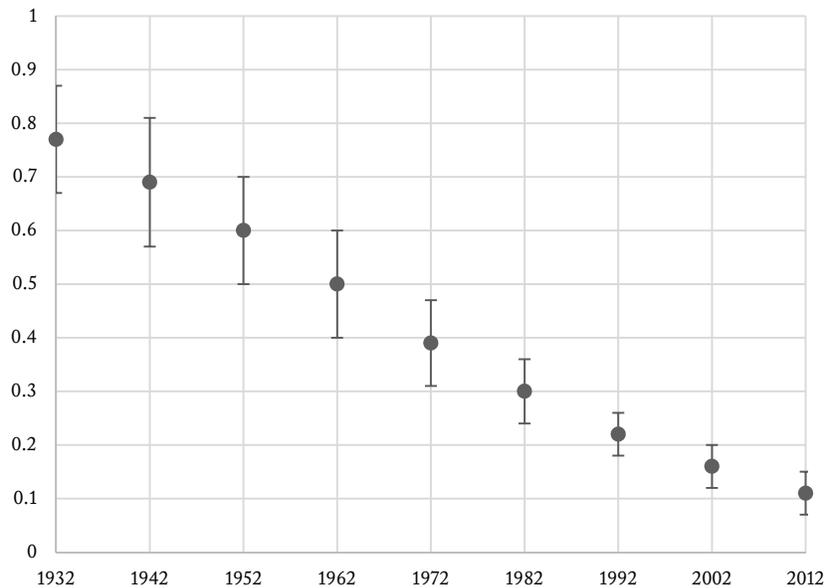
<sup>80</sup> Our 2013 study of dicta revealed a similar phenomenon: lower courts were less willing to call out higher courts for nonbinding dicta at a time when there was less reason for lower courts to fear higher court reversal. *See* Klein & Devins, *supra* note 2, at 2044–47.

<sup>81</sup> The left-hand model includes cases from all years; the right-hand model does not include cases from 1932. All standard errors are robust, clustered by deciding judge.

Our analyses explain the outcome of whether a precedent was followed (0) or resisted (1), as defined earlier.<sup>82</sup> The standard method for such an analysis is logistic regression, or logit. Table 2 displays the results from two analyses of district courts' treatments of precedent. The left-hand column includes data from all of our years but only the first four control variables. The right-hand column includes all five control variables but not cases from 1932 (recall that we could not calculate workload statistics for 1932).<sup>83</sup>

The key results are for the "Year Decided." In both models, they indicate that district court judges have become markedly less likely to resist precedent over time, even once we take into account characteristics of the judges and the cases they are deciding. Figure 4 displays, for each year, the estimated probability that a typical civil precedent will be resisted rather than followed. It shows, for instance, that the estimated probability of a resisting treatment declines from 0.50 for a typical case decided in 1962 to 0.15 for a typical case decided in 2002.

**Figure 4: Predicted Probability that Cited Case Will Be Resisted, Given that It Is Either Resisted or Followed, by Year of Citing Case<sup>84</sup>**



<sup>82</sup> See *supra* Section II.B.

<sup>83</sup> Some of the judges in our dataset decided multiple cases. To keep that data from exerting an undue influence on the results, we employ robust standard errors clustering on judges.

<sup>84</sup> From left-hand model in Table 2. Criminal and Habeas are set to zero. Precedent Age and Ideological Distance are set to their medians. Lines represent 95% confidence intervals.

One change over time that we have not yet considered is the increasing frequency with which district courts issue “unpublished” opinions. These opinions are fully available on Lexis and Westlaw but are not submitted to the Federal Supplement, the official case law reporter for the district courts. Since publication is often reserved for cases that present more important or more legally complicated issues, it could be that citation practices differ significantly between published and unpublished cases. If so, that would complicate the inferences to be drawn from our study.

To test for this possibility, we determined whether each opinion from the three most recent years (1992, 2002, and 2012) was published in the Federal Supplement or not.<sup>85</sup> We then re-ran the full analysis from the right-hand side of Table 2 and this time included a variable indicating whether the opinion was published or unpublished. The new variable had no effect on the treatment of precedent (coefficient = 0.04; standard error = 0.54;  $p > 0.93$ ). The greater deference apparent in district court judges’ opinions is not tied to whether those opinions are published or unpublished.

Our results yield compelling evidence that something has changed in the way federal courts handle precedents from higher courts.<sup>86</sup> We also anticipate that state practices have changed, for our earlier study of the holding–dicta distinction suggests no differences between state and federal practices. State courts only invoke the holding–dicta distinction to reach results at odds with higher court dicta in 1 in 4000 cases—numbers that match federal court practices.<sup>87</sup> Moreover, our Part III discussion of the causes of changing district court practices applies to state courts as well as federal district courts.<sup>88</sup> At the

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<sup>85</sup> One hundred and thirty-four of the opinions in those years were published, and those cases yielded 140 citations either following or resisting circuit court precedents, so there are plenty of cases for comparison.

