

Michigan Law Review

Volume 44 | Issue 6

1946

PRECEDENT IN PAST AND PRESENT LEGAL SYSTEMS

C. Sumner Lobingier

presently Legal Adviser to the Military Governor of the American zone in Korea

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Comparative and Foreign Law Commons](#), [Jurisprudence Commons](#), and the [Legal History Commons](#)

Recommended Citation

C. S. Lobingier, *PRECEDENT IN PAST AND PRESENT LEGAL SYSTEMS*, 44 MICH. L. REV. 955 (1946).

Available at: <https://repository.law.umich.edu/mlr/vol44/iss6/4>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

PRECEDENT IN PAST AND PRESENT LEGAL SYSTEMS

*C. Sumner Lobingier**

I

HISTORICAL AND COMPARATIVE

A. *In General*

THE prevailing notion that *stare decisis* is peculiar to the Anglican Legal System is quite provincial and far from correct. On the contrary, the principle is inherent in every legal system,¹ at least in

* B.A., M.A., LL.M., Ph.D., D.C.L., Univ. of Nebraska; D.Jur., Soochow Univ., China; J.U.D., National University; Former Judge, Court of First Instance, Philippines; Former Judge, United States Court for China (awarded the Order and Decoration of the Chiao Ho by the Chinese Gov't on completing 20 years of judicial service); Securities & Exchange Commission Officer 1934-1946; presently Legal Adviser to the Military Governor of the American zone in Korea; formerly teacher of law in University of Nebraska, the Philippine Law School, the Comparative Law School of China, National University and other law schools; Author: *THE PEOPLE'S LAW* (1910), *EVOLUTION OF THE ROMAN LAW* (1923); *THE BEGINNINGS OF LAW*, A.B.A. COMPARATIVE LAW BUREAU BULLETIN (1933) and numerous articles in legal and other encyclopedias and periodicals.—*Ed.*

¹ "All the Law is judge-made. . . . The shape in which a statute is imposed on the community . . . is that statute as interpreted by the courts." GRAY, *NATURE AND SOURCES OF THE LAW* 119-120 (1909). Cf. the same author's "Judicial Precedents," 9 HARV. L. REV. 27 at 39 (1895); CARDOZO, *PARADOXES OF LEGAL SCIENCE* 15 (1928); Collins, "Stare Decisis and the 14th Amendment," 12 COL. L. REV. 603 (1912). "The whole of the rules of equity, and nine tenths of the rules of common law, have in fact been made by judges." Mellish, L.J. in *Allen v. Jackson*, 1 Ch. Div. 399 at 405 (1875). This is especially true of evidence. See Lobingier, "Our Model Code of Evidence," 91 UNIV. PA. REV. 581 at 584 (1943). "The survey of text writers down to the middle of the 16th century proves the dependence of English law upon decided cases." Lewis, "History of Judicial Precedent, I," 46 L.Q. REV. 207 at 215 (1930).

"In all this process of forming and fashioning the law, precedent is the most potent instrument . . . the most fundamental article of faith in every English lawyer's creed . . . as Burke described it, 'the sure foundation of English law and the sure hold of the lives and property of all Englishmen.'" Allen, "Precedent and Logic," 41 L.Q. REV. 329 at 338 (1925).

" . . . all legal systems follow precedents; for it is a natural practice of the human mind, whether legal or non-legal, to accept the same pattern in similar, or analogous, cases. . . . This method . . . is accepted by the English Law. . . ." Goodhart, "Precedent in English and Continental Law," 50 L.Q. REV. 40 at 41 (1934).

"The best and most rational portion of English law is, in the main, judge-made law. Our judges have always shown, and still show, a really marvellous capacity for developing the principles of the unwritten law and applying to the solution of questions raised by novel circumstances." Editorial Note, 9 L.Q. REV. 106 (1893).

On this point the only dissenting voice appears to be that of Dean Pound who "recognize(s) that legislation is the more truly democratic form of law-making . . .

its primitive stage;² for the earliest form of law is custom, and the "core of custom"³ is precedent, not necessarily judicial, but something quite as authoritative.

B. In Earlier Legal Systems

Thus the Chinese legal system, the oldest system in continuous existence, has always been based on precedent,⁴ as were Sumerian⁵ and the Semitic in various forms—Babylonian,⁶ Assyrian,⁷ Hebrew⁸ and

the more direct and accurate expression of the general will." "Common Law and Legislation," 21 HARV. L. REV. 383 at 406 (1908). But if the "democratic form" is the goal, why not adopt the Initiative and Referendum?

"The Supreme Court has been the supreme constitution-maker . . . a perpetual constitutional convention . . . [Its work] includes more than one half of our present constitution . . . the doctrine of sovereignty . . . dual form of government . . . supremacy of Supreme Court . . . all changes in the other constitutional law doctrines." Willis, "The Part of the United States Constitution Made by The Supreme Court," 23 IOWA L. REV. 165 at 212 (1937).

" . . . *stare decisis* is a rule of necessity and a natural evolution from the very nature of our institutions." Lile, "Views on the Rule of *Stare Decisis*," 4 VA. L. REV. 95 at 97 (1916).

² See MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY 125 et seq. (1926). "The earliest compilations of Roman and of Germanic customary law—the Twelve Tables, the Leges of the different German Tribes, and the Dooms of the Anglo-Saxons—are statements of the legal tradition established by decisions." MUNROE SMITH, A GENERAL VIEW OF EUROPEAN LEGAL HISTORY 292-93 (1927).

"The old Germanic Assemblies possessed both the legislative and the judicial power . . . cited their own former resolutions as the law, and if they wished to change the law, . . . did it instanter, *nunc pro tunc*, and applied the changed law to cases before them which had arisen while the former law was in force." Teisen, "The False Theory of the Force of Precedent," 76 CENTRAL L. J. 147 at 152 (1913).

³ See Lobingier, "The Real Natural Law," 15 NOTRE DAME LAWYER 26, 32 (1939).

⁴ See Lobingier, "An Introduction to Chinese Law," 4 CHINA L. REV. 121 et seq. (1930); Sheng, "Selected Cases from the Han Dynasty," 4 id. 437. Modern "Chinese law follows in principle the Swiss Code. In practice, however, we are tending toward the Anglo-American System . . . The President of the Supreme Court . . . was authorized by the Rules of Judicial Organization . . . to take necessary steps to secure uniformity . . . whenever a new decision conflicts with it, [precedent] the occasion will call for the taking of steps toward uniformity and consensus of opinion." Chang, Liang, & Wu, "Sources of Chinese Law," 2 CHINA L. REV. 209 at 211-12 (1925).

⁵ Langdon, "The Sumerian Law Code, Compared with Hammurabi's," J. OF ROYAL ASIATIC SOC. 490-1 (1920). Cf. Keeton, "The Origins of Babylonian Law," 41 L. Q. REV. 441 at 451 (1925).

⁶ Babylonian: "Khammurabi's Code had been based on decided cases in the courts; its influence had lasted in the Middle East until the seventh century A.D." "The Significance of Case Law in the Emergence of all Legal Systems," 168 L.T. 428 at 429 (1929), from a lecture by de Montmorency.

⁷ JOHNS, BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS 39 at c. 4 (1904), and see preceding note.

⁸ MENDELSON, THE CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS

Arabic.⁹ Ancestral custom formed an important part of Hellenic Law,¹⁰ especially in its earliest period.

I. *Roman Law*

"Precedent was the very essence of Roman public life and... the Romans found a large place for what we may call 'precedent,' in the widest sense, in their legal system."¹¹ *Mos* was the outstanding classical example of customary law, and interpretation by the pontiffs probably provided precedents.¹² Some of the *juris prudentes*, who appeared during the republic, received the *jus respondendi* under the empire and their *responsa* "had the character of true judicial precedents."¹³ But *stare decisis* went to seed in the late Roman Law when Valentinian prescribed the weight to be given to each of the five great jurists and required the courts to follow them accordingly.¹⁴

2. *Romanesque (Modern Civil Law)*

The civil law seems to have perpetuated the principle of *responsa prudentium* in the form of doctrine.¹⁵ In France, as well as other

225 (1891); SULZBERGER, ANCIENT HEBREW LAW OF HOMICIDE 9 (1915); MIELZINER, INTRODUCTION TO THE TALMUD, 3d ed., 4, 5 (1925); WALLIS, GOD AND THE SOCIAL PROCESS 9, 12, 17 (1935); FARRAR, HISTORY OF INTERPRETATION 88 (1886).

⁹ ROBERTSON SMITH, THE OLD TESTAMENT IN THE JEWISH CHURCH, 2d ed., 331 (1902).

¹⁰ VINogradoff, HISTORICAL JURISPRUDENCE 75 (1920). "[In Greece] Many important innovations—for instance, inheritance by the mother—had been introduced by the decision of special cases." "The Significance of Case Law in the Emergence of all Legal Systems," 168 L.T. 428 at 429 (1929), from a lecture by de Montmorency.

¹¹ Jolowicz, "Precedent in Greek and Roman Law" (MS), read before the Riccobono Seminar of Roman Law, May 11, 1939. Cf. BUCKLAND, A TEXT BOOK OF ROMAN LAW 52 (1921).

"There could be no more conspicuous example than this [praetorian system] of a whole body of law built up by judicial practice." ALLEN, LAW IN THE MAKING, 2d ed., 112 (1930).

¹² 2 MOMMSEN, HISTORY OF ROME, rev. ed., Dickson's trans., 213 (1911). Cf. SOHM, INSTITUTES OF ROMAN LAW, Ledlie's 3d ed., § 12 (1907).

¹³ Gray, "Judicial Precedents—A Short Study in Comparative Jurisprudence," 9 HARV. L. REV. 27 at 29 (1895).

¹⁴ "We accord our approval of all the writings of Papinian, Paulus, Gaius, Ulpian and Modestinus... If divergent *dicta* be adduced, that party shall prevail who has the greater number of authorities. If the number on each side be equal, that shall prevail which has the support of Papinian; but while he, the most excellent of all, is to be preferred to any other single authority, he must yield to any two. Where opinions are equal, and none given preference we leave it to the judge's discretion which he shall adopt." C. Th. I. 3. Cf. LOBINGIER, EVOLUTION OF ROMAN LAW 280 (1923). This was amended by Justinian (preface to D.I. I. 6) so as to include notes by Ulpian, Paulus and Marcian. See GRAY, THE NATURE AND SOURCES OF THE LAW 249-250 (1909).

¹⁵ See "Modern Civil Law," 40 C.J., § 5, pp. 1249-50; Radin, "Case Law and

continental countries, not only "doctrine" but "jurisprudence" (judicial precedents) are not infrequently followed,¹⁶ subsequent to an earlier practice of seeking the consensus of professional opinion.¹⁷

Stare Decisis," 33 COL. L. REV. 199 (1933); Ireland, "Precedent's Place in Latin Law," 40 W. VA. L. Q. 115 (1934).

¹⁶ "Case law exists in a much more highly developed form on the Continent than appears to be realized by English lawyers, although the Anglo-American and Continental case law systems do not function in quite the same way. . . ." In Germany, Gutteridge, "A Survey of German Case Law in 1928," 10 J. OF COMP. LEG. (3d ser.) 203 at 203 (1928). "I heard a lawyer, a Socialist member of the Reichstag, argue before a Berlin court the question as to what was a lawful assembly and . . . most of his argument rested upon decision." McMurray, "Changing Conceptions of Law," 3 CAL. L. REV. 441 at 447 (1915).

Following decisions is not unknown in France, see Coxe, "Decisions in France," 16 GREEN BAG 449 (1904). "This accumulation of precedents has had a visible and growing effect in modern French jurisprudence. . . ." ALLEN, LAW IN THE MAKING, 2d ed., 125 (1930). "Wherever judicial decisions are systematically reported, their authority tends to increase; witness the case of France, Germany and Switzerland in recent times." Lewis, "History of Judicial Precedent," 46 L.Q. REV. 207 at 215 (1930). *The Conseil d'Etat* or French Administrative Tribunal applies the doctrine of stare decisis to its own judgments. See Lobingier, "Administrative Law and Droit Administratif," 91 UNIV. PA. L. REV. 36 at 48 (1942).

C. C. Soule found stare decisis in Italy, Austria, Spain and Hungary. "Stare Decisis in Continental Europe," 19 GREEN BAG 460 (1907); see Henry, "Jurisprudence Constante and Stare Decisis Contrasted," 15 A.B.A.J. 11 (1929). Cf. 29 ILL. L. REV. 984 (1935); 64 UNIV. PA. L. REV. 570 (1916).

Netherlands Law "does not assign to judicial precedent the same authority [as did] Roman Dutch jurisprudence prior to . . . the code . . . but it must frequently occur that Dutch courts pay due attention and weight to judicial precedent." Kotzé, "Judicial Precedent," 34 SO. AFRICA L. J. 280 (1917). Reprinted in 144 L.T. 340 (1918).

British Civil Law Jurisdictions: "Scottish Judges take the same view of the binding force of judicial precedent as do the judges of any common law jurisdiction." So do "the Roman Dutch jurisdictions" and, to a certain extent, Quebec. Amos, "The Common Law and the Civil Law in the British Commonwealth of Nations," 50 HARV. L. REV. 1262 (1937). For increasing recognition of stare decisis in Scotland see Gardner, "A Comparison of the Doctrine of Judicial Precedent in American Law and in Scots Law," 52 JURID. REV. 144 (1940); 26 A.B.A.J., 774 at 780 (1940); Henderson, "English Cases as Scots Authorities," 12 JURID. REV. 304 (1900); Stare decisis in works of Scotch jurists, 51 L.Q. REV. 587 (1935). "The Quebec courts follow the decisions of the Privy Council and of the Supreme Court of Canada in their interpretations of Dominion statutes and of the Code." Laird, "The Doctrine of Stare Decisis," 13 CAN. BAR REV. 1 at 15 (1935); Williams, "Stare Decisis in Canada, Review of Cases," 4 CAN. BAR REV. 289 (1926). "American decisions [on international subjects] ought to be considered with a greater desire to endeavor to agree with them." 54 CAN. L. J. 15 at 17 (1918), 52 IRISH L. T. 212 (1918).

¹⁷ ". . . while the English lawyers of these two centuries [14th and 15th] made the common law a system of case law, the continental lawyers . . . made their law depend upon the common opinion of the legal profession . . . gathered principally from

3. *International Law*

"Which method of precedent—English or Continental—[asks Goodhart]¹⁸ is the more likely to be followed by the Permanent Court of International Justice in the development of international law?" The question had been answered by the court itself in its use of precedents.¹⁹ So in British prize law, "the rule *stare decisis* applies";²⁰ and papal law, administered by an ancient court—*Sacra Romana Rota*—once "the supreme tribunal of the whole Christian world."²¹ and still international in the sense that it exercises jurisdiction (chiefly in matrimonial causes) over parties of different nationalities, "had grown up out of the Roman system of case law."²²

C. *In the Anglican System*

I. *In general*

It would hardly be an exaggeration to say that the Anglican legal system is largely a product of the maxim *stare decisis et non quita movere* (to stand by decisions and disturb not what is settled).²³ For while, as we shall see,²⁴ the doctrine of *stare decisis* was relatively long in attaining full recognition there, a mass of decisions was meanwhile

legal treatises, and sometimes from the *Arrets de règlement*, that is, the general rulings of the superior courts." 4 HOLDSWORTH, HISTORY OF ENGLISH LAW 220 (1924).

¹⁸ Goodhart, "Precedent in English and Continental Law," 50 L. Q. REV. 40 at 64 (1934).

¹⁹ "... a rule of law applied as decisive by the Court in one case, should, according to the principle *stare decisis*, be applied by the Court as far as possible in its subsequent decisions." Ehrlich, J. in *Charzow Factory*, 1 World Ct. Rep. 646 at 697 (Ser. A, No. 17, 1927).

"The Court follows its own decisions for the same reason for which all courts—whether bound by the doctrine of precedent or not—do it, namely, because such decisions are a depository of legal experience to which it is convenient to adhere; because they embody what the Court thinks is the law; because respect for decisions given in the past makes for continuity and stability, which are of the essence of orderly administration of justice; and because judges do not like, if they can help it, to admit that they were previously in the wrong." LAUTERPACHT, DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 8 (1934).

²⁰ Kunz, "British Cases 1939-41," AM. J. INT. L. 204 at 205 (1942).

²¹ WIGMORE, PANORAMA OF THE WORLD'S LEGAL SYSTEMS, Lib. ed., 937 et seq. (1936). Cf. 20 GEO. L. J. 14 (1931).

²² de Montmorency, "The Significance of Case Law in the Emergence of all Legal Systems," 168 L.T. 428 (1929).

²³ See *Supra*, Note 1.

