The Methodology of Using Precedents

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This paper elucidates the common law doctrine of *stare decisis* and the methodology of using precedents, including the practice of distinguishing and overruling them.[1]

As noted in Cross and Harris's classic book *Precedent in English Law*, "It is a basic principle of the administration of justice that like cases should be decided alike."[2] In the common law system, this principle takes on the form of a positive obligation: previous decisions must be followed unless there is a justification for departing from them. This is the essence of the doctrine of *stare decisis*.

After sketching the development of the doctrine of *stare decisis* and explaining what is meant by *ratio decidendi*, distinguishing, and overruling, this paper will reveal a profound insight into precedents, namely, that they are employed basically like statutes, but statutes which have a transparent "legislative" history or *travaux préparatoires*. Then the paper will show that precedents play a significant role in civil law jurisdictions like Germany. Finally, the paper will enumerate the jurisprudential justifications which underpin the doctrine of precedent.

1. See generally Thomas Lundmark, *Charting the Divide between Common and Civil Law* ch 9 (2012); Thomas Lundmark, "Umgang mit dem Präjudizienrecht," *Juristische Schulung* 546 (2000); Thomas Lundmark, *Juristische Technik und Methodik des Common Law* (1998).
2. Rupert Cross & JW Harris, *Precedent in English Law* 3 (4th ed 1991).

1. The historical development of the modern doctrine of *stare decisis*

How did *stare decisis* come to take on such an important role in the common law system? Originally, during the initial development of the common law in England when there were very few statutes, the idea took hold that earlier decisions could provide assistance in deciding new cases. This phenomenon is seen most clearly in Henry de Bracton's *De Legibus et Consuetudinibus Angliae* (The Laws and Customs of England), published in the mid-13th century. Bracton systematized all of English law into a rational system in this seminal work. And the law that he systematized consisted of judicial pronouncements alongside statute law. Bracton makes no distinction between them relative to sources of law and stature: judicial pronouncements are simply accorded equal status with statutes. This view of the law was not just Bracton's: it reflected the understanding of law in the early centuries of the common law that judicial pronouncements were merely statements of what the judges believed the law to be at the time. They were not understood to constitute acts of a sovereign who wished to change existing law. The common law was already in existence, waiting to be discovered by the king's judges.

Even though judicial pronouncements were merely statements of what the judges believed the law to be, they were entitled to great respect. As reported in the previous paragraph, Bracton's work tacitly assumes that the pronouncements of the judges have a status equal in authority to that of the statutory pronouncements of the sovereign. Unsurprisingly, then, *De Legibus* led directly to the publication of the *Year Books* (1268-1535).

The *Year Books* were made possible by the practice of English lawyers and law students of recording certain aspects of important judicial decisions that they had observed in judicial proceedings. These observers would briefly report the relevant facts of the dispute and the arguments of counsel, including counsel's citations to statutes and previous decisions, that is, precedents. These lawyers and students would, of course, also summarize the ruling and the reasoning of the common law judge or judges as announced orally from the bench. As stated above, the rulings themselves consisted of pronouncements of what the judges believed the law to be, whether the law was statute law or common law in the sense of law as found or proclaimed by the judges in the absence of statute. The reasoning that was reported in the *Year Books* consisted of the judges' application of the law to the facts of the case before them. Consequently,

readers of the *Year Books* would find the pronouncements of what the judges took to be the binding statutory or common law on the subject at hand as well as the reasons why the judges felt that the binding law dictated that they decide the case in the way that it was decided.

Nowadays, many people would say that the common law judges were being ingenuous, or even that they were being dishonest. Consider the following. In cases where there was an applicable statute, the judges would discuss the statute in light of their own precedents, if any, that interpreted the statute. In other words, the judges treated their own precedents as being equal in status to statutory law. If there were no statutes, the judges would simply treat their own precedents as having the same force as statutory law. And whether the judges were applying a statute interpreted by precedent or a precedent based on the common law, they were often in a position to alter ("distinguish" or "overrule", discussed below) that precedent at will. This was the case if the precedent had been issued from the judges' own court or from a court inferior to their own court.

