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The Concept of Precedent and Its Significance in the Constitutional Law of the United States

Robert S. Barker, *Duquesne University School of Law*

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by Robert S. Barker*

*Duquesne University Distinguished Professor of Law (Duquesne University, Pittsburgh, Pennsylvania, U.S.A.).

I. Introductory Note

The concept of "precedent," or "*stare decisis*," is not only a distinctive feature of the Common Law tradition, it is, indeed, the most important element of that tradition. Any number of Common Law rules and practices could be – and have been – eliminated without altering the essential character of the tradition; but the Common Law so depends on precedent for both its coherence and its dynamism that, without precedent, the Common Law tradition would simply disappear. The purpose of the present article is to provide a picture of the theory and practice of precedent as utilized in the United States, giving particular attention to the significance of precedent in constitutional matters. It is hoped that this approach will be of interest to lawyers formed in the Civil Law tradition, many of whose countries have introduced rules of precedent into their own systems of constitutional adjudication.

II. The Historical Background

Writing in the mid-Thirteenth Century, the great English jurist Henry de Bracton, in his treatise, *De Legibus et Consuetudinibus Regni Angliae*, said:

> "If any new and unfamiliar matters hitherto unpracticed in the realm should arise, then if analogous cases have occurred, let the decision be in like manner, since it is a proper occasion to proceed from similar to similar cases."[1]

In his famous *Note Book*, Bracton collected and cited earlier court decisions and presented them for the guidance of the younger generation, particularly newly-commissioned judges. One need not enter into the scholarly debate over the relative importance of Bracton to appreciate that his work both reflected and facilitated the

[1] Henry de Bracton, *De Legibus et Consuetudinibus Regni Angliae*, fol. 16.

development of not just a particular legal system (that of England), but of a general legal tradition based on precedent and known as the "Common Law".

The Common Law had its origins, of course, in the customary rules of Anglo-Saxon England, but it was the Norman conquest in 1066 that produced the unifying measures and judicial consultations that would turn the country's local customary rules into a national legal system, with precedent at its heart.[2] King William "the Conqueror" (r. 1066-1087) centralized land tenure, and sent tax collectors, census takers, and royal judges to all parts of the country to establish and enforce royal authority and "the king's justice."[3] The extension of royal judicial authority, begun by William, became more thorough and systematic during the reign of King Henry II (r. 1154-1189).[4]

The royal judges "rode circuit;" that is, they traveled from place-to-place across the country, according to regular schedules, holding courts and deciding cases in each place, and then returning periodically to their "headquarters" at Westminster, where, naturally enough, they compared their experiences with those of their colleagues.[5] There being very little royal legislation at the time, the law that the judges applied on their visits was usually local customary law. When the judges would confer informally with each other, they came to learn that the local customs that they had been applying had much in common with the local customs of the areas visited by their colleagues. Thus, through their extra-judicial conversations, the judges came to conclude, issue by issue, that there were customary rules of law on many matters that were "common" (or nearly so) to all of

[2] See, *e.g.*, F.W. Maitland, *The Constitutional History of England* 6-10 (Fisher, ed.)
[3] See, *e.g.*, Cornelius J. Moynihan, *Introduction to the Law of Real Property* 2-8; David C. Douglas, *William the Conqueror* 305-310, 346-355.
[4] W. L. Warren, *Henry II* 317-361; Richard Mortimer, *Angevin England, 1154-1258,* 51-55.
[5] Goldwin Smith, *A History of England* 54-55; Christopher Brooke, *From Alfred to Henry III, 871-1272,* 182-185.

England. The judges' conversations, over time, produced a uniformity of customary law that was declared by the judges and was sustained by their adherence thereafter to those decisions and those of their colleagues. John P. Dawson, Professor of Law at Harvard, writing in 1967, has described the process as follows:

> "The solid core [of English law] was English custom, a synthesis or abstraction that was derived from the usages of many English communities, but did not coincide precisely with any of these. The reiterated experience of royal judges in deciding cases and their frequent, informal consultation brought consistency and structure and made the rules into a system."[6]

A body of law derived from custom and declared by judges could survive and grow into a system only if the judges themselves showed significant respect for their own, and their colleagues', prior decisions. It has been observed that at least as early as the days of King Edward I (r. 1274-1307) lawyers were citing and "distinguishing" previous cases; that is, they were arguing that the case at hand was so like, or unlike, some already-decided case that the earlier decision should, or should not, determine the outcome of the present case.[7] This distinctively English approach has been explained as follows:

> "Neither Roman law, . . . nor any of those modern systems which are founded upon it, allows any such place or authority to precedent. They allow to it no further or other influence than that which is possessed by any other expression of expert legal opinion.

[6] John P. Dawson, *The Oracles of the Law* 2.
[7] 1 Frederick Pollock and F.W. Maitland, *The History of English Law Before the Time of Edward I,* 178.

> A book of reports [of judicial decisions] and a textbook are on the same level. They are both evidences of the law; they are both instruments for the persuasion of judges; but neither of them is anything more. English law, on the other hand, draws a sharp distinction between them. A judicial precedent speaks in England with a voice of authority; it is not merely evidence of the law but a source of it; and the courts are bound to follow the law that is so established."[8]

When English settlers established colonies in North America, they brought with them the English Common Law. In the words of Joseph Story, Justice of the United States Supreme Court (1811-1845) and Professor of Law at Harvard, writing in 1833:

> "The universal principle (and the practice has conformed to it) has been that the common law is our birthright and inheritance, and that our ancestors brought hither with them upon their emigration all of it, that was applicable to their situation. The whole structure of our present jurisprudence stands upon the original foundations of the common law."[9]

The concept of "precedent" was, for the colonies and for the independent United States of America, an integral part of the common law inherited from England. James Wilson of Pennsylvania, one of the original members of the United States Supreme Court, wrote:

> "In certain sciences, a peculiar degree of regard should be paid to authority. The common law is one of those sciences. Judicial

[8] J. W. Salmond, "The Theory of Judicial Precedents," 16 Law Quarterly Review 376-377 (1900).
[9] Joseph Story, *Commentaries on the Constitution of the United States*, 65 (Carolina Academic Press edition, 1987).