<sup>86</sup> We speak here of both federal district and court of appeals judges. While our study focuses on district judges, data on federal court of appeals citations of U.S. Supreme Court precedents also highlights increasing deference over time. *See supra* Figure 1. At the same time, we recognize that our discussion is one of aggregate trends and that some lower court judges—especially influential court of appeals judges—may continue to make use of common law methodology. At the same time, we recognize that our discussion is one of aggregate trends and that some lower court judges may continue to make use of common law methodology. One example may be Seventh Circuit Judge Richard Posner. According to his 1992–1993 law clerk Dan Klerman, Posner “told his clerks that the adverse precedents we thought we found were not binding on him, because he could distinguish the facts and ignore the adverse dicta on which we relied.” Email from Daniel M. Klerman to Neal E. Devins (Feb. 26, 2016, 8:47 PM) (on file with authors).

<sup>87</sup> Klein & Devins, *supra* note 2, at 2041.

<sup>88</sup> Most notably, changes in legal research are pervasive and state court judges both hear more cases and increasingly rely on law clerks. *See* LYNN LANGTON & THOMAS H. COHEN, U.S. DEPT’ OF JUSTICE, STATE COURT ORGANIZATION, 1987–2004, at 2 (2007), <http://www.bjs.gov/content/pub/pdf/sco8704.pdf> [<https://perma.cc/7LDC-7HHE>] (observing nationwide increases in state courts’ caseloads and hiring of law clerks); *see also* Thomas E. Baker, *Applied Freakonomics: Explaining*

same time, we readily concede that one limitation of our study is that our sample is limited to cases in federal courts. State courts, being separately constituted and having different environments, may not be quite as deferential to the U.S. Supreme Court as are federal courts.<sup>89</sup>

#### E. *The Death of Common Law Judging?*

Our study presents compelling evidence of change in the treatment of precedent by federal court judges. At the same time, changes in the treatment of precedent do not necessarily evidence a fundamental change in judges' understanding of their roles. As we will explain in Part III, increasingly deferential opinions could be, in part, a function of greater reliance on clerks and changing legal research practices.<sup>90</sup> If that is true, then it might not be that district court judges care quite as much about higher courts as these findings suggest. That said, the findings of our study are so stark that we strongly suspect that judges' role orientations have changed in a serious way.

More to the point, these findings are significant whether or not they speak decisively to the question of changes in the judicial role. Whether district court judges actively engage in or simply acquiesce in contemporary practices, those practices matter. Judges' opinions, as the only formal explanations of their decisionmaking, are the primary source of signals to other participants in the legal system about the approach district court judges are likely to take in future cases. The message those opinions are sending is, increasingly, that when it comes to precedent, our job is to find guiding language from higher courts, interpret it, and follow it—not to identify a set of sufficiently related decisions and tease out the legal principles underlying them. Capable attorneys are likely aware of those signals and may well structure their briefs and arguments accordingly, with the likely result that their actions—giving greater prominence to higher courts' language—will reinforce the practices of the district courts.

Our earlier study of the holding–dicta distinction tells a similar tale. With federal and state courts both refusing to rule against higher court dicta, lawyers have no incentive to call on lower courts to ignore higher court dicta. “For most lawyers,” as we noted in our study, “seeing a court disregard a

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*the “Crisis of Volume,”* 8 J. APP. PRAC. & PROCESS 101, 109 (2006) (explaining that the increase of law clerks for federal circuit court judges “increase[d] the appellate capacity of [those] courts”).

<sup>89</sup> See Sara C. Benesh & Wendy L. Martinek, *Context and Compliance: A Comparison of State Supreme Courts and the Circuits*, 93 MARQ. L. REV. 795, 800-01 (2009) (noting that state supreme courts “may be inclined to separate themselves from the federal system, thereby strengthening their position as major players in their respective state governments”). And naturally, our results do not allow for any inferences about how state trial courts treat the precedents of state intermediate and high courts.

<sup>90</sup> See *infra* subsections III.A.1–2.

significant statement from a higher court because it is dictum will literally be a once-in-a-lifetime experience.”<sup>91</sup> Correspondingly, higher courts can issue sweeping rulings that address questions not immediately before them, knowing that lower courts will honor those statements and not treat them as nonbinding dicta.

The combined lesson of our two studies is that, whether or not the deference evident in lower court judges’ opinions truly reflects their view of their place in the system, it limits their input into the law. In earlier days, when district court judges carefully evaluated a small set of higher court precedents and were not reluctant to argue that a precedent should not govern the present case, the distinctions and arguments they made directly shaped the law in the short-term and had the potential to influence its direction even in the long-term. In today’s typical opinion, where the primary function of citation is to identify guiding or supporting texts, the district court judge stands little chance of making an imprint on the law. Likewise, the refusal to invoke the holding–dicta distinction limits the ability of lower courts to limit the scope of higher court rulings and thereby shape the law.