To summarize, the *Year Books* reported only the facts of the dispute, the arguments of counsel (including precedents and statutes cited), the pronouncements of the judges as to the applicable law, and the ruling of the judges along with their reasoning, all of which were briefly recorded in writing from oral statements made in court. Interestingly, what were *not* included in the *Year Books* were the actual judgments of the court. Indeed, it was not until 1765, with *Plowden's Reports*, that court judgments were recorded regularly and reliably. The year 1865 saw the publication of the *Law Reports* by the Incorporated Council of Law Reporting, a commission which had been set up specifically for this purpose, and which still exists today. It will be seen that the availability and reliability of these law reports were crucial to the development of the doctrine of precedent as we know it today.[3] Everywhere in the common law world today, judges sitting on lower courts will follow the published decisions of appellate courts in their own judicial hierarchy on questions regarding the interpretation of statute law and of the common law. This is due to what can be referred to as custom or convention. There are virtually no statutes which require this practice,

3. John H Baker, *The Common Law Tradition: Lawyers, Books and the Law* ch 14 (2000).

which is referred to as vertical *stare decisis*.[4] This custom or convention serves the obvious public purpose of equality: like cases will be decided alike. In addition to serving equality, the custom or convention of vertical *stare decisis* promotes predictability in the law: once the appellate judges have ruled on a particular issue, people in that jurisdiction can be quite sure that inferior judges will rule the same way. In addition, this practice promotes judicial efficiency: when confronted with a legal issue that has already been decided by a higher court in their hierarchy, the inferior judges do not need to reexamine the ruling; they can simply adopt the ruling as their own. This saves the parties from having to appeal, and saves the appellate judges from having to reiterate their previous ruling.

From the above exposition, it would appear that vertical *stare decisis* has been practiced in England at least since the mid-13th century. This is not the case, for the horizontal form of *stare decisis*, that is, the convention of higher courts, such as the Supreme Court of the United Kingdom and the Supreme Court of the United States, to abide by their own precedents. The horizontal form of *stare decisis* first began to establish itself in the common law world, specifically in the United States and the United Kingdom, some six centuries after the establishment of the vertical form. This also holds true for the modern practice of finding the law in individual cases.

To understand why the horizontal form of *stare decisis*, and the modern practice of finding the law in individual cases, came to be established so late, at least relative to the vertical form, one must examine the historical record to identify the forces at play. The first relevant development was the enactment of the Judicature Acts in 1876.[5] Before these enactments, the British courts were not organized according to a clearly structured hierarchy. For example, the judgments of the common law courts might be appealed within the common law judicial system, or they might be challenged in the equity courts, which did not adhere to the customary practice of following the decisions of the higher courts in the common law system, for they had their own court system. Second, before the 19th century, court decisions were not reliably reported and published to the general

4. One notable exception to this is Article 141 of the Constitution of India, which states that the law declared by the Supreme Court shall be binding on all courts within the territory of India.
5. Jim Evans, "Changes in the Doctrine of Precedent during the Nineteenth Century," *Precedent in Law* 58 (Laurence Goldstein ed 1991).

legal public.[6] Without ready access to the decisions of the higher courts, it was practically impossible for judges and lawyers alike to find the relevant portion of the judgment, that is, its *ratio decidendi*, discussed below. Without knowing the *ratio*, it is not possible to employ judicial decisions in lieu of statutes.

The third, and arguably the most important, of these historical forces was constitutional in character: the reconsideration of the role of common law, that is, judge-made law, in light of the developing democratization and concomitant increased respect for separation of powers. From the earliest years of the common law, it was thought that the common law was not to be found in individual court decisions; rather the case decisions in their totality were a reflection of what the law was.[7] Law other than statute law was understood to exist independently, as if woven in to the fabric of society or perhaps even transcendent. This understanding served as a convenient fiction to avoid confrontation with the monarchy. Statute law was made by the sovereign, either directly by edict from the king or queen, or through the royal organ of the Parliament. Common law, in contrast, was not made: it was merely discovered. According to this understanding, which we might today call a fiction, judges were not acting in a political or legislative way; they were acting like conscientious civil servants doing the heavy lifting for the monarchy. This view of the role of judges and of precedents persisted literally for centuries. In fact, it was only from the beginning of the 19th century that some appellate courts began to speak about the binding power of individual legal decisions. Law was not to be found in the totality of precedents, but rather in individual precedents.[8] As explained in the following paragraph, this development suggests that the judges had elevated themselves from the role of law-finders to law-makers, or at least had begun to acknowledge that this was the case. This radically new view of the role of precedents quickly spread throughout the common law world, with the result that the birth of the modern doctrine of *stare decisis* – that the applicable law is to be found in the rules (usually called *ratios* or holdings) announced in individual cases – can be dated to the middle of the 19th century.[9]

6. Carleton Kemp Allen, *Law in the Making* 221 *et seq.* (7th ed 1964).
7. AKR Kiralfy, *Potter's Historical Introduction to English Law and its Institutions* 275 (4th ed 1958).
8. Max Radin, *Handbook of Anglo-American Legal History* 356 (1936).
9. JD Murphy & R Rueter, *Stare Decisis in Commonwealth Appellate Courts* 3 (1981).