> decisions are the principal and most authentic evidence which can be given of the existence of such a custom as is entitled to form a part of the common law.[10]

III. The Meaning and Operation of Precedent

What, after all, is this concept of "precedent" that is so much a part of the Common Law? And what are its consequences?

The word "precedent" is a shorthand expression of "*stare decisis*" ("to stand by the decisions"), and the two terms are used interchangeably.[11] In practice, "precedent," or "*stare decisis*" means that lower courts must follow the decisions of the higher courts of their jurisdiction on questions of law, and the higher courts themselves should depart from their own prior decisions on questions of law only when there are important reasons for doing so. The principles of precedent apply not only to decisions about *customary* rules of law, but also to decisions interpreting positive law. Thus, for example, decisions of the Pennsylvania Supreme Court (the highest court of my state) concerning the customary law of Pennsylvania; or the interpretation of the Pennsylvania Constitution, any statute of Pennsylvania, or any ordinance of any municipality in Pennsylvania, are binding on all other Pennsylvania courts; that is, the lower courts of Pennsylvania must apply the precedent established by the Pennsylvania Supreme Court in any case involving the same legal issue. If a lower court fails to follow such a precedent, there is a very great likelihood that the lower court's decision will be reversed on appeal.[12]

The United State Constitution provides that the Constitution itself, and the laws and treaties of the United States are the supreme law of the land, and that the judges in

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[10] 2 Kermit L. Hall and Mark David Hall (eds.), *Collected Works of James Wilson* 953.
[11] The complete Latin maxim is "*stare decisis et non quieta movere*."
[12] E. Allan Farnsworth, *An Introduction to the Legal System of the United States* 53-54 (3d ed.).

every state "are bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."[13] This rule of federal supremacy, combined with the principles of precedent, means that the decisions of the United States Supreme Court concerning the interpretation of the United States Constitution and the statutes and treaties of the United States must be followed by all other courts in the country, federal and state.[14]

IV. "Holding" and "Dictum"

Not everything said by a court constitutes "precedent." Only those parts of a court's opinion that are statements of law that are essential to the resolution of the case before the court have precedential value. These essential statements are called "holdings." Other statements of law that a court may make in the course of an opinion – statements that go beyond what is essential to the outcome of the case are called "obiter dicta," or simply "dicta,"[15] and do not produce rules of precedent.

A good example of the difference between "holding" and dictum" is found in the well-known constitutional law case of *Marbury v. Madison*,[16] decided by the United States Supreme Court in 1803. The facts of the case are as follows: in 1801, in the final weeks of John Adams's presidency, Adams nominated William Marbury and a number of others to positions as justices of the peace in the District of Columbia. The United States Senate approved those nominations and President Adams signed the documents, called "commissions," designating Marbury and the others as justices of the peace. Adams then sent the commissions to the State Department, because the Secretary of State was the

[13] Constitution of the United States of America (hereinafter "Constitution"), art. VI, ¶2.
[14] *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958).
[15] Farnsworth, supra, n. 12, pp. 55-57.
[16] 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

person designated by law to deliver the commissions to the persons appointed. A few days later, President Adams's term of office expired, and the new President, Thomas Jefferson (who had defeated Adams in the election) took office. Jefferson's Secretary of State, James Madison, discovered that some forty-two commissions, including Marbury's, had not been delivered to the appointees, but rather remained in the offices of the State Department. President Jefferson directed Secretary Madison to deliver twenty-five of the commissions in question, but to withhold the other seventeen, including Marbury's.[17]

Marbury and several other appointees whose commissions were withheld, brought an action of *mandamus*[18] in the United States Supreme Court against Madison, seeking an order directing the Secretary of State to deliver to them the commissions to which they alleged they were entitled. The Supreme Court, speaking through Chief Justice John Marshall, began its analysis of the case by stating:

> "In the order in which the court has viewed this subject, the following questions have been considered and decided.
>
> 1st. Has the applicant [Marbury] a right to the commission he demands?
>
> 2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

[17] A good explanation of the political background of the *Marbury v. Madison* decision is found in 3 Albert J. Beveridge, *The Life of John Marshall* 101-156.

[18] "Mandamus" is an action to compel a public official or an inferior court to perform a non-discretionary duty.

> 3d. If they do afford him a remedy, is it a mandamus issuing from this court?"[19]

The Supreme Court proceeded to answer the foregoing questions in the order that it listed them. The Court, after some analysis, concluded that, yes, Marbury did have a right to the commission.[20] Proceeding to the second question, the Court said that the laws of the United States did indeed afford Marbury a remedy.[21] In addressing the third question, the Court said that, yes, an action of mandamus was a proper remedy available to Marbury.[22] But, the Court asked, was Marbury's proper remedy a mandamus action *commenced in the Supreme Court*?

Marbury, in bringing his mandamus action in the Supreme Court, relied on a federal statute (part of the Judiciary Act of 1789) that authorized the Supreme Court

> ". . .to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."[23]

Marbury's action was obviously one of mandamus, and Secretary of State Madison was indisputably a "person holding office under the authority of the United States." However, the Supreme Court said, the United States Constitution limits the original jurisdiction of the Supreme Court to cases involving foreign diplomatic and consular personnel, and cases in which a State (of the United States) is a party. Since Marbury's case was not within either of those categories, the Supreme Court concluded that the Constitution prohibited it from exercising original jurisdiction in Marbury's case.

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[19] 5 U.S. at 154, 2 L.Ed. at 66.
[20] 5 U.S. at 154-162, 2 L.Ed. at 66-69.
[21] 5 U.S. at 162-168, 2 L.Ed. at 69-70.
[22] 5 U.S. at 168-173, 2 L.Ed. at 70-72.
[23] An Act to Establish the Judicial Courts of the United States, Section 13, 1 Stat. 80.

Thus, the Supreme Court was confronted with a federal statute that (as the Court interpreted the statute) gave it original jurisdiction over Marbury's case, and a constitutional provision that (as the Court interpreted the Constitution) forbade the Court to exercise original jurisdiction over that same case. The Court said that it must prefer the Constitution to an ordinary statute, and concluded that it therefore lacked original jurisdiction to hear Marbury's case.[24]

How much of *Marbury* is "holding" (that is, has precedential value), and how much is "dictum" (that is, language that lacks precedential value)?