### III. CAUSES AND RAMIFICATIONS OF THE DECLINE IN COMMON LAW JUDGING

Having found empirical evidence that traditional common law judging is on the wane, we will now explore the causes and ramifications of this fundamental change in judicial practices. Our aim is not to defend or attack common law judging. Many have debated whether a vertical hierarchical system or a horizontal one, where lower courts reshape the law by distinguishing higher court cases or deeming language in those cases nonbinding dicta, makes better legal policy. We will note some of those arguments when we identify the consequences of the shift.<sup>92</sup> To start, we explore how the decline of common law judging tracks pervasive and seemingly permanent changes to our legal system, suggesting that the emerging style of judging we described may prove an enduring part of our legal landscape.

#### A. Causes

The changing practices of lower court judges and the related changes in the dynamic between lower and higher court judges are almost certainly tied to developments in the larger legal world. We describe five such developments: changes to legal research, increasing reliance of judges on law clerks, the growing docket of lower courts, the advent of the administrative

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<sup>91</sup> Klein & Devins, *supra* note 2, at 2042.

<sup>92</sup> See *infra* Section III.B.

state and related rise of statutes, and efforts by the U.S. Supreme Court to perpetuate the judicial hierarchy model. While it is unclear how much each of these phenomena has contributed to the decline of common law judging individually, we feel certain that as a group they have played a large role in the shift towards hierarchy and away from common law decisionmaking.

### 1. Legal Research

Today's lawyers are trained to do legal research by looking at keywords in large databases. The result is that lawyers spend far less time reading cases, and there is far less awareness of whether a case is truly governed by a higher court precedent. As Judith Stinson points out, lawyers emphasize "words over concepts"<sup>93</sup>:

Holdings are rarely presented in neatly packaged statements. To determine the holding of a case, the reader must analyze the facts, issues, rationales, and result of that case. In contrast to the difficult task of determining a case's holding, it is often easy to locate language in an opinion that, on its face, supports a particular position, even when the case itself does not stand for that proposition.<sup>94</sup>

Electronic search services have made it even easier to search by language and less necessary to employ topically organized digests or Shepard's to identify related cases. Electronic researchers "access a far greater number of cases on a wider array of topics" with the result that "fewer people read full cases," understand precedents' context in legal principles, are able to distinguish earlier cases, or discern holding from dicta.<sup>95</sup> "Without an understanding of how the source fits into the broad context of legal analysis, the researcher is likely to focus more on the factual content of the information."<sup>96</sup> The logical result is what Peter Tiersma calls a "shift from legal reasoning to close reading,"<sup>97</sup> an increased emphasis on finding and interpreting directive language from higher courts rather than analyzing and seeking to uncover the logic behind their actions.

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<sup>93</sup> Stinson, *supra* note 24, at 253.

<sup>94</sup> *Id.* at 222 (footnote omitted).

<sup>95</sup> Larsen, *supra* note 22, at 74-76.

<sup>96</sup> Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 935 (2011).

<sup>97</sup> Tiersma, *supra* note 1, at 1189.

## 2. Judges' Reliance on Law Clerks

Judges increasingly rely on law clerks to write legal opinions.<sup>98</sup> Cases deemed “nonprecedential” are often authored entirely by law clerks, and a law clerk may “insert a quotation from some precedential opinion that supports his or her judge’s argument without reading the entire opinion or considering its context.”<sup>99</sup> It is widely thought that judges’ reliance on law clerks to write opinions has grown as the ratio of clerks to judges increases.<sup>100</sup> Indeed, studies have found that the rise of law clerks has resulted in a dramatic upswing in the number of cited cases in judicial opinions. For example, the average number of citations in Supreme Court opinions grew from 9.2 to 12.9 after the Justices employed four (rather than two) law clerks.<sup>101</sup>

Law clerks, of course, tend to be fresh out of law school, and most are twenty-six to thirty years old.<sup>102</sup> Whether because of training or because they lack confidence, law clerks may feel a greater compulsion to find support in opinions from higher courts and may be more reluctant to challenge those opinions than judges would. The fact that clerks have had a larger hand in writing more recent opinions is almost surely one reason that the opinions exhibit more deference.

It is telling that the rise of law clerks corresponds to the rise of deference in lower court opinions. District court judges were not even authorized to hire clerks until 1936, and universal access to them did not come for several more decades.<sup>103</sup> “Since 1960, the approximate beginning of the ‘caseload explosion’ in the nation’s federal courts, the number of law clerks has increased at what some believe is an alarming rate.”<sup>104</sup> Today, federal district court judges typically hire at least two clerks, court of appeals judges three clerks, and Supreme Court Justices four clerks.<sup>105</sup> In contrast, before 1948, a district court judge could only hire one clerk and the number of clerks was “strictly

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<sup>98</sup> See Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 665 (2015) (noting that “textual analysis, statements by judges, and even opinions themselves” reveal the role clerks play (footnotes omitted)); Todd C. Peppers et al., *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 ALB. L. REV. 623, 635-36 (2008) (noting that “97% of the [federal district court judge] respondents stated that their law clerks review the relevant briefs and draft memoranda and orders regarding dispositive motions”); Albert Yoon, *Law Clerks and the Institutional Design of the Federal Judiciary*, 98 MARQ. L. REV. 131, 141-42 (2014) (citing studies showing that “law clerks are playing an increasingly larger role in the opinion-writing process”).