One of the most significant drivers behind this modern view of the doctrine of *stare decisis* was the work of John Austin (1790-1859), one of the pioneers of legal positivism in the common law world. Austin contradicted the then widely held view that law was transcendent, capable of being found, but not created. He disseminated the positivist notion that law "properly so called" consisted only of the norms that originate from the deliberate pen of the legislator or other "law giver."[10] The logical consequence of this notion was that, assuming a particular law was recognized to be a binding legal rule, to the extent that Parliament had not made that law, such as was the case for the common law, then the judges must be making it. According to this line of thinking, common law judges were necessarily "law givers". But, according to the doctrine of separation of powers, popularized by John Locke (1632–1704) and Montesquieu (1689-1755), having judges as legislators would contravene the doctrine of separation of powers by intruding on the province of the democratically constituted Parliament. Without meaning to minimize the positivistic influence of Thomas Hobbes (1588-1679) and Jeremy Bentham (1748-1832), who raised the same objections to common law, it was primarily due to Austin's assault that judicial pronouncements would be widely seen, pretty much for the first time, as intruding improperly upon the legislative prerogative.[11]

Thus chastised by Hobbes, Bentham, and finally Austin, the legal establishment began to look at the legal system as follows: First, judges must decide the cases presented to them, and they must decide according to law, even if the law which they use to decide the case is the common law, that is, judge-made law. In such cases, the judges are compelled to pronounce what the common law is on the subject. Because this pronouncement has the character of law, the judges are, admittedly, acting as "law givers". This is necessary, but it is also regrettable because it would have been more democratically legitimate if Parliament had pronounced what the law should be on the subject. Second, while it is admittedly necessary for judges to pronounce what the law is when the legal issue is presented for the first time, and there is no applicable statute, it is decidedly not necessary for the judges to change their pronouncement the next time a similar case reaches their court. Indeed, it would be best for the judges to stand by their previous decision and wait for Parliament to affirm it or re-

10. John Austin, *The Province of Jurisprudence Determined* 268 (1832).
11. See EC Clark, *Practical Jurisprudence: A Comment on Austin* 4 *et seq.* (1883).

ject it by explicit legislation. If Parliament did not reject the pronouncement, that would be seen as an affirmation. By deferring to Parliament in this way, judges believed that they were not only protecting equality and predictability in the law, not to mention acting efficiently,[12] but that they were also showing respect for democracy and separation of powers.

This positivist approach led the British judiciary to adopt a strict understanding of the doctrine of horizontal *stare decisis*. At the end of the 19th century, the Lords of Appeal in Ordinary or "Law Lords", the most senior judges in the United Kingdom at the time, declared in *London Street Tramways v London County Council* that they regarded themselves to be bound by their own earlier judgments on the law (at least those involving the interpretation of statutes) until Parliament acted to change those judgments.[13] This ruling remained in force for over half a century. It was not until 1966 that the Law Lords in a Practice Statement announced that they would in future depart from the approach announced in *London Street Tramways*. However, they would depart from previous precedents only when they felt that failure to do so would lead to injustice or would obstruct the development of the law.[14] In announcing this momentous change of direction, the Law Lords specifically acknowledged two universally recognized justifications for overruling precedents: mistake and changes in society. These are discussed in the following section.

In contrast to the House of Lords (now the Supreme Court of the United Kingdom), the Court of Appeal of England and Wales still considers itself to be bound by its own previous decisions, subject to a number of exceptions. Yet it recognizes that the Supreme Court of the United Kingdom may overrule these decisions by pronouncing a new rule.[15]

In the United States, in line with the venerable judicial practice in common law jurisdictions, both federal and state courts adhere to the doctrine of vertical *stare decisis*. However, American courts, unlike the British Law Lords, have never voluntarily relinquished their prerogative to de-

12. These are the three jurisprudential justifications for the vertical form of *stare decisis*.
13. *London Street Tramways v London County Council*, 1898 AC 375.
14. Zenon Bankowski, D Neil MacCormick, & Geoffrey Marshall, "Precedent in the United Kingdom," *Interpreting Precedents: A Comparative Study* 326 (MacCormick & Summers eds 1997).
15. Zenon Bankowski, D Neil MacCormick, & Geoffrey Marshall, "Precedent in the United Kingdom," *Interpreting Precedents: A Comparative Study* 326 (MacCormick & Summers eds 1997).

part from their own previous decisions. They continued to shape and mould their jurisprudence as they saw fit, without waiting for the federal Congress or the state legislatures to intervene.