²⁴ *Infra*, Note 36.

accumulating which became law by virtue of that doctrine. Indeed, even "legislation, like judge-made law, follows precedent."²⁵

2. In England

Precedent was recognized in England by the Keltic inhabitants before the invasions of the Anglo-Saxons.²⁶ The latter's "codes, like the *Leges Barbarorum* of the continent, enacted the customary law of the tribe."²⁷ After the Norman Conquest "the general or universal opinion of the bar... was often solicited by the judges and regarded, when obtained, as of authority," and the same appears to be still true, in England at least, as regards "the general practice of conveyancers."²⁸

Bracton (ca. 1250) cites about 500 cases; but other writers before the period of the Year Books (1290-1535) cite few; and "show a diversity of practice. Precedents are constantly employed and followed, but the judges do not necessarily consider themselves bound by them, and there are a great many conflicting decisions *in pari materia*."²⁹ Lewis concedes that "in the later Year Books there is hardly any explicit denial of the force of precedent"; but he claims to "have sifted the evidence, both for and against the view that the [*stare decisis*] doctrine dates from time immemorial and conclude[s] that it is not to be found in the Year Books."³⁰ But Holdsworth thought "that Pro-

²⁵ Horack, "The Common Law of Legislation," 23 IOWA L. REV. 41 at 42 (1937). Cf. Page, "Statutes as Common Law Principles," 1944 WIS. L. REV. 175, showing how the courts have drawn upon statutory analogies.

²⁶ A Welsh book of precedents for pleaders, of as late date as the reign of Edward IV, recognizes *galanas* (wer-gild). MAITLAND, COLLECTED PAPERS 227 (1911).

²⁷ 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 3d ed., 19, 20 (1923). "The earliest was not published till the end of the 6th century." Cf. WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY, c. 3 (1925).

²⁸ Komar, "Opinio Prudentum in Anglo-American Law," 71 UNIV. PA. L. REV. 340 at 344 (1923), citing cases beginning with 1302. Cf. HOLDSWORTH, HISTORY OF ENGLISH LAW, 3d ed., 19, 20 (1923).

²⁹ Allen, "Precedent and Logic," 41 L.Q. REV. 329 at 338 (1925). But that means merely that no real Anglican system had yet been developed. "... The first use of the actual word 'precedent' which I have been able to discover, is in a case in Dyer of... 1557." ALLEN, LAW IN THE MAKING, 2d ed., 140-1 (1930). "It is a safe thing to follow approved precedents . . ." wrote Coke (1552-1634), 1 Institutes, Thomas ed., 5 (1827). Here, apparently, he meant "forms" to which he had just referred; but in 2 COKE LIT. 244a (1832) he said: "It cannot be but among such a farrago of authorities there should be much refuse." Chief Justice Vaughan of the Common Pleas (1668-1674) is said to have made "the first attempt . . . to lay down a studied theory of the authority of precedents." ALLEN, LAW IN THE MAKING, 2d ed., 144 (1930).

³⁰ Lewis, "The History of Judicial Precedent, I," 46 L.Q. REV. 207 at 221 (1930); id., "The History of Judicial Precedent, III," 47 L.Q. REV. 411 at 423 (1934).

fessor Winfield³¹ minimizes too much the part played by precedent during the period of the Year Books."³² These were nevertheless often incomplete and sometimes unreliable.³³ The progress of stare decisis was promoted, however, by the substitution of written for oral pleadings, with their pretrial formulation of the issues³⁴ and the rise of modern private reporting, of which Plowden's (1550-1580) was among the most complete and accurate.³⁵ "The modern theory as to the authority of decided cases was reached substantially by the end of the 18th century," said Holdsworth.³⁶ Equity, which ostensibly began by reliance on the chancellor's conscience, "developed, through the use of judicial precedents, from broad principles into a system [so] rigid . . . that little surprise is occasioned by the denial of the title 'Court of Conscience' to the Chancery Division . . . Equity judges have contributed more than Common law judges to modern case-law learning. . . ."³⁷

³¹ WINFIELD, *THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY* 148 et seq. (1925).

³² "Case Law," 50 L.Q. REV. 180 at 181, note 7 (1934). "If they had not been regarded as being of some authority it would be difficult to see what value the Year Books would have been to the legal profession." *Id.* at 181.

³³ Lewis, "The History of Judicial Precedent, III," 47 L.Q. REV. 411 (1931).

³⁴ "At the end of the 15th and the beginning of the 16th centuries—which concentrated the reporters' attention, not upon the oral debate in court as to what the issue should be . . . but upon the decision." Holdsworth, "Case Law," 50 L.Q. REV. 180 at 181 (1934).

³⁵ Gray, "Judicial Precedents," 9 HARV. L. REV. 27 at 38 (1895); ALLEN, *LAW IN THE MAKING*, 2d ed., 142 (1930); Lewis, "The History of Judicial Precedent, IV," 48 L.Q. REV. 230 at 231 et seq. (1932). "After law-reporting, however limited in range, has been exerting its influence for a century and a half, we may observe the effect in some significant remarks of Prisoet C.J. In 1454 he remarks that a certain point has been decided a dozen times in our books. . . ." ALLEN, *LAW IN THE MAKING*, 2d ed., 140 (1930).

³⁶ Holdsworth, "Case Law," 50 L.Q. REV. 180 (1934). Of Allen's claim [*LAW IN THE MAKING*, 2d ed., 150 (1930)] that "it is certainly a product of the nineteenth century," Holdsworth added (*id.*, note 4) "I do not agree. . . It seems . . . that Professor Allen has not sufficiently observed the distinction between the general theory and the reservations with which . . . [it] has been accepted." See also 18th century decisions collected by WAMBAUGH, *STUDY OF CASES*, 2d ed., § 93, note (1894).

³⁷ Winder, "Precedent in Equity," 57 L.Q. REV. 245 at 245, 279 (1941), an exhaustive treatise. Cf. ALLEN, *LAW IN THE MAKING*, 2d ed., Appx. C (1930). In *Young v. Bristol Aeroplane Co., Ltd.*, [1944] K.B. 718 at 730, the English Court of Appeal holds that it must follow its own decisions, divisional as well as those of the full court unless in conflict with a House of Lords decision or "was given per in curiam."

3. *In the Dominions (Australia, Canada³⁸ and New Zealand)*

The doctrine of *stare decisis* prevails in the Dominions wherever Anglican law is in force. Even in Civil Law jurisdictions under the British crown, that doctrine seems to be gaining ground.³⁹

4. *In the United States*

Due largely to animosities engendered during the American Revolution, statutes were enacted in New Jersey (1799), Kentucky (1807), and Pennsylvania (1810) forbidding citation of any English authorities in the courts.⁴⁰ But the common law was too deeply rooted in the colonies to be displaced in that way and long before the end of the nineteenth century the prejudice which had led to it evaporated. In 1895 "the general rule and practice as to the weight due to a precedent in the court which made it or in a court of coordinate jurisdiction is substantially the same as in England," wrote Professor Gray.⁴¹

³⁸ See Williams, "Stare Decisis," 4 CAN. B. REV. 289 at 301 (1926) where the decisions are set out by provinces.

In *Howard v. Herod Construction Co.*, 41 ONT. W.N. 198 (1932), it was pointed out by the late Justice Riddell that repeal of an act providing that a decision of a divisional court was binding "on all other courts and judges" and was not to be departed from "without the concurrence of [those] who gave the decision" [Judicature Act, Rev. Stat. Ont. (1927) c. 88, § 31] did not affect the applicability of *stare decisis*.

³⁹ *Scotland*. In an article appearing in 26 A.B.A.J. 774 (1940) and 52 JURID. REV. 144 (1940), J. C. Gardner, of the Scottish Bar, compares the use of precedent in Scotland and the United States and concludes that in both the doctrine is more flexible than in England, but is "held in strong respect," subject to the device of "distinguishing and discarding" obsolete precedents. "A decision of the House of Lords in a Scots appeal is binding on all courts in Scotland and on the House itself... in Scots law." *London St. Tramways Co. v. London Co. Council*, [1898] A.C. 375, 78 L.T.R. 361. Such a decision in an English appeal, "tho not binding in Scotland, is entitled to great respect on grounds of general jurisprudence." Orr Ewing, 13 *Rettie* (H.L.) 1 (1885). An increasing tendency in both Scots and English courts to cite each others' decisions was claimed by J. H. Henderson in 12 JURID. REV. 304 (1900). See also note, *Stare decisis* in works of Scottish jurists, 51 L.Q. REV. 587 (1935). "Scottish Judges take the same view of the binding force of judicial precedent as do the judges of any common law jurisdiction." So do "the Roman Dutch jurisdictions" and, to a certain extent, Quebec. Amos, "The Common Law and the Civil Law in the British Commonwealth of Nations," 50 HARV. L. REV. 1249 at 1262 (1937). "The Quebec courts follow the decisions of the Privy Council and of the Supreme Court of Canada in their interpretations of Dominion statutes and of the Code." Laird, "The Doctrine of *Stare Decisis*," 13 CAN. B. REV. 1 at 15 (1935).

⁴⁰ WARREN, *HISTORY OF THE AMERICAN BAR* 232 et seq. (1911); GRAY, *THE NATURE AND SOURCES OF THE LAW*, Appx. ix, p. 323 (1909). Cf. Ashley, "Effect of *Stare Decisis* on American Jurisprudence," 39 AM. L. REV. 696 (1905).

⁴¹ Gray, "Judicial Precedents," 9 HARV. L. REV. 27 at 40 (1895). That is true of other Federal courts, e.g., *Meigs v. United States*, 20 Ct. Cl. 181 at 185

About a generation later, Professor Goodhart, a countryman of Gray, living in England, claimed "a marked divergence between the English and the American attitude to . . . *stare decisis*" and even predicted its "eclipse." He devoted over three fine print pages⁴² to quotations from "recent articles" in American periodicals which, he says, "range all the way from the more moderate suggestion of slight modification to the radical demand for a complete abolition." But of the fifteen writers quoted, not more than two or three seem even to suggest (and much less to "demand") "complete abolition," and they are hardly qualified to speak for the 175,000 lawyers in the United States. Indeed, the writer most quoted (three articles) is a champion of *stare decisis*.⁴³ Moreover, while Professor Goodhart quotes at some length from Judge Moschzisker, he omits entirely a most significant passage.⁴⁴ A close analysis of the other articles reveals a tendency to criticize the application of *stare decisis* rather than the doctrine itself.

Let us turn now to some American authorities not mentioned by Professor Goodhart. According to Messrs. Kocourek and Koven⁴⁵ "*stare decisis* has received the stamp of approval from many judges, and leaders of the Bar." This has been notably true of the Federal Supreme Court Justices.⁴⁶ Some of the courts in former civil law

(1885); *Leigh v. United States*, 43 *id.* 374 at 386 (1908), and administrative agencies. "... judges of the [United States] Tax Court, as a general rule, consider themselves bound by each other's decisions. . . ." subject to the power to overrule. Roehner, "Are Tax Court Judges Bound by Other's Decisions," 23 *TAXES* 310 (1945).

⁴² GOODHART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* 50, 65, 74 (1930); *id.* 60-64.

⁴³ "... *Stare decisis* is a feature of the common law techniques of decision. What is wrong with that technique . . . based on a conception of law as experience, developed by reason . . . tested and developed by experience?" Pound, "What of *Stare Decisis*?" 10 *FORDHAM L. REV.* 1 at 1, 5, 12 (1941).

⁴⁴ "When the rule is reasonably appreciated and correctly applied, *stare decisis* plays a fine part in our system of law." Moschzisker, "Stare Decisis in Courts of Last Resort," 37 *HARV. L. REV.* 409 (1924).

⁴⁵ "Renovation of the Common Law Through *Stare Decisis*," 29 *ILL. L. REV.* 971 at 981 (1935).

⁴⁶ "*Stare decisis* is usually the wise policy, because in most matters, it is more important that the applicable rule of law be settled than that it be settled right. [Cf. *National Bank v. Whitney*, 103 U.S. 99 at 102 (1880)]. This is commonly true even where the error is a matter of serious concern, provided correction cannot be had by legislation." Brandeis, J. in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 at 406, 52 S. Ct. 443 (1932), citing nearly a page of Supreme Court decisions.

"We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations." Frankfurter, J. in *Helvering v. Hallock*, 309 U.S. 106 at 119, 60 S. Ct. 444 (1940).

"I cannot believe that any person who at all values the judicial process or dis-

jurisdictions have been turning to *stare decisis*—e.g., Louisiana⁴⁷ and the Philippines.⁴⁸ There is also an extensive list of law review articles in support of that doctrine,⁴⁹ some of which claim trends toward “relaxation” and greater flexibility.⁵⁰ Of course, the doctrine⁵¹ has always

tinguishes its method and philosophy from those of the political and legislative process would abandon or substantially impair the rule of *stare decisis*.” Justice Robert H. Jackson, “Decisional Law and *Stare Decisis*,” 30 A.B.A.J. 334 at 334 (1944), 28 J. AM. JUD. SOC. 6 (1944).

Chief Justice Stone did not condemn *stare decisis* but found “in this country less emphasis upon its compulsion and rather more readiness to restrict precedent regarded as dubious than to adhere to it.” Stone, “The Common Law in the United States,” 50 HARV. L. REV. 4 at 9 (1936).

Professor Goodhart quotes from an article published in 1923 by “Hon. Harlan F. Stone.” After writing it the latter served twenty-one years on the Federal Supreme Court and he seems to have made quite as full use of *stare decisis* as his colleagues there. See, e.g., *Wolfe v. United States*, 291 U.S. 7, 54 S. Ct. 279 (1934), where, in an opinion of less than six pages, he cited forty-three decisions beside text books.

“I think adherence to precedent should be the rule and not the exception.” CARDOZO, NATURE OF THE JUDICIAL PROCESS 149 (1937). “What has once been settled by a precedent will not be unsettled over night, for certainty and uniformity are gains not lightly to be sacrificed.” CARDOZO, THE PARADOXES OF LEGAL SCIENCE 29, 30 (1928).

⁴⁷ Louisiana “. . . the judges of the Supreme Court . . . have fully adopted the common law doctrine of *stare decisis* and have virtually disregarded the civil law view.” 7 TULANE L. REV. 100 at 116 (1932).

⁴⁸ Philippines “. . . the status of . . . *stare decisis* is uncertain. Our Supreme Court had applied the doctrine in the past altho recent cases have been decided in the contrary. . . .” Lazaro, “*Stare Decisis* and the Supreme Court of the Philippines,” 16 PHIL. L.J. 404 at 419 (1937).

⁴⁹ “To this doctrine we owe a weight of obligation whose magnitude cannot easily be overstated.” From an address by John F. Dillon, “Precedents,” 30 J. OF JURISPRUDENCE 501 at 502 (1886). “*Stare decisis* is the best system . . . that man has yet devised—at least for us and our conditions. We *must* have some rule of conduct, and any rule involves a certain degree of rigidity. Let us earnestly set to re-establishing it, rather than consciously or unconsciously whittling it down. . . . Our system of precedent should be one of principles—not cases.” Sheppard, “Decadence of Precedent,” 24 HARV. L. REV. 298 at 304 (1911). Cf. McKean, “The Rule of Precedents,” 76 UNIV. PA. L. REV. 481 at 487 (1928); Chamberlain, “*Stare Decisis*, Reason and Extent,” 8 N.Y. ST. B.A. PROC. 69 (1885).

⁵⁰ Aumann, “Where to With *Stare Decisis*,” 1 OHIO ST. UNIV. L.J. 169 (1935); Hardman, “*Stare Decisis* and the Modern Trend,” 32 W. VA. L.Q. 163 (1926); 2 TEMPLE L.Q. 169 (1928); 42 COMMERCIAL L.J. 90 (1937).

⁵¹ De Tocqueville thought it “gives the lawyer more timid habits and more conservative inclinations in England and America than in France.” I DEMOCRACY IN AMERICA, Reeve’s trans., 277 (1945) See also Rihani, “*Stare Decisis*,” 57 ALBANY L.J. 392 (1898); Trumbull, “Precedent v. Justice,” 27 AM. L. REV. 321 (1893) (criticized, *id.* 794); Winslow, “The Courts and the Paper Mills,” 10 ILL. L. REV. 157, 365 (1915), 26 J. AM. JUD. SOC. 124 (1943); Whitney, “The Doctrine of *Stare Decisis*,” 3 MICH. L. REV. 89 (1904), predicts codification; Teisen, “The False Theory of the Binding Force of Precedent,” 76 CENT. L.J. 147 (1913);

had critics and opponents, even among members of the legal profession, both judges⁵² and lawyers.⁵³

II

ANALYSIS

A. *Precedent as a Juridical Concept*

1. *Definition and form*

In the Anglican system precedent means a final judicial pronouncement on a legal question, properly presented,⁵⁴ and "*stare decisis* . . . only arises in respect of decisions directly upon the point in issue."⁵⁵ In that system also the decision is usually accompanied by, and embodied in, an "opinion";⁵⁶ but the latter is not essential to constitute the decision a precedent.⁵⁷ Nor is the *ratio decidendi*⁵⁸ necessarily a part of the opinion; for often there is more than one, each advancing distinct, and sometimes conflicting "reasons"⁵⁹ and only the ruling upon

Sachs, "Stare Decisis and the Legal Tender Cases," 20 VA. L. REV. 856 (1934); Gumbleton, "Misleading Sign Posts," 96 L.T. 580 (1894); Shenton, "The Common Law System of Judicial Precedent Compared with Codification as a System of Jurisprudence," 23 DICKINSON L. REV. 37 at 57 (1918); "The tyranny of case law," 65 IR. L.T. 57 (1931), 35 LAW NOTES 38 (1935).

