John M. Walker, Jr.

Senior Circuit Judge,

United States Court of Appeals for the Second Circuit

The Role of Precedent in the United States:
How Do Precedents Lose Their Binding Effect?

CHINA GUIDING CASES PROJECT

February 29, 2016 (Final Edition)∗


This Commentary was written in English and was edited by Jordan Corrente Beck. This Commentary is also available in Chinese at the above hyperlink. The information and views set out in this Commentary are the responsibility of the author and do not necessarily reflect the work or views of the China Guiding Cases Project.
Introduction

American courts follow the doctrine of *stare decisis* and defer to earlier cases on similar issues. Such cases are known as “precedents.” Part I of this Commentary will provide a brief overview of the role of precedent in the American legal system. Part II will discuss how precedents can lose their binding effect through judicial action and will explore common judicial rationales for overturning precedents. Part III will address the evolution of the judiciary’s approach to overturning precedents. Although no clear mechanical formula exists to determine when a precedent should be cast aside, the U.S. Supreme Court has provided a series of guiding principles intended to be applied on a case-by-case basis.

I. How Does a Case Become a Binding Precedent?

The American case system is based on the principle of *stare decisis* and the idea that like cases should be decided alike. Each judge, when deciding a matter before him or her, selects the prior cases on which to rely; no external authority designates precedents. Under *stare decisis*, every case has the potential of being a precedent in some sense. One part of a decision may have persuasive or even binding authority even if a different part of the decision has been discredited or overturned. Yet only the holding or *ratio decidendi* of a case can be binding; any remarks unnecessary to the result are non-binding dicta.

A prior case must meet two requirements to be considered binding precedent. First, as compared with the present matter before the judge, the prior case must address the same legal questions as applied to similar facts. The higher the degree of factual similarity, the more weight the judge gives the prior case when deciding the present matter. The degree of similarity of a prior case is therefore often a point of contention between parties to a litigation. Litigants compare and contrast prior cases with their own in briefs submitted to the court. The judge reviews and weighs these arguments but also may conduct his own research into, and analysis of, prior cases.

The second requirement for a case to be considered binding precedent is that it must have been decided by the same court or a superior court within the hierarchy to which the court considering the case belongs. The American federal court system has three tiers: the district courts, the courts of appeals (divided into “circuits” with distinct geographic boundaries), and the U.S. Supreme Court. Each state also has a multi-tiered court system and, if certain jurisdictional requirements are met, the U.S. Supreme Court may review the decisions of the highest court in each state. Each district court thus follows precedents handed down by the Supreme Court and by the court of appeals in the circuit encompassing the district court. Each court of appeals follows its own precedents and precedents handed down by the Supreme Court, but it need not adhere to decisions of courts of appeals in other circuits. A court may consider decisions by other, non-

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superior courts to be persuasive precedent, however, and follow them if they are well-reasoned and if there is no binding precedent that conflicts.

The doctrine of *stare decisis* confers many benefits on the American judicial system. At its core, the doctrine protects and respects “the legitimate expectations of those who live under the law.”3 *Stare decisis* promotes stability, “represents an element of continuity in law, and is rooted in the psychological need to satisfy reasonable expectations.”4 Reasonable expectations are particularly compelling in the commercial context, where “contracts or title to property may be premised on a rule established by case law” and a shift in the law could “undermine vested contract and property rights” or undermine related rules upon which people have come to rely.5 By safeguarding reliance interests, *stare decisis* furthers “a system of justice based on fairness to the individual.”6 *Stare decisis* also ensures that legal change moves in an incremental fashion, “facilitating the gradual assimilation of new rules into the overarching legal framework.”7 A precedent-based system additionally serves an efficiency function: as the late Supreme Court Justice Benjamin Cardozo once wrote, “[t]he labor of 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 the courses laid by others who had gone before him.”8 Thus, *stare decisis* “expedites the work of the courts by preventing the constant reconsideration of settled questions.”9 Lastly, adherence to *stare decisis* ensures the legitimacy of the judicial process by “permit[ting] society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.”10

The most obvious disadvantage to *stare decisis* is the risk, occasionally borne out, that poorly reasoned precedents may become part of the legal fabric. There is a remedy when this occurs, however. The doctrine of *stare decisis* does not wholly isolate precedents from review. Congressional action by statute may overturn judicial decisions on statutory issues, and constitutional amendments may overturn judicial decisions on constitutional issues. Remedial legislative action is frequently not required, however, because the judiciary may overturn its own decisions when certain conditions are met. Below, Part II discusses how precedents can lose their binding effect through judicial action and explores principles that guide remedial judicial action set forth by the Supreme Court.

