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TEXT AND PRECEDENT IN CONSTITUTIONAL ADJUDICATION

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Giving to this panel the topic, "the conflict between text and precedent in constitutional adjudication," has a generous assumption that we will find common turf on the large field it describes. On one level, the whole idea is oxymoronic in that precedent that conflicts with text is not precedent. But this only points up the difficulty of describing the role of precedent, an understandable difficulty because one's view of precedent is bound up with views of law itself. Because language is the lawyers' tool, or as Charles Black puts it, the linseed oil of the law, it is equally understandable that the lawyers' response to the topic is, "what is text and what is precedent?" It is then the disabilities of a legal education, or perhaps the absence of much more, that lead me to describe precedent with its difficulties before turning to its fit with text.

I

Even describing the role of precedent quickly engages political view because precedent is inevitably in part, sometimes in large part, in the eye of the beholder. Yet, it is my strong conviction that the concept of precedent has force and sufficient discipline to decide the great percentage of cases that come to our court, including constitutional issues; it is my observation that it in fact does so. That a little mysticism, priestly role playing, and postured discovering of the law has survived the realists and "law and" supporters, or even that they are yet important to the acceptance of judicial law making, does not mean that the concept of precedent lacks content at its core. As Professor David P. Bryden put it in denying that constitutional law is all politics and no law, "[t]he difference between a partial myth and a complete myth is the difference between Abraham Lincoln and the tooth fairy."[1]

In defining precedent we must distinguish among a larger set of rules that also bind successors to a decision. While these rules may incidentally serve purposes similar to the purposes of stare decisis, their primary purpose is to cope with the increasing size and output

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1 Bryden, *Politics, The Constitution, and the New Formalism*, in 3 CONSTITUTIONAL COMMENTARY 415, 418 (1986).

of the courts and to manage the mechanics of judicial decisionmaking. For example, our circuit, as do many others, has a formal rule that one panel cannot overturn another, and permitting only the en banc court to reject our own precedent. Absent an intervening decision by the Supreme Court, we adhere to this rule regardless of how wrong-headed the panel deciding the subsequent case may believe the former case to be. Relatedly, we provide by rule that a panel cannot decline to follow a decision of a sister circuit if it will create a conflict among the circuits. These rules of orderliness are similar to rules in some state appellate courts that insist that a unanimous decision can be overturned only by a unanimous court. I leave to devotees of game theory the exploration of how such rules can affect outcomes. For now, I want to lay aside such rules.

Next we should keep in mind that the bind of first decision differs in its horizontal and vertical reaches. District judges do not treat decisions of other district judges as binding and, apart from conflict reducing rules, circuit courts do not treat decisions of sister circuits as binding. In talking about precedent, I am then talking about how the Supreme Court treats its own precedent and how precedent binds on its vertical reach—first treating precedent in its common law tradition as stare decisis, that is, to stand by decided cases, and then adding to the mix, constitutional text.

As Roger J. Traynor pointed out: "in modern Italian *stare* means to stay, to stand, to lie, or to sit, to remain, to keep, to stop, or to wait. With delightful flexibility it also means to depend, to fit or to suit, to live and, of course, to be."[2] As we will see, Italian may better describe some views of precedent than Latin.

The values claimed for precedent are familiar. Professor Wasserstrom lists four major justifications: certainty, reliance, equality, and efficiency.[3] He lists as minor justifications: practical experience, a notion resting "upon the hypothesis that judge-made law enables the legal system to adapt itself quite readily to new situations and novel controversies by responding to these situations in an *a posteriori* fashion as they arise"; restraint upon the individual judge; and the termination of particular litigation.[4] There is little to quarrel with here. It is in applying the doctrine that its strengths and weaknesses take definition.

In describing the mechanics of stare decisis, it is important to keep in mind that the deciding court cannot fully control the precedential force that its decision will have in the future. That strength

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2 Traynor, *Reasoning in a Circle of Law*, 56 VA. L. REV. 739, 745 (1970).

3 R. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 60-74 (1961).

4 *Id.* at 74-81.

is in the main given by the later decisionmaker. Of course, the first decider may write broadly and may even disclaim a holding, but the accepted decisional process makes this effort less than fully effective. That is, we accept that it is the rule of the case or *ratio decidendi* that binds, and the successor court has play, often considerable, in deciding what that holding is. As Karl N. Llewellyn teaches, the later court can confine the first case to its facts concluding, for example, that "[t]his rule holds only of redheaded Walpoles in pale magenta Buick cars."[5] A court may equally give full sway to all that was said in the earlier decision. Faced with multiple prior cases, it may simultaneously give broad and narrow readings. Stated in its happy form, it is the Janus faced, as Llewellyn called it, quality of stare decisis that allows the case method to evolve doctrine. Stated in more fearsome terms, it is a considerable source of judicial power, a power that may aptly be called the heartbeat of common law decisionmaking. That is, the courts obedient to stare decisis have the range, at least within an outer circle of an earlier case, to push the law, often to push off in a quite different direction from the first court, without overruling its decision.