⁵² E.g., North Dakota. "Justice Robinson's *bete noir* is the doctrine of *stare decisis*." 33 HARV. L. REV. 973 (1920) and see preceding note, especially Winslow, 10 ILL. L. REV. 157, 365 (1915).

⁵³ "Jettison Stare Decisis." Shenton, "The Common Law System of Judicial Precedent Compared with Codification as a System of Jurisprudence," 23 DICKINSON L. REV. 37, 57 (1918); "The tyranny of case law," 65 IR. L.T. 57 (1931), 35 LAW NOTES 38 (1935). Cf. note 51, *supra*.

⁵⁴ Cf. 1 KENT, COMM., 2d ed., 475 (1832); BLACK, LAW OF JUDICIAL PRECEDENTS 3 (1912); WELLS, A TREATISE ON THE DOCTRINES OF STARE DECISIS AND RES ADJUDICATA (1879); Chamberlain, "The Doctrine of Stare Decisis as Applied to Decisions of Constitutional Questions," 3 HARV. L. REV. 125 (1889). "The best statement of the circumstances which add to or diminish the weight of precedents is to be found in Ram on [Legal] Judgments [Townshend's ed. 1871]." Gray, "Judicial Precedents," 9 HARV. L. REV. 27 at 39, note 1 (1895).

⁵⁵ Pollock v. Farmers' L. & T. Co., 157 U.S. 429 at 574, 15 S. Ct. 673 (1895).

⁵⁶ "The confusion of the opinion with the decision is an inveterate one, particularly with students. . . . The rule is *stare decisis*, not *stare opinionibus* [n] or even *stare responsis*." Radin, "Case Law and Stare Decisis," 33 COL. L. REV. 199 at 210 (1933).

⁵⁷ WAMBAUGH, STUDY OF CASES, 2d ed., §§ 15, 37 (1894). Cf. 15 C.J., § 346, p. 954; Black, "Stare Decisis Principle," 25 A.L. REG. (N.S.) 745 (1886).

⁵⁸ I.e., "the underlying principle which . . . forms its authoritative element." SALMOND, JURISPRUDENCE, 7th ed., 201 (1924).

⁵⁹ For conspicuous examples, see Dred Scott v. Sandford, 19 How. (60 U.S.) 393 (1856); Boyd v. Nebraska, 143 U.S. 135, 12 S. Ct. 375 (1892); Alzua v. Johnson, 21 Philippine 308 (1912).

which a majority of the judges agree becomes a precedent.⁶⁰ An opinion has been called "authoritative"⁶¹ though not "binding," nor are all its contents "authoritative"; e.g., *obiter dicta* are excluded.⁶² In Texas, a commissioner's ruling, if adopted by the court, is a precedent;⁶³ but a contrary rule was announced in Nebraska.⁶⁴

2. *Classes and Effect*

Precedents have been classified into obligatory (or "imperative") and persuasive. Under the Anglican system the decision of the highest court of a jurisdiction is obligatory upon all inferior tribunals therein.⁶⁵

⁶⁰ 21 C.J.S., § 184, p. 295. Cf. the expression often found in opinions, "Smith, J. concurs in the result," usually accepted as a dissent from the reasoning of other opinions, and see WAMBAUGH, *STUDY OF CASES*, 2d ed., c. 3 (1894). "The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them." GOODHART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* 25 (1931). Cf. WAMBAUGH, *STUDY OF CASES*, 2d ed., c. 2, especially §§ 20, 21 (1894). "The position of the opinion is almost exactly that of the doctrine of Continental jurisprudence . . . all opinions have no more than 'persuasive' force. . . . Our 'doctrine' is scattered through the pages of thousands of reports instead of being concentrated in text books, but so is a great deal of the 'doctrine' of French courts, where the notes by distinguished jurists in the pages of Dalloz, Sirey or the *Gazette du Palais*, enjoy a real authority. The doctrinal discussions in the many German legal periodicals are studied by all German lawyers. We have merely taken the comment on the decision from the footnote into the text and have put it into the mouth of the judge himself." Radin, "Case Law and Stare Decisis," 33 *COL. L. REV.* 199 at 210, 211 (1933). Cf. Pound, "The Theory of Judicial Precedent," 36 *HARV. L. REV.* 940 at 945 et seq. (1923).

"Unlike stare decisis, the law of the case is a principle for the case at bar—for the litigation of today." Moore and Oglebay, "The Supreme Court, Stare Decisis and Law of the Case," 21 *TEXAS L. REV.* 514 at 552 (1943).

⁶¹ Radin, "Case Law and Stare Decisis," 33 *COL. L. REV.* 199 (1933).

⁶² GRAY, *NATURE AND SOURCES OF THE LAW*, § 555 (1927). Cf. cases collected by Kocourek & Koven, "Renovation of the Common Law through Stare Decisis," 29 *ILL. L. REV.* 971 at 979, note 45 (1935); 15 C.J., § 344, p. 950; 21 C.J.S. § 190, p. 309. And see the remark of Herbert E. Ritchie before the Cincinnati Conference of 1940, 14 *UNIV. CIN. L. REV.* 252-8 (1940).

⁶³ *Wooters v. Hollingsworth*, 58 *Tex.* 371 (1883).

⁶⁴ *Hoagland v. Stewart*, 71 *Neb.* 102 at 107, 98 *N.W.* 428 (1904); *Flint v. Chaloupka*, 72 *Neb.* 34, 99 *N.W.* 825 (1904).

⁶⁵ See POLLOCK, *A FIRST BOOK OF JURISPRUDENCE*, 6th ed., pt. 2, c. 6 (1929); WAMBAUGH, *STUDY OF CASES*, 2d ed., § 87 (1894); 15 C.J., § 308, p. 920; *id.*, § 312, p. 924; 21 C.J.S., § 197, p. 343; *id.*, § 201, p. 352.

Arkansas. "The decisions of the Supreme Court shall be obligatory on the Circuit Court." Criminal Code § 337, *Ark. Dig. Stat.* (1937) § 4260.

But in at least two instances [*Louisville & N. R. Co. v. Western Union Tele. Co.*, (D.C. Ky. 1914) 218 *F.* 91, and *Barnette v. W. Va. State Bd.*, (D.C. W. Va. 1942). 47 *F. Supp.* 251], lower federal courts declined to follow a Supreme Court precedent which was expected to be overruled—and was overruled, the first in *Lee*

Decisions of the courts of another jurisdiction are usually persuasive only.⁶⁶ Another classification recognizes "original" and "declaratory" precedents; but the latter in the sense in which they are used, merely adhere to the former and are hardly entitled to be called true precedents:⁶⁷ rather are they consequents. Salmond⁶⁸ draws a distinction between legal and historical precedents; but the latter, not being judicial, are not authoritative⁶⁹ in Anglican law, though they might be in other systems.

3. *Diverse theories*

a. "*Declaratory.*" Judges and jurists have divided into opposing schools as to the juridical nature of decisions as precedents.⁷⁰ As early as 1341 Judge Scot announced what later became known as the "declaratory" theory,⁷¹ viz., that "when judgment is reversed it is as

v. C. & O. Ry., 260 U.S. 653, 43 S. Ct. 230 (1923), and the second in 319 U.S. 624, 63 S. Ct. 1178 (1943).

⁶⁶ WAMBAUGH, *STUDY OF CASES*, 2d ed., § 88 (1894); 15 C.J., § 315, p. 925; 21 C.J.S., § 204, p. 354. Cf. Green, "The Law as Precedent, Prophecy, and Principle: State Decisions in Federal Courts," 19 *ILL. L. REV.* 217 (1924).

⁶⁷ "It is always difficult to say what is a new precedent." Winder, "Precedent in Equity," 57 *L.Q. REV.* 245 at 254 (1941).

⁶⁸ SALMOND, *JURISPRUDENCE*, 7th ed., 164 et seq. (1924). Probably an instance of the historical precedent would be the judgment (its first) of the Permanent Court of International Justice, enforcing Art. 380 of the Versailles Treaty opening the Kiel Canal "to vessels of all nations." It leaned heavily upon usages followed by administrators of the Suez and Panama Canals. S. S. Wimbledon, 1 *World Ct. Rep.*, 163 (Ser. A, No. 1, 1923).

⁶⁹ "What is meant by a 'legal source of law'? What should we understand by a 'medical source of medicine'? . . . A mechanical dichotomy between 'legal' and 'historical' sources leads only to scholasticism and illusion and nothing is more productive of error than to divorce the history from the theory of the law." Allen, "Precedent and Logic," 41 *L.Q. REV.* 329 at 331 (1925).

"The influence of precedents depends on two factors: some have a flat value because of the high authority by which they are issued; some have an intrinsic value based on individual quality. The two may have no relation, but when they concur we have the precedent at its zenith." Justice Jackson before the American Law Institute, May 9, 1944. See 28 *J. AM. JUD. SOC.* 6 (1944), 30 *A.B.A.J.* 334 (1944).

⁷⁰ "The issue framed by this conflict of opinion can thus be stated: Does a judge, in deciding a case in which he is not directed by statute [n]or bound by judicial precedent, create the law announced by his decision?" Rand, "Swift v. Tyson versus Gelpcke v. Dubuque," 8 *HARV. L. REV.* 328 at 329 (1895). For a collection of commentators' opinions pro and con, see WAMBAUGH, *STUDY OF CASES*, 2d ed., § 78, note 2 (1894).

"Historically it [the declaratory theory] represents the Germanic conception of law, the sighing of the creature for the justice and truth of his creator which . . . is to be found in every law book of the Middle Ages." Pound, "Courts and Legislation," 77 *CENTRAL L.J.* 219 at 221 (1913).

⁷¹ *Y.B. 15 Edw. 3* (1341), Rolls Series, p. 230.

though the judgment had never been."⁷² Sir Matthew Hale (1609-1676) wrote⁷³ of "judicial decisions," "they do not make a law properly so called,—for that only the king and parliament can do." Blackstone,⁷⁴ in the following century, asserted that in overruling decisions, "Judges do not pretend to make a new law." The United States Supreme Court by Justice Story, in a famous decision,⁷⁵ since overruled,⁷⁶ held the phrase "laws of the several states" in the Judiciary Act not to include judicial decisions; and a long line of cases,⁷⁷ both federal and state, adheres to that doctrine. C. K. Allen⁷⁸ wields a belated cudgel for the "declaratory" theory. "...The judge does not, and cannot, make law," he asserts,⁷⁹ "in the sense that the Legislature makes it"; and he proceeds to discourse on the various meanings of "make," much as do those who quibble over the question: "Do bees make honey?" Of course, they do not make the ingredients; but their product is something different from aught else in nature. And does not the legislator, like the judge, gather his material from various pre-existing sources?

Again "the Legislature can project into the future a rule of law which has never before existed in England," says Allen.⁸⁰ "The Courts can do nothing of the kind." But how about the "fellow servant rule"⁸¹

⁷² Cf. Moschzisker, "Stare Decisis in Courts of Last Resort," 37 HARV. L. REV. 409 at 422 (1924), and see note 90, *infra*.

⁷³ HISTORY OF THE COMMON LAW OF ENGLAND, 6th ed., 90 (1820).

⁷⁴ 1 BLACKST. COMM. *70, Chitty's ed., (1859).

⁷⁵ Swift v. Tyson, 16 Pet. (41 U.S.) 1 (1842).

⁷⁶ Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938).

⁷⁷ See Kocourek & Koven, "Renovation of the Common Law through Stare Decisis," 29 ILL. L. REV. 971 at 978, 979 (1935); Moschzisker, "Stare Decisis in Courts of Last Resort," 37 HARV. L. REV. 409 at 422 (1924), and cases cited in note 36; Jenckes v. Jenckes, 145 Ind. 624, 44 N.E. 632 (1896) [criticized in 20 YALE L.J. 321 (1910)]; Sears Roebuck v. 9th Ave.-31 St. Corp., 274 N.Y. 388 at 401; 9 N.E. (2d) 20 (1937). "... a decision of this court 'overruling' a previous decision is not, at least in theory, a retrospective change of the law; it is merely a reformulation of the general rules of law which we deem applicable in a particular situation." [Yet that court is criticized for "judicial legislation," 14 YALE L.J. 312 (1905)].

⁷⁸ "Precedent and Logic," 41 L.Q. REV. 329 (1925). But see Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938).

⁷⁹ 41 L.Q. REV. 329 at 336 (1925).

⁸⁰ *Ibid.*

⁸¹ First announced in Priestley v. Fowler, 3 M. and W. 1 (1837), for which no precedent had been found but which was probably taken from D. IV. 9.7. The decision (doctrine) has been called "famous, or infamous." GOODHART, JURISPRUDENCE AND OTHER ESSAYS ON THE COMMON LAW 2, 3 (1931); Cf. Goodhart, "Precedent in English and Continental Law," 50 L.Q. REV. 40 at 55 (1934).

"Even in the first half of the nineteenth century, when technicality was practised *con amore*, such cases as *Collin v. Wright*, *Lumley v. Gye* and *Tulk v. Moxhay*,

and similar instances in the United States? ⁸² In 1938 the controversy in the federal realm was ended, at least for the present, by a five to three decision ⁸³ (Justice Cardozo being absent on account of illness) which overruled *Swift v. Tyson* after the lapse of almost a century. Three years earlier, however, Messrs. Kocourek and Koven ⁸⁴ had conceded that "despite the expressed disapproval of eminent writers, the prevailing doctrine is that of the declaratory theory."

b. "*Creative.*" As opposed to the "declaratory" we find what may be termed the "creative" theory, likewise announced at an early date, that each original precedent creates new law. ⁸⁵ "In the Court of Chancery," according to Salmond, ⁸⁶ "this declaratory theory never prevailed..."

reveal their readiness to satisfy reasonable demands, if necessary by conscious invention." FIFOOT, *ENGLISH LAW AND ITS BACKGROUND* 238 (1932).

⁸² "The dead hand of the common-law rule of 1789 [disqualifying convicts as witnesses] should no longer be applied." Clarke, J. in *Rosen v. United States*, 245 U.S. 467, 38 S. Ct. 148 (1918). [Goodhart, quoting this opinion, makes the date read 1879 instead of 1789, GOODHART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* 28 (1931).] "No Federal Statute ever specifically changed this former rule." 27 *YALE L.J.* 670 (1918). See also *Funk v. United States*, 290 U.S. 371 at 382, 54 S. Ct. 212 (1933). Comment, 40 *W. VA. L.Q.* 270 (1934), changing the common law rule disqualifying a wife as a witness for her accused husband; *Wolfe v. United States*, 291 U.S. 7 at 17, 54 S. Ct. 279 (1934), declaring admissible confidential communications by a husband to his wife through a stenographer. Cf. the judicial origin of the presumption of innocence, the sufficiency of a single witness and the hearsay rule, 91 *UNIV. PA. L. REV.* 585 (1943).

Similar decisions by state courts changing common law rules are: *Thurston v. Fritz*, 91 *Kan.* 468 at 475, 138 *P.* 625 (1914) (changing dying declarations rule); *Oppenheim v. Kridel*, 236 *N.Y.* 156 at 165 (1923) (affirming wife's right to sue for criminal conversation); *Seeley v. Peters*, 5 *Gil.* (10 *Ill.*) 130 (1848) (rejecting common law rule as to fencing in cattle); *Reno Smelting Works v. Stevenson*, 20 *Nev.* 269, 21 *P.* 317 (1889) (rejecting the riparian rights rule).

⁸³ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938). Justice Reed concurred with the majority in its view that "'laws' include decisions" but not on the theory that the doctrine of the overruled case was unconstitutional (*id.* at 91).

"... it was the more recent research of a competent scholar (Charles Warren), who examined the original document, which established that the construction given to it by the court was erroneous." Brandeis, J. (*id.* at 72), citing 37 *HARV. L. REV.* 49 (1923).

⁸⁴ "Renovation of the Common Law Through Stare Decisis," 29 *ILL. L. REV.* 971 at 987 (1935).