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5. Lee, supra note 1, at 652-53.
8. Lee, supra note 1, at 652.
II. How Do Precedents Lose Their Binding Effect?

In 1932, Justice Louis Brandeis wrote that “in most matters it is more important that the applicable rule of law be settled than that it be settled right.”\textsuperscript{11} Justice Brandeis acknowledged in the same breath, however, that in some cases a court must “bow[] to the lessons of experience and the force of better reasoning.”\textsuperscript{12} Unwavering adherence to precedent “threatens to undermine the principal policy on the other side of the \textit{stare decisis} ledger: assuring accurate judicial decisions that faithfully apply correct principles of law.”\textsuperscript{13} U.S. courts are mindful of the delicacy of this balance and, although they may overturn their own precedents or the precedents of lower courts, they do so only with “some special justification.”\textsuperscript{14}

In the federal system, the Supreme Court may overturn its own precedent. The courts of appeals may do so at the panel level based upon an intervening Supreme Court decision or by the full court of appeals sitting “en banc” in plenary session.

To guide courts in identifying a “special justification” warranting overturning a precedent, the Supreme Court has “identified a cluster of factors, interrelated and overlapping in some respects, [that are] relevant to the decision whether or not to overrule a prior decision.”\textsuperscript{15} Courts do not analyze these considerations in any mechanical manner; “[n]one is treated as dispositive; none is identified as essential; the relative weight of each is unclear.”\textsuperscript{16} One of the great benefits of this “classic multifactor balancing test of incommensurable considerations,”\textsuperscript{17} however, is that it allows for a case-by-case, individualized assessment of the merits of casting aside any particular precedent.

Factors particularly relevant to this assessment include (a) workability, (b) reliance, (c) abandonment, and (d) legitimacy. This is not a comprehensive list; additional guiding principles include the fact that the Supreme Court has suggested that less precedential power should attach to cases “decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of [the] decisions,”\textsuperscript{18} as well as the fact that the Court “portrays its statutory decisions as entitled to the strongest form of deference.”\textsuperscript{19} (This latter principle derives from the Court’s recognition that Congress can alter statutory decisions by enacting a statute, whereas Congress may only alter constitutional decisions through the more complicated process of constitutional amendment.)\textsuperscript{20} An examination of the above four factors, however, can help one to

\begin{itemize}
\item \textsuperscript{11} \textit{Burnet v. Coronado Oil & Gas Co.}, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).
\item \textsuperscript{12} \textit{Id.} at 407-08.
\item \textsuperscript{13} Lee, supra note 1, at 653-54.
\item \textsuperscript{14} \textit{Payne v. Tennessee}, 501 U.S. 808, 842 (1991) (internal quotation marks omitted).
\item \textsuperscript{15} Michael Stokes Paulsen, \textit{Does the Supreme Court’s Current Doctrine of Stare Decisis Require Adherence to the Supreme Court’s Current Doctrine of Stare Decisis?}, 86 N.C. L. REV. 1165, 1172 (2008).
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} \textit{Payne}, 501 U.S. at 828-29.
\item \textsuperscript{19} Kozel, supra note 7, at 1463.
\item \textsuperscript{20} See \textit{id.} at 1463 n.18.
\end{itemize}
understand some of the more prominent instances when the Supreme Court has chosen to break with precedent.

1. Workability

In deciding whether to overturn a precedent, courts consider the “workability” of that precedent. This inquiry examines whether the rule of law announced by the precedent has “tended to generate inconsistent applications, fostered unclarity and uncertainty, or proven difficult to manage in any kind of principled way.” \(^{21}\) A precedent is more likely to be overruled if it announced “nebulous, vague, judicially crafted standards not well-rooted in legal texts or traditions.” \(^{22}\)

The “workability” analysis can be partially understood as an effort to preserve one of the more significant advantages of a precedent-based system: judicial efficiency. \(^{23}\) Stare decisis is intended to serve as a time-saving measure—saving judges from having to “re-invent the wheel” each time they consider a case—but efficiency gains are lost when a precedent announces an unclear rule with an uncertain application. \(^{24}\) A judge must then engage in a more searching and complex analysis to determine how best to apply the unworkable precedent. \(^{25}\)