<sup>99</sup> See Masur & Ouellette, *supra* note 98, at 665-66.

<sup>100</sup> See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 141 (1996).

<sup>101</sup> Cross et al., *supra* note 64, at 539-40.

<sup>102</sup> Yoon, *supra* note 98, at 141.

<sup>103</sup> Peppers et al., *supra* note 98, at 626-27.

<sup>104</sup> J. Daniel Mahoney, *Foreword: Law Clerks: For Better or for Worse?*, 54 BROOK. L. REV. 321, 326 (1988) (footnote omitted).

<sup>105</sup> *Id.*

limited.”<sup>106</sup> By 2007, there were 2075 full-time law clerks at the federal district court level.<sup>107</sup>

### 3. Explosion of Lower Court Docket

The rise of the law clerk as junior varsity judge is closely linked to dramatic increases in the number of cases lower courts now decide. “Over the years, the clerk-author has been accepted as somewhat of a necessary band-aid for an overworked judiciary. Echoing throughout the chambers of our courts are the cries and moans of docket strain.”<sup>108</sup> Between 1970 and 1977, for example, there was a 35.2% increase in cases filed in federal court.<sup>109</sup> For federal district courts, there have been dramatic increases in the number of cases, number of complex cases, and number of trials lasting over 30 days.<sup>110</sup> Federal Judicial Center data reveals that there were 26,326 civil cases filed in the federal district courts in 1932, increasing to 35,548 in 1952, 69,444 in 1972, 167,909 in 1992, 220,844 in 2002, and 230,750 in 2012. In other words, almost nine times as many cases were filed in 2012 as were filed in 1932.<sup>111</sup> Making matters worse, the number of judgeships has not substantially increased, and there is little political will to markedly overhaul the federal judiciary.<sup>112</sup> Lower court judges, instead, must decide more and more cases every year.

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<sup>106</sup> *Id.* at 325-26. The growth of law clerks at the federal courts of appeals is equally striking. In the 1940s and 1950s, court of appeals judges “could only hire a single law clerk per chambers, [but] the number rose to two in 1969 and three in 1979. At present, courts of appeals judges are authorized to hire four law clerks per chambers (if they forgo a second secretarial position), and these staff assistants are supplemented by approximately 500 staff attorneys spread across the federal appellate courts.” Todd C. Peppers et al., *Surgeons or Scribes? The Role of United States Court of Appeals Law Clerks in Appellate Triage*, 98 MARQ. L. REV. 313, 315-16 (2014) (footnotes omitted). For information on the rise of law clerks at the state level, see *supra* note 88.

<sup>107</sup> Peppers et al., *supra* note 98, at 628.

<sup>108</sup> Nadine J. Wichern, Comment, *A Court of Clerks, Not of Men: Serving Justice in the Media Age*, 49 DEPAUL L. REV. 621, 649 (1999).

<sup>109</sup> Marjorie Lakin & Ellen Perkins, Comment, *Realigning the Federal Court Caseload*, 12 LOY. L.A. L. REV. 1001, 1002 n.5 (1979).

<sup>110</sup> See Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 770 & n.1 (1981) (explaining that federal district court filings more than doubled between 1968 and 1980). For federal courts of appeals, there was an 82.4% increase in filings between 1986 and 2004. Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1440 (2009). One study found that between 1960 and 2010, the circuit courts' caseload increased by 1436%. WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURT OF APPEALS IN CRISIS* 3 (2013). For information on state court docket growth, see *supra* note 88.

<sup>111</sup> See *History of the Federal Judiciary*, FED. JUD. CTR., [http://www.fjc.gov/history/caseload.nsf/page/caseloads\\_private\\_civil](http://www.fjc.gov/history/caseload.nsf/page/caseloads_private_civil) [https://perma.cc/D52T-EHM2]; see also Yoon, *supra* note 98, at 133-36 (providing aggregate caseload statistics from 2000 through 2013 to show that over time, the federal judiciary's “docket has steadily increased”).

<sup>112</sup> See Yoon, *supra* note 98, at 134, 147 (explaining that “the number of authorized judgeships grew only modestly” between 1900 and 2013 and concluding, “[b]ased on recent history, [that] the chances of an increase in judgeships are unlikely”).

This increasing caseload has resulted in federal judges both delegating to law clerks and adopting shortcuts to decisionmaking. And while many of these shortcuts are managerial—such as limiting published opinions and deciding appeals without oral argument—lower court judges are still left with less time to sort out the particulars of higher court rulings in order to distinguish those rulings or explain why language in them is nonbinding dicta.