Departures from previous decisions ("overruling") are the subject of the following section. "Distinguishing" is explained in section C.

2. The overruling of precedents

When do courts depart from their previous decisions, and when should they? To answer these questions, Lewis A Kornhauser employs the model of an immortal judge.[16] In this imaginary court system, which consists of a single judge, the training, experience, and fundamental personal values of the immortal judge will influence to some degree how the judge sees the cases, the judge's selection of the applicable statutes, the judge's selection of the applicable case decisions, and the judge's solutions. Provided the immortal judge has perfect recall of all of her previous decisions, similar cases will be decided alike to a degree unattainable by any group of judges, no matter how well trained. For the individuals in the group will differ in their training, experience, fundamental personal values, etc. The quality of the decision-making in such a legal system would ensure an extremely high degree of equality, legal predictability, and trust in the judiciary (legitimacy).

According to Kornhauser, faced with a case with facts similar to one of her precedents, the immortal judge will only depart from a precedent (in other words, she would only overrule one) in three situations: first, if she now realizes that she made a mistake in the previous case; second, if important social, legal, or other features of society have changed since she announced the previous decision; or third, if her fundamental personal values have changed. We know that normal, mortal judges make mistakes now and then, even those sitting in the Supreme Court of the United Kingdom, as they have acknowledged this in their 1966 Practice Statement, where they recognized their ability and responsibility to correct their previous *per incuriam* ("through lack of care") decisions. Where the social situation, perceptions of public policy, or developments in the law have changed since the previous ruling, even the Justices of the United

16. Lewis A Kornhauser, "Modeling Collegial Courts, II," *Journal of Law, Economics & Organization* 441 *et seq.* (1992).

Kingdom Supreme Court will occasionally change their minds; and, in doing so, we will expect them to describe what has changed and to justify the resultant, changed legal consequences. A dynamic understanding of the *stare decisis* doctrine therefore makes exceptions to the horizontal effect of precedents in the interests of correcting errors (corrective overrulings) and of updating case decisions to comport with modern situations (renovative overrulings).

What of the third situation identified by Kornhauser in which the immortal judge might amend her previous rulings: changes in the judge's personal fundamental values? In reality, neither immortal nor mortal judges are likely to change their personal fundamental values. In the real world, an overruling which can only be explained by a change in the personal fundamental values of the judges is one that is due to a change in the composition of the court. This type of overruling is described here as being legislative or political. As witnessed in the *London Street Tramways* case, and as reiterated in the 1966 Practice Statement, it is this type of ruling – here termed legislative or political overruling – which the Supreme Court of the United Kingdom believes must be avoided for fear of treading on Parliament's toes. Recalling that the vertical form of *stare decisis* serves three jurisprudential purposes – equality, legal predictability, and efficiency – it is submitted that the horizontal form has a fourth purpose: respect for separation of powers. This purpose encourages judges not to upset the decisions of their predecessors on the court simply because they would have decided the case differently if they had been on the court at the time the case was decided.

Two leading American political scientists, Saul Brenner and Harold Spaeth, published a study in 1995 in which they examined the overruling practice of the United States Supreme Court over a number of years, including 1953 through 1969, the years in which Earl Warren was Chief Justice. The Warren Court, as it is known, was widely seen then and now as an activist court which, among other things, expanded the rights of those who stood accused of crimes in the federal and in the state courts.[17] This required the overruling of a good number of precedents that had shown great deference to the legislatures and judges of the states. Brenner and Spaeth shared the view that the United States Supreme Court was activist in the years that they researched, as the provocative title of their

17. See generally Frederick P Lewis, *The Context of Judicial Activism: The Endurance of the Warren Court Legacy in a Conservative Age* (1999).

book makes clear: *Stare Indecisis: The Alteration of Precedent on the Supreme Court 1946-1992*. Over this span of years, Brenner and Spaeth identified 115[18] decisions in which the United States Supreme Court overruled one or more of its precedents.[19] According to the research of the author of this paper, in the period from 1966 to 2010 the Supreme Court of the United Kingdom, or its predecessor the Law Lords, overruled 12 previous decisions.[20] While these years were not known as years of judicial activism in the United Kingdom, it should be remembered that the Law Lords had been refusing to overrule their previous decisions since the *London Street Tramways* decision in 1898.