In *Payne v. Tennessee*, the Court overturned two precedents—*Booth v. Maryland* \(^{26}\) and *South Carolina v. Gathers* \(^{27}\)—to hold that the Eighth Amendment did not prohibit a capital sentencing jury from considering victim impact evidence. \(^{28}\) The Court’s decision relied heavily on unworkability concerns, explaining that both *Booth* and *Gathers* “have defied consistent application by the lower courts” and “when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent.” \(^{29}\) By contrast, in *Casey v. Planned Parenthood*, the Supreme Court declined to overturn *Roe v. Wade*, a precedent recognizing a woman’s constitutional right to an abortion, \(^{30}\) relying in part on the fact that, “[a]lthough *Roe* has engendered opposition, it has in no sense proven unworkable.” \(^{31}\)

The Supreme Court has never clarified the exact weight to give to the workability factor or how to balance workability against other competing considerations. \(^{32}\) In fact, the Court has sometimes overturned precedents without considering workability at all. In *Roper v. Simmons*, for

\(^{21}\) Paulsen, *supra* note 15, at 1175.
\(^{22}\) Id. at 1173.
\(^{23}\) Id. at 1174.
\(^{24}\) Id.
\(^{25}\) Id.
\(^{26}\) 482 U.S. 496 (1987).
\(^{27}\) 490 U.S. 805 (1989).
\(^{28}\) *Payne*, 501 U.S. at 830.
\(^{29}\) Id. (internal quotation marks omitted).
\(^{32}\) Paulsen, *supra* note 15, at 1175.
example, the Court held that the Eighth Amendment prohibited the death penalty for minors, overturning the contrary precedent of *Stanford v. Kentucky*. *Stanford* had articulated a bright line rule and was by no means difficult to apply, but the Court nonetheless stripped the case of its precedential power. *Roper* took issue not with *Stanford*’s workability but rather with the precedent’s tension with “society’s evolving standards of decency.” Workability is thus neither dispositive nor applicative in every case.

2. Reliance

Courts also consider reliance interests in deciding whether to overturn a precedent. This consideration honors a litigant’s reasonable and justifiable expectations regarding the continued effectiveness of a rule of law. A court will be discouraged from overturning a precedent that “is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation.”

*Casey* emphasized the role of reliance interests in deciding not to overturn *Roe*, explaining that “for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.” In *Dickerson v. United States*, the Court also alluded to reliance interests in declining to overrule *Miranda v. Arizona*’s requirement that certain warnings must be given to a criminal suspect during custodial interrogation in order for the suspect’s subsequent statement to later be admissible in a court of law. Although some Justices, including the Chief Justice, who authored the *Dickerson* opinion, “believed that the original *Miranda* decision rested on a flawed interpretation of the Constitution,” *Dickerson* nonetheless upheld *Miranda* based on the fact that the precedent had “become embedded in routine police practice to the point where the warnings have become part of our national culture.”

The weight of reliance interests was a significant point of contention in *Lawrence v. Texas*, where the Court overturned *Bowers v. Hardwick* to hold that the Constitution protected the right to intimate homosexual conduct. The majority in *Lawrence* asserted that *Bowers* had “not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on *Bowers* of the sort

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33 543 U.S. 551 (2005).
36 *Casey*, 505 U.S. at 854.
37 *Id.* at 856.
41 *Dickerson*, 530 U.S. at 443.
that could counsel against overturning its holding once there are compelling reasons to do so.”

Justice Antonin Scalia’s dissent in Lawrence, however, challenged the majority’s conception of the reliance interests at stake, arguing that “[c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation.” The dispute over reliance interests plainly emerged from larger disagreements between the Justices about the core substantive issues in the case but nonetheless illustrates the subjective or malleable nature of the reliance inquiry.

Like the workability inquiry, the Court has not given the reliance inquiry any preassigned weight in a stare decisis analysis. The Court has suggested, however, that reliance interests may be especially important in business or commercial contexts, “where advance planning of great precision is most obviously a necessity.” In Quill Corp. v. North Dakota, for example, the Court declined to overrule National Bellas Hess, Inc. v. Department of Revenue of Illinois, a precedent prohibiting a state from imposing a sales tax collection duty on a mail-order reseller if the seller lacks a physical presence within the state. Quill based its ruling in part on the fact that the precedent had “engendered substantial reliance and [. . .] become part of the basic framework of a sizable industry.”

3. Abandonment

Courts additionally consider whether subsequent cases have moved the law in a different direction such that a precedent has become “a doctrinal anachronism discounted by society.” Courts are more likely to discard such “a remnant of abandoned doctrine.” When Lawrence overturned Bowers, the Court emphasized the fact that “[t]he foundations of Bowers have sustained serious erosion” from subsequent Supreme Court cases involving sexual privacy. Conversely, in Casey, when declining to overturn Roe, the Court noted that “[n]o development of constitutional law since the case was decided has implicitly or explicitly left Roe behind as a mere survivor of obsolete constitutional thinking.” Abandonment concerns interact with workability and reliance concerns because an abandoned precedent may lead the judiciary to struggle inefficiently to analyze conflicting precedents and may lead litigants to misplace their faith in outdated or unstable case law.

