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An Examination of Dictum in Texas Opinions

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I. INTRODUCTION

Courts often write opinions that say more than strictly necessary to decide a case. The most necessary part of the opinion constitutes its holding, whereas the unnecessary part constitutes dictum. The challenge for appellate courts and lawyers comes in drawing the line between the former and the latter.

The concept of dictum has deep roots in American law. Everyone knows that courts sometimes write dictum, and that dictum generally lacks binding force in future cases, even though it may have the power to persuade. *See, e.g.*, *Central Virginia Comm. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated"); *United States v. Rubin*, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring) ("A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'"). Be that as it may, everyone also knows that dictum is an unavoidable part of the system, sometimes for good and sometimes for ill. *See, e.g.*, *United States v. Rabinowitz*, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting) ("a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision.").

The great Chief Justice of the United States, John Marshall, authored a bit of dictum in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). This came back to haunt him in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), where counsel for the state of Virginia contested the Court's jurisdiction and pointed to the language in *Marbury*. So Chief Justice Marshall explained that it was inappropriate to treat every word of *Marbury* as binding precedent. He started from the proposition that dictum is not binding:

> It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens, 19 U.S. at 399-400. Chief Justice Marshall then applied this principle to the *Marbury* opinion, explaining that some of his own expressions there went "far beyond" the strict needs of the controversy:

> In the case of *Marbury v. Madison*, the single question before the Court, so far as that case can be applied to this, was whether the legislature could give this Court original jurisdiction in a case in which the Constitution had clearly not given it, and in which no doubt respecting the construction of

> the article could possibly be raised. The Court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But, in the reasoning of the Court in support of this decision, some expressions are used which go far beyond it.

Id. at 400.

In recent years, commentators have written about dictum in American law. *See, e.g.*, Marc McAllister, *Dicta Redefined*, 47 WILLAMETTE L. REV. 161 (2011); Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219 (2010); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U.L.REV. 1249 (2006); Michael B. Abramowicz & Maxwell L. Stearns, *Defining Dicta*, 57 STANFORD L. REV. 953 (2005); Thomas Fowler, *Holding, Dictum . . . Whatever*, 25 N.C. Cent. L.J. 139, 140-41 (2003); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994). A few papers have examined Texas opinions in particular. *See* Elizabeth (Heidi) G. Bloch, *Oh Bitter Dicta*, in State Bar of Texas 24th Annual Advanced Civil Appellate Practice (2010); *see also* Nick Dominguez, *Invitation by Footnotes: A Survey of Five Years' Worth of Texas Supreme Court Opinions*, in State Bar of Texas 32nd Annual Advanced Civil Appellate Practice (2018).

So let us take a look and see what we can find in Texas regarding the Supreme Court's use of dictum. To do this, let us ask several questions about dictum. Why does anyone care about identifying dictum? How does one identify dictum? Is there a trend toward more dictum in the Texas courts?

II. WHY DOES ANYONE CARE ABOUT IDENTIFYING DICTUM

Start with the question of why anyone cares about defining dictum, because this question has fairly easy answers. Identifying dictum matters for two principal reasons: (1) accuracy, and (2) legitimacy. The courts stand a higher chance of getting the answer right when they narrow the focus as much as possible; conversely, courts tend to make more mistakes when they inflate opinions beyond the dispute at hand.

As to legitimacy, the concern comes down to one of separation of powers. Legislation is supposed to come from the legislative branch, not from the judicial branch. If courts could create law more or less at will by writing too expansively, the result would be to turn judges into legislators. Judges are of course not legislators, and American judges generally take it as axiomatic that they must not write advisory opinions.

So to guard against drifting out of their lanes, American courts have a venerable tradition of stripping dictum of any binding effect: "An important function of the esoteric (to nonlawyers) distinction between the holding of a case and its dicta (roughly, statements inessential to the outcome)—with only the former having precedential effect—is to limit judges' legislative powers by preventing them from promulgating, in the form of judicial opinions, treatises that would have the force of law." RICHARD POSNER, HOW JUDGES THINK 81 (2008).

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