The Catholic Lawyer

Volume 22
Number 1 *Volume 22, Winter 1976, Number 1*

Article 3

April 2017

Stare Decisis and the Judicial Process

Edward D. Re

STARE DECISIS AND THE JUDICIAL PROCESS†

EDWARD D. RE*

"Law must be stable and yet it cannot stand still."

—ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY

These words refer to the two ideals that must be harmonized and reconciled within an effective legal system—stability and change. Stability requires continuity with the past and is necessary to permit members of a society to conduct their daily affairs with a reasonable degree of certainty as to the legal consequences of their acts. Change implies a variation or alteration of that which is fixed and stable. Without change there can be no progress. This Article will explore the function of stare decisis in the attainment of these two seemingly contradictory ideals within the judicial process.

Basic to this discussion is the understanding that in a common law system a judicial decision serves a dual function: First, it settles the controversy, since under the doctrine of res judicata the parties may not relitigate the issues that have been decided; and second, it has precedential value under the doctrine of stare decisis. This latter doctrine, derived from the maxim *stare decisis et non quieta movere* (stand by the decision and do not disturb what is settled) is rooted in the common law policy that a principle of law deduced from a judicial decision will be considered and applied in the determination of a future similar case. In essence, this policy reflects the likelihood that a similar case arising in the future will be decided in the same way. In a common law system, wherein the law is enunciated and developed through judicial decisions, this doctrine is absolutely essential. It was indispensable in the early periods of the common law when legislative enactments were both few in number and usually limited to the area of public law.

Stare decisis was received in the United States as part of the common law tradition. In addition to fostering stability and permitting the development of a consistent and coherent body of law, it also served other benefi-

† Address delivered at the Conference for Federal Appellate Judges at the Federal Judicial Center, Washington, D.C., May 13, 1975.

* Judge, United States Customs Court. B.S., St. John's University, 1941; LL.B., St. John's University, 1943; J.S.D., New York University, 1950; Ped. D., Aquila, Italy, 1960; LL.D., St. John's University, 1968; LL.D., St. Mary's College of Notre Dame, 1968; LL.D., Maryville College, 1969.

cial functions: it preserved continuity, manifested respect for the past, assured equality of treatment for litigants similarly situated, spared judges the task of reexamining rules of law with each succeeding case, and afforded to the law a desirable measure of predictability. These concepts, developed in the course of hundreds of years of judicial experience, require further consideration as a result of today's era of massive legislative activity. Since the doctrine of precedents continues to serve a useful and beneficial function, it is always appropriate to examine and reexamine its applicability and limitations.

What is the doctrine of stare decisis, and what are its inherent limitations? It must be understood that the decided case, the precedent, is almost universally treated as no more than a point of beginning. The decided case is said to establish a principle, and it is indeed a *principium,* a beginning, in the true etymological sense of the word. A principle is therefore a fundamental assumption which does not foreclose further inquiry. As a point of departure, the common law judge affirms or asserts the relevance of a principle extracted from the precedent found to be in point. He then proceeds to apply it by molding or shaping that principle to meet the needs of the case at bar. The process of application, whether it results in an expansion or a restriction of the principle, is more than a mere gloss; it represents the judge's distinct contribution to the growth and development of the law. In a discussion of precedents in *The Nature of the Judicial Process,* Justice Cardozo wrote:

> [I]n a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. *Stare decisis* is at least the everyday working rule of our law.[1]

In the application of a precedent, the jurist must determine the nature of the authority of that precedent. Is the authority binding or is it merely persuasive? If it is binding, the principle established in the prior case must be applied to determine the disposition of the subsequent case. If the authority is only persuasive, a variety of additional factors may be considered to ascertain whether it will be applied and the extent or degree of its application.

An accurate description of the doctrine of stare decisis will contain a statement of the limitations upon its applicability. A few definitions, set forth by those who have explored the doctrine in depth, may be helpful. For example, Henry Campbell Black, in his *Law of Judicial Precedents,* stated:

---

[1] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 19-20 (1921).

> A decision is not authority as to any questions of law which were not raised or presented to the court, and were not considered and decided by it, even though they were logically present in the case and might have been argued, and even though such questions, if considered by the court, would have caused a different judgment to be given.[2]

Black thus highlights the importance of the issues presented in the prior case. Were the issues in the present litigation considered and decided in the previous case? If they were not, even though they could have been, the prior decision is not a binding precedent.