It is important to remember that the stare decisis concept, or doctrine if you prefer, offers no guidance for the interpreting court's choice of whether it will give a broad or narrow reading to the first holding. The push one way or the other must come from elsewhere; elsewhere I will for now leave as judicial attitude. In its common law mode its rationale is marked by heavy reliance upon analogical reasoning, or description, often leaving unidentified any regression line or guiding value.

It would seem that as decisions are reached and a line of cases are developed by a succession of broad and narrow readings, the ambit of each succeeding deciding court is circumscribed, and so it may be for the intellectually honest court. But under the tradition, the deciding court's ambit of discretion is in part a function not only of its honesty, but also its creative ability, or so it seems. There is a baseline and it is that point at which facile restatements of prior holdings, restatements of cases and discovery of underlying principles, become dissembling; but between blind adherence and dishonest statement lies a sometimes significant area that does seem to reward the creative jurists with the opportunity to impose their will. Nonetheless, as courts push toward the limit of dissembling treatment of precedent they disserve the values of stare decisis. There is a point at which there is no predictibility, where expectations are so unsettled that parties cannot adjust their affairs. Such creative juris-

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5 K. LLEWELLYN, THE BRAMBLE BUSH 72 (1960).

prudence at this point begins to raise questions about whether the "law" is any more than the judges' individual predilections. But the difficulties are largely ones that revolve around the effectiveness of rules and less about the power or authority of the decisionmaker.

I suggest that this occurs far less in the world of daily decisions than my academic friends suppose. Law professors are bright and creative. In their teaching and scholarship they thrive at the margin where legal doctrine is developing, is uncertain, and, delights of delights, internally inconsistent. Students barraged with socratic slicing of these cases are given a skewed view of stare decisis and perpetuate a voguish belief that law is little more than the judge's predilection. But with this aside I return to my main point, that the predictibility of judicial decisions must rest in part upon some awareness of the attitudes of the judges that are reading the precedent, given the latitude of the honest judge. As Judge Schaefer put it in a lecture at this law school some twenty-one years ago:

> If [the judge] views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not. If he views the court as an instrument of society designed to reflect in its decisions the morality of the community, he will be more likely to look precedent in the teeth and to measure it against the ideals and aspirations of his time.[6]

So far I have not spoken of constitutional text or focused upon the precedent force of decisions construing text. That is, I have not described a system where the values are given and the force of precedent is therefore different.

II

In turning to precedent and constitutional text, I start with Justice Frankfurter's oft cited statement that "[t]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."[7] Questions about the power of common law courts usually ask whether a particular decision ought to have been left for the legislature; for the most part the lawmaking function of the common law judge is accepted on the assumption that the legislature is available to correct errors.

Citing a dissenting opinion by Justice Brandeis, Justice Stevens stated in an opinion joined by Justices Brennan, Stewart, and Blackmun that "[t]he doctrine of *stare decisis* has a more limited application when the precedent rests on constitutional grounds, because

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6 Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 23 (1966).

7 Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

'correction through legislative action is practically impossible.' "[8] Justice Brandeis in turn cited Justice Miller, who wrote in 1869:

> With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court . . . .[9]

Brandeis' opinion, handed down in 1931, cited forty cases in which the Supreme Court overruled its earlier decisions.

But this describes the Supreme Court's treatment of its own precedent and accepts its shorthand explanation that because Congress cannot overturn their decision, the Court must be more willing to do so. It does not develop a distinction between duty owed to the Constitution and duty owed to decisions construing it. Presumably, at least two sitting Justices, looking horizontally, see such a difference. Justices Brennan and Marshall persist in their votes against the death penalty in all cases despite contrary votes by a majority of the Justices. Presumably, they justify this persistence as a rightful adherence to the Constitution and not to decisions concerning it; or as Justice Frankfurter put it—the Constitution as the Justice reads it.

III

How the Supreme Court treats its own precedent is instructive of how inferior courts ought, in turn, to treat rulings of the Supreme Court; at least an inferior court, though unable to overrule, may employ accepted principles of stare decisis to define the holdings of the Court.

It ought to be unnecessary to remind that courts, including the Supreme Court, are empowered to decide cases and controversies. They are not empowered to pronounce rules of governance other than in the decision of cases and controversies. Because constitutional law is then the holdings of cases, their reach is informed by the way in which courts treat precedent, and courts do here have a regression line; the value choices are made—by text.