In order to compare the overruling practices of these two courts, one must also know that the United States Supreme Court issued 6,553 full decisions during the years 1946 to 1992,[21] whereas the Supreme Court of the United Kingdom and the Law Lords issued only 1,315 during the years 1966 to 2010. Further, there was a significant disparity in the number of judges who sat on the two courts during these periods of time: only 29 on the United States Supreme Court, and 62 on the Supreme Court of the United Kingdom. Mindful of these divergences, and of the fact that the periods of time studied do not coincide, it is nonetheless tempting to compare the relative rates of overruling by the two courts. Doing so reveals that the United States Supreme Court overruled at a rate of 1.13 per cent while the Supreme Court of the United Kingdom overruled at a rate of 0.61 per cent.

These facts and figures, although crude, suggest that the Supreme Court of the United Kingdom is approximately twice as deferential to precedents as the United States Supreme Court. This on its own is inter-

18. Saul Brenner & Harold D Spaeth, *Stare Indecisis: The Alteration of Precedent on the Supreme Court 1946-1992* at 22 (1995).
19. Forty-one of Brenner and Spaeth's 115 overruling cases overruled solely cases decided before 1946. Subtracting these 41 cases from the 115 overruling reduces the number of overruling cases by the United States Supreme Court to 74 during the period from 1946 to 1992. There were five more cases that overruled cases both before and after 1946. All of the remaining 74 overrulings only involve cases decided after 1945. See Saul Brenner & Harold D Spaeth, *Stare Indecisis: The Alteration of Precedent on the Supreme Court 1946-1992* appendix I (1995).
20. Four of these were decided before 1966, reducing the number of overruled decisions to eight.
21. Epstein, Segal, Spaeth, & Walker, *The Supreme Court Compendium: Data, Decisions, and Developments* 212 (2nd ed 1996).

esting. But perhaps the justices of the United States Supreme Court made more mistakes than their British brethren and therefore had to correct their jurisprudence more often (corrective overruling). Or it might be the case that the American justices had more of a need to update their jurisprudence to comport with modern situations (renovative overrulings). As explained above, these two types of overruling – corrective and renovative – are consistent with separation of powers and respect for the legislative branch of government.

The only type of overruling which is arguably[22] disrespectful of separation of powers is legislative or political overruling. Consequently, rather than looking at the gross percentages of overrulings in general, it would be more revealing for our purposes to assess and compare the rates of political overrulings. If one disregards the non-political overrulings (i.e., the corrective and renovative ones) and just calculates the rate of political overruling, one finds that the United States Supreme Court engages in political overruling at a rate of 0.47 per cent, which is six times more often that the Supreme Court of the United Kingdom (0.08 per cent). Thus, employing this measure, one can generalize by saying that the United States Supreme Court is far more likely than the Supreme Court of the United Kingdom to overrule politically.

But this imbalance might be traceable to a fundamental difference between the roles of the two courts. The United States Supreme Court, unlike the Supreme Court of the United Kingdom, has the power to declare acts of the President and of the Congress of the United States, and the governors and legislatures of the states, to be unconstitutional under the United States Constitution. The only direct way for these organs of government to "correct" such a declaration is to amend the United States Constitution, which is an extremely difficult task.[23] In the United Kingdom, on the other hand, the Supreme Court of the United Kingdom does not hold this power, so that Parliament retains the power to "correct" rulings of the Supreme Court of the United Kingdom by a simple act of Parliament. This means that the Justices of the United States Supreme Court, unlike their brethren on the United Kingdom Court, have an obligation to

22. Here a distinction must be made between judicial interpretation of statutes and judicial interpretation of a constitution. The former may be "corrected" by the legislature; the latter not. Consequently, judges should arguably be more willing to overrule decisions interpreting the constitution.
23. Thomas Lundmark, *Power & Rights in US Constitutional Law* 70-92 (2nd ed 2008).

revisit previous decisions to the extent that they are based on United States Constitutional law.

If one considers these constitutional factors, bears in mind that the rates of overruling and the numbers of overruling cases are small, and remembers that the classification between political versus non-political overrulings is inexact, it would be misleading to generalize further than to conclude on the basis of this study alone that the overruling practice of the two courts is similar.

3. Finding the *ratio decidendi*, using the *ratio* like a statutory norm, and distinguishing

Having addressed the historical and jurisprudential framework for following precedents, we will now consider how precedent is actually used. In order to apply a previous decision, the first task is to find a decided case with basically similar facts (a process of equivalence). This process involves the same mental process as looking for relevant statutes. In fact, many if not most precedents are the result of statutory interpretation.