⁸⁵ "By a decision in this avowry we shall make a law throughout the land," said Bereford, C.J. in *Venour v. Blund*, Y.B. 3 and 4 *Edw.* 2 (1912), S.S. 161. Cf. Y.B. 8 *Edw.* 4 (1469), M.F. 12, p. 9; Y.B. 13 *Hen.* 7 (1498), T. f. 27, p. 5. Lord Hardwicke thought "authorities established are so many laws; and receding from them unsettles property; and uncertainty is the unavoidable consequence." *Ellis v. Smith*, 1 *VESSEY JR.* 11 at 17 (1754).

⁸⁶ *JURISPRUDENCE*, 9th ed., 231 (1937).

Austin⁸⁷ termed it "a childish fiction" and many other eminent scholars have followed him.⁸⁸ In 1863 the Federal Supreme Court, though without citing Justice Story's opinion⁸⁹ of twenty-one years earlier, upheld the validity of municipal bonds, issued in accordance with the State Supreme Court's decision, though the latter had subsequently been overruled.⁹⁰ For the next three-quarters of a century the conflict between these two decisions was a subject of continuous discussion.⁹¹

⁸⁷ JURISPRUDENCE, 4th ed., 655 (1873).

⁸⁸ HOLLAND, JURISPRUDENCE, 12th ed., 66 (1917); GRAY, NATURE AND SOURCES OF THE LAW, 2d ed., 222 (1921); MAINE, ANCIENT LAW, 4th ed., c. 2, p. 31 (1912).

"Judges do and must legislate; but they can do so only interstitially." Holmes, J. in Southern Pacific R. Co. v. Jensen, 244 U.S. 205 at 221, 37 S. Ct. 524 (1917). Cf. Holmes, J. in Kuhn v. Fairmont Coal Co., 215 U.S. 349 at 370, 30 S. Ct. 140 (1910).

"The analytical jurists did a great service to legal science when they exposed this fiction, though their conclusion that a complete code should be enacted in order to put an end to the process of judicial law-making, shows that they saw but one half of the truth." Pound, "Courts and Legislation," 77 CENT. L.J. 219 at 222 (1913).

"Judicial legislation is a necessary element in the development of the common law." Thayer, "Judicial Legislation," 5 HARV. L. REV. 172 at 199 (1891). "It is idle to say that the court does not legislate." Young, "Law as an Expression of Ideals," 27 YALE L.J. 1 at 28 (1917).

"... any one not writing fairy tales must recognize that judges do make law." Spruill, "The Effect of an Overruling Decision," 18 N.C. L. REV. 199, at 201 (1940). citing Gross v. State, 135 Miss. 624 at 632, 100 S. 177 (1924). After a century of experience in the endeavor to carry out this purpose, [to prevent judges from forming a body of case law] French jurists are now agreed that the article (Art. 5 of Civil Code) ... has failed of effect. To-day the elementary books from which law is taught to French students ... do not hesitate to lay down that ... judicial decision is a form of law." Pound, "Courts and Legislation," 77 CENT. L.J. 219 at 222 (1913). See also CARDOZO, NATURE OF THE JUDICIAL PROCESS 114 (1937); Carpenter, "Court Decisions and the Common Law," 17 COL. L. REV. 593 (1917); Lincoln, "Relation of Judicial Decision to the Law," 21 HARV. L. REV. 120 (1907); Aumann, "Judicial Law-making and Stare Decisis," 21 KY. L.J. 156 (1933); and references in 27 YALE L.J. 669, note 2 (1918); FIFOOT, ENGLISH LAW AND ITS BACKGROUND 238 (1932).

⁸⁹ Swift v. Tyson, 16 Pet. (41 U.S.) 1 (1842).

⁹⁰ Gelpcke v. Dubuque, 68 U.S. 175 (1863), the court saying, at 206, "It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that the rights acquired under a statute may be lost by its repeal." Justice Miller, dissenting, sensed the effect of this, observing, at 211: "I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former was not, and never had been law ... the decision of this court contravenes this principle, and holds that *the decision ... makes the law.*" (Italics supplied.)

⁹¹ "The many decisions upon the authority of Swift v. Tyson declare that the decisions ... do not make the law, whereas the cases that follow Gelpcke v. Dubuque as confidently assert the contrary." Rand, "Swift v. Tyson versus Gelpcke v. Dubuque," 8 HARV. L. REV. 328 at 350 (1895).

4. *Comparison of Precedent-Making and Statute-Making*

The controversy between exponents of these two theories appears to have abated somewhat in recent years and the present tendency is to regard it as less important;⁹² but the legislative and judicial processes afford an instructive comparison and the former has for some time been approaching the latter technique.⁹³ The legislative committees, e.g., resemble in some respects the division of a court whose decisions are made *en banc*. The committee subpoenas and hears witnesses,⁹⁴ listens to arguments and prepares a report which is not unlike a judicial opinion. Often there is a minority report which more nearly resembles a dissenting opinion.

It has been claimed⁹⁵ that "since courts can reverse their own decisions, decisions are not law." But is not the repeal of statutes quite as common as the overruling of decisions? By a parity of reasoning, statutes are not law. "To overrule an important precedent" seems quite analogous to the repeal or annulment of a statute.⁹⁶ Allen, after referring to the techniques of these two processes, observes, "... this

⁹² "The more the writings on each side are examined, the more the question will seem one of pure logomachy, with the judges (denying, on the whole, that their activities can be called legislative) fighting a retiring action and having rather the worst of it." Wade, "The Concept of Legal Certainty," 4 MODERN L. REV. 183 at 199 (1941).

"... it is immaterial that ... one investigator ... calls it the doctrine by the case illustrated and ... another ... the doctrine by the court established." WAMBAUGH, STUDY OF CASES, 2d ed., § 79 (1894).

⁹³ "... the essentials of the 'trial of a statute' are [those] of the judicial system. Legislation of significance inevitably receives complete committee consideration ... and in recent years, an opportunity for proponent and opponent provided. [Citing Landis, "Constitutional Limitations on the Congressional Power of Investigation," 40 HARV. L. REV. 153 (1926), and "Constitutional Limitations on Congressional Power of Legislation," 40 HARV. L. REV. 153 (1926); Seabury, HERNITZ & MULLIGAN, "The Legislative Investigating Committee," 33 COL. L. REV. 1 (1933)]. ... Save for formal differences of structure, legislation and adjudication spring from similar patterns of human conduct." Horack, "The Common Law of Legislation," 23 IOWA L. REV. 41 at 51 (1937). Cf. POUND, LAW AND MORALS 51, 52 (1926); Moffat, "The Legislative Process," 24 CORN. L.Q. 223 (1939).

⁹⁴ The legislative power of compelling attendance is practically the same as the judicial. See *Journey v. MacCracken*, 294 U.S. 125, 55 S. Ct. 375 (1935), where a lawyer was imprisoned for failing to produce for a Senate investigating committee, papers claimed by him as privileged professional communications.

⁹⁵ Stimson, "Swift v. Tyson: What Remains?" 24 CORN. L.Q. 54 (1938). But see Sims, "The Problem of *Stare Decisis* in the Reform of the Law," 36 PA. B. A. REP. 170 at 184 (1930), who compares overruling decisions with annulling statutes for unconstitutionality.

⁹⁶ Jackson, "Decisional Law and *Stare Decisis*," 30 A.B.A.J. 334 (1944); 28 J. AM. JUD. SOC. 6 (1944). Cf. note 88, *supra*.

only amounts to saying that the Legislature *legislates* while the courts *interpret*.”⁹⁷ But do not legislatures also interpret? In the earliest stage of English legislation “the legislature issues its own interpretation of its acts”⁹⁸ and in the United States, at least, statutes often prescribe the meaning to be construed.

Of course, there are differences between the two processes.⁹⁹ “A decision . . . exists primarily for . . . the settling of a particular dispute: a statute purports to lay down a universal rule.”¹⁰⁰ But the decision may also lay down a rule or annul one¹⁰¹ and the consequences, it would seem, should be similar.¹⁰²

But to some, “judicial legislation” has a sinister sound;¹⁰³ moreover, the latter word has appertained so long to the statute making

⁹⁷ “Precedent and Logic,” 41 L.Q. REV. 329 at 336 (1925), referring to steps commonly confused under the name of interpretation.

Pound writes: “Chiefly, perhaps, it is due to the dogma of separation of powers, which refers lawmaking to the legislature and would limit the courts to interpretation and application.” “Theory of Judicial Decision,” 36 HARV. L. REV. 940 at 946 (1923). Cf. note 53, supra.

⁹⁸ “Inasmuch as the determination of legislative policy involves much more than a specific or limited fact inquiry, it is natural that the form of the hearing will not be identical with a judicial trial; but, although the form differs, the essential purpose of such procedure is the same—the collection of reliable evidence—and a sharp policy judgment based on the evidence. Indeed when legislatures consider special legislation, the committee hearing assumes not only the objectives of trial procedure but all its forms.” Horack, “The Common Law of Legislation,” 23 IOWA L. REV. 41 at 51 (1937).

⁹⁸ “. . . or else the Judges interpret statutes in the light of their own intentions when they themselves drew them. . . .” PLUNKNETT, STATUTES AND THEIR INTERPRETATION IN THE FOURTEENTH CENTURY 165 (1922).

⁹⁹ “Judges do not enact laws as a legislature does, nor do they act arbitrarily; but they do make laws indirectly in the course of giving their decisions and, since they must decide a case . . . they cannot avoid so doing.” Lincoln, “Relation of Judicial Decisions to the Law,” 21 HARV. L. REV. 120 at 129 (1907). Cf. Kocourek & Koven, “Renovation of the Common Law Through Stare Decisis,” 29 ILL. L. REV. 971 at 998 (1935); Thayer, “Judicial Legislation,” 5 HARV. L. REV. 172 (1801).

¹⁰⁰ ALLEN, LAW IN THE MAKING, 2d ed., 248 (1930).

¹⁰¹ See Sims, “The Problem of *Stare Decisis* in the Reform of the Law,” 36 PA. B.A. REP. 170 at 184 (1930), who compares overruling decisions with annulling statutes for unconstitutionality.

¹⁰² “The true rule [of stare decisis] is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts” as to “a legislative amendment, i.e., make it prospective but not retroactive.” *Douglass v. Pike County*, 101 U.S. 677 at 687 (1879).

¹⁰³ “It is habitually used by our courts with this sense of reproach. The same disapproval is apparent when Bentham, expressing theories very different from those of the judges, designates the whole common law as ‘judge-made law.’ But if judicial legislation be understood to mean the growth of the law at the hands of the judges,—and it is in this sense that the term will here be used,—it will not do to assume that it

process that some confusion may result from applying it to decisions. It would seem better to keep the two processes distinct, by using the terms precedent-making and statute-making, with the word legislation reserved for the latter.

III

APPLICATION

A. *Limitations*

The courts themselves have in various ways limited the application of stare decisis. It should not be applied (even in property cases) to perpetuate error,¹⁰⁴ nor to follow overruled or misconstrued decisions,¹⁰⁵ those whose force had been changed by statute,¹⁰⁶ or those rendered obsolete by a lapse of time,¹⁰⁷ ill considered ones,¹⁰⁸ or those rendered by an equally divided court,¹⁰⁹ or those based upon findings

is merely an evil. I shall endeavor to show, on the contrary, that it is a desirable, and indeed a necessary, feature of our system." Thayer, "Judicial Legislation," 5 HARV. L. REV. 172 at 172 (1891).

"... the pained cry against judicial legislation ignores a thousand years of common law history. How little of our law is not judge-made! Shining through the statutes, codes and regulations, are all the concepts, the methods and standards which we learned in law school and which the legislators, codifiers and commissioners heard with us." Cahn, "Taxation," 30 GEO. L.J. 587 at 608 (1942). Cf. supra, note 23.

¹⁰⁴ 15 C.J. 949, note 50; 21 C.J.S., § 193, p. 322 et seq., notes 59, 60.

¹⁰⁵ WAMBAUGH, STUDY OF CASES, § 51 (1892); 15 C.J. 960, note 29; 21 C.J.S., § 194, p. 326, note 79. 25 Am. L. Reg. (N.S.) 745 (1886).

"A rule of procedure founded upon a misconstruction of a statute... is not protected by the principle of stare decisis." Beatty, C.J. in *Bell v. Staacke*, 137 Cal. 307 at 309, 70 P. 171 (1902). Cf. McMurray, "Changing Conceptions of Law," 3 CAL. L. REV. 441 (1915).

¹⁰⁶ *Lemp v. Hastings*, 4 Iowa 448 (1854); 15 C.J., § 347, p. 954, notes 86, 87; 21 C.J.S., § 191, p. 318.

¹⁰⁷ 15 C.J. 954-5; 21 C.J.S., § 191, p. 318. *Cessante ratiōe cessat ipsa lex* is a maxim which "might well have been given a far wider application." Thayer, "Judicial Legislation," 5 HARV. L. REV. 172 at 200 (1891).

In *Genesee Chief v. Fitzhugh*, 12 How. (53 U.S.) 443 (1851), Taney, C.J., formulated a new definition of navigable waters extending it beyond tidal ones and including those "navigable in fact" owing to steam propulsion.

¹⁰⁸ E.g., when rendered by consent or after little or no argument. WAMBAUGH, STUDY OF CASES, § 62 (1894). Cf. *In re Todd*, 208 Ind. 168, 193 N.E. 865 (1935), overruling previous decisions as to mode of amending state constitutions where stress was laid on "strong dissents."

¹⁰⁹ WAMBAUGH, STUDY OF CASES, § 47 (1894). Cf. Green, "Stare Decisis," 14 AM. L. REV. 609 at 630, note 1 (1880). In Georgia it seems that a Supreme Court decision is not binding unless "concurrent in by all the justices." *Walton v. Benton*, 191 Ga. 548, 13 S.E. (2d) 185 (1941). Some would even exclude decisions by a "closely divided" court; but that would bar the "5 to 4" rulings of our highest court, in which dissents rose from 16 per cent in the 1930's to 44 per cent in the 1942 term

on questions of fact.¹¹⁰ "...In cases involving the Federal Constitution, where corrections through legislative action is practically impossible, this court has often overruled its earlier decisions."¹¹¹ Other limitations have been urged by various writers.¹¹²

and 63 per cent in the following one [Pritchett, "The Coming of the New Dissent," 11 UNIV. CHI. L. REV. 49 et seq. (1943); 13 U.S.L.W. 3021 (1944)]. This is hardly the place for an appraisal of dissenting opinions; but they at least indicate that the case has been really studied by more than one judge. Moreover, the writer of the article last cited failed to notice Professor Pritchett's conclusion that "this analysis of alignments... during the 1942 term certainly demonstrates a range of attitudes on the part of the present membership sufficiently broad to guarantee effective performance by the Court of its historic function." *Id.* at 61.

¹¹⁰ "... the decision of the Court, if, in essence, merely the determination of a fact, is not entitled, in later controversies between other parties, to that sanction which, under the policy of stare decisis, is accorded to the decision of a proposition purely of law." Brandeis, J. in *Burnet v. Coronado Oil Co.*, 285 U.S. 393 at 412, 52 S. Ct. 443 (1932) citing *Abie State Bank v. Bryan*, 282 U.S., 765 at 772, 51 S. Ct. 252 (1931).

"... neither *stare decisis* nor anything like it should have any place in ascertaining the state of mind of a particular testator." Cooley, "What Constitutes a Gift To a Class," 49 HARV. L. REV. 903 at 932 (1936).

G. M. Hodges, in "Stare Decisis in Boundary Disputes," 21 TEXAS L. REV. 241 (1943), claims that adjudications of boundaries by an appellate court should not be followed in later litigation where neither parties nor questions of law are the same. He suggests a procedure like that followed in the Torrens system.

¹¹¹ Brandeis, J. in *Burnet v. Coronado Oil Co.*, 285 U.S. 393 at 406, 52 S. Ct. 443 (1932). "... the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." Frankfurter, J. in *Graves v. New York*, 306 U.S. 466 at 491, 492, 59 S. Ct. 595 (1939). Cf. *Smith v. Allwright*, 321 U.S. 649, 665-6, 64 S. Ct. 757 (1944), per Reed, J. •

It has even been argued that "stare decisis cannot possibly have any place in the decision of constitutional questions." Boudin, "Stare Decisis in Our Constitutional Theory," 8 N.Y. UNIV. L.Q. 589, 595 (1931), contending that the judicial interpretation of the Constitution is, under the American doctrine, never final but always open to review. Cf. the same author's "Stare Decisis and the Obligation of Contracts," 11 *id.* 207 (1933). Cf. Chapin, "Stare Decisis and Minimum Wages," 9 ROCKY MT. L. REV. 297 (1937), discussing, 8 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578 (1937), overruling *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S. Ct. 394 (1923). See also 3 WARREN, SUPREME COURT IN AMERICAN HISTORY 470 (1922); 1 WILLOUGHBY, CONSTITUTIONAL LAW, 2d ed., § 44 (1929).