Of course, inferior courts must follow the Supreme Court. But, this duty of obedience is defined in substantial part by the accepted manner of treating precedent, and presumably no other branch of government owes decisions of the Court any greater duty of obedi-

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[8] Thomas v. Washington Gas Light Co., 448 U.S. 261, 272-73 n.18 (1980) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting)).

[9] Washington Univ. v. Rouse, 75 U.S. (8 Wall.) 439, 444 (1864) (Miller, J., dissenting).

ence than is owed by the lower courts. Sometimes then, the faithfulness of lower courts and other branches of government to decisions of the Court are in part in the eye of the beholder. I conclude this opening by using two famous cases to illustrate the difficulty.

In 1948, the Supreme Court in *Shelley v. Kraemer*,[10] speaking through Chief Justice Vinson, concluded that enforcement by state courts of racially restrictive covenants controlling the sale of real estate was state action. While inferior courts were obligated to obey the holding of *Shelley*, it's holding if read too broadly was fairly debatable. So read, the Court would have found state action in most of the state action cases that followed. For example, in *Evans v. Abney*[11] the Court faced the question of whether under *Shelley* the enforcement by the courts of Georgia of a common law reverter, whereby Senator Bacon's park was returned to his heirs, constituted state action. How free was the Court of Appeals for the Fifth Circuit to conclude that it did not? Ultimately, Justice Black, writing for the Court, concluded in *Abney* that this judicial involvement was not state action.[12] *Shelley*, broadly read, would also have answered the state action issues presented by the sit-in demonstrations of the early 1960's, but the Court chose to rest their decision elsewhere.

That the duty of obedience owed by inferior courts is informed by how the Supreme Court treats its own precedent is also demonstrated by the development of the first amendment issue of clear and present danger. In 1917, two years before Justice Holmes wrote *Schenck v. United States*,[13] Judge Learned Hand, then a district judge, had interpreted the same statute at issue in *Schenck*, the Espionage Act of 1917.[14] In his opinion in *Masses Publishing Co. v. Patten*,[15] Judge Hand took a different tack than Holmes did two years later in *Schenck*. Judge Hand focused on the nature of the utterance itself rather than engaging in the predictive exercise of clear and present danger.[16] We now know that in correspondence with Professor Zachariah Chaffee, Jr., Judge Hand was critical of Holmes' formulation. When *Dennis v. United States*[17] reached the Second Circuit in 1951, Judge Hand was Chief Judge of the Second Circuit and

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10 334 U.S. 1 (1947).

11 396 U.S. 435 (1970).

12 *Id.* at 445 ("Similarly, the situation presented in this case is easily distinguishable from that presented in *Shelly v. Kraemer* where we held unconstitutional state judicial action which had affirmatively enforced a private scheme of discrimination against Negroes.") (citation omitted).

13 249 U.S. 47 (1919).

14 Espionage Act of 1917, ch. 30, 40 Stat. 217 (codified at 18 U.S.C. §§ 11, 791-94, 2388, 3241; 22 U.S.C. §§ 213, 220-22, 401-08; 50 U.S.C. §§ 191, 192, 194 (1982)).

15 244 F. 535 (S.D.N.Y. 1917).

16 *Id.* at 539.

17 341 U.S. 494 (1951).

took his pen to the clear and present danger test. In reviewing these convictions under the Smith Act,[18] Hand interpreted clear and present danger to ask "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[19] This was in substantial part an implementation of Judge Hands' original *Masses* approach. Speaking through Chief Justice Vinson, the Supreme Court in the *Dennis* opinion affirmed, expressly adopting Judge Hand's formulation. Justice Frankfurter's concurring opinion referred to the *Dennis* defendants' reliance upon Holmes' formulation of clear and present danger, stating:

> In all fairness, [defendants' clear and present danger] argument cannot be met by reinterpreting the Court's frequent use of "clear" and "present" to mean an entertainable "probability." In giving this meaning to the phrase "clear and present danger," the Court of Appeals was fastidiously confining the rhetoric of opinions to the exact scope of what was decided by them. We bave greater responsibility for having given constitutional support, over repeated protests, to uncritical libertarian generalities.
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> . . . [If past] decisions are to be used as a guide and not as an argument, it is important to view them as a whole and to distrust the easy generalizations to which some of them lend themselves.
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> . . . Viewed as a whole, [these] decisions express an attitude toward the judicial function and a standard of values which for me are decisive of the case before us.[20]

Was Judge Leonard Hand faithful to his duty to follow precedent?

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18 Smith Act of 1940, ch. 439, § 2, 54 Stat. 670 (codified at 18 U.S.C. 2385 (1982)).

19 United States v. Dennis, 183 F.2d 201, 212 (2d Cir.), *aff'd*, 341 U.S. 494 (1951).

20 Dennis v. United States, 341 U.S. at 527-28, 539 (Frankfurther, J., concurring).