Once a case with similar facts has been found, it is necessary to identify the rule – the *ratio decidendi* – of the case that has been found. This need to identify the *ratio* of the case holds both for cases that interpret and apply statutes (i.e., statutory rules) and for cases that interpret and apply propositions (i.e., judge-made rules) of the common law (i.e., law in the absence of a statute). In cases that interpret and apply statutes, the *ratios* announced by the court represent, in effect, concretizations of how the statute is to be applied in the particular circumstances of the case. Similarly, in cases that interpret and apply propositions of common law (i.e., common law rules), just as with cases that interpret and apply statutes (i.e., statutory rules), the *ratios* announced by the court represent, in effect, concretizations of how the common law rule is to be applied in the particular circumstances of the case.

The *ratio* is sometimes referred to as the holding or the rule of the case, and represents that aspect of the case which may be binding precedent. In almost all cases, the *ratio* has been stated in the form of a rule by one or more of the judges who decided the precedent. Ordinarily, that rule can be found as a headnote at the beginning of the published report of the case. It is almost never necessary to extract or induce the *ratio* from the case. Indeed, in author's many years of practicing law in which he dealt with hundreds of cases, he cannot remember a single instance in which it was necessary to induce the *ratio*.

Up to this point, the only function of the facts of the case has been as a mean to help to locate the statutory or common law rule that appears to provide the solution to the case at hand. This even holds true for the extremely few cases in which the *ratio* must be extracted or induced from the case. To state the

obvious: one must first find the case before one can induce a *ratio* from it.

3.1. The textual approach to using the *ratio*

Once identified, how is a *ratio decidendi* used? Simply said, it is used like a statutory rule. The most common approach is to apply the *ratio* according to its wording, just as one would apply a statute in a textual manner. This approach or "method" is also known as the linguistic method or the plain meaning rule of statutory interpretation. At its core, the textual approach asks, "What does the rule say?" As such, this approach is fundamentally concerned with the wording of the *ratio* in question and aims to establish the meaning of the individual words or of the sentence as a whole. In so doing, it aims to ascertain what the *ratio* is actually stating, rather than what the judge or judges who articulated the *ratio* actually intended to say. (This is the subject of the historical interpretation, discussed in the follow section.) It should be noted that this method of interpretation is not restricted to legal rules; it is frequently used in all subjects in the humanities to determine the meaning of textual passages.[24] Perhaps as a consequence of the general acceptance of the validity of this approach, some people are of the view that this method of interpretation should take precedence over the others.[25] In the author's experience as a practicing lawyer, the vast majority of uses of *ratios* employ the textual approach.

3.2. The historical approach to using the *ratio*

The historical approach to statutory interpretation is sometimes termed "subjective interpretation" because it asks, "What did the people who drafted the rule mean?" A more pointed way to put the question is, "How would these people decide the case at hand?" This approach aims to identify what the members of the legislature intended to say, rather than what

24. Norbert Horn, *Einführung in die Rechtswissenschaft und Rechtsphilosophie* paragraph 176 (5th ed 2011).
25. Bernd Rüthers & Dirk Fischer, *Rechtstheorie* paragraph 731 (5th ed 2010).

they actually did say, which is the aim of linguistic interpretation.[26] In order to follow the train of thought of the members of the legislature, the interpreting judge or lawyer will consult the legislative history or *travaux préparatoires*. This might include statements by proponents of the legislation and the minutes of committee meetings and the like. This approach is always problematic. For one thing, it is often difficult to find documentation. This is especially true for older legislation. For another, social and economic conditions may have changed since the statute was enacted. Other problems arise because of the length of the legislative process and the inability to assess whether, for example, a statement of intent as stated in the report of a committee was actually shared by the members of the legislature who voted in favour of the legislation, or even if they had knowledge of the content of the committee report. Because of such problems, the historical approach is often of questionable use to statutory interpretation.

Turning to the interpretation of *ratios*, the situation regarding the historical approach is not nearly so dire. After all, the *ratio* will be found in a judicial decision that was reached by a small number of judges who had access to the same materials and who heard the same oral arguments. Not infrequently, individual judges will add a concurring judgment to the judgment of the court. Consequently, it is much easier to answer the more pointed question above: "How would these people decide the case at hand?"

When we engage in this exercise of trying to imagine how the judges who decided the precedential case would decide the case at hand, it is important to recognize that we are employing the historical approach to interpretation and not, as commonly thought, applying the precedent by analogy. Statements such as the following, which is just one of many, are therefore patently mistaken:

"This type of reasoning in common law is called case-based reasoning, which is inductive in nature ... Civil law relies more on rule-based reasoning, which is deductive in nature."[27]

26. Dieter Schmalz, *Methodenlehre für das juristische Studium* paragraph 247 (3rd ed 1992).
27. Fleure Nievelstein, Tamara van Gog, & Frans J Prins, "Learning Law: The Problems with Ontology and Reasoning," *Handbook of Research for Educational Communications and Technology* 553 (David Jonassen *et al* eds 2008).