#### 4. Rise of the Administrative State

Starting with the New Deal, according to Guido Calabresi, “we have gone from a legal system dominated by the common law, divined by the courts, to one in which statutes, enacted by legislatures, have become the primary source of law.”<sup>113</sup> Over time, moreover, legislatures have written increasingly detailed statutes that bear more resemblance to the civil law than common law.<sup>114</sup> Indeed, judges are not principally responsible for the interpretation of these statutes; that task, instead, falls to agencies.<sup>115</sup> “Today, we have 2,840,000 federal workers in 15 departments, 69 agencies and 383 nonmilitary sub-agencies. This exponential growth has led to . . . [a] shift of authority [that] has been staggering.”<sup>116</sup> Agencies have also grown at the state level: as of March 2012, there were 5,286,000 state government employees as compared to 1,082,000 in 1953.<sup>117</sup>

The rise of the administrative state, of course, means that lawmakers and agencies now make legal policy that was once made by courts exercising their common law power. More fundamentally, the administrative state cuts against common law decisionmaking in some basic ways. Lower courts may see the locus of governmental power as resting outside their purview and, relatedly, see the traditional process of distinguishing higher court precedent and invoking the holding–dicta distinction to be relics of a bygone era.<sup>118</sup> In this

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<sup>113</sup> CALABRESI, *supra* note 6, at 1.

<sup>114</sup> See Schauer, *supra* note 1, at 768 (noting various ways that judicial discretion in “both the state and federal systems” has been replaced by codification).

<sup>115</sup> See Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 STAN. L. REV. 1, 100 (2000) (explaining that “agencies know they will retain authority to determine what their own law means”).

<sup>116</sup> Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), [https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaado-c2ed-11e2-9fe2-6ee52doeb7c1\\_story.html](https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaado-c2ed-11e2-9fe2-6ee52doeb7c1_story.html) [https://perma.cc/6UBD-4HG3]. Indeed, “a citizen is 10 times more likely to be tried by an agency than by an actual court.” *Id.*

<sup>117</sup> COUNCIL OF STATE GOV’TS, THE BOOK OF THE STATES 396 tbl.8.1 (2014), <http://knowledgecenter.csg.org/kc/system/files/Table%208.1.pdf> [https://perma.cc/7TVR-32U9].

<sup>118</sup> Even Guido Calabresi—who celebrates common law decisionmaking—recognizes that the reasons for “statutorification are too profound to be reversed” and that the courts will never again, in most instances, be “the primary makers of law.” CALABRESI, *supra* note 6, at 163. Correspondingly, the notion that the law’s development should be seen as policymaking was fueled by the rise of legal realism in the 1930s and its growing acceptance thereafter. See LAURA KALMAN, LEGAL REALISM AT YALE, 1927–60, at 1 (1986); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988).

way, lower courts further limit their lawmaking powers and look to others to shape legal policymaking through their decisions: most notably, higher courts.

### 5. The U.S. Supreme Court's Embrace of Judicial Hierarchy

Another development, probably best understood as both a cause and effect, is a growing tendency to view the federal judiciary as a hierarchy in which lower court judges are “agents” of higher courts, with higher courts “set[ting] the policy that the lower courts should implement.”<sup>119</sup> More broadly, in contemporary depictions of the legal policymaking process by commentators, jurists, and lawmakers, lower courts are seldom seen as partners in the process. The creative energy of legal policymaking is understood to reside in higher courts. Academic commentators increasingly see higher courts primarily as expounders of legal rules rather than dispute-resolvers that engage in minimalist decisionmaking and facilitate the development of legal principles “one step at a time.”<sup>120</sup> Although she calls this view into question, Pauline Kim maintains that it is “now commonplace for judicial politics scholars” to describe the federal courts this way.<sup>121</sup> This is especially true of the Supreme Court, which is seen as departing “from the conventional model of appellate adjudication,” abandoning “the common law way,” and preferring, instead, to lay “down rules or standards that will control a large number of future cases”;<sup>122</sup> seeking “to ensure and expand its hierarchical superiority in our judicial system” by embracing a “law declaration” model that focuses on legal issues of interest to the Court;<sup>123</sup> and “functioning as a rule maker and legislature for other courts” rather than exercising “the ‘judicial power’ as traditionally understood.”<sup>124</sup>

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(reviewing KALMAN, *supra*) (explaining that “[l]egal realism has fundamentally altered our conceptions of legal reasoning”). Unlike the common law (which embraced the idea of courts at all levels working together to refine “the law”), the administrative state and legal realism saw law as policy—something that could be distinguished and manipulated to pursue policy goals. See William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the “Legal Process,”* 107 HARV. L. REV. 2031, 2032-33 (1994). Perhaps for this reason, as Jeff Pojanowski noted in comments on an earlier draft of this Article, lower courts came to eschew the common law method, worrying that “they lack[ed] the competence or legitimacy to engage in broad policymaking. Call it the Wile E. Coyote effect: once you look down and realize you are running on air, you fall.” Email from Jeffrey Pojanowski, Professor of Law, Notre Dame Law Sch., to Neal Devins (Oct. 25, 2015, 9:49 PM) (on file with authors).