The answer to these questions depends on the relevant substantive and procedural law. In the Common Law, a tribunal that lacks jurisdiction over the subject matter in litigation has no power to decide the merits of the case. The Supreme Court, in *Marbury*, decided that it lacked jurisdiction to hear the case in the first instance. Since it lacked jurisdiction of the case, the Court perforce had no authority to address the merits of the case. Thus, the Court's discussion of Marbury's right to the commission and its assertion that mandamus was an appropriate remedy, are *dicta* – assertions beyond those necessary to resolve the matter. The Supreme Court's discussion of these issues might be *persuasive* (that is, influential) to some other court in a future case, but would not be binding, precisely because what the Supreme Court said about Marbury's right to the commission and his right to a remedy in mandamus were rendered superfluous by the Court's decision that it lacked jurisdiction.

On the other hand, the Court's statements that the Judiciary Act purported to give it original jurisdiction of mandamus actions against federal officers, that the Constitution forbids the exercise of Supreme Court original jurisdiction of those same cases (unless

[24] 5 U.S. at 173-180, 2 L.Ed. at 72-74.

they involve diplomats or states), are "holdings." Similarly, the Supreme Court's decision that it – and by necessary implication, every other court, federal or state, in the United States – has the authority to refuse to apply laws that conflict with the Constitution, is a holding (and, indeed, the holding of greatest significance in the case).

In the course of its opinion in *Marbury*, the Supreme Court offered other examples of laws that would be unconstitutional. The Court said, for example, that if Congress were to pass an ex post facto law, or a bill of attainder, or a law permitting conviction of treason on the basis of an out-of-court confession or on the testimony of but a single witness, such laws would be unenforceable in a court of law because they would violate the Constitution.[25] These statements by the Court are *not* holdings, because they do not deal with legal issues actually before the Court. While those statements might have a persuasive effect on lower courts if ever those courts had to deal with such laws, the Supreme Court's statements in *Marbury* about ex post facto laws, bills of attainder, and the evidentiary requirements for a treason conviction, are mere *dicta*, not rules of precedent.

The difference between a holding, which has precedential effect, and dictum, which does not, is often difficult to discern. For this reason, United States law schools devote considerable time to the study of cases in which the significance of particular judicial statements – as holding or dictum – is itself a matter of controversy.[26] In any event, the examples noted hereinabove from *Marbury v. Madison* illustrate the basic principles that determine which judicial statements constitute "precedent," and which do not.

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[25] 5 U.S. at 179, 2 L.Ed. at 74.

[26] See, *e.g.*, *Rush v. Maple Heights*, 167 Ohio St. 221, 147 N.E. 2d 599 (1958), a case that illustrates very well the sometimes subtle and controversial difference between *holding* and *dictum*.

V. Following, Distinguishing, and Limiting Precedent

A. The "Taxpayer Standing" Example

How do courts apply precedent? The clearest and simplest way is for the court to say, "The rule applicable to the present case is the rule established [by this same court or by a higher court] in *Smith v. Jones* that [stating the precedent]. . . ." But a court's treatment of precedent is often more complicated, as when the court distinguishes a precedent by stating that the facts of the present case are sufficiently different from those in the previous case, that the precedent established in the earlier case simply does not apply to the case at hand. Usually this process of "distinguishing," when done by the same court that established the earlier precedent, has the effect of "limiting" the precedential authority of the earlier case to a narrower range of situations. For example, in 1923, the United States Supreme Court decided that a federal taxpayer, as such, lacked standing to challenge the constitutionality of a federal program of grants to the states for maternal and child care.[27] More than forty years later several federal taxpayers brought suit to prevent the federal government from providing financial assistance to (among other educational institutions) schools operated by religious groups. The taxpayers argued that such assistance constituted an "establishment of religion" in violation of the United States Constitution. In 1968 the Supreme Court held that the taxpayers *did* have standing. The Court said that whereas its 1923 decision involved an assertion by the taxpayer that Congress had exceeded its constitutional powers – an assertion that bore no relationship to the plaintiff's status as a taxpayer – the taxpayers in the 1968 case were invoking a provision of the Constitution – the prohibition of an establishment of religion – that was meant to protect taxpayers *as taxpayers* from having to pay for the support of

[27] *Frothingham v. Mellon*, 262 U.S. 447, 43 S. Ct. 597, 67 L.Ed. 1078 (1923).

religion. Thus the Court distinguished the two cases, and limited – but did not overrule – its 1923 holding.[28]

A few years later, another group of taxpayers brought an action challenging the transfer by the federal government of obsolete property (a former hospital) to a college operated by a religious organization. The taxpayers argued that the Supreme Court's 1968 decision established the precedent that taxpayers had standing to challenge the constitutionality of government programs that (arguably) constituted an establishment of religion. In 1982 the Supreme Court held that the taxpayers in question did *not* have standing. The Court distinguished the 1968 and 1982 cases by holding that the precedent established in 1968 (allowing taxpayer standing) applied only to situations (such as that in the 1968 case) in which the federal government's allegedly unconstitutional conduct involved an exercise of Congress's power to "tax and spend" – a power relevant to the 1968 plaintiffs' status as taxpayers. On the other hand, said the Court, the 1982 plaintiffs were challenging an exercise of a different power – the power to dispose of federal property – a power unrelated to the plaintiffs' status as taxpayers.[29]

Thus, the Supreme Court, by distinguishing the 1968 and 1982 cases, justified its denial of "taxpayer standing" to the 1982 plaintiffs, limited – but did not overrule – its 1968 precedent, and gave renewed breadth to its 1923 decision. It is interesting to note that the dissenting justices in the 1982 case argued that the 1968 precedent, if it had been followed, would have led to the conclusion that the 1982 plaintiffs *did* have standing; the dissenters criticized the majority for pretending to distinguish the two cases when they

[28] *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed. 2d 947 (1968).
[29] *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).

were in fact overruling at least part of the 1968 decision.[30] However that may be, the controlling precedents with respect to taxpayers' standing to challenge the constitutionality of actions of the federal government are those rules that emerge from the Supreme Court's 1923 decision, as limited by its 1968 decision, and as the 1968 decision was, in turn, limited by the 1982 decision.[31]

B. The "Presidential Power" Decisions

Even the process of "following" precedent can be more complex than the hypothetical language on page ____ suggests. Sometimes, in the course of following precedent, the Supreme Court will, without disturbing the precedent itself, shift the emphasis or add greater detail to a pre-existing precedent.