3.3. The teleological (functional) approach to using the *ratio*

The teleological or functional approach to statutory interpretation derives its name from the ancient Greek *telos*, meaning "aim". In statutory interpretation, this approach seeks to determine the meaning and purpose of the statutory rule, the so-called *ratio legis*.[28] This approach to statutory interpretation summarizes the relevant arguments for the interpretation of statutes that do not fall within the ambit of the textual or historical approaches. In this respect, the term "teleological" is used in order to differentiate this approach from the textual and historical approaches, which are necessarily limited respectively to textual arguments and to evidence from the historical record. One can summarize as follows: While the textual approach asks "What does the rule say?" and historical approach asks "What did the people who drafted the rule mean?" the teleological approach asks "What do we think the rule should mean?"[29]

In statutory interpretation, the regulatory purpose of the statute is to be determined in the abstract, that is, in isolation from any actual legal dispute. Nevertheless, the regulatory purpose of the statute is easier and more accurately determined if one also considers the conflicts of interest that underlie the act. For every statute is the result of a weighing up of opposing interests.[30] In effect, every statute is a hypothetical judgment about which interests, and consequently which party, should prevail. Accordingly, in the context of statutory interpretation, it must be asked how the members of the legislature evaluated these conflicts of interest, and which interests were chosen to predominate.[31]

Everything said above about the teleological or functional approach to statutory interpretation applies with equal force to the interpretation of *ratios*. Just as with statutory rules, case-based rules can be expanded and restricted. As described by Kornhauser in his discussion of the doctrine of

28. While Savigny named this method "systematic", he was nevertheless referring to what we know today as the teleological method. Klaus Adomeit & Susanne Hähnchen, *Rechtstheorie für Studenten* paragraph 66 (5th ed 2008).
29. Rolf Wank, *Die Auslegung von Gesetzen* 97 (3rd ed 2005).
30. Dieter Schmalz, *Methodenlehre für das juristische Studium* paragraph 251 (3rd ed 1992).
31. Norbert Horn, *Einführung in die Rechtswissenschaft und Rechtsphilosophie* paragraph 182 (5th ed 2011). See generally Dieter Schmalz, *Methodenlehre für das juristische Studium* paragraph 252 (3rd ed 1992) and Peter Schwacke & Rolf Uhlig, *Juristische Methodik mit Technik der Fallbearbeitung und Normsetzungslehre* 37 (2nd ed 1985).

stare decisis in *The New Palgrave Dictionary of Economics*,[32] one might look behind the *ratio* for a broad legal principle. This corresponds to looking behind a statutory rule for a broad function or purpose, which is ordinarily termed a teleological extension when speaking of statutory interpretation. In the opinion of the author, this nomenclature should also be used when speaking of *ratios*. On the other hand, one might narrow the *ratio* to the fact-based result of the case. This corresponds to a teleological reduction of a statute. There is, therefore, some flexibility in how a court may choose to use the *ratio* from a precedential case, just as there is flexibility in how statutes are applied.

The processes of finding the appropriate case or cases (the process of equivalence) and of identifying and articulating the binding *ratios* also involve the process of distinguishing. Distinguishing is the name given to the decision of the judge not to employ the *ratio* of an arguably binding precedent. Sometimes, judges depart from an arguably binding precedent by establishing significant differences in the facts of the case or the previous decision with the result that two superficially similar cases turn out to be not so similar after all. In this way, the judges are restricting the scope of application of the *ratio* from the previous decision. Using Kornhauser's vocabulary, one would say that the judges are reducing the rule of the previous decision to its fact-based result. As stated above, the author suggests that this be termed a teleological reduction. No matter what nomenclature is used, the effect of distinguishing is to release the case in question from applying the rule from the arguably precedential case.

This process of distinguishing, by the way, is exactly the same process as is used when a judge decides not to employ an arguably applicable statute. Sometimes, the judge will establish significant differences between the facts as stated in the statute and those found by the judge. This is commonly done by defining or re-defining the statutory language so that the statute, which seemed superficially similar to that case at hand, turns out to be not so similar after all. In this way, the judge (teleologically) reduces the reach of the statute.