<sup>119</sup> Kim, *supra* note 34, at 536.

<sup>120</sup> SUNSTEIN, *supra* note 17.

<sup>121</sup> Kim, *supra* note 34, at 535.

<sup>122</sup> Richard A. Posner, *The Supreme Court 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 37 (2005).

<sup>123</sup> Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 669 (2012).

<sup>124</sup> Ashutosh Bhagwat, *Separate but Equal? The Supreme Court, the Lower Federal Courts, and the Nature of the Judicial Power*, 80 B.U. L. REV. 967, 968 (2000).

Over the course of our empirical study (1932 to 2012) and especially since 1989, the Supreme Court has increasingly embraced judicial hierarchy. Initially, the Court extensively used “error correction” to oversee the lower federal and state courts; in other words, rather than rule broadly, the Court operated in a more circumscribed way.<sup>125</sup> This type of minimalist decisionmaking was very much in keeping with traditional common law decisionmaking. It arguably persisted through the 1960s.<sup>126</sup>

By 1989, however, the Court seemingly embraced the view—advanced by Justice Scalia—that the “common-law, discretion-conferring approach is ill suited . . . to a legal system in which the supreme court can review only an insignificant proportion of the decided cases.”<sup>127</sup> The Court instructed lower courts to “give some degree of respect to Supreme Court dicta if the Court dedicated sufficient consideration to such matters.”<sup>128</sup> More tellingly, it reprimanded lower federal courts for “anticipatory overrulings” of precedents that they thought were outdated and no longer supported by the Supreme Court. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Court ruled that lower courts were bound to follow Supreme Court precedent—even if the precedent “appears to rest on reasons rejected in some other line of [Supreme Court] decisions” and that “the prerogative of overruling” belonged to the Supreme Court alone.<sup>129</sup>

More recently, the Supreme Court has taken steps to secure its position atop the judicial hierarchy. Over the past several Terms, the Court has increasingly embraced the so-called “law declaration” model (where it sets the boundaries of Supreme Court adjudication) rather than the party-controlled “dispute resolution” model.<sup>130</sup> Instead of adhering to the “adversarial myth,”

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<sup>125</sup> See Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 44-47 (2009) (describing the Supreme Court’s use of error correction during its early years “to ensure its status in the judicial hierarchy”).

<sup>126</sup> See Strauss, *supra* note 40, at 850-51 (describing the 1953–1969 Warren Court as a “common law” court).

<sup>127</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

<sup>128</sup> Lisa M. Durham Taylor, *Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms*, 57 DRAKE L. REV. 75, 104 (2008); see also Kozel, *supra* note 23, at 198 (noting that “[s]ome lower courts describe Supreme Court dicta as akin to Supreme Court holdings”).

<sup>129</sup> 490 U.S. 477, 484 (1989). Notwithstanding the bar on anticipatory overruling, the Justices sometimes signal to lower courts that they should limit past precedents. See Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 797 (2012) (noting how lower courts use standing and other jurisdictional devices to work around precedent that the Supreme Court seems to disfavor); Richard M. Re, *Narrowing Supreme Court Precedents from Below*, 104 GEO. L.J. 921, 956-60 (2016) (discussing examples of how the Supreme Court has encouraged the narrowing of its previous decisions).

<sup>130</sup> See Neal Devins & Saikrishna B. Prakash, *Reverse Advisory Opinions*, 80 U. CHI. L. REV. 859, 862-63, 890-92 (summarizing the academic debate regarding law declaration and dispute resolution models). See generally Monaghan, *supra* note 123 (exploring recent Supreme Court developments and linking them to increasing adoption of the law declaration model).

the Justices direct the parties to file supplemental briefs, appoint amici to argue issues not raised or briefed by the parties, and undertake independent internet searches to broaden the sweep of rulings based on their understandings of the relevant facts.<sup>131</sup> The Court's opinions also specify "exactly what the holding is in carefully crafted text that is meant to fetter the discretion of lower courts in the same way that a statute does."<sup>132</sup> By expanding its ability to have the final say on any "question capable of judicial resolution," the Court makes clear that it stands atop the judicial pyramid and that all other courts must follow its lead.<sup>133</sup>

The prevalence of this perception could certainly influence the understanding of district court judges themselves. Moreover, with the Court rejecting anticipatory overruling and otherwise limiting the boundaries of what lower courts can do, it seems highly probable that the Court's increasing embrace of judicial hierarchy is causally related to the increasing refusals of trial courts to distinguish higher court precedent or invoke the holding–dicta distinction.<sup>134</sup>

### B. *Ramifications*

If we and other scholars are reading these signs correctly, then a change in the relationship between lower and higher courts is underway. In particular, our findings highlight that district court deference to circuit courts has grown especially dramatically in the last few decades. Where once a court of appeals over a district court hardly seemed to play a role in district court judges' decisionmaking, now it is cited more extensively and followed more frequently than the Supreme Court. This basic change in hierarchy strikes us as remarkable.