Of course, the issues raised in a case stem from the facts presented. The facts of the case, therefore, are of the utmost importance. The Latin maxim, *ex facto jus oritur*, tells us that the law arises out of the facts. Of particular relevance are the following observations by Professor Brumbaugh:

> Decisions are not primarily made that they may serve the future in the form of precedents, but rather to settle issues between litigants. Their use in after cases is an incidental aftermath. A decision, therefore, draws its peculiar quality of justice, soundness and profoundness from the particular facts and conditions of the case which it has presumed to adjudicate. In order therefore that this quality may be rendered with the highest measure of accuracy, it sometimes becomes necessary to expressly limit its application to the peculiar set of circumstances out of which it springs.[3]

The authority of the precedent thus depends upon and is limited to "the particular facts and conditions" which the prior case "presumed to adjudicate."

Precedents, therefore, are not to be applied blindly. The precedent must be analyzed carefully to determine whether there exists a similarity of facts and issues and to ascertain the actual holding of the court. The precedent must be studied to determine whether the principle deduced therefrom is the holding of the case or is merely dictum. Only the holding of the case is entitled to recognition and respect as binding authority. A dictum is no more than a remark or observation, and is, at best, merely persuasive authority. The factors that affect or determine the degree of persuasiveness to be accorded to dicta are many and varied. How pertinent is the dictum to the decision wherein it was articulated? Does the court or judge who authored the dictum enjoy a special reputation for scholarship and wisdom? Is the dictum reasonable?

The distinction drawn between the holding of a case and its dicta is warranted by the nature of the adversary system that prevails under the common law. The reason for this distinction was expressed by Chief Justice John Marshall, who stated:

---

[2] H.C. BLACK, LAW OF JUDICIAL PRECEDENTS § 10, at 37 (1912).

[3] J. BRUMBAUGH, LEGAL REASONING AND BRIEFING 171-72 (1917).

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.[4]

Hence, the holding of a prior case is limited to the principle or rule that was necessary for the resolution of those factual and legal issues actually presented and decided. All utterances not necessary to the decision are dicta.

That a binding decision arises only as a result of litigation has led to a criticism of the doctrine of precedents. Allen, in *Law in the Making,* observed:

> Nor is it an entirely unjust criticism that precedents tend to make the development of the law depend on accidents of litigation. Important points may remain at large simply because nobody happens to have brought action upon them. An erroneous judgment may stand, and acquire an undeserved authority, merely because the losing party does not appeal against it—usually for the excellent reason that he cannot afford any further costs of litigation.[5]

A further limitation upon the binding authority of a precedent was recognized in the following quotation from a decision of the New York Court of Appeals:

> [T]he doctrine of *stare decisis,* like almost every other legal rule, is not without its exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such cases it is the duty of courts to reexamine the question.[6]

Similar language of Chancellor Kent is also worthy of quotation:

> A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case.[7]

---

[4] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

[5] C. ALLEN, LAW IN THE MAKING 298 (6th ed. 1958) (footnote omitted).

[6] Rumsey v. New York & N.E.R.R., 133 N.Y. 79, 85, 30 N.E. 654, 655 (1892).

[7] 1 J. KENT, COMMENTARIES *475.

For Chancellor Kent, a decision that is entitled to precedential value as binding authority is one that is "solemn." The proposition of law deduced from the prior case must have been necessary to the decision of that case and is authority only in a like case. Clearly, a subsequent case may be distinguishable on the facts or on the issue presented.

Chancellor Kent also wrote of the possibility of a "reversal" of the prior decision upon a showing that the law "was misunderstood or misapplied in that particular case." Reflecting upon the possibility of demonstrating that a prior case was erroneously decided, Justice Field has stated that "[i]t is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations."[8]

These quotations indicate the limitations which surround the application of the doctrine of stare decisis. Experience indicates that in most cases precedents may be distinguished on the facts or issues presented. Even should the facts and issues be identical, however, there is also the possibility of showing that the prior case was erroneously decided and contrary to reason. Hence, although all prior cases have precedential value, their value as precedents may differ radically.[9]

Is the principle deduced from the prior case contained in a thorough, well-reasoned opinion which was, itself, based upon clear and binding precedents? Is the precedent one that is seriously weakened either by a trenchant dissent or by a concurring opinion which casts doubt upon the wisdom of the majority opinion? Is the applicable principle found in a single case, or has it been restated and applied in a line of cases which have reaffirmed its value and social desirability? Clearly, the authoritative value of precedents varies widely. At the one extreme are those precedents found binding; at the other extreme are those precedents found to be completely inapplicable to the present case.