On the other hand, it has been argued that stare decisis applies to constitutional as well as other questions. Shroder, "Stare Decisis in Constitutional Interpretation," 58 CENT. L.J. 23 (1904). Cf. Chamberlain, "Stare Decisis as Applied to Constitutional Questions," 3 HARV. L. REV. 125 at 131 (1889); *State v. Nashville Baseball Club*, 127 Tenn. 292, 154 S.W. 1151 (1912), and see 13 COL. L. REV. 643 (1913).

¹¹² See "Stare Decisis in Tax Law," 20 TAXES 137 (1942); Lee, "Stare Decisis as to Patentability," 23 J. PATENT OFFICE 745 (1941). The late J. M. Kerr, "Stare Decisis and Uniform State Laws," 56 AM. L. REV. 497 (1922), claimed that such laws should be construed without regard to precedents except those involving the uniform laws. As to construing codifying acts see 80 L.J. 3 (1935).

"The doctrine of stare decisis does not apply to 'advisory opinions.'" In re

B. Perversion

I. "Reluctant Adherence"

A Canadian periodical¹¹³ contains a critical comment on decisions of the English Court of Appeal and the Supreme Court of Canada for "reluctant adherence to previous decision... tacitly admitted" to be wrong. Unfortunately, judges in the United States are not often so frank as their British brethren, but veil "reluctance" under such phrases as these: "If the question were *res integra*"¹¹⁴ or "*res nova*," or "before us for the first time," "uninfluenced by authority"¹¹⁵ or similar excuses for willingness "to sacrifice common sense for consistency."¹¹⁶

Opinion of Justices, 214 Mass. 599, 102 N.E. 464 (1913), and see 15 C.J., § 335, p. 943, note 99 et seq.

Kocourek and Koven, "Renovation of the Common Law Through Stare Decisis," 29 ILL. L. REV. 971 at 988-9, note 97 (1935) [Cf. 52 ALBANY L.J. 73 (1895)], have collected the cases in support of the doctrine that "property rights acquired in reliance upon a statute or constitutional provision" are excepted from the stare decisis doctrine as are also acts lawful when committed but subsequently declared unlawful. (Id. note 101). See also *State v. Fulton*, 149 N.C. 485, 63 S.E. 145 (1908), criticised in 18 YALE L.J. 422 (1909), for overruling a prior decision interpreting a penal statute.

¹¹³ 19 CAN. B. REV. 303 (1941). Cf. Holdsworth, "A Chapter of Accidents In The Law of Libel," 57 L.Q. REV. 74 (1941).

"It is also unfortunate that a judge is sometimes bound by precedent to give a decision contrary to his own conviction, very often hoping that it will be reversed." Allen, "Precedent and Logic," 41 L.Q. REV. 329 at 344 (1925).

In *Olympia Oil and Coke Co. v. Produce Brokers Co. Ltd.*, 112 L.T.R. (N.S.) 744 (1915), Buckley, L.J. was "unable to adduce any reason to show that the decision... is right." Phillimore, L.J. concurred "with reluctance... almost with sorrow." The House of Lords allowed an appeal, [1916] 1 A.C. 314.

"... in six cases there reported [in Vol. I of the 1926 King's Bench reports] one or more of the judges state that they might have decided the case... differently if they had not been bound by a prior decided case." GOODHART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* 55 (1931). In 50 L.Q. REV. 40 at 55 (1934) the same writer discusses "*Hillas and Co., Ltd. v. Arcos, Ltd.*, 36 Com. Cas. 353 (1931), where "the Court of Appeal, to its great regret," followed what the House of Lords later found (38 Com. Cas. 23, 1932) was a mistaken precedent and reversed the judgment.

¹¹⁴ *Barnett v. Phelps*, 97 Ore. 242, 191 P. 502 (1920), where the court followed "a mere dictum."

¹¹⁵ *Globe Pub. Co. v. State Bank*, 410 Neb. 175 (1894).

¹¹⁶ Goodhart, "Precedent in English and Continental Law," 50 L.Q. REV. 40 at 55 (1934). In the midst of these evasive expressions it is refreshing to find a frank statement like this: "We have thought it wisest to overrule outright rather than to evade, as is often done, by an attempt to distinguish where distinction there is none." *Paul v. Davis*, 100 Ind. 422 at 428 (1884).

"The frequent resorts to distinctions which do not distinguish are themselves a tribute to the force of... stare decisis; even though these distinctions sometimes

2. *Distinctions Without Difference*

Distinctions without difference afford another device for perverting stare decisis.¹¹⁷ The phrase "—— v. —— distinguished" has often become a polite formula disclosing unwillingness to follow a previous decision which, on further consideration, cannot be supported. Another convenient phrase is "...that the earlier decision must be regarded as...based on 'special' or 'particular' facts."¹¹⁸

C. Regulation

1. "The Rule for Breaking a Rule"¹¹⁹

a. *Generally.* Except in a few jurisdictions,¹²⁰ "*stare decisis* is not, like the rule of *res judicata*, a universal, inexorable command."¹²¹ The duty to follow precedent is always qualified by the right to overrule it, for both are essential to the orderly operation of their respective processes.¹²² And just as the legislatures have not awaited a constitutional mandate for the repeal of their enactments, courts of last resort

result...in actually overruling previous decisions." Boudin, "Stare Decisis in Our Constitutional Theory," 8 N.Y. UNIV. L.Q. 589 at 618 (1931).

¹¹⁷ See cases collected by Kocourek & Koven, "Renovation of the Common Law Through Stare Decisis," 29 ILL. L. REV. 978, note 39 (1935).

¹¹⁸ 60 L.Q. REV. 216 (1944).

¹¹⁹ DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 139 (1927).

¹²⁰ "A decision of the House of Lords upon a question of law is conclusive" and "can be set right only by an Act of Parliament." London Co. v. London County Council, [1898] A.C. 375.

"A decision of this House in an English case ought to be held conclusive in Scotland as well as in England, as to the questions of English law and jurisdiction. It cannot of course, conclude any question of Scottish law or...jurisdiction." Orr Ewing Trustees v. Orr Ewing, 13 Rettie, 1, 3 (1885). See, also, Fairlie, "Stare Decisis in British Courts of Last Resort," 35 MICH. L. REV. 946 (1937), where the cases are reviewed and exceptions to the general rule disclosed.

A Circuit Court of Appeals is not bound to follow its own decisions. Hertz v. Woodman, 218 U.S. 205 at 212, 30 S. Ct. 621 (1910).

¹²¹ Brandeis, J. in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 at 405, 52 S. Ct. 443 (1932).

¹²² "The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in physical sciences, is appropriate also in the judicial function." (Brandeis, J. id. at 407).

"If we figure stability and progress as opposite poles, then at one pole we have the maxim of *stare decisis* and the method of decision by the tool of a deductive logic; at the other we have the method which subordinates origins to ends... Each method has its value, and for each in the changes of litigation there will come the hour for use. A wise eclecticism employs them both." CARDOZO, THE PARADOXES OF LEGAL SCIENCE 8 (1928). Cf. Sims, "The Problem of Stare Decisis in the Reform of the Law," 36 PA. B.A. REP. 170 at 184 (1930).

have assumed inherent power to overrule their decisions.¹²³ That they have utilized that power is apparent to anyone who scans the tables of overruled cases.¹²⁴ Nor is the age of the precedent a controlling factor.¹²⁵

b. *In the United States.* The Federal Supreme Court has, probably more than any other tribunal, exercised its discretion¹²⁶ to over-

¹²³ *England.* In re Shoemith, [1938] 2 K.B. 637, holding that the English Court of Appeal "can overrule a decision of the Court of Appeal which has held the field for a number of years." See also White, "Stare Decisis in the Court of Appeal," 3 MODERN L. REV. 66 (1939).

While attaching great weight to previous decisions *in pari materia*, the Judicial Committee of the Privy Council will examine the reasons on which such decisions rest and give effect to its own view of the law. Clifton v. Ridsdale, 2 Prob. Div. 276 at 307, 36 L.T. 865 (1877). Cf. Read v. Bishop of Lincoln, [1892] A.C. 644, 67 L.T. 128; "Stare Decisis and the Privy Council," 54 L.Q. REV. 157 (1938). And see Fairlie, "Stare Decisis in British Courts of Last Resort," 35 MICH. L. REV. 946 (1937).

¹²⁴ See WOODS & RITCHIE, A DIGEST OF CASES OVERRULED in the English and other courts (1907) 3 vols.; See GREENLEAF, OVERRULED CASES, 4th ed. (1856); Sharp, "A Study of Modified and Overruled Decisions," 46 HARV. L. REV. 361, 593, 795 (1933). [In 1924 Justice Brandeis listed a dozen cases overruled by the Supreme Court, *Industrial Acc. Com. v. Rolph*, 264 U.S. 219 at 238, 44 S. Ct. 302 (1924)]. By 1931 he had found nearly two printed pages of such cases [*Burnet v. Oil Co.*, 285 U.S. 393 at 406, 407, 52 S. Ct. 443 (1932)].

"...I wish not... to press too strongly the doctrine of *stare decisis*, when I recollect that there are one thousand cases to be pointed out in the English and American... reports, which have been overruled, doubted, or limited in their application." I KENT, COMM., 2d ed., 477 (1832). "... *Stare decisis* concededly must not stand in the way of the progress of the law." Boudin, "The Problem of Stare Decisis in Our Constitutional Theory," 8 N.Y. UNIV. L.Q. 2, 589 at 590 (1931), citing many cases; Winchester, "The Doctrine of Stare Decisis," 8 GREEN BAG 257 (1896).

¹²⁵ "... a decision does not, merely because it is old, fetter the courts forever." Pound, "Some Recent Phases of the Evolution of Case Law," 31 YALE L.J. 361 at 366 (1922). "... there is no prescription of a wrong decision when it reaches a higher court." "Overruling a Long-Standing Decision," 186 L.T. 134 at 136 (1938).

"We have more to fear from an exaggerated respect for antiquity than from innovating judges." Allen, "Precedent and Logic," 41 L.Q. REV. 329 at 342 (1925). "... *Stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable." *Helvering v. Hallock*, 309 U.S. 106 at 119, 60 S. Ct. 444 (1940). Professor Carpenter, "Stare Decisis and Law Reform," 7 ORE. L. REV. 31 at 35 (1925), thinks "It is only the exceptional case where the question [of overruling] should be raised."

¹²⁶ "We recognize fully, not only the right of a State Court, but its duty to change its decisions whenever, in its judgment, the necessity arises... for new reasons, or because of a change of opinion in respect to old ones." Waite, C.J., in *Douglass v. Pike County*, 101 U.S. 677 at 687 (1879). For whether a former decision "should be followed or departed from, is a question entirely within the discretion of the court." *Hertz v. Woodman*, 218 U.S. 205 at 212, 44 S. Ct. 302 (1910).

"*Stare Decisis* is ordinarily a wise rule of action. But... the instances in which

rule its decisions.¹²⁷ But while, as will be seen, the process is by no means new in that Court, a novel chapter therein was written within the decade following 1936, when two-fifths of all the overruling decisions were rendered.¹²⁸ That situation evoked a series of protests from

this court has disregarded its admonition are many." Brandeis, J. in *Washington v. Dawson & Co.*, 264 U.S. 219 at 238, 44 S. Ct. 302 (1924).

"Of course the law may grow to meet changing conditions. I do not advocate slavish adherence to authority where new conditions require new rules of conduct. But this is not such a case." Roberts, J., in *Mahnich v. So. S.S. Co.*, 321 U.S. 96 at 113, 64 S. Ct. 455 (1944).

¹²⁷ "From 1801 to 1910, 18 cases; 1911 to 1930, 9 cases; 1931 to 1936, 2 cases; 1937 to 1944 (end of 1943 term), 19 cases." Wilson, "Stare Decisis Quo Vadis: The Orphaned Doctrine in the Supreme Court," 33 *Geo. L. J.* 251 at 254, note (1945), the most exhaustive discussion of the subject.

Rose v. Himley, 4 Cranch (8 U.S.) 240 (1808), per Marshall, C.J., was declared two years later in *Hudson v. Guestier*, 6 Cranch (10 U.S.) 280 at 284, 285 (1810), "overruled by a majority of the court" although the Chief Justice "was still of the opinion that the construction then given was correct." *Louisville, Cincinnati, and Charleston R. Co. v. Letson*, 2 How. (43 U.S.) 497 (1844), qualified, if it did not overrule, several previous decisions, one as early as 1806. *Genesee Chief v. Fitzhugh*, 12 How. (53 U.S.) 443 (1851), per Taney, C.J., overruled two previous decisions by extending admiralty jurisdiction to waters navigable in fact, though not tidal; but the Chief Justice observed that if the overruled authority had involved property rights "we should have felt ourselves bound to follow it notwithstanding."

"... the Supreme Court... has overruled its previous decisions in matters of the greatest importance. . . . in 1870, that court held the Legal Tender Act . . . unconstitutional [*Hepburn v. Griswold*, 8 Wall. (75 U.S.) 603 (1869)]. The judges stood five to three. One of the majority resigned, and two new judges were appointed; the question was again brought up in another case and the court, in 1871, overruled its former decision, the two new judges uniting with the previous minority. . . . [*Legal Tender Cases*, 12 Wall. (79 U.S.) 457 (1870)]." GRAY, NATURE AND SOURCES OF THE LAW 229 (1909). *Fairfield v. Gallatin County*, 100 U.S. 47 (1879), overruled *Concord v. Portsmouth Savings Bank*, 92 U.S. 625 (1875), because it was found that the highest court of the state where the cause of action arose had construed differently its constitution. *Roberts v. Lewis*, 153 U.S. 367, 14 S. Ct. 945 (1894), overruled *Giles v. Little*, 104 U.S. 291 (1881), because the state supreme court in *Little v. Giles*, 25 Neb. 313, 41 N.W. 186 (1889), had meanwhile differently construed the will in question. Judge Wilson, *supra* this note, 33 *Geo. L. J.* 251 at 254 (1945), calls *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842), "the most venerable of the authorities to debase"; but its ninety-six years were exceeded by three when *Hylton v. United States*, 3 Dall. (3 U.S.) 171 (1796), was overruled by *Pollock v. Farmers' L. & T. Co.*, 158 U.S. 601, 15 S. Ct. 912 (1895), which in turn was "overruled by Amendment XVI of the Federal Constitution."

¹²⁸ *A Decade of Dissent and Overruling*: (1) *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578 (1937), overruling *Adkins v. Childrens Hospital*, 261 U.S. 525, 43 S. Ct. 394 (1923), and, by implication, *Morehead v. New York*, 298 U.S. 587, 56 S. Ct. 918 (1936). (2) *Helvering v. Mountain Producers' Corp.*, 303 U.S. 376, 58 S. Ct. 623 (1938), overruling *Gillespie v. Oklahoma*, 257 U.S. 501, 42 S. Ct. 171 (1922), and *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 52 S. Ct. 443 (1932). (3) *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938), overruling *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842). (4) *Graves v. New York*,

one of the older members of the Court who has since retired,¹²⁹ but some disinterested critics outside the Court approved the trend and

306 U.S. 466, 59 S. Ct. 595 (1939), overruling *Collector v. Day*, 11 Wall. (78 U.S.) 113 (1871) and *New York v. Graves*, 299 U.S. 401, 57 S. Ct. 269 (1937). (5) *O'Malley v. Woodrough*, 307 U.S. 277, 59 S. Ct. 838 (1939), overruling *Miles v. Graham*, 268 U.S. 501, 45 S. Ct. 601 (1925). (6) *Madden v. Kentucky*, 309 U.S. 83, 60 S. Ct. 406 (1940), overruling *Colgate v. Harvey*, 296 U.S. 404, 56 S. Ct. 252 (1935). (7) *Helvering v. Hallock*, 309 U.S. 106, 60 S. Ct. 444 (1940), overruling *Helvering v. St. Louis etc. Trust Co.*, 296 U.S. 39, 56 S. Ct. 74 (1935), and *Becker v. Same*, 296 U.S. 48, 56 S. Ct. 78 (1935). (8) *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451 (1941), overruling *Hammer v. Dagenhart*, 247 U.S. 251, 38 S. Ct. 529 (1918). (9) *Nye v. United States*, 313 U.S. 33, 61 S. Ct. 810 (1941), overruling *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 38 S. Ct. 560 (1918). (10) *Olsen v. Nebraska*, 313 U.S. 236, 61 S. Ct. 862 (1941), overruling *Ribnik v. McBride*, 277 U.S. 350, 48 S. Ct. 545 (1928). (11) *United States v. Classic*, 313 U.S. 299, 61 S. Ct. 1031 (1941), overruling *Newberry v. United States*, 256 U.S. 232, 41 S. Ct. 469 (1921). (12) *Alabama v. King & Boozer*, 314 U.S. 1, 62 S. Ct. 43 (1941), overruling *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 48 S. Ct. 451 (1928), and *Graves v. Texas Co.*, 298 U.S. 393, 56 S. Ct. 818 (1936). (13) *California v. Thompson*, 313 U.S. 109, 61 S. Ct. 930 (1941), overruling *Di Santo v. Pennsylvania*, 273 U.S. 34, 47 S. Ct. 267 (1927). (14) *State Tax Commission v. Aldrich*, 316 U.S. 174, 62 S. Ct. 1008 (1942), overruling *First National Bank v. Maine*, 284 U.S. 312, 52 S. Ct. 174 (1932), which had overruled other decisions. (15) *Williams v. North Carolina*, 317 U.S. 287, 63 S. Ct. 207 (1942), overruling *Haddock v. Haddock*, 201 U.S. 562, 26 S. Ct. 525 (1906), but qualified by *Williams v. Same*, 325 U.S. 226, 65 S. Ct. 1092 (1945); and according to Powell, "And Repent at Leisure," 58 HARV. L. REV. 930 at 953 (1945), *Haddock v. Haddock* was not overruled. (16) *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178 (1943), overruling *Minersville School District v. Gobitis*, 310 U.S. 586, 60 S. Ct. 1010 (1940). (17) *Jones v. Opelika*, 319 U.S. 103, 63 S. Ct. 890 (1943), vacating previous judgment in same case [316 U.S. 584, 62 S. Ct. 1231 (1942)] and overruling *Martin v. Struthers*, 319 U.S. 141, 63 S. Ct. 862 (1943) and *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S. Ct. 870 (1943). (18) *United States v. S.E. Underwriters' Assn.*, 322 U.S. 533, 64 S. Ct. 1162 (1944), where four justices concurred in overruling *Paul v. Virginia*, 8 Wall. (75 U.S.) 168 (1868), three dissented and two failed to participate. (19) *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S. Ct. 455 (1944), overruling *Plamals v. Pinar Del Rio*, 277 U.S. 151, 48 S. Ct. 457 (1928).