Normatively, there is something to be said for either more or less deferential approaches to precedent. The primary advantage of highly deferential lower court judging is predictability. Most cases settle before trial, and most cases that are tried are never appealed. So for the vast majority of litigants (and potential litigants), the important behavior to predict is the trial judge's. In a system where trial judges seldom reach decisions in tension with decisions of

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<sup>131</sup> See Brian P. Goldman, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions*, 63 STAN. L. REV. 907, 918–39 (2011) (surveying Supreme Court–appointed amici); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 53–68 (2011) (highlighting the consequences of appellate courts' reliance on extra-record facts); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1260 (2012) (noting the Justices' use of internet searches).

<sup>132</sup> Tiersma, *supra* note 1, at 1188.

<sup>133</sup> Monaghan, *supra* note 123, at 730. Monaghan's focus is on constitutional questions and how the Court now seeks out rather than avoids resolving unnecessary questions. *Id.*

<sup>134</sup> As Figure 1 *supra* reveals, federal courts of appeals increasingly follow Supreme Court precedent. At the same time, there are a handful of notable exceptions to this prevailing practice, including federal courts of appeals' rulings on habeas corpus, gun control, and campaign finance. See Re, *supra* note 129, at 959–65.

higher courts, litigants will rarely have doubts about what they will do, at least in the many areas where higher courts have already spoken. For this very reason, Larry Alexander and Fred Schauer embrace judicial hierarchy, arguing that law's principal function is to "settle [matters] authoritatively" and that higher courts can promote "[s]tability" through definitive judicial rulings.<sup>135</sup> Under this view, higher courts should settle contested legal issues, and both lower courts and elected officials should adhere to those rulings.

On the other hand, change on such a scale should not be accepted uncritically, and there are reasons to question how desirable it is. For one thing, arguments for lower court obedience to higher courts principally speak to obedience to the U.S. Supreme Court, not district courts' adherence to circuit courts. For example, Evan Caminker argues that the principal benefits of deference are that (a) the language and logic of Article III of the Constitution requires that "inferior" courts take a subordinate position to the "Supreme" Court and (b) consistent interpretation and application of the law are furthered by lower court deference to higher courts.<sup>136</sup> The first of these justifications is specifically focused on the Supreme Court. The second justification has some application to federal appeals courts, for intra-circuit deference ensures intra-circuit uniformity. At the same time, such deference does little or nothing to promote the goals of consistency at the national level.

There are other reasons that circuit court decisions might be entitled to less deference. Randy Kozel, for example, notes that intermediate appeals courts "make more interpretive errors than the Supreme Court," for the Supreme Court benefits from "a circuit court's reasoning . . . [and its own] light docket, as well as from the substantial attention its cases receive from interested parties who provide diverse perspectives in the form of amicus curiae briefs."<sup>137</sup>

More importantly, as this last point suggests, there may be reasons to worry about excessive deference to any higher court, whether a court of appeals or the Supreme Court. As we noted earlier, it is inevitable that judges will make mistakes, and indiscriminate adherence to precedent can entrench those mistakes.<sup>138</sup> Mistakes may have become more likely over time as the world has

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<sup>135</sup> Alexander & Schauer, *supra* note 38, at 1371, 1376. For a competing perspective, see generally Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998) for an argument that stability in the law is best achieved through a dynamic process in which other parts of government challenge Supreme Court rulings.

<sup>136</sup> Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 828, 855 (1994). See generally Grove, *supra* note 125 (making analogous arguments about higher court supremacy and, with it, the desirability of the Supreme Court issuing "maximalist" opinions).

<sup>137</sup> Kozel, *supra* note 23, at 228. The Supreme Court, too, "could observe the results [of lower court decisionmaking] and then, when the time comes, create national law in a more practically informed way." Bruhl, *supra* note 55, at 874.

<sup>138</sup> See *supra* text accompanying note 39.

grown more complex. When “the relevant facts are in flux and changing very rapidly, and the consequences of current developments are hard to foresee,” courts should limit their rulings, learn about the consequences of different legal holdings, and pursue an “empirically informed” jurisprudence.<sup>139</sup> Even if not, as Mike Dorf has pointed out, in the same way that overly hierarchical private companies and government agencies can have trouble adapting to changes in the environment, a judicial system organized as a bureaucracy is less likely to keep pace.<sup>140</sup> A dynamic system better allows for innovation since lower level decisionmakers are encouraged to experiment by challenging past practices.<sup>141</sup>

Lower court judges’ assertions of independent judgment need not entail outright defiance of precedents from higher courts. Proponents of greater independence could still expect lower courts to faithfully follow the lead of higher courts in cases that clearly raise the same central question.<sup>142</sup> But it is one thing to say that judges should respect controlling precedent; it is quite another to say that they should base their decisions primarily on—or at least justify those decisions primarily on the basis of—statements from higher courts of what the law is.<sup>143</sup> Judges can respect precedent yet look beyond higher courts’ language to the facts and reasoning underlying their decisions. “By speaking clearly in some respects and leaving room for narrowing in others, higher courts can simultaneously tap into the advantages of both uniformity and disuniformity.”<sup>144</sup>