In 1952, during the Korean War, the United Steelworkers of America, the labor union representing the workers at most of the steel-producing companies in the country, announced its intention to begin a strike against the steel producers. Shortly before the strike was to begin, President Harry S. Truman issued an "Executive Order" directing the Secretary of Commerce to take possession of the steel mills and keep them operating.[32] The steel companies commenced an action in federal court seeking the return of the mills to their control, arguing that the President had exceeded his authority in issuing the Executive Order. The United States Supreme Court decided, by vote of six-to-three, that the President had exceeded his constitutional powers, and ordered that

[30] 454 U.S. at 510-512, 102 S.Ct. at 778-780, 70 L.Ed.2d at 733-735 (Brennan, J., dissenting).
[31] See, *e.g.*, *Daimlerchrysler Corp. v. Cuno*, 547 U.S. 332, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006).
[32] The legal controversy is explained in William H. Rehnquist, *The Supreme Court* 169-192 (rev. ed.) The political context is described in Robert J. Donovan, *Tumultuous Years: The Presidency of Harry S. Truman, 1949-1953*, 382-391.

the mills be returned to their private owners.[33] The President, of course, complied with the Court's order.

In 1981, in the closing days of his presidency, President Jimmy Carter entered into an agreement with Iran to resolve the crisis caused by Iran's imprisonment of United States diplomatic and consular personnel. To implement that agreement, Carter's successor, President Ronald Reagan, issued an Executive Order which, *inter alia* suspended proceedings in United States courts against Iranian governmental agencies and prohibited the enforcement of existing judicial judgments against those agencies. Dames & Moore, an engineering company that had obtained a judgment in a United States court against Iran's Atomic Energy Agency and wished to collect the amount of the judgment, brought an action against Donald Regan, the Secretary of the Treasury (the official responsible for carrying out President Reagan's order), arguing that the President had exceeded his constitutional authority in issuing the order. The company cited the steel seizure decision of 1952 as precedent supporting its position.

The Supreme Court analyzed the Iran agreement and presidential order in light of the 1952 steel seizure case. More specifically, the Court relied on the analytical framework proposed in 1952 in the concurring opinion of Justice Robert H. Jackson. Jackson had been part of the majority in 1952, and had joined in the opinion of the Court (which was written by Justice Hugo L. Black); but Jackson had written a separate opinion in order to emphasize what he believed to be the proper criteria for analyzing constitutional challenges to exercises of presidential authority. According to Jackson, such cases should be analyzed according to whether the President had acted *with* Congressional support (express or implied), *contrary* to Congress's wishes (again,

[33] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

express or implied), or without either congressional support or opposition.[34] In 1981, the Court concluded that whereas President Truman in 1952 had acted contrary to the wishes of Congress, in 1981 President Reagan was acting with the support of Congress, thus vastly increasing the extent of his constitutional authority. The Court upheld the Iran settlement order, relying on the 1952 steel seizure case but, interestingly, giving greatest weight not to the 1952 opinion of the Court (which is the opinion that establishes precedent) but to the separate opinion of a single member of the majority.[35] As a result, the 1952 decision retained its importance, but Justice Jackson's concurring opinion acquired the authority of precedent, an authority that it retains to this day.[36]

VI. Overruling Precedent

The most dramatic way of dealing with precedent occurs when the court that established the precedent overrules that precedent and replaces it with a new one. The best-known instance of this in United States constitutional history occurred with respect to governmentally-imposed racial segregation.

In 1896 the Supreme Court decided, in the case of *Plessy v. Ferguson*, that a state law that required that white and black railroad passengers occupy separate cars, segregated by race, did not violate the Fourteenth Amendment guarantee of "equal protection of the laws," so long as the separate accommodations were "equal" in a tangible, physical sense.[37] The precedent thus established became known as the "separate but equal" doctrine. Fifty-eight years later, in 1954, the Court considered the case of *Brown v. Board of Education*, in which black litigants argued that racial

[34] 343 U.S. at 634-655, 72 S.Ct. at 869-880, 96 L.Ed. at 1198-1209.
[35] *Dames & Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981).
[36] Justice Jackson's 1952 concurring opinion was relied on by the Supreme Court in *Medellín v. Texas*, 552 U.S. ___, 128 S.Ct. 1346, ___ L.Ed.2d ___ (2008).
[37] 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

segregation in public schools denied them "equal protection of the laws" regardless of any tangible "equality" of the separate schools. The Supreme Court, of course, was faced with its "separate but equal" precedent, and decided, unanimously, to overrule it.[38] The Court dealt with the matter as follows:

> "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . .
>
> * * *
>
> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. . . ."[39]

While the explicit holding in *Brown* was limited to racial segregation in public schools, the logic of the Court's reasoning (repudiating as it did the doctrine of "separate but equal") strongly indicated that all governmentally-imposed racial segregation violated the constitutional guarantee of equal protection of the laws. In the years following

[38] 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).
[39] 347 U.S. at 493, 495, 74 S.Ct. at 691, 692, 98 L.Ed. at 880, 881.

Brown, lower federal courts, and some state courts applied the *Brown* precedent and declared racial segregation laws unconstitutional in a wide range of situations.[40]

In its two hundred eighteen years of operation, the United States Supreme Court has overruled its own precedents approximately 204 times, about 124 of which involved constitutional questions.[41] One must approximate because courts (including the United States Supreme Court) are not always explicit about whether they are "distinguishing" or "overruling" a particular precedent. Indeed, even when the Court says that it is distinguishing a prior case, dissenting justices sometimes accuse the majority of overruling it *sub silentio*.[42]

VII. Stability and Change in a Precedential System

A legal system based on the principle of *stare decisis* requires that precedents, once established, receive a significant degree of judicial respect and deference. Frequent, arbitrary, or capricious overrulings of established precedents would destroy the foundation of the system. On the other hand, absolute adherence to precedent would prevent the correction of manifest errors, and would require the application of rules, appropriate when announced, whose *raison d'être* disappeared long ago. Therefore, the survival and success of a precedential system depends upon the maintenance of a reasonable balance between stability and change. While all Common Law jurists agree on the necessity of such a balance, they frequently disagree over what balance is appropriate and, more specifically, what circumstances justify the repudiation of

[40]See, Thomas G. Walker, "Precedent," in Kermit L. Hall (ed.), *The Oxford Companion to the Supreme Court of the United States* 663 (1st ed.)