The doctrine of stare decisis thus does not require unbending adherence to past decisions. It permits a court to benefit from the wisdom of the past, and yet reject the unreasonable and the erroneous. First, the court must determine whether the principle extracted from the prior case is applicable. Second, the court must determine to what extent the principle will be applied. A court may choose to extend a principle beyond the prior case if it believes that such an action will promote justice. If the application of the principle, however, would produce an undesirable result, the court may narrow or restrict the principle, or it may apply a wholly different precedent. It must be noted, therefore, that stare decisis is not merely a doctrine of stability and uniformity. Its inherent limitations, as well as

---

[8] Barden v. Northern Pac. R.R., 154 U.S. 288, 322 (1894).

[9] For a discussion of the importance of the doctrine of precedents to the advocate, see E.D. RE, BRIEF WRITING AND ORAL ARGUMENT 91-100 (4th ed. 1974).

the factors that render prior decisions inapplicable, make possible the flexibility required for change and progress.

Discussions of stare decisis in a common law system often proceed as though the system itself is the same as that which prevailed centuries ago. Ours is still a common law system in which prior decided cases have precedential value. A most important new element, however, has been added to the blend of authorities that must be considered by the judge in the decision of cases. In the past, particularly in the field of private law, judicial consideration focused essentially upon the authority of prior cases, while legislative enactments seldom bore upon the decisional law. The common law system of the modern world, however, must cope with legislative policy expressed or implied in a multitude of relevant statutes.

Since the common law system developed on a case by case basis and the effect of legislative policy upon the law was minimal, legislation came to be regarded almost as an alien field. Justice Cardozo acknowledged the sense of unease with which legislation was viewed when he said: "The truth is that many of us, bred in common law traditions, view statutes with a distrust which we may deplore, but not deny."[10] Chief Justice Stone, writing of this attitude toward statutes, stated that "the common-law courts have given little recognition to statutes as starting points for judicial law-making comparable to judicial decisions."[11]

Legislation may directly, and indeed abruptly, change or repeal a legal standard or rule. Courts, however, may only "legislate" to fill an omission or lacuna in a statute. To use the words of Justice Holmes: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially . . . ."[12] There is no doubt that judges must decide a *casus omissus,* the unprovided-for case, for which no specific provision has been made in the statute. As with judicial precedents, courts may, and in practice do, expand or restrict the application of the legislative policy. This, as is well known, is done pursuant to the declared judicial policy of giving effect to the legislative intent expressed or implied in the relevant statute.

Today, legislation so extensively covers practically every branch of law, both public and private, that the principle, the point of beginning, can no longer be presumed to be a judicial precedent. Often, the point of beginning must be the legislative policy set forth in a relevant statute. Courts, of course, must apply and construe statutes. The system, nevertheless, requires that courts examine judicial precedents that have previously employed and construed the applicable statute. At this point, however, a more serious question is injected into the process. Judges may have a tendency to attach more significance to judicial precedents than to the

[10] B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 9 (1928).
[11] Stone, *The Common Law in the United States,* 50 HARV. L. REV. 4, 12 (1936).
[12] Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917)(Holmes, J., dissenting).

legislative policy that those precedents purported to construe and apply. Courts are thus faced with the difficult task of determining the relative weight that must be attributed to legislative policy and to judicial precedent. Surely, it is a judicial function to interpret and construe a statute. Under our tripartite system of government, however, the court must be faithful to the legislative purpose and policy. The judge must not forget that ours is a government of three branches, and that in deciding cases he is fulfilling an institutional responsibility of the court.