More broadly, a fundamental goal of the legal system is to develop a sound body of law. All else equal, when more minds are brought to bear on a particular problem, a good solution is more likely to emerge. Assuming that lower court judges are typically capable and committed to the goal of developing sound law, it seems reasonable to suppose that the law will benefit from lower court judges bringing their independent judgment to questions of law and reporting even views that might be in tension with language or decisions of higher courts.<sup>145</sup>

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<sup>139</sup> SUNSTEIN, *supra* note 17, at 174, 255; *see also* Strauss, *supra* note 40, at 858 (noting that a benefit of common law reasoning is that “[r]ather than trying to solve a problem by reasoning from abstractions, we are better off looking to see how people, over time, addressed that specific problem when it arose”).

<sup>140</sup> Michael C. Dorf, *The Supreme Court 1997 Term: Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 58 (1998).

<sup>141</sup> *See* Strauss, *supra* note 40, at 858-59.

<sup>142</sup> Proponents of the traditional common law model often afford deference to higher court precedent that speaks to the precise legal issue, but they advocate that lower court judges should be willing to distinguish cases that raise similar but not identical issues. *See* Moore & Oglebay, *supra* note 15, at 539-40 (noting that precedent should be obeyed unless “clearly erroneous” in cases raising nearly identical issues so as to ensure “uniformity of treatment to litigants”).

<sup>143</sup> For a full-blown treatment of this question, *see* generally Kozel, *supra* note 23, which critiques the “inclusive” view of precedent.

<sup>144</sup> *Re*, *supra* note 129, at 947.

<sup>145</sup> For a general defense of common law decisionmaking on these sorts of pragmatic grounds, arguing that it yields efficient economic outcomes, *see* generally RICHARD A. POSNER, *ECONOMIC*

This is particularly true with respect to the dynamic between lower courts and the U.S. Supreme Court. Today's Supreme Court now hears around eighty cases a year and, as such, there is increasing reason for "lower courts—operating individually and in conversation with each other"—to "fill in the details of the Supreme Court's doctrinal sketches" by fine-tuning legal rules "through the repeated application of overarching principles to specific facts."<sup>146</sup>

Correspondingly, litigants are entitled to receive individual attention and to have their cases decided on their own merits. Arguably, these aims are better served by considering the case-at-hand's facts in light of the facts of previously decided cases—allowing the case-at-hand to be decided in a different way when the facts are sufficiently different rather than forcing it into a category neatly covered by a higher court's statement of the law. This, of course, is the very logic of common law judging. Legal doctrine is not set by the first court to decide an issue. Rather, courts move cautiously and incrementally. Each new case, while evaluated in light of previously decided ones, is decided on its own merits. In theory, a series of such decisions will yield a refined principle or rule, resulting in fewer injustices and inefficiencies than would result if the first court's approach were followed religiously in all similar cases.

## CONCLUSION

We think it clear that the relationship between lower and higher courts is fundamentally transformed and that this transformation might signal the end of the common law style of judging. As our study demonstrates, there has been a basic shift in the dynamic between U.S. district courts and both the courts of appeals and the U.S. Supreme Court. In the first several decades covered in our study, district courts operated as traditional common law courts—distinguishing higher court precedent and placing their own imprint on legal policymaking. Over the past thirty years, however, district courts have become more and more deferential toward their superiors, with correspondingly less legal policymaking emanating from district courts. We also suspect that this transformation in lower court–higher court dynamics extends both to federal courts of appeals and state courts.<sup>147</sup> This trend is buttressed by fundamental changes in the American legal system. The common law model does not fit comfortably in a world driven by statutes, regulations, millions of

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ANALYSIS OF LAW (1972). For a more recent argument linking common law decisionmaking to economic growth, see Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 514-19 (2001).

<sup>146</sup> Randy J. Kozel & Jeffrey A. Pojanowski, *Discretionary Dockets*, 31 CONST. COMMENT. 221, 244 (2016).

<sup>147</sup> For our discussion of federal courts of appeals, see *supra* notes 64–65. For our discussion of state courts, see *supra* notes 87–89.

government workers, the internet, keyword-driven legal research, and overworked courts that look to law clerks to write opinions. Instead, “[t]he common law developed as a concept in a smaller and [less complex] society.”<sup>148</sup> Furthermore, higher courts increasingly see themselves as superior and have taken steps both to limit party control and lower court discretion.

The desirability of this basic change is another matter. It is not obvious to us whether it is better for lower courts to exercise their common law powers to update and correct legal standards or to embrace the values of consistency and stability that favor lower court deference. What we can say without qualification is that the hierarchical relationship between district court judges and higher courts has shifted dramatically over time, that this shift undoubtedly has important consequences, and that it demands more attention and critical evaluation. This Article, by identifying how the lower court–higher court dynamic has changed and examining why it has changed, is an important first step in this process.

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<sup>148</sup> Schauer, *supra* note 1, at 781.

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