[41] These figures are based on the United States Government Printing Office website publication, "The Constitution of the United States of America: Supreme Court Decisions Overruled by Subsequent Decision," http://www.gpoaccess.gov/constitution/html/scourt.html (March 17, 2008).

[42] See, for example, the various opinions in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974) and, a year later on the same constitutional issue, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975).

established precedent. In the United States, this debate has become very intense in recent years, and the focus of that debate is the Supreme Court's jurisprudence on abortion.

In 1973, in the case of *Roe v. Wade*[43], the United States Supreme Court made its most controversial decision in more than a century – perhaps its most controversial decision ever – when it declared that there is a constitutional right to abortion. The decision provoked immediate calls that it be overruled. Nineteen years later, with the arbitrary nature of the 1973 abortion decision becoming increasingly apparent,[44] and with several changes in the composition of the Supreme Court, many people believed that the Court would, in a case challenging Pennsylvania's law restricting abortion, overrule *Roe v. Wade*. However, the Court, by a vote of five-to-four, reaffirmed its central holding in *Roe* that there is a constitutional right of abortion.[45] In rejecting the opportunity to overrule *Roe*, the Court said, in pertinent part:

> [A decision to overrule] is usually perceived (and perceived correctly) as, at least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for

[43] 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973).
[44] See, *e.g.*, Lino A. Graglia, "Constitutional Law Without the Constitution: The Supreme Court's Remaking of America," in Robert H. Bork (ed.), *A Country I Do Not Recognize* 20-22. Not incidentally, the Supreme Court, in 1992, while reaffirming its "central holdings" in *Roe v. Wade*, (see note 45, infra) assiduously avoided saying that *Roe* had been correctly decided.
[45] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed. 2d 674 (1992).

> particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.[46]

Writing for the four justices who would overrule *Roe*, Chief Justice William H. Rehnquist (who, as an Associate Justice, had dissented in *Roe*) said:

> "The. . .opinion [of the Court] discusses several *stare decisis* factors which, it asserts, point toward retaining a portion of *Roe*. Two of these factors are that the main 'factual underpinning of *Roe* has remained the same,' and that its doctrinal foundation is no weaker now than it was in 1973. [S]urely there is no requirement, in considering whether to depart from *stare decisis* in a constitutional case, that a decision be more wrong now than it was at the time it was rendered. If that were true, the most outlandish constitutional decision could survive forever, based simply on the fact that it was no more outlandish later than it was when originally rendered. . . .
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> The. . .[Court's] opinion also points to the reliance interests involved in this context in its effort to explain why precedent must be followed for precedent's sake. . . .
>
> Apparently realizing that conventional *stare decisis* principles do not support its position, the. . .[Court's] opinion advances a belief that retaining a portion of *Roe* is necessary to protect the 'legitimacy' of this Court. [T]he. . .[Court's] opinion goes on to state that when the Court 'resolve[s] the sort of

[46] 505 U.S. at 866, 112 S.Ct. at 2815, 120 L.Ed.2d at 708.

> intensely divisive controversy reflected in *Roe*, and those rare, comparable cases, its decision is exempt from reconsideration under established principles of *stare decisis* in constitutional cases. . . . Under this principle, when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, *unless opposition to the original decision has died away."*[47] [Emphasis in original.]

The debate about precedent arose again, over the question of constitutional protection of homosexual sodomy. In 1986 the Supreme Court, in the case of *Bowers v. Hardwick,*[48] decided by a vote of five-to-four that the Constitution did not guarantee a right to practice homosexual sodomy. In 2003, in *Lawrence v. Texas,*[49] the question again came before the Court. By a vote of six-to-three, the justices explicitly overruled *Bowers*, and announced a constitutional right of homosexual sodomy. Writing for the Court, Justice Anthony Kennedy (one of the co-authors of the Court's opinion in *Casey*), said:

> "The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. [*Planned Parenthood. . . v. Casey*] noted that when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. ("Liberty finds no refuge in a jurisprudence of doubt.") The

[47] 505 U.S. at 955, 957-958, 112 S.Ct. at 2861, 2862-2863, 120 L.Ed.2d at 766, 768.
[48] 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986).
[49] 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

> holding in *Bowers*, however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. . . .
>
> "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[50]

Justice Antonin Scalia, in a dissenting opinion in which Chief Justice Rehnquist and Justice Clarence Thomas joined, responded to Justice Kennedy's argument about *stare decisis* as follows:

> "I begin with the Court's surprising readiness to reconsider a decision rendered a mere 17 years ago in *Bowers v. Hardwick*.... [I]n *Planned Parenthood v. Casey*. . .*stare decisis* meant preservation of judicially invented abortion rights; the widespread criticism of *Roe* was strong reason to *reaffirm* it.
>
> "Today, however, the widespread opposition to *Bowers*, a decision involving an issue as 'intensely divisive' as the issue in *Roe*, is offered as a reason for *overruling* it.
>
> "Today's approach to *stare decisis* invites us to overrule an erroneously decided precedent (including an 'intensely divisive' decision) *if*: (1) its foundations have been eroded by subsequent decisions; (2) it has been subject to 'substantial and continuing' criticism; and (3) it has not induced 'individual and societal reliance' that counsels against overturning. The problem is that

[50] 539 U.S. at 577, 578, 123 S.Ct. at 2483, 2484, 156 L.Ed.2d at 525.

> *Roe* itself – which today's majority surely has no disposition to overrule – satisfies these conditions to at least the same degree as *Bowers*."[51] [Emphasis in original.]