¹²⁹ "The tendency to disregard precedents in the decision of cases like the present has become so strong in this court of late as, in my view to shake confidence in the consistency of decision and leave the court below on an uncharted sea of doubt and difficulty without any confidence that what was said yesterday will hold good tomorrow, unless, indeed a modern instance grows into a custom of members of this court to make public announcement of a change of views and to indicate that they will change their votes when another case comes before the court." [See *Minersville School District v. Gobitis*, 310 U.S. 586, 60 S. Ct. 1010 (1940); *Jones v. Opelika*, 316 U.S. 584 at 623, 62 S. Ct. 1231 (1942); *Barnette v. State Board*, (D.C. W. Va. 1942) 47 F. Supp. 251; *W. Va. State Bd. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178 (1943)] *Mahnich v. S.S. Co.*, 321 U.S. 96 at 113, 64 S. Ct. 455 (1944), Roberts, J. dissenting.

"The reason for my concern is that the instant decision, overruling that announced

thought that more of its decisions needed overruling.¹³⁰ Moreover, recent expressions by certain of the judges indicate a more conservative attitude,¹³¹ and while "the rule to break a rule" prevails in the state courts¹³² its exercise does not seem to have increased unduly.

about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view of current decisions, that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject. . . . This tendency, it seems to me, indicates an intolerance for what those who have composed this court . . . have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us which was denied to our predecessors." Roberts, J. in *Smith v. Allwright*, 321 U.S. 649 at 666, 669, 64 S. Ct. 757 (1944). "In the present term the court has overruled three cases." *Id.* at 669. It is but fair to point out, however, that most of the recently overruled Supreme Court decisions were rendered by a divided bench.

¹³⁰ See Stimson, "Retroactivity in Law," 38 MICH. L. REV. 30 at 56 (1939); Snyder, "Retrospective Operation of Overruling Decisions," 35 ILL. L. REV. 121 at 128 (1940). Cf. Kocourek and Koven, "Renovation of the Common Law Through Stare Decisis," 29 ILL. L. REV. 971 at 987 (1935).

"The doctrine of stare decisis was never intended to tie the hands of a supreme court and prevent it from correcting its own errors, or from making adjustments in the law to meet the needs of people who must rely on the courts for the protection of their interests. On the contrary, the doctrine casts upon the court a heavy obligation to see that the substantive processes which the lower courts must follow are readily available to litigants who seek the law's protection." Green, "Freedom of Litigation," 38 ILL. L. REV. 117 at 118 (1943). The decision in *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539 (1905), was severely criticized by President Theodore Roosevelt. See also Nehemkis, "Paul v. Virginia: The Need for Re-examination," 27 GEO. L.J. 519 (1939).

¹³¹ "... to overrule an important precedent is serious business. It calls for sober appraisal of the disadvantages of the innovation as well as those of the questioned case." Justice Jackson in 28 J. AM. JUD. SOC. 7 (1944); 30 A.B.A.J. 334 (1944). [Up to 1945 he had concurred in three overruling decisions and dissented in seven. Dissenting in *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193 (1944), he had criticized the doctrine of *Hirabayashi v. United States*, 320 U.S. 81, 63 S. Ct. 1375 (1943)].

"But beyond that is the problem of stare decisis. The construction given Section 20 [of the Criminal Code] in the Classic Case [supra note 128, No. 11] formulated a rule of law which has become the basis of federal enforcement in this important field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have a situation here comparable to *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S. Ct. 455 (1944) [supra note 128, No. 19] where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The Classic case was not the product of hasty action or inadvertance. . . . We add only to the instability and uncertainty of the law if we revise the meaning of Section 20 to meet the exigencies of each case coming before us." Justice Douglas for the majority in *Screws v. United States*, 325 U.S. 91 at 112, 65 S. Ct. 1031 (1945).

¹³² *Colorado*. Imperial Sec. Co. v. Morris, 57 Colo. 194, 141 P. 1160 (1914), overruling a fairly recent decision which had been followed "several times." *Florida*.

2. *Retroaction*

We have traced the analogy of the judicial and legislative processes and found that the consequences ought to be similar.¹³³ Now one of the consequences of repeal may be the loss of rights acquired in reliance upon the repealed statute. The legislative process usually provides against that,¹³⁴ although, apparently, such a provision is not necessary.¹³⁵ "Why could not the judicial doctrine of *stare decisis* be applied with the same restriction?" asked Wigmore.¹³⁶ In fact, some courts had already so applied it even then.¹³⁷

Layne v. Tribune, 108 Fla. 177, 146 S. 234 (1933). *Georgia*. "Minor errors, even if quite obvious, or important errors, if their existence be fairly doubtful, may be adhered to and repeated indefinitely; but the only treatment for a great and glaring error affecting the administration of justice in all courts of original jurisdiction, is to correct it. When an error of this magnitude and which moves in so wide an orbit, competes with truth in the struggle for existence, the maxim for a supreme court . . . is not *stare decisis*, but *fat justitia ruat coelum*." *Ellison v. R. Co.*, 87 Ga. 691 at 696, 13 S.E. 809 (1891). *Idaho*. Kerr v. Finch, 25 Idaho 32, 135 P. 1165 (1913), adhering to a previous decision conceded "contrary to the current of authority . . . precedent is not controlling," Ailshie, J. *Indiana*. Overruling former decisions as to the number of electors required to ratify a Constitutional Amendment was in the public interest, making possible modern standards for admission to the bar and in the majority's opinion, "in no way affecting private interests." *In re Todd*, 208 Ind. 168, 193 N.E. 865 (1935). *Iowa*. Montanick v. McMillin, 225 Iowa 442; 280 N.W. 608 (1938). *Kentucky*. L. & N. R. Co. v. Hutton, 220 Ky. 277, 295 S.W. 175 (1927). *Michigan*. Hilt v. Weber, 252 Mich. 198, 233 N.W. 159 (1930). *Missouri*. Heller v. Lutz, 254 Mo. 704 at 716, 164 S.W. 123 (1914). "Judgment should be according to the law and not . . . to the precedents." *Nebraska*. In *Globe Publishing Co. v. State Bank*, 41 Neb. 175, 59 N.W. 683 (1894), an opinion, approved by the court though written by a Commissioner, overruled four of its previous decisions holding that the statute in question imposed a contractual and not a penal liability. *New York*. Butler & Barker v. Van Wyck, 1 Hill (N.Y.) 438 at 462-3 (1841); Leavitt v. Blatchford, 17 N.Y. 521 at 543-4 (1858). *Oklahoma*. Frick Co. v. Oats, 20 Okla. 473, 94 P. 682 (1908), overruling a territorial court decision. *Texas*. Long v. Martin, 114 Tex. 581, 260 S.W. 327 (1924), *Utah*. Salt Lake v. Industrial Comm., 93 Utah 510, 74 P. (2d) 657 (1937), overruling five decisions. *Wisconsin*. Schwanke v. Garlt, 219 Wis. 367, 263 N.W. 176 (1935). And see WAMBAUGH, STUDY OF CASES, 2d ed., § 94, note (1894); 15 C.J. 957, note 20; 21 C.J.S. 325, note 67.

¹³³ See *supra*, note 102.

¹³⁴ See SCIENCE OF LEGAL METHOD (9 Modern Legal Philosophy Ser.), preface at xxxviii (1921).

¹³⁵ *Ohio L. & T. Co. v. Debolt*, 16 How. (57 U.S.) 415 at 432 (1853). See also Snyder, "Retrospective Operation of Overruling Decisions," 35 ILL. L. REV. 121 at 146 (1940), and cases cited in notes 228 et seq.

¹³⁶ SCIENCE OF LEGAL METHOD (9 Modern Legal Philosophy Ser.), preface at xxxviii (1921).

¹³⁷ See Stimson, "Retroactivity in Law," 38 MICH. L. REV. 30 (1939), and cases cited note 1. Cf. the following state court decisions: *Jones v. Woodstock Co.*, 95 Ala. 551, 10 S. 635 (1891); *Bank v. Posey*, 130 Miss. 825, 95 S. 134 (1923);

Much has since been written on the subject.¹³⁸ In 1931 Professor Kocourek¹³⁹ proposed "an act declaring the effect of judicial decisions"; but by 1935 he had concluded that "the courts already inherently have the power to accomplish this program. No statute is needed. No change in any constitution is required."¹⁴⁰ The conclusion is based on an unanimous decision¹⁴¹ of the Federal Supreme Court upholding a

Gross v. State, 135 Miss. 624, 100 S. 177 (1924); Hill v. Brown, 144 N.C. 117, 56 S.E. 693 (1907); Kneeland v. Milwaukee, 15 Wis. 497 (1862).

¹³⁸ Carpenter, "Court Decisions and the Common Law," 17 COL. L. REV. 593 (1917); Carpenter, "Stare Decisis and Law Reform," 7 ORE. L. REV. 31 (1927), 62 AM. L. REV. 145 (1928); 1 So. CAL. L. REV. 537 (1927); Freeman, "The Protection Afforded Against the Retroactive Operation of an Overruling Decision," 18 COL. L. REV. 230 (1918); Hardman, "Stare Decisis and the Modern Trend," 32 W. VA. L.Q. 163 (1926); Kocourek, "Retrospective Decisions and Stare Decisis and a Proposal," 17 A.B.A.J. 180 (1931); Hanner, "A Suggested Modification of Stare Decisis," 28 ILL. L. REV. 277 (1933); "Effect of Overruled and Overruling Decisions on Intervening Decisions," 47 HARV. L. REV. 1403 (1934); "Retroactive Effect of an Overruling Decision," 42 YALE L.J. 779 (1933); Kocourek and Koven, "Renovation of the Common Law Through Stare Decisis," 29 ILL. L. REV. 971 (1935); Stimson, "Retroactivity in Law," 38 MICH. L. REV. 30 (1939); Hirschman, "Judicial Decision; Limitation of Its Retroactivity," 24 CORN. L.Q. 611 (1939); Spruill, "Effect of an Overruling Decision," 18 N.C.L. REV. 199 (1940); Snyder, "Retrospective Operation of Overruling Decisions," 35 ILL. L. REV. 121 (1940); "Shall Overruling Decisions Be Given Retrospective Operation," 27 IOWA L. REV. 315 (1942).

¹³⁹ Kocourek, "Retrospective Decisions and Stare Decisis and a Proposal," 17 A.B.A.J. 180 (1931).

¹⁴⁰ 29 ILL. L. REV. 971 at 999 (1935).

¹⁴¹ Great Northern R. Co. v. Sunburst Oil Co., 287 U.S. 358, 53 S. Ct. 145 (1932), where the action complained of was a change of freight rates, fixed with the announcement that they were tentative. Cardozo, J. for the whole court (id. at 364-5) said: "A state, in defining the limits of adherence to precedent, may make a choice for itself between the principle of forward operation and that of relation backward. It may say that the decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. Tidal Oil Co. v. Flanagan . . .) [263 U.S. 444 at 450, 44 S. Ct. 197 (1924)], that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them. . . . The alternative is the same whether the subject of the new decision is common law . . . or statute."

Judge Moschizker, when on the Pennsylvania Supreme Court, had objected to such a solution as "plain and outright legislation." "Stare Decisis in Courts of Last Resort," 37 HARV. L. REV. 409 at 427 (1924); but would it be anymore so than was creation by the courts of the stare decisis rule itself, or of the "declaratory" theory? He also objected that such an "attempted ruling could be nothing more than dicta." (Ibid.) But would it not rather partake of the nature of a declaratory judgment whose advantages are many and whose constitutionality in both state and federal statutes has been upheld by the Supreme Court? See Potts "The Declaratory Judgment," 28 J. AM. JUD. SOC. 82 (1944). Cf., GEO. L.J. 635 (1939), note on Perkins v. Elg, (App. D.C. 1938) 99 F. (2d) 408, applying it to citizenship; Borchard, "The

state court which had "refused to make its [over] ruling retroactive." The same doctrine has been applied also by state supreme courts¹⁴² and has received favorable comment from law writers,¹⁴³ though there has also been some dissent.¹⁴⁴ To Messrs. Kocourek and Koven¹⁴⁵ the retrospective operation of overruling decisions is an incident of the "declaratory theory." Professor Snyder,¹⁴⁶ however, finds in that theory "authority for overruling with the full support of tradition" and even concludes that such "retrospective operation... is logically unnecessary."¹⁴⁷

The avowed purpose of the limitation upon retrospective overruling, is to protect the loser who has relied upon the overruled decision.¹⁴⁸ Whether the claimant for relief actually so "relied" would

Declaratory Judgment as an Exclusive or Alternative Remedy," 31 MICH. L. REV. 180 (1932), criticising *Miller v. Siden*, 259 Mich. 19, 242 N.W. 823 (1932). "Our judicial system would have to undergo a decidedly questionable change before judges would be willing to apply one rule of law to the case before them and lay down an opposite one by which they and their successors should be bound in the future." But, as we have just seen, such a solution has already been undertaken by the courts without a "change in our judicial system."

¹⁴² *Montana Horse Products Co. v. Great Northern R. Co.*, 91 Mont. 194, 7 P. (2d) 919 (1932); *Sunburst Oil Co. v. Great Northern R. Co.*, 91 Mont. 216, 7 P. (2d) 927 (1932), overruling *Doney v. Northern Pacific R. Co.*, 60 Mont. 209, 199 P. 432 (1921), which denied recovery of excessive freight charges paid by a shipper until he had sought relief from the State Railway Commission. Cf. *Payne v. Covington*, 276 Ky. 380, 123 S.W. (2d) 1045 (1938).

¹⁴³ Besides those cited by Kocourek and Koven, "Renovation of the Common Law Through Stare Decisis," 29 ILL. L. REV. 995, note 135 (1935), see "Judicial Regulation of Stare Decisis," 24 J. AM. JUD. SOC. 150 (1941).

¹⁴⁴ The commentator in 47 HARV. L. REV. 1403 (1934), sees the Supreme Court's technique "beset with grave theoretical and practical difficulties." (Id. at 1412). Cf. 42 YALE L. J. 781 (1913).

¹⁴⁵ 29 ILL. L. REV. 971 at 986 (1935).

¹⁴⁶ "Retrospective Operation of Overruling Decisions," 35 ILL. L. REV. 121 at 129, 130, 153 (1942).

¹⁴⁷ Id. at 153. Cf. *Warring v. Colpoys*, (App. D.C. 1941) 122 F. (2d) 642 [construing *Nye v. United States*, 313 U.S. 33, 61 S. Ct. 810 (1941), as not operating prospectively, and 27 IOWA L. REV. 315 (1942)].

¹⁴⁸ "... stare decisis . . . cannot be relied upon by one who has not in good faith been deceived or misled to his prejudice by reliance upon a decision which the courts subsequently concludes was erroneous (7 R.C.L. 1002)." *Neff v. George*, 364 Ill. 306 at 309, 4 N.E. (2d) 388 (1936).