44 Lawrence, 539 U.S. at 577.
45 Id. at 589 (Scalia, J., dissenting).
46 Paulsen, supra note 15, at 1178.
47 Casey, 505 U.S. at 856.
50 Quill Corp., 504 U.S. at 317.
51 505 U.S. at 855.
52 Id.
53 Lawrence, 539 U.S. at 576.
54 Casey, 505 U.S. at 857.
55 Paulsen, supra note 15, at 1184-85.
4. Legitimacy

Legitimacy concerns form a fourth relevant consideration in a *stare decisis* analysis. The Court cautioned in *Casey* that “frequent overruling would overtax the country’s belief in the Court’s good faith” and that “[t]he legitimacy of the Court would fade with the frequency of its vacillation.”\(^{56}\)

The Court has stated that legitimacy concerns are especially pressing when the Court analyzes the precedential power of a landmark case on a publicly divisive issue. When a case is surrounded by public controversy, “to overrule under fire in the absence of the most compelling reason” might call into question the Court’s integrity.\(^{57}\) “[O]nly the most convincing justification” could assuage public concerns that “a later decision overruling the first was anything but a surrender to political pressure [or the result of a change in court personnel], and an unjustified repudiation of the principle on which the Court staked its authority in the first instance.”\(^{58}\) Declining to overturn *Roe* in *Casey*, the Court noted the “intensely divisive controversy reflected in *Roe*,” and the “rare [. . .] dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”\(^{59}\) This dimension, the Court explained, “requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation.”\(^{60}\)

III. How Have Judicial Approaches to Overturning Precedents Evolved Over Time?

Principles for overturning precedent have evolved significantly from the time of the early judiciary. For example, the Supreme Court rejected until well into the twentieth century the idea that “the constitutional or statutory nature of a precedent” should “affect[] its susceptibility to reversal.”\(^{61}\) (As noted above, the Court now affords greater deference to its statutory decisions.)\(^{62}\) Yet the most significant change in the Court’s approach to *stare decisis* has arguably been the rate at which the Court now casts aside settled case law. Statistical studies reveal that the Court has grown increasingly comfortable with overturning its own precedents.\(^{63}\) This increase has yielded criticism: Justice Scalia alleged that “the doctrine of *stare decisis* has appreciably eroded” in the modern era.”\(^{64}\) Legal scholars have critically attributed the trend to an increase in politicization of the Court, claiming that *stare decisis* has been rendered “a matter of ‘convenience, to both

\(^{56}\) 505 U.S. at 866.

\(^{57}\) Id. at 867.

\(^{58}\) Id.

\(^{59}\) Id.

\(^{60}\) Id.

\(^{61}\) Lee, *supra* note 1, at 645.

\(^{62}\) See Kozel, *supra* note 7, at 1463.

\(^{63}\) Lee, *supra* note 1, at 645.

\(^{64}\) Id. at 649 (quoting Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in 18 THE TANNER LECTURES ON HUMAN VALUES 79, 87 (Grethe B. Peterson ed., 1997)).
conservatives and liberals,’ whose ‘friends . . . are determined by the needs of the moment.” 65
Yet politicization does not provide the only explanation for the increase in overturned precedents. As other scholars note, in its early years the Court had far fewer precedents and “consistently wrote on a clean slate as it addressed fundamental questions of constitutional law,” whereas “today’s Court routinely is faced with the task of reconciling or distinguishing prior decisions.” 66

Conclusion

*Stare decisis* is a bedrock principle of the American legal system, but it is not “an inexorable command.” 67 The doctrine “is a principle of policy and not a mechanical formula of adherence to the latest decision.” 68 In determining whether to strip a precedent of its binding power, courts balance a number of non-dispositive factors including the workability of the precedent, the reliance interests at stake, whether the precedent has been abandoned by subsequent legal developments, and whether overturning the precedent would threaten the legitimacy of the judiciary. This “series of prudential and pragmatic considerations” frame courts’ attempts to reconcile the act of “overruling a prior decision with the ideal of the rule of law.” 69

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67 *Payne*, 501 U.S. at 842.

68 *Helvering*, 309 U.S. at 119.

69 *Casey*, 505 U.S. at 854.