The debate over the degree of deference to be given to precedent will never end; it is inherent in our system of *stare decisis*. The intensity of the debate would, of course, be diminished if the Supreme Court would simply refrain from inventing "constitutional" rights such as abortion and homosexual sodomy.[52] However, even a less inventive Supreme Court will have to deal constantly with the tension between stability and change that inheres in the theory and practice of *stare decisis*.

VIII. Precedent and the Separation of Powers

The essence of precedent, or *stare decisis*, has always been that judicial decisions on questions of law are to be followed (subject to the conditions and limitations discussed hereinabove) by judge and courts, that is, *within the judicial branch* of government. A more difficult issue, and a more controversial one in the constitutional history of the United States, is whether judicial precedents are binding on the other branches of government. It has always been understood in the United States, as in other societies based on the rule of law, that a judicial decision is binding on everyone, including the other branches of government, insofar as that decision determines the rights and obligations of the parties to the case decided. But does a Supreme Court decision in a constitutional matter obligate the other branches of the federal government (and of the states) to follow the Court's precedent in future situations? Or may the Congress, the

[51] 539 U.S. at 586-587, 123 S.Ct. at 2488, 2489, 156 L.Ed.2d at 531-532.
[52] See, *e.g.*, "Panel on Originalism and Precedent," in Steven G. Calabresi (ed.), *Originalism: A Quarter-Century of Debate* 199-252.

President, state governors, and state legislatures make their own, independent decisions about what is constitutional?

In 1798 the United States Congress passed, and President John Adams signed, the Sedition Act, which severely limited the right of publishers to criticize the President or the Congress. The law was very controversial, and the legislatures of two states, Virginia and Kentucky, adopted resolutions asserting their rights as states to determine the constitutionality of federal laws, and declaring the Sedition Act unconstitutional and unenforceable within their respective boundaries.[53] In 1801, Thomas Jefferson, an opponent of the Sedition Act, became President. In a draft of his annual message to Congress, Jefferson prepared himself to declare the Sedition Act unconstitutional and "a nullity." Jefferson deleted that declaration from the final version of his address, and so never delivered his "nullification" statement to Congress.[54] The Virginia and Kentucky Resolutions did not purport to have any effect beyond the borders of those states, and Jefferson's draft passage said that he would enforce his nullification decree only by pardoning those already convicted under the Act. Jefferson did use his presidential discretion to pardon persons convicted of violating the Sedition Act. (Since the pardons were clearly within the president's constitutional authority,[55] their issuance created no separation-of-powers controversy.) The Sedition Act expired by its own terms early in Jefferson's presidency, and the question of its constitutionality never reached the Supreme Court. However, the notion that constitutional questions could be decided by a

[53] The resolutions are reprinted in 1 Henry Steele Commager, *Documents of American History* 178 et. seq. (6th ed., 1958).
[54] Beveridge, *supra*, n. 17, 605-606
[55] Article II, Section 2, paragraph 1 of the Constitution gives the President power "to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

state for itself, or by the President alone, had respectable authority before the Supreme Court itself asserted the power of judicial review in 1803 in *Marbury v. Madison*.

The right of a state to nullify federal laws was again asserted in 1832, when a special Convention of the State of South Carolina adopted an Ordinance of Nullification declaring certain federal tariff laws null and unenforceable in that state.[56] President Andrew Jackson responded with a vigorous assertion of federal supremacy, and threatened to use federal troops against South Carolina. The state repealed its nullification ordinance, and the matter was settled politically rather than judicially.[57]

In 1850, as part of a series of laws, collectively known as "The Compromise of 1850," designed to ease tensions over slavery, the United States Congress passed the Fugitive Slave Act, which in various ways made it easier for slaveowners to recapture runaway slaves who had escaped to free states in the North.[58] In response, some northern states enacted "personal liberty laws" designed to guarantee the freedom of runaway slaves and, in general, to impede the operation of the federal Fugitive Slave Act.[59] In 1859, the United States Supreme Court declared Wisconsin's personal liberty law unconstitutional because it conflicted with the federal statute (the Fugitive Slave Act) and therefore violated the Supremacy Clause of the United States Constitution.[60] Thus, a state attempt to impede the operation of federal law was set aside by the Supreme Court.

A more dramatic controversy over *stare decisis* began in 1857, with the decision of the United States Supreme Court in the case of *Dred Scott v. Sandford*.[61] Scott, a slave

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[56] South Carolina Ordinance of Nullification, November 24, 1832, in Commager, supra, n. 53 at 261-262.
[57] For the history of the controversy, see William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836*.
[58] For background, see David M. Potter, *The Impending Crisis, 1848-1861*, 130-132.
[59] Id. at 138-139.
[60] *Ableman v. Booth*, 62 U.S. (21 How.) 506, 16 L.Ed. 169 (1859).
[61] 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857).

in Missouri, brought suit for his freedom. He argued that he had become free by reason of having been taken by a previous owner to federal territory where slavery was prohibited. In one of the worst (and most creative) decisions in its history, the Supreme Court decided against Scott. The Court's principal *holding* was that Scott, as a person of African ancestry, was not and could not become a "citizen" of the United States or of any state for constitutional purposes.[62] The Court went on to say that the federal government had no constitutional authority to prohibit slavery in federal territories.[63] The Court's statements about slavery in the territories were *dicta*, because the decision about state citizenship put an end to the case;[64] nevertheless, it was the Court's language about the territories that provoked the greatest controversy. The Southern, slaveholding states wanted to be able to extend slavery into various western parts of the country that were not yet states, but rather federal territories. They saw the *dicta* in *Dred Scott* as a declaration of their right to expand their system, unhindered by federal regulation. Many people in the North believed that Congress could, and should, continue to prohibit slavery in all or most of the federal territories. [65]

The presidential election campaign of 1860 was fought largely over the question of slavery in the territories. Abraham Lincoln, the candidate of the Republican Party, argued that slavery in the federal territories should be prohibited by federal law,