"When there is absent this element of reliance upon the rules of law . . . there will be no more unfairness in the courts changing a rule than in the legislatures changing a rule. . . . In the law of torts there is usually none of this element. . . ." Courts should not permit one to profit wrongfully [*International News v. Assoc. Press*, 248 U.S. 215, 39 S. Ct. 68 (1918)]. Carpenter, "Stare Decisis and Law Reform," 7 ORE. L. REV. 31 at 40 (1927), 62 AM. L. REV. 145 (1928).

"Where there has been no change of position in reliance upon existing decisions,

seem to be a pure question of fact, the burden of proving which rests on the claimant.¹⁴⁹ But this feature has received little attention in the opinions. In one leading case,¹⁵⁰ as Professor Stimson points out,¹⁵¹ "there was no evidence of reliance" on the decision whose overruling, according to the opinion, deprived claimant of the property in question without due process. The legal fiction that "everyone is presumed to know the law" could hardly be stretched to cover such a case.

Yet, on the other hand, we find, according to a careful comment,¹⁵² that "reliance is conclusively presumed in most cases." Indeed, in the most famous¹⁵³ of the overruling decisions the opinion mentions no proof of reliance on the overruled one and such reliance appears improbable.¹⁵⁴ But why should reliance be presumed? And if not presumed, how should it be proved? These are questions for the courts to answer if "the solution is in their hands";¹⁵⁵ but such a change in the *onus probandi* rule as to indulge in the presumption of reliance in such cases would certainly be "judicial legislation."

3. Overruling "by implication"

While the practice of overruling is thus well established, there is a misuse of it which has been characterized as "a vicious practice,"¹⁵⁶

the retroactive application of a decision overruling them would seem not to be unconstitutional." Stimson, "Retroactivity in Law," 38 MICH. L. REV. 30 at 56 (1939), citing *O'Neil v. Northern Colorado Irrigation Co.*, 242 U.S. 20, 37 S. Ct. 7 (1916).

¹⁴⁹ See 8 TEXAS L. REV. 387 (1930).

¹⁵⁰ *Muhlker v. R. Co.*, 197 U.S. 544, 25 S. Ct. 522 (1905).

¹⁵¹ Stimson, "Retroactivity in Law," 38 MICH. L. REV. 30 at 50 (1939).

¹⁵² 42 YALE L.J. 779 at 782, note 22 (1933).

¹⁵³ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

¹⁵⁴ "... An injured trespasser could hardly be considered as having 'equitable' claim based on 'reliance' on *Swift v. Tyson* when he trespassed; but the inhabitants of the forty-eight states whose actions, for many years, had involved actual 'reliance' on the doctrine of *Swift v. Tyson* might well have been protected, as to the past, by an equitable clause in the overruling opinion as to its general application." Grinnell, "Judicial Regulation of *Stare Decisis*," 24 J. AM. JUD. SOC. 150 at 156 (1941).

"Relying on a rule that had been reiterated and followed by the Federal courts for ninety-six years, Tompkins lost his case by reason of the agreement of six justices (two dissenting and one taking no part...) that the rule had always been wrong. Why should he have been made the victim of the failure of *stare decisis* to function when no constitutional question was involved? The Court might have announced that the doctrine was erroneous and would no longer be followed and at the same time have preserved to Tompkins the right that he was justified by lapse of time and by scores of decisions in believing was his." Wilson, "Stare Decisis Quo Vadis: The Orphaned Doctrine in the Supreme Court," 33 GEO. L.J. 251 at 255 (1945).

¹⁵⁵ See 29 ILL. L. REV. 971 at 999 (1935).

¹⁵⁶ Boudin, "The Problem of *Stare Decisis* in Our Constitutional Theory," 8 N.Y. UNIV. L.Q. 589 at 618 (1931).

viz., overruling by deciding differently a later case without mentioning the former.¹⁵⁷ In the Federal Supreme Court this practice has left the law on some questions in a state of uncertainty¹⁵⁸ and quite recently has evoked a sharp criticism from one of the court's own members.¹⁵⁹ In

¹⁵⁷ See Sharp, "Movement in Supreme Court Adjudication—A Study of Modified and Overruled Decisions," 46 HARV. L. REV. 361 at 593 (1933). Cf. WAMBAUGH, STUDY OF CASES, §49 (1894).

¹⁵⁸ "There is a conflict in the United States Supreme Court decisions on the question whether the retroactive application of an overruling decision to one who changed his position in reliance upon the decisions overruled is contrary to due process of law. *Muhlker v. New York & Harlem R.R.*, [197 U.S. 544, 25 S. Ct. 522 (1905)] holding that the Constitution prohibits the retroactive application of an overruling decision in such cases, should be followed. *Central Land Co. v. Laidley*, [159 U.S. 103, 16 S. Ct. 80 (1895)] *Dunbar v. New York* [251 U.S. 516, 40 S. Ct. 250 (1920)] and *Tidal Oil Co. v. Flanagan* [263 U.S. 444, 44 S. Ct. 197 (1924)] should be overruled." Stimson, "Retroactivity in Law," 38 MICH. L. REV. 30 at 56 (1939).

In the last named case the Muhlker decision "is treated as though it was based solely on the contract clause. The overruling decision changing the construction of the statute in that case was said to be an application of the statute prohibited by the contract clause. Chief Justice Taft did not explain how a statute enacted seventy-five years before Muhlker acquired title could impair his rights." *Id.* at 51.

Cf. *Central Land Co. v. Laidley*, which Professor Stimson thinks "was impliedly overruled by *Muhlker v. New York & Harlem R.R.*," (*id.* at 51), but which was "... nevertheless followed in subsequent decisions [*Patterson v. Colorado*, 205 U.S. 454, 27 S. Ct. 556 (1907); *Dunbar v. New York*, 251 U.S. 516, 40 S. Ct. 250 (1920)] without citing the *Muhlker* case at all," in which Justice Holmes said, at 575: "What plaintiff claims is really property, a right *in rem*. It is called contract merely to bring it within the contract clause of the Constitution... and... should not be extended to a case like this."

"The time is ripe for the Supreme Court to disavow not only *Gelpcke v. Dubuque* but also *Tidal Oil Co. v. Flanagan*." Boudin, "Stare Decisis, State Constitutions, and Impairing the Obligation of Contracts by Judicial Decision," 11 N.Y. UNIV. L.Q. 207 at 235 (1933). Cf. *id.* at 226, 227, containing a criticism of Chief Justice Taft's opinion in the last named case.

In *Clark v. Bever*, 139 U.S. 96 at 117, 11 S. Ct. 468 (1891), the court declined to follow *Jackson v. Traer*, 64 Iowa 469, 20 N.W. 764 (1884), but failed to cite *Gelpcke v. Dubuque*. See also Willis, "Conflicting Decisions of the Supreme Court," 13 VA. L. REV. 155 at 157, 164 (1927); *Washington v. Dawson & Co.*, 264 U.S. 219 at 238, 44 S. Ct. 302 (1924), citing a dozen overruled cases.

¹⁵⁹ "It is suggested that *Grove v. Townsend* [295 U.S. 45, 55 S. Ct. 622 (1935)] was overruled *sub silentio* in *United States v. Classic*, 313 U.S. 299 [61 S. Ct. 1031 (1941)]. If so, the situation is even worse than that exhibited by the outright repudiation of an earlier decision, for... in the *Classic* case, *Grove v. Townsend* was distinguished in brief and argument by the Government without suggestion that it was wrongly decided, and was relied on by the appellees, not as controlling... but by way of analogy. The case is not mentioned in either of the opinions in the *Classic* case... If this court's opinion in... [that] case discloses its method of overruling earlier decisions, I can only protest that, in fairness, it should

the state courts, as well as federal, "Usually, earlier holdings are later disregarded without being overruled. By merely distinguishing, ignoring, or limiting them, courts are able to conceal reversals and thus to avoid the question of what effect should be given an overruling decision."¹⁶⁰ Such a practice may be compared to the legislative repeal of a statute "in executive session" with no mention thereof in the published proceedings.

4. *The Remedy: Continuous Case Law Revision*

For suggestions to relieve stare decisis from the perversions and abuses¹⁶¹ with which it has too often been applied, we may turn with profit to Roman procedure. Neither the *praetor* nor the *judex* was a trained lawyer; but the latter was "an educated man with legal advisers..." who tended more and more to become legal experts.¹⁶²

It was this *consilium* of legal experts whose continuous researches and advice during the republic enabled the Roman lay judge to perform with notable success the duties of his office, and, at the same time, to build up a legal system which became a model for later civilization. Under the empire a similar body functioned for the emperor (who became the ultimate court of appeal) and prepared the sound and terse judgments issued in his name. Modern law reformers have, consciously or not, advocated a revival of that system to relieve the courts of their growing burdens.

rather have adopted the open and frank way of saying what it was doing than, after the event, characterize its past action as overruling *Grove v. Townsend* though those less sapient never realized the fact." Roberts, J. in *Smith v. Allwright*, 321 U.S. 649 at 669, 670, 64 S. Ct. 757 (1944). 42 *YALE L.J.* 779 (1933).

¹⁶⁰ *Missouri*. "Pattison's Digest of Missouri Reports, including the 49th volume, contains a list of about two thousand cases criticised, some of them overruled, others questioned, doubted, or modified, exclusive of a large number of the decisions reported, which have been dodged by the Supreme Court, or quietly ignored." "Stare Decisis," 4 *CENT. L.J.* 100 at 101 (1877).

Nebraska. In *Hanley v. Stratbucker*, 144 Neb. 437, 13 N.W. (2d) (1944), the court ignored, and thus impliedly overruled, two previous decisions [*Te Poel v. Shutt*, 57 Neb. 592, 78 N.W. 288 (1899); *Oberlender v. Butcher*, 67 Neb. 410, 93 N.W. 764 (1903)] which were directly in point and urged in appellee's brief but not mentioned in the opinion.

¹⁶¹ See *supra* notes 113, 156.

¹⁶² *BUCKLAND, THE MAIN INSTITUTIONS OF ROMAN LAW* 360 (1931). "It is impossible to conceive how, in classical times, the judge could have performed his office without the help of such a *consilium*; even if he, like the worthy Gellius, gathered together on his study table, books on the *officium judicis*, juristic literature, which was becoming more and more difficult, was only in part accessible to the layman." *SCHULZ, PRINCIPLES OF ROMAN LAW*, Wolff's trans., Oxford, 241, 242 (1936).

Before 1826, and after his retirement from office, Chancellor Kent wrote: "It is probable that the records of many... courts in this country are replete with hasty and crude decisions and such cases ought to be examined without fear, and revised without reluctance..."¹⁶³ The learned Chancellor did not suggest a reviser; but in that day of more limited litigation he probably intended that it should be the court. The late Professor Tiedeman,¹⁶⁴ whose text books were familiar to those of a former generation, advocated, nearly half a century ago, a commission of "the ablest jurists of the state" for reduction of the existing law to commentaries which would have the same force as decisions. Another New Yorker¹⁶⁵ recently expressed the feeling "that our times have witnessed considerable relaxation in the authority of the precedent" and that this is largely due to their "enormous multiplication." He concedes that "remedies are hard to devise"; but the situation which he describes clearly calls for some kind of an authorized "sifting committee." The late Dean Wigmore¹⁶⁶ mentioned commissions in Russia and Spain "whose duty it is to report periodically on defects in the law" and the Federal Supreme Court, in its order of January 5, 1942, moved in that direction by designating "a continuing advisory committee to advise the court with respect to proposed amendments or additions to the Rules of Civil Procedure."¹⁶⁷ If that or another committee's duties were extended so as to report periodically on needed changes in case law, we might expect practical progress toward a solution of the problems related to *stare decisis*. For "the task of modernizing the rules of law devolves upon the judiciary and the process... requires a technique not hitherto used."¹⁶⁸

Such a committee, whatever its title, should survey systematically the whole field of its jurisdiction's case law, seek the dead and obsolete material and place it periodically before the court for elimination. That is a task for which the court itself has neither the time nor the equip-

¹⁶³ I KENT, COM., 2d ed., 477 (1832).

¹⁶⁴ See 19 N.Y. ST. B.A. PROC. 103 (1896). Cf. Tiedeman, "The Doctrine of *Stare Decisis*," 3 UNIV. L. REV. 11 (1896). Like the American Law Institute, he disclaimed any codifying purpose.

¹⁶⁵ Justice Jackson before the American Law Institute, May 9, 1944. See 28 J. AM. JUD. SOC. 6 (1944), 30 A.B.A.J. 334 (1944).

¹⁶⁶ "Problems of Law's Mechanism in America," 4 VA. L. REV. 337 at 350 (1917).

¹⁶⁷ See 28 A.B.A.J. 91 at 120 (1942).

¹⁶⁸ Hanner, "A Suggested Modification of *Stare Decisis*," 28 ILL. L. REV. 277 at 278 (1933), discussing *Great Northern R. Co. v. Sunburst Oil Co.*, 287 U.S. 358, 53 S. Ct. 145 (1932).

ment, and its performance would probably remove all valid objections to the doctrine of *stare decisis*. Such a committee should be attached to every court of last resort.¹⁶⁹ A judge who had been a member of Congress recently remarked, "a court does not have as good facilities to study these problems...as the legislative body."¹⁷⁰ But is not that merely because the courts have not sought such facilities? They have not been so long available to legislative bodies and courts are not usually denied assistance when they seek it. If statutory authority is required for such a committee (and probably nothing more than an appropriation for expenses would be needed) it should be obtained easily. The next step, and the most important one, would be the selection of the "ablest jurists" of the jurisdiction for the committee's personnel;¹⁷¹ for its task is one of exhaustive and meticulous research. Thus equipped, our courts could keep abreast of current decisions in other jurisdictions as well as their own.

Judge Cardozo suggested a ministry of justice;¹⁷² others, utilization of the existing judicial councils¹⁷³ of some twenty-eight or more

¹⁶⁹ "Regulation of procedure implies necessarily a continuing power and duty. If there were ever a perfect code it would nevertheless require changes from time to time. This means that the operation of the rules must be closely and responsibly observed. And here, most emphatically, it is obvious that the supreme court must be assisted by a specific agency." Editorial, 23 J. AM. JUD. SOC. 91 (1939).

¹⁷⁰ Vinson, J., (now Chief Justice, United States Supreme Court) in *Gertman v. Burdick*, (App. D.C. 1941) 123 F. (2d) 924, referring, doubtless, to the House of Representatives' Committee on Revision of the Laws.

¹⁷¹ Some of the judicial councils appear to lack this requisite. In one, e.g., the Supreme Court selects a member, the district courts another, and the county judges, which are not required even to be lawyers, another. It might well happen that none of these would have the training and experience needed for productive research.

"How the committee should be constituted, is, of course, not of the essence of the project. My own notion is that the ministers should be not less than five in number. There should be representatives, not less than two, perhaps even as many as three, of the faculties of law or political science in institutes of learning. Hardly elsewhere shall we find the scholarship on which the ministry must be able to draw if its work is to stand the test. There should be, if possible, a representative of the bench; and there should be a representative or representatives of the bar. Such a board would not only observe for itself the workings of the law as administered day by day. It would enlighten itself constantly through all available sources of guidance and instruction; through consultation with scholars; through study of the law reviews, the journals of social science, the publications of the learned generally; and through investigation of remedies and methods in other jurisdictions, foreign and domestic." Cardozo, "A Ministry of Justice," 35 HARV. L. REV. 113 at 124 (1921).

¹⁷² Cardozo, "A Ministry of Justice," 35 HARV. L. REV. 113 at 124 (1921).

¹⁷³ Pound, "Judicial Councils and Judicial Statistics," 28 A.B.A.J. 98 (1942). Cf. his contribution on "Jurisprudence" in BARNES, HISTORY AND PROSPECTS OF THE SOCIAL SCIENCES 476-7 (1925).

states, in order to meet the need for case law revision. But neither of these, as at present constituted, would seem adequate.¹⁷⁴ The New York Judicial Council appears to be doing excellent work in suggesting to the legislature possible revisions in both statute and case law;¹⁷⁵ but both it and the New York State Law Revision Commission¹⁷⁶ seem to deal with the legislature exclusively, having no direct official contact with the courts or their proceedings, and that appears to be true in the other states. But the judicial councils and other revisionary bodies, including the advisory committees, could be utilized in keeping the law, both case and statutory, uniform throughout the country, if the American Law Institute should see fit to extend *ex officio* membership to the formers' personnel. The Institute's annual meetings could then provide a clearing house for the results of these revisionary bodies' researches, placing them at the disposal of all courts. With such an equipment, so largely recruited from existing institutions, and with little added expense, our courts of last resort should be able to cope with the growing body of case law and at the same time apply and preserve the time honored *stare decisis* doctrine, initiating a new era in its history and in that of our common legal system.¹⁷⁷

¹⁷⁴ Cf. *supra*, note 170.

¹⁷⁵ See its 10th Annual Report (1944), containing 25 recommendations for constitutional and statutory changes.