Undue or unwarranted reliance upon judicial precedents in the face of relevant and perhaps overriding legislative policy has caused Dean Irwin Griswold to decry what he has termed "judicial leapfrogging." Although his remarks were directed toward an unduly expansive judicial attitude in construing the United States Constitution, Dean Griswold's criticism is equally applicable to the judicial construction of statutes. He spoke of the danger of the process as follows:

> The danger here, as elsewhere, is that a sort of decisional leapfrogging takes over as a principle expands: the first decision is distilled from the language of the Constitution, but the next expansion begins from the reasoning of the last decision, and so on down the line until we reach a point where the words of the Constitution are so far in the background that they are virtually ignored. In the end we may be left with a rationale that comes to little more than, "Well, it really is a good idea. We want a free society where all of these things can be done and we want to keep the Government off the backs of the people." There are governmental processes for bringing such results about, but it is hard to think that such adumbrations of the Constitution are an appropriate exercise of judicial power.[13]

The possibilities and variations of "judicial leapfrogging" are infinite. Many examples are already recorded in the law books. A particularly cogent example may be found in the case of *Girouard v. United States*,[14] decided by the Supreme Court in 1946. Girouard filed a petition for naturalization. He stated that he "understood the principles of the government of the United States, believed in its form of government, and was willing to take the [statutory] oath of allegiance."[15] The oath provided that he would "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic. . . ."[16] To a question in the naturalization application: " 'If necessary, are your willing to take up arms in defense of this country?', [Girouard] replied, 'No (Non-

---

[13] Griswold, *The Judicial Process*, 28 RECORD OF N.Y.C.B.A. 14, 25 (1973).

[14] 328 U.S. 61 (1946), *rev'g* 149 F.2d 760 (1st Cir. 1945).

[15] 328 U.S. at 61-62.

[16] *Id.* at 62, *quoting* Act of Oct. 14, 1940, ch. 876, § 335, 54 Stat. 1157 (now 8 U.S.C. § 1448(a) (1970)).

combatant) Seventh Day Adventist.' "[17]

In an effort to do justice in the particular case, perhaps by the subconscious application of Aristotelean *epikeia,* the district court admitted Girouard to citizenship. On the clear and unmistakable authority of *United States v. Schwimmer,*[18] *United States v. Macintosh,*[19] and *United States v. Bland,*[20] the Court of Appeals for the First Circuit reversed, stating that the facts brought the case "squarely within the principles of these [three] cases."[21] The issue raised in the three Supreme Court precedents was the statutory construction of the congressional mandate that an alien, before admission to citizenship, declare on oath that he will "defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same."[22] These statutory provisions were then reenacted by Congress.[23] Despite this clear indication of congressional approval of the *Schwimmer-Macintosh-Bland* rationale, the *Girouard* Court overruled these cases.[24]

The principle of the prior cases was crystal clear. Unless the alien was willing to respond affirmatively to the question in the application whether, if necessary, he would be willing to take up arms in defense of this country, he would not be admitted to citizenship. That *Schwimmer, Macintosh,* and *Bland* stood for the proposition asserted could not be denied since the Supreme Court had recognized in In re *Summers,*[25] that an alien who refused to bear arms would not be admitted to citizenship.[26]

Justice Stone, for cogent reasons, joined in the dissents of Chief Justice Hughes in the *Macintosh*[27] and *Bland*[28] cases. Adopting substantially the same rationale as that previously expressed in the Hughes-Stone dissents, the Supreme Court in *Girouard* reversed the circuit court of appeals. In admitting Girouard to citizenship, even though he refused to state that he would bear arms, the Court stated: "We conclude that the *Schwimmer, Macintosh,* and *Bland* cases do not state the correct rule of law."[29]

One would think that they, Chief Justice Stone and the other Justices, who had dissented in the earlier cases[30] would have regarded this

---

[17] 328 U.S. at 62.
[18] 279 U.S. 644 (1929).
[19] 283 U.S. 605 (1931).
[20] 283 U.S. 636 (1931).
[21] 149 F.2d 760, 763 (1st Cir. 1945), *rev'd,* 328 U.S. 61 (1946).
[22] Act of June 29, 1906, ch. 3592, § 4, 34 Stat. 596 (now 8 U.S.C. § 1448(a) (1970)).
[23] Act of Oct. 14, 1940, ch. 876, § 335, 54 Stat. 1157 (now 8 U.S.C. § 1448(a) (1970)).
[24] 328 U.S. at 69.
[25] 325 U.S. 561 (1945).
[26] *Id.* at 572.
[27] 283 U.S. at 627 (Hughes, C.J., dissenting).
[28] 283 U.S. at 637 (Hughes, C.J., dissenting).
[29] 328 U.S. at 69.
[30] In both *Macintosh* and *Bland,* Chief Justice Hughes was joined in his dissents by Justices Stone, Brandeis, and Holmes.