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[62] 60 U.S. at 400-427, 15 L.Ed. at 699-710.
[63] 60 U.S. at 430-454, 15 L.Ed. at 711-720.
[64] Dred Scott, the plaintiff, asserted that he was a citizen of the state of Missouri, that the defendant was a citizen of New York, and that the federal court therefore had jurisdiction of the case by virtue of constitutional and statutory provisions giving federal courts jurisdiction over suits "between citizens of different states." The Supreme Court's determination that Scott was not a "citizen" meant that the Court lacked jurisdiction to adjudicate the merits of the case. Thus the Court's statements in *Dred Scott* about slavery in federal territories were *dicta* for the same reason that its statements about Marbury's right to the commission were *dicta* in *Marbury v. Madison*, supra, n. 16. The legal history of the *Dred Scott* case is explained in Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-1875*, 172-192.
[65] See, Potter, supra, n. 58, at 272-287.

notwithstanding the Supreme Court's statements in the *Dred Scott* case.[66] John C. Breckenridge, the candidate of the Southern faction of the Democratic Party,[67] maintained that the *Dred Scott* decision had settled the question, and that all federal territories were open to slavery. Stephen A. Douglas, the candidate of the Northern wing of the Democratic Party, contended that the residents of each federal territory should decide for themselves whether their territory would be "slave" or "free."[68] It was Lincoln, of course, who won the election.[69] In his Inaugural Address, he alluded to the *Dred Scott* decision, and spoke directly about *stare decisis*, when he said:

> "I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon

[66] See, Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* 231-232.
[67] In 1860, as the presidential election approached, the Democratic Party split into Northern and Southern factions over the slavery issue. See, Roy Franklin Nichols, *The Disruption of American Democracy, passim.*
[68] Id.
[69] The 1860 presidential campaign and election are described and explained in Potter, supra, n. 58 at 405-447.

> vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."[70]

Lincoln's argument concerning the limited precedential effect of *Dred Scott* was rendered moot by the federal victory in the Civil War and the adoption of the Thirteenth and Fourteenth Amendments to the United States Constitution,[71] but the question remained whether "precedent" in constitutional matters bound anyone other than judges.

In the late 1950's, a federal court in Arkansas, following the precedent established by the United States Supreme Court in *Brown v. Board of Education*,[72] ordered the racial integration of Central High School in the city of Little Rock. State and local authorities in Arkansas adopted statutes and ordinances, and issued statements prohibiting integration of the school. The order of the federal judge was appealed. The appeal reached the Supreme Court, which said, in pertinent part:

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the

[70] Abraham Lincoln, "First Inaugural Address, March 4, 1861," in, *Inaugural Addresses of the Presidents of the United States* 124 (U.S. Govt. Printing Office, 1961).
[71] The Thirteenth Amendment, adopted in 1865, abolished slavery; the Fourteenth Amendment, adopted in 1868, provides, *inter alia*, that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside.
[72] Supra, n. 38.

> notable case of *Marbury v. Madison*. . . that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that *the federal judiciary is supreme in the exposition of the law of the Constitution*, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.[73] [Emphasis added.]

Although federal judicial supremacy in constitutional matters had in fact been widely acknowledged for more than a century, it was not until the Little Rock case, in 1958, that the Supreme Court explicitly proclaimed that supremacy.

The issue of the supremacy of precedent came again before the Supreme Court in the case of *City of Boerne v. Flores*,[74] decided in 1997, but the jurisprudential history of the controversy began more than three decades before: In 1963, in the case of *Sherbert v. Verner*,[75] the Supreme Court, interpreting the constitutional guarantee of the Free Exercise of Religion, held that any time that government imposes a substantial burden on anyone's exercise of religion, the governmental action is unconstitutional unless it serves a compelling governmental interest, a very demanding test. However, in 1990, in the case of *Employment Division v. Smith,*[76]a case very much like *Sherbert*, the Supreme Court impliedly overruled *Sherbert* by declaring that an otherwise-valid law does not violate the Free Exercise Clause when it burdens, even severely, an individual's exercise of religion. This abandonment by the Court of the precedent that it had established in

[73] *Cooper v. Aaron*, 358 U.S. 1, 18, 78 S.Ct. 1401, 1409-1410, 3 L.Ed.2d 5, 16-17 (1958).
[74] 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).
[75] 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).
[76] 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

1963 in *Sherbert*, led to widespread demands that Congress restore the same degree of religious freedom that had been enjoyed under *Sherbert*. Congress responded by enacting the Religious Freedom Restoration Act ("RFRA").[77] The purpose of RFRA, as stated in the statute itself, was "to restore the 'compelling interest' test that had been established in *Sherbert v. Verner* (1963) and to guarantee its application in all cases where free exercise of religion is substantially burdened."[78] The application of RFRA to the states was justified by Congress as an exercise of its constitutional power to enforce the Fourteenth Amendment.[79] Accordingly, RFRA declared that "governments should not substantially burden religious exercise without compelling justification," and prohibited government from substantially burdening a person's exercise of religion unless the government could demonstrate that the burden furthered a compelling governmental interest and was the least restrictive means of furthering that interest."[80]

Shortly after the enactment of RFRA, the Catholic Archbishop of San Antonio, Texas applied for a permit to enlarge St. Peter Church in the City of Boerne. The city denied the permit, and the Archbishop brought suit, challenging the denial and arguing that the City's action violated the Church's free exercise of religion as guaranteed by RFRA. The Supreme Court emphasized that it is the Court's interpretation of the Fourteenth Amendment – and of every other part of the Constitution – that is authoritative, and consequently the authority of Congress to "enforce" the Fourteenth

[77] Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. §2000bb et seq.
[78] Id., at 42 U.S.C. §2000bb(b).
[79] The Fourteenth Amendment, *inter alia*, prohibits the States from depriving any person of life, liberty, or property without "due process of law." Section 5 of the Fourteenth Amendment gives Congress "power to enforce, by appropriate legislation, the provisions" of that Amendment. The Supreme Court decided, in 1940, that the guarantee of "due process of law" in Section 1 of the Fourteenth Amendment includes an implicit guarantee of the free exercise of religion. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). Congress, in making the Religious Freedom Restoration Act (RFRA) applicable to the States, relied on its constitutional authority under Section 5 of the Fourteenth Amendment.
[80] Supra., n. 77 at 42 U.S.C. §2000bb-1.