¹⁷⁶ See the Address of its secretary before the Cincinnati Conference on the "Status of the Judicial Precedent Rule," Feb. 17, 1940, 14 UNIV. CIN. L. REV. 308 (1940). The Commission's function is to examine the state's common law, statutes and judicial decisions for defects and anachronisms, receive and consider recommendations and suggestions from the courts and other officials, bar associations, etc., so as "to bring the law . . . into harmony with modern conditions." See its annual reports, 1935 to 1943.

¹⁷⁷ "Precedent, restrained to its proper use and understood as an instrument of logic, has proved itself one of the most valuable factors in our legal reasoning . . . it has certain disadvantages and inconveniences . . . but these weaknesses, though considerable, do not outweigh the substantial merit of the system . . . and the amount of irrationality introduced into the law by certain inevitable difficulties of application, is inconsiderable beside the solid and rational jurisprudence which the Common Law, built up on example and analogy, has erected to so high a position in European civilization." ALLEN, *LAW IN THE MAKING*, 2d ed., 205 (1930).

"The laws of the state and nation must keep pace with conditions. . . . That the common law has within itself the quality and capacity for growth and of adaptation to new conditions, has been one of its most admirable features. The law has the inherent capacity to meet the requirements of the new and various experiences which arise out of the development of the country." *Montanick v. McMillan*, 225 Iowa 442 at 459, 280 N.W. 608 (1938).

"If the retrospective rule is modified, the courts will be free to change the rules of the common law. The chains which they have themselves forged . . . will fall away, and we may expect in the course of time a complete renovation of the common law.

IV

SUMMARY: ANALYSIS OF OBJECTIONS TO STARE DECISIS IN THE
LIGHT OF THE PROPOSED REMEDY*A. Multiplicity of Decisions*

This is the objection primarily stressed by most of the critics,¹⁷⁸ and it was answered by the late Justice Holmes¹⁷⁹ whom Goodhart quotes. In the United States the "uncontrollable flood," to use Goodhart's phrase, has largely been due to the increase of last resort courts in the course of our history. We started with not more than thirteen and now have fifty-two, including the territorial supreme courts. But the process appears to have about reached its limit and it has never meant an increase of courts making "obligatory" precedents of which there is but one in each jurisdiction.¹⁸⁰ Surely the "flood" of such precedents in any one jurisdiction has not become so great as to preclude analysis and disposition by the proposed advisory committee. For the task appears no greater than that accomplished annually for the past decade by the New York Law Revision Commission.¹⁸¹ Professor Goodhart¹⁸² believes "that in no distant time the American doctrine will approximate . . . that of the Civil Law." But is that system free from the multiplicity of precedents? Let Professor Gray answer.¹⁸³

The important work of the American Law Institute and the extensive researches of specialists now lying unused in the pages of our law reviews and texts, will be immediately available. We may achieve not only a renovation . . . but possibly a renaissance of the common law that will carry us forward to a level higher than ever reached by any system of law." Kocourek and Koven, "Renovation of the Common Law Through Stare Decisis," 29 ILL. L. REV. 971 at 999 (1935).

"We cannot deny to the judicial process capacity for improvement, adaptation, and alteration unless we are prepared to leave all evolution and progress in the law to legislative processes." Justice Jackson, "Decisional Law and Stare Decisis," 30 A.B.A.J. 334 at 334 (1944), 28 J. AM. JUD. SOC. 6 (1944).

¹⁷⁸ GOODHART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* 50, 65 (1930); Wade, "The Concept of Legal Certainty," 4 MODERN L. REV. 183 (1941); Justice Jackson, 28 J. AM. JUD. SOC. 6 (1944), 30 A.B.A.J. 334 (1944), and in 31 MICH. L. REV. 121 at 122 (1932), and others.

¹⁷⁹ "It is a great mistake to be frightened by the ever increasing number of reports. [Those] of a given jurisdiction in the course of a generation take up pretty much the whole body of the law and restate it from the present point of view. We could reconstruct the corpus of them if all that went before were burned." Holmes, "The Path of the Law," 10 HARV. L. REV. 457 at 458 (1897).

¹⁸⁰ See *supra*, note 68.

¹⁸¹ *Supra*, note 176.

¹⁸² GOODHART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* 71 (1930).

¹⁸³ "... The theory of one learned civilian will be precisely opposite to that of another. There will often be a multitude of writers, no two agreeing with each other,

Mr. Goodhart¹⁸⁴ also thinks that "the tendency to depart from . . . *stare decisis* will receive a tremendous impetus in the restatements of the American Law Institute," which he considers "a code . . . whether official or unofficial." But does American experience with codes indicate that they lessen the volume of precedents? What about our practice acts (especially New York's) with the voluminous interpretations in a single jurisdiction? Or what of the Uniform Negotiable Instruments Law, now operative in fifty-three American jurisdictions and already, within a half century, profusely construed by the courts of all?

And let us test the soundness of this objection by facing the alternative: Would the burdens of the courts and the bar be lessened if *stare decisis* were discarded and each legal problem considered anew? The late Justice Cardozo answered the question in the light of his learning and experience when he sagely remarked, "the labor of the judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of . . . [those] laid by others. . . ." ¹⁸⁵

And, finally, is not the cry against the "flood of decisions" too often a lazy man's complaint? Do they not stimulate research and a desire to exhaust the material on the subject? Indeed, the legal field is not the only one where *materia* multiplies. That is occurring in all branches of science; they are continually being refashioned by new discoveries and concepts. Take, for example, our sister profession, medicine. It has not been so long since its devotees generally called themselves "physicians *and* surgeons"; now the two are quite distinct and each subdivides into others. From the surgeons have sprung large and growing groups, for example, the dentists and urologists, aurists and oculists; from the physicians, cardiologists and neurologists, not to mention accessory lines like pharmacists, opticians and optometrists. In brief, the medical profession has been solving our problem by specialization, and the specialist is able to keep abreast of the new material.

Why may not the legal craft do likewise? Indeed, have they not actually been doing so? A time honored subdivision is into civil and

and without any common arbiter. . . . 'Compare the general tone of our courts in dealing with the opinions of other tribunals, and that of the German jurists who, as has been said, seem to write mainly for the purpose of refuting each other, and one will be inclined to believe the atmosphere of a court room quite as favorable to unbiassed consideration of legal questions as that of the study.'" GRAY, NATURE AND SOURCES OF THE LAW 262 (1909).

¹⁸⁴ GOODHART, ESSAYS IN JURISPRUDENCE 71 (1931).

¹⁸⁵ THE JUDICIAL PROCESS 149 (1937).

criminal lawyers, the late Clarence Darrow being a conspicuous example of the latter. Corporation law has long been a recognized branch of civil practice and the tendency now is toward corporate specialties, public utilities, etc. The maritime (admiralty) lawyer is an ancient member of the profession and his counterpart is coming in the person of the aviation lawyer. Workmen's compensation acts have not eliminated the specialist in "personal injury" cases, although they have changed his forum and, to a considerable extent, his mode of procedure.

In none of these specialties does the practitioner find himself submerged by the "flood of decisions"; in some of them the complaint is rather that they are too few to guide him. Nor are the specialists likely to need many precedents outside their respective lines, *provided they have been well grounded in the fundamentals of the broad legal field*. And here the movement for "building a better bar"—better, if fewer, lawyers—finds its fullest justification. One may not leap into a specialty without mastering the essentials of generality. Like the oculist and the dentist, the legal specialist must undergo the common preliminary training of his profession.

Finally, we should not overlook the importance of up to date mechanical aids in the solution of this problem. Text books, digests and encyclopedias, appearing in successive and vastly improved editions, have lightened the labors of the precedent seeker almost as much as the "flood of decisions" has increased them. The American Law Institute's Restatement is very helpful as are the multitudinous monographs appearing in the law reviews, and the proposal¹⁸⁶ of "a comprehensive and universal law finding manual . . . keyed to all our encyclopedias and digests" appears feasible; for the maxim, "necessity is the mother of invention," finds notable examples among American law publishers.

B. *Irregularity of Operation*

"Case-law is irregular in its operation," says Allen,¹⁸⁷ "since it must depend on the accidents of litigation." That, unfortunately, has been true in the past; but one of the functions¹⁸⁸ of the proposed ad-

¹⁸⁶ Lavery, "Volume of Judicial Decisions," 26 A.B.A.J. 622 (1940).

¹⁸⁷ ALLEN, *LAW IN THE MAKING*, 2d ed., 205 (1930).

¹⁸⁸ "This is the function of keeping the judicial process on its substantive law level in good working order and open to litigants. . . . It involves the constant revitalizing of substantive processes, the theories and formulas of the law by which duties are imposed and through which the rights of litigants are given recognition. . . . For, just as the statute books in a period of, say, a century, become cluttered and clogged with legislative debris, so do the reports of a supreme court . . . with judicial debris.

visory committee would be to avoid the handicap of waiting until some new case comes to the court before correcting an unsound ruling. The recommendations of the committee for overruling specific decisions, could be made the subject of hearings (resembling legislative ones) open to all members of the bar, at least, either before or after submission to the court. The mere pendency of such a proceeding would suffice to warn lawyers and litigants not to rely too strongly upon the precedent in question. In the same connection the committee could investigate and submit recommendations as to the retrospective operation of overruling.

C. *Lack of Certainty*

Professor Goodhart¹⁸⁹ believes "that the development of the common law (precedent) doctrine is due not merely to the existence of convenient judicial machinery, but primarily to . . . the need of certainty." Others deny that certainty has been attained under *stare decisis*.¹⁹⁰ But under what system has it been obtained? Are not the *responsa* of the jurisconsults and the books of "doctrine"¹⁹¹ often con-

The process of life and death—of new law borning and old law dying—has no more respect for court decisions . . . than . . . for statutes." Green, "Freedom of Litigation," 38 ILL. L. REV. 117 (1943).

¹⁸⁹ Goodhart, "Precedent in English and Continental Law," 50 L.Q. REV. 40 at 61 (1934).

¹⁹⁰ Wigmore in SCIENCE OF LEGAL METHODS (9 Modern Legal Philosophy Ser.), Preface, p. xix (1921); 4 VA. L. REV. 337 at 342, 243 (1917); Borchard, "Some Lessons From the Civil Law," 64 UNIV. PA. L. REV. 570 at 580 (1916).

¹⁹¹ See *supra*, note 14. ". . . You will find in the upper levels of research and judgment grave differences of opinion among the elect few." Hughes, quoted by CARDOZO, THE PARADOXES OF LEGAL SCIENCE 135 (1928). Professor Goodheart devotes chapter 4 to "Three Cases On Possession," showing the conflict among the English Courts and also the jurists on that much discussed concept. But what about the civil law on the same subject? Again we turn to GRAY, THE NATURE AND SOURCES OF THE LAW 262 (1909):

"Take, for instance, the leading topic of possession. Before 1803, when Savigny first published his treatise, not including the glossators, nor the other commentators down to the end of the fifteenth century, and excluding also a great number of writings to which Savigny says it would be paying far too high honor to say of each separately that it was good for nothing, thirty-three authors had written on the subject. In the following sixty-two years, down to 1865, when the seventh and last edition of Savigny's book was published, one hundred and twenty more books and articles had been added to the list; [SAVIGNY, DAS RECHT DES BESITZES, EINLEITUNG II (1865)] and before the beginning of this century there had been published over thirty more separate treatises on the subject, not including the discussions in the general works or the articles in the legal periodicals. [See bibliography, e.g., in CORNIL, POSSESSION DANS LE DROIT ROMAIN, xiii (1905)]. More than forty years ago, Ihering was able to

flucting? The most uncertain factor of law would seem to be the human element in its administration and that factor is permanent although its quality may be improved. Bearing in mind that in a great majority of American states the judiciary is still elective, we may well wonder that case law is as consistent and certain as it is.¹⁹² But here the multiplicity of decisions, like an ill wind, is not without its benefits. For every new decision on a disputed question lightens the burden of the lawyer and the judge. Even where the new decisions conflict, they provide the option of selecting the soundest, and to that extent the law is rendered less uncertain.¹⁹³

Finally, here as elsewhere we must consider the alternative. If not *stare decisis* what shall be the guide in adjudication? For even with that system, its perversion is thus pictured by a recent writer; reviewing the last decade of the Federal Supreme Court:

“Many of the decisions have been rendered by a bare majority . . . one by a minority.¹⁹⁴ What appears to be certainty is generally an illusion. Neither the antiquity nor the lineage of an authority has been a bar to an assault upon its competency and validity. . . . In the face of an apparently insurmountable obstacle of an adverse decision, litigants have been successful. Other litigants will be encouraged to test the question again, entertaining the impression that there is no reasonable fixity, definiteness nor

enumerate eight different theories on the reason for the protection of possession, to which eight theories he proceeded to add a ninth. [IHERING, *GRUND DES BESITZES-SCHUTZES*, §§ 1-5 (Jena, 1869)].”

¹⁹² “Traverse the whole continent of Europe,—ransack all the libraries belonging to the jurisprudential systems of the several political states,—add the contents all together,—you would not be able to compose a collection of cases equal in variety, in amplitude, in clearness of statement—in a word, all points taken together, in instructiveness—to that which may be seen to be afforded by the collection of English reports of adjudged cases.” “Papers Relative to Codification and Public Instruction,” IV BENTHAM, *WORKS* 461 (1843).

“ . . . On the whole the judges have been doing their part well.” Pound, “Theory of Judicial Decisions,” 36 *HARV. L. REV.* 940 at 958 (1923).

¹⁹³ “. . . a wise use of precedents is capable of meeting . . . the demand for certainty and order and . . . for change and growth. . . . A proper appreciation . . . of the true province of *stare decisis*, would open up great possibilities for the common law method of administering justice.” Carpenter, “*Stare Decisis* and Law Reform,” 7 *ORE. L. REV.* 31 at 34 (1927), 62 *AM. L. REV.* 145 (1927). Cf. Lawrence, “Precedent v. Evolution,” 12 *ME. L. REV.* 169 (1919).

¹⁹⁴ *United States v. Southeastern Underwriters' Assn.*, 322 U.S. 533, 64 S. Ct. 1162 (1944); *supra*, note 128, No. 18, where four justices concurred in overruling *Paul v. Virginia*, 8 Wall. (75 U.S.) 168 (1868).

predictability in the law because the court may be divided in the test case as before, with the majority on the other side; and in that event the last decision on any subject may be overruled as readily and summarily as it overruled the former."¹⁹⁵

If such be the situation where *stare decisis* prevails in the great majority of cases, what could we expect if it were entirely discarded? One is reminded of Benjamin Franklin's remark about religion: "If men are so bad with it, what would they be without it?"

D. *Inflexibility?*

"This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law," said Matthews, J.¹⁹⁶ Others deny it that quality;¹⁹⁷ but, at most, that is merely a feature of its application. Under the House of Lords rule, as generally stated, it is inflexible; but no such rule has every prevailed in the United States. On the contrary, as we have seen, "a rule for breaking a rule"¹⁹⁸ is here universal and under it *stare decisis* becomes as flexible as the courts may wish to make it. An instance of this is the prevailing treatment of constitutional questions, which Professor Goodhart discusses¹⁹⁹ but, apparently without realizing that it directly contradicts the charge of inflexibility.²⁰⁰

E. *Effects of American Law School Training*

The same author finds final support for his prediction of *stare decisis* "eclipse" in the prevailing comparative method of American law school instruction.²⁰¹ But does it really lead the American student away from precedent? Does it not rather lead him toward the ideal

¹⁹⁵ Judge Wilson, "Stare Decisis Quo Vadis: The Orphaned Doctrine in the Supreme Court," 33 GEO. L.J. 251-278 (1945). Cf. the following from Sir William Jones (1748-1794): "No man who is not a lawyer would ever know how to act and no lawyer would, in many instances, know how to advise, unless courts were bound by authority." *ESSAY ON BAILMENTS*, 4th ed., 46 (1836).

¹⁹⁶ *Hurtado v. California*, 110 U.S. 516 at 530, 4 S. Ct. 111 (1884).

¹⁹⁷ GELDART, *ELEMENTS OF ENGLISH LAW* 28 (1914); GOODHART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* 68 (1931).

¹⁹⁸ DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 139 (1927).

¹⁹⁹ GOODHART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* 68 (1931).

²⁰⁰ *Supra*, note 111 et seq.

²⁰¹ GOODHART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* 69, 70 (1931).

which we are seeking, viz., to consult more precedents but to weigh them carefully and choose the best?²⁰²

* * *

Thus it will be seen that all of these objections could be removed, or at least materially lessened, by careful, intelligent and fearless application of the doctrine by its creators, the courts, aided by a committee of experts. No, stare decisis is not ready for an "eclipse." True to its name, it "stands up" quite well despite its critics and in comparison with its rivals.

²⁰² Cf. St. Paul's injunction "Prove [test] all things; hold fast that which is good." I Thess. V:21.