32. Lewis A Kornhauser, "Stare Decisis," New Palgrave Dictionary of Economics and the Law vol 3 (Peter Newmann ed 1998).

4. The role of precedents in civil law jurisdictions

Although civil law jurisdictions do not expressly recognize the doctrine of *stare decisis*, civilian judges in the first instance work in judicial hierarchies in which they are expected to follow the rulings of the judges on the appellate courts. In addition to creating more work for the appellate courts, the failure of lower court judges to follow appellate court rulings would violate notions of equality, lessen predictability, and undermine the public's trust in the judiciary. Further, many civil law countries have statutes on the books that require inferior judges to follow the decisions of judges superior to them in the judicial hierarchy.[33] In addition, there are statutes regulating the binding power of precedents of the various panels on appellate courts in civilian jurisdictions.[34] To promote efficiency, predictability, and collegiality, the legislatures in civilian jurisdictions often enact statutes requiring all panels of such courts either to follow the previous rulings of the other panels, or else call for an *en banc* decision of all of the panels of the court so that they can reach agreement on how the law should be interpreted.

In fact, such *en banc* decisions are extremely rare.[35] In the vast majority of cases, the judges of the other panels accept the considered judgments of their colleagues on the other panels. It is also very rare for the panels to overrule their own decisions.

These assertions can be illustrated by the following statistics that the author has collected on the German Federal Constitutional Court. In the first 55 years of the German Federal Constitutional Court's existence (1951-2006) in which it published 2,999 full decisions,[36] the two senates of

33. E.g., German Federal Constitutional Court Statute (*Bundesverfassungsgerichtsgesetz*) § 31 (I).
34. E.g., German Federal Constitutional Court Statute (*Bundesverfassungsgerichtsgesetz*) § 16. See also chapter 3, section 5 of the Swedish Procedural Code (*rättegångsbalken*), discussed in Gunnar Bergholz & Aleksander Peczenik, "Precedent in Sweden," *Interpreting Precedents: A Comparative Study* 300 *et seq.* (N MacCormick & RS Summers eds 1997).
35. Thomas Lundmark, "Stare decisis vor dem Bundesverfassungsgericht," 28 *Rechtstheorie* 330 *et seq.* (1997); Thomas Lundmark, *Charting the Divide between Common and Civil Law* 332 *et seq.* (2012).
36. This figure was arrived at by adding up all of the judgments in the official reports, the *Sammlung der Bundesverfassungsgerichtsentscheidungen* (BVerfGE). During the same period, the three-judge chambers, which are discussed below, issued 133,831

the German Federal Constitutional Court departed from only 15 previous decisions in addition to four departures under the section 16 *en banc* procedure of the German Federal Constitutional Court Statute. Using the methodology employed above for the United States Supreme Court, which, like the German Federal Constitutional Court, has the power of constitutional judicial review, one can conclude that the United States Supreme Court is nearly twice as likely as the German Federal Constitutional Court to overrule previous cases (an overruling rate of 1.13 per cent compared to 0.63 per cent respectively). Furthermore, as reported in a previous section of this paper, the author's research shows that the United States Supreme Court engaged in political overrulings at a rate of 0.47 per cent compared to a rate of 0.37 per cent for the German Court. These figures suggest that the German Federal Constitutional Court shows roughly the same respect for precedents as the United States Supreme Court.

5. Conclusion

Although respect for previous judicial decisions can be traced back to the earliest centuries of the common law, the doctrine of *stare decisis* as we know it today – the search for the law in single judicial decisions – did not arise until the 19th century. There are three basic reasons why it did not arise earlier: (1) the unclear structure of the judicial hierarchies before 1875; (2) the unavailability of reliable reports of the judicial decisions; and, most importantly, (3) the realization that judicial decision-making is a form of law-making, and law-making should be left as much as possible to the legislature.

The law pronounced in judicial decisions can only be effective as law if the populace believes that the judges will not change their decisions arbitrarily. Consequently, overrulings should ordinarily be limited to those which correct mistakes (corrective overruling) and those which seek to update previous decisions in light of changes in society (renovative overrulings). "Political" or "legislative" overrulings are those which cannot be classified as corrective or renovative. They are due to the appointment of new judges to the court. But even these overrulings have a place, especially when the court is construing constitutional law.

decisions and disposed of 1,789 applications for preliminary relief. See www.bundesverfassungsgericht.de/organisation/organisation.html.

Stare decisis is not limited to the common law world. Convincing evidence of a similar process can be found in civil law jurisdictions like Germany. The overruling practice of the German Federal Constitutional Court, for example, looks very similar to that of the United States Supreme Court.

The doctrine of *stare decisis* is based on the fundamental principle of justice: that like cases must be decided alike, that is, equality. The vertical aspect of the doctrine serves equality, predictability, and efficiency. The horizontal aspect also serves a fourth purpose: judicial respect for separation of powers. This fourth purpose engenders public trust in the justice system and in that way enhances the legitimacy of the entire legal system.