express overruling of the prior cases and the adoption of their dissenting views as a genuine vindication. Nevertheless, Chief Justice Stone again dissented in *Girouard*. He began his dissent by stating:

> I think the judgment should be affirmed, for the reason that the court below, in applying the controlling provisions of the naturalization statutes, correctly applied them as earlier construed by this Court, whose construction Congress has adopted and confirmed.[31]

Chief Justice Stone indicated that the "only question [in the prior cases] was of construction of the statute which Congress at all times has been free to amend if dissatisfied with the construction adopted by the Court."[32] He explained that he and three other Justices had dissented in *Macintosh* and *Bland* "for reasons which the Court now adopts as ground for overruling them."[33] Because of his firm view that Congress had adopted and confirmed the Court's earlier construction of the naturalization statutes, the Chief Justice regarded the Court's overruling of those cases as judicial action that would "discourage, if not . . . deny, legislative responsibility."[34] With Justices Reed and Frankfurter joining in his dissenting opinion, Chief Justice Stone concluded that "[i]t is not the function of this Court to disregard the will of Congress in the exercise of its constitutional power."[35]

These cases clearly demonstrate the differing judicial views that may prevail. Chief Justice Stone stated, in effect, that his dissenting opinions were not the law of the land. If they were to be adopted to effect a change in the law set forth in the earlier cases, such a policy determination should have been made by the Legislature. Of course, it was a judicial question whether the principle of law enunciated in the earlier cases had, in fact, been adopted by the Congress. This question was whether there had been legislative acquiescence in the judicial construction of the statute. In his dissent in *Girouard,* Chief Justice Stone noted that six successive Congresses had declined to adopt proposals or amendments that would have overturned the rulings in *Schwimmer, Bland,* and *Macintosh,*[36] the three cases expressly overruled by *Girouard.* He also noted that prior to *Girouard,* the state and federal courts had consistently applied the rule espoused in the three prior cases.[37]

There is little doubt that the earlier cases, until overruled by

---

[31] 328 U.S. at 70 (Stone, C.J., dissenting).

[32] *Id.* at 72 (Stone, C.J., dissenting).

[33] *Id.* (Stone, C.J., dissenting) (footnote omitted).

[34] *Id.* at 76 (Stone, C.J., dissenting).

[35] *Id.* at 79 (Stone, C.J., dissenting). For a discussion of the overruling of existing authority, see E.D. RE, BRIEF WRITING AND ORAL ARGUMENT 93-97 (4th ed. 1974).

[36] *Id.* at 74 (Stone, C.J., dissenting).

[37] *Id.* (Stone, C.J., dissenting).

Girouard, represented the law of the land. Consequently, the state and federal courts acted correctly and properly in applying the principle for which these cases stood. Indeed, Chief Justice Stone quoted from one pre-*Girouard* case wherein the court of appeals had noted that proposed amendments to the statutes at issue had been rejected, and stated: "We must conclude, therefore, that these statutory requirements as construed by the Supreme Court have congressional sanction and approval."[38]

The *Girouard* example suggests that one's philosophy about the separation of powers of the three branches of government may also play a vital role in determining judicial attitudes toward judicial precedents and legislative policy. The factors are many that a judge will intuitively, deliberately, or unconsciously consider in determining the weight to be given prior judicial pronouncements. Is the court dealing with an isolated precedent or a series of well-reasoned opinions? Has the precedent that is being urged upon the court been eroded by decisions that have restricted its application? Have changed conditions rendered the precedent obsolete? With what degree of authority may the court speak? Is it a trial court or an appellate court? Surely, if a court can speak with finality on a particular question, it will determine for itself the particular balance that will be struck between stability and change. The court will make a value judgment as to the desirability of following the past or effecting change. If the decision is to bring about change, we can only hope that it be progress.[39]

---

[38] *Id.* at 74-75 (Stone, C.J., dissenting), *quoting* Beale v. United States, 71 F.2d 737, 739 (8th Cir. 1934).

[39] Extensive discussion of the doctrine of stare decisis within the judicial process is found in W. DOUGLAS, STARE DECISIS (1949); K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).