Amendment is limited by the Court's determination of what the Fourteenth Amendment means.[81] Thus, the Court concluded, the meaning of "free exercise of religion," as guaranteed by the Fourteenth Amendment, means what the Court, in its controlling precedent (that is, *Employment Division v. Smith*) says it means, and Congress lacks the power to reinterpret the Fourteenth Amendment in a way that departs from the Court's interpretation. The Court said, in this regard:

> "When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*. . . . When the political branches of the government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed."[82]

Justice Sandra Day O'Connor (who dissented on other grounds) was even more emphatic about judicial supremacy when she said:

> ". . .when Congress enacts legislation in furtherance of its delegated powers Congress must make its judgments consistent with this Court's exposition of the Constitution. . . ."[83]

[81] 521 U.S. at 536, 117 S.Ct. at 2172, 138 L.Ed.2d at 649.
[82] Id.
[83] 521 U.S. at 545, 117 S.Ct. at 2176, 138 L.Ed. 2d at 655.

IX. Keeping Track of Precedents

A legal system based on precedent obviously requires that judges and lawyers have easy access to the cases – more specifically, to the decisions on any given issue of law that might arise. It has been estimated that there are in the United States approximately four million decisions, of federal and state appellate courts, that could possibly have precedential effect, and that each year that number increases by about 100,000. How can judges and lawyers keep track of so many decisions and be able to find the precedents applicable to the particular case before them? Fortunately, the inherent demands of *stare decisis* have led to the development of systems of case reporting that facilitate the search for the precedents, or caselaw, on any issue. These are described in the excerpt from Professor E. Allan Farnsworth's book, *An Introduction to the Legal System of the United States* (3rd edition, 1996) that appears as Appendix A of this article. To further illustrate the system of case reporting, the "headnotes" (unofficial statements of the holdings contained in a particular judicial opinion, identified by "key numbers" that specify the area of law and the particular issue addressed), from the Supreme Court's famous 1954 decision in *Brown v. Board of Education* are attached as Appendix B. Finally, explanatory pages from *Shepard's Citations*, a coded system of numbers and letters that enables the researcher to find all subsequent appellate-court references to a given appellate decision, are attached as Appendix C. These exhibits, it is hoped, will give the reader a general idea of the way in which the various reporting systems make it relatively easy for a lawyer or judge to find the applicable precedents, to verify that those precedents have not (or have) been overruled, and to learn where and

how a given precedent may have been reaffirmed, limited, distinguished, or otherwise affected by later cases.

X. Conclusion

For more than one hundred years, legal education in the United States has consisted primarily of the study of cases, that is, of decisions of appellate courts. This system of study, often called "the case method," had its beginning at Harvard Law School in the last decades of the Nineteenth Century. The study of law by the case method makes sense in the United States for at least two reasons. First of all, because of the Common Law concept of precedent, judicial opinions are the most authoritative statements of the law. Even where (as is increasingly the case), a rule of law is created by statute, it is the judicial interpretation of the statute that determines what the statute means and when it is applicable. The second reason for studying the cases, closely related to the first, is that it forces the student to do what every lawyer must do every day, that is, to discover the legal issues and rules as they lie hidden in unique and ever-changing human situations. In a system based on precedent the lawyer, having identified the legal issues, must then evaluate the precedents, considering not only the holdings announced in the potentially-controlling precedential cases, but also asking himself whether his own case – which is not *exactly* like any that has yet been adjudicated – is within or outside the scope of any existing precedent. If a given precedent clearly applies to his case, and that precedent favors his client, the lawyer will emphasize the significance of that precedent in any negotiation or litigation that might follow. If, on the other hand, the precedent is unfavorable to his client, the lawyer must be prepared to argue for a modification or overruling of that precedent, or else abandon the claim. In

any event, the precedent, whether favorable or unfavorable, will significantly affect the lawyer's advice to his client.

The principle of precedent is naturally subtle, its application is often complex, and its results are sometimes controversial; nevertheless, and perhaps paradoxically, to the United States lawyer (and probably to every Common Law lawyer) it has served for centuries as the basis of juridical security and stability, in constitutional matters as in all other areas of the law.

Appendix A

(excerpts from E. Allan Farnsworth, *An Introduction to the Legal System of the United States* (3d ed., 1996) 48-49, 50.

"**FINDING CASE LAW**

The sheer number of decisions is an obvious obstacle to finding case law. Reported decisions of the Supreme Court of the United States and of many of the state appellate courts can be found in the official reports of those courts. Those decided from at least 1887 to date can also be found in a system of unofficial reports, the National Reporter System, with a total number of volumes that is rapidly approaching 10,000, some volumes with over 1,500 pages.

In this System, state court decisions are published in seven regional sets of volumes, each covering a geographical area of the country, plus three additional sets devoted solely to decisions of the California, Illinois, and New York courts. Federal decisions are published in five sets, one each for the Supreme Court, the courts of appeals, and selected cases from the district courts, along with one for bankruptcy cases and one for decisions involving the federal rules of procedure. Decisions of the lower federal courts are not published officially. Opinions as reported in the unofficial reports are sometimes preferred by lawyers because they are available sooner through publication in temporary pamphlets known as advance sheets, are coordinated with the most comprehensive digest system, and are more compact. A second and highly selective system of

unofficial reports, the American Law Reports, publishes only that small fraction of all reported cases that is thought to be of special interest and appends extensive annotations that discuss and cite related cases.

. . .

"This flood of cases has been manageable in the past only because of two well developed systems, one of digests and the other of citators. The American Digest System, the leading digest, is coordinated with the National Reporter System, and covers the appellate court reports from 1658 to the present. The several points in an opinion are digested in short paragraphs and are then numbered and classified by subject matter according to an elaborate classification scheme. The numbered digest paragraphs are printed as the headnotes to the cases as they are reported in the National Reporter System and are also collected in a series of analytically arranged digest volumes. Subject to the vagaries of the classification system, one trained in the use of these digest volumes can, in a relatively short time, collect all of the reported cases, with a few minor exceptions, decided by the courts upon a particular point. The System also includes an alphabetical table of case names. Shepard's Citations, an index of citations, covers the National Reporter System and the official state reports. It indexes decisions which have been cited in later opinions so that in a few minutes it is possible to compile a list of subsequent opinions in which a particular decision has been mentioned."

[Footnotes omitted.]