

CHAPTER 6 Precedent

Precedent is an important building material for the writing of judicial opinions and almost any other legal argument. Precedent is itself embodied in a legal opinion; thus legal opinions are used to create new legal opinions. A justice, as well as any person writing a legal argument, seems unavoidably to encounter what appears to be a vicious circle-to write an opinion one needs to understand a prior opinion, but to understand a prior opinion one needs to know how to write an opinion. There is a way out of the circle, which this chapter provides by examining the concept of a precedent's *ratio decidendi*.

The interpretation of precedent by formulating its *ratio decidendi* is both a skill and an art, in which the justices are very adept. This chapter will examine the basic approach the justices use in developing the *ratio decidendi* of a precedent, as well as discuss the principle of **stare decisis** -- the principle that guides the justices in deciding whether to follow or overrule a precedent.

A TERMINOLOGICAL INTERLUDE

There are a number of terms that frequently occur in constitutional law: (1) principles; (2) doctrines; (3) tests or standards of review; (4) rules; (5) the holding or the *ratio decidendi*, and (6) policy. Let's begin with the term "policy." Policy making may be viewed as the process by which goals and the means to the goals are simultaneously considered and decided upon. Those who engage in policy making may (are expected to?) engage in compromise and bargaining with a view to reaching mutually agreed upon solutions. In constitutional parlance, policy is something that only the legislature produces. Courts, it is frequently said, should not engage in policy making. Courts, in theory, should only find, interpret, and apply the law.

The terms "principles," "doctrines," "rules," "tests," and "standards of review" are frequently used interchangeably. For example, the following formulation can be referred to as a principle, rule, doctrine, or test: Pursuant to its authority to regulate interstate commerce, Congress may regulate labor relations at even a "local" manufacturing plant, when it is part of an interstate manufacturing and sales company, because labor disruption at such a plant has "a most serious effect upon interstate commerce" (*National Labor Relations Board v. Jones & Laughlin Steel Corp.* [1937]). This might also be termed the "holding" or the *ratio decidendi* of *Jones & Laughlin*. This rule also provides a "test" for deciding future cases, namely, a regulation is permissible under the commerce clause if it regulates an activity that has a 'substantial economic effect' upon interstate commerce.

But while terms like "rule" and "principle" are often used interchangeably, they can also be used with different meanings and implications. For example, the term "principle" sometimes means something very fundamental and enduring. Principles, in the grand sense of the word, tend to be cast in general value-laden terms that require further elaboration and interpretation. For example, it might be said that the principle embodied in the equal protection clause of the Fourteenth Amendment is that all people

should be treated with equal dignity and respect. But we also say that the Constitution embodies other "principles" that are less obviously moral statements (e.g., the principle of separation of powers).

..."[T]ests" or "standards of review"...are judicially created criteria that the Court says a governmental policy must satisfy in order to be constitutional. For example, a policy that treats different businesses differently is constitutional if "the classification is rationally related to a legitimate purpose." (This is the "rational basis" test used in equal protection cases.) Tests derive from or are based upon principles, which presumably are more fundamental and enduring.

"Rules" also derive from fundamental principles, and rules are typically formulated in more precise or narrow language than fundamental principles. For example, based in part on the principle of separation of powers, the Supreme Court has developed certain rules (or doctrines) that it uses to guide its decisions regarding whether or not to hear a case. One is the rule that the Court will not render advisory opinions on questions submitted to them by a president seeking legal advice.

The *ratio decidendi* of an opinion is (1) the **material** facts of the case, plus (2) the conclusion whether or not the government's policy is constitutional. (The *ratio decidendi* can also be called the **holding**.) For example, in *Zobel v. Williams* (1982), Alaska distributed its surplus tax revenues, derived from the taxation of its booming oil industry, to state residents in the form of a dividend that varied from resident to resident depending upon the length of time the resident had lived in the state after Alaska had become a state. The Court concluded that this policy violated the equal protection clause of the Fourteenth Amendment. Thus, the *ratio decidendi* in the case can be stated as follows: It is a violation of the equal protection clause for a state to redistribute surplus tax revenues to residents according to a formula that allocates the revenues proportionately in terms of the length of time the resident was in the state after it became a state.

The holding, *ratio decidendi*, rules, and principles of these opinions are not something to be "discovered," but something that is creatively formulated through an interpretation of the opinion. Take for example the formulation of the holding. As I indicated, the formulation of the *ratio decidendi* requires a determination as to what are the "material" facts of the case. One says a fact was "material" to the decision if one is prepared to show that it was "necessary" or "sufficient" to the conclusion. If one is prepared to show that the fact had a "causal" effect on the conclusion regarding constitutionality or unconstitutionality, then one is prepared to claim that fact was "material."

Back to *Zobel*. In reaching its decision the Court rejected Alaska's argument that the length of residency was a measure of a resident's contribution to the state, and that the state could apportion the surplus funds in terms of a resident's contributions to the state. In other words, the Court also "held" (ruled, or concluded) that rewarding citizens differentially for undefined past contributions of various kinds to the state is not a "legitimate state purpose." Let me now suggest a yet more generalized version of the *ratio decidendi*. It is a violation of the equal protection clause of the Fourteenth Amendment for a state to treat its bona fide law-abiding residents differently solely based on an assessment as to who is a more worthy citizen.

To summarize, the terms principle, holding, rule, test, and *ratio decidendi* are sometimes used interchangeably. Second, there are occasions when these words do not mean precisely the same thing. For example, as noted, the holding or *ratio decidendi* is often used in its technical meaning, namely, it is a rule-like statement formulated by combining (1) the material facts of the case with (2) the decision on whether the government's policy was constitutional or not.

Third, in justifying the "holding" or *ratio decidendi*, the Court will announce "principles," "rules," "tests," or "standards of review" that it then uses in justifying its *ratio decidendi*. Hence, it is often said that the opinion "held" (ruled, or concluded) that in the future all problems of type "X" will be analyzed in terms of test "H." These principles, rules, tests, and standards of review also carry precedential weight and are used by future courts in the justification of decisions they reach. These principles, rules, tests, and standards of review can in turn be used as part of a strategy of deduction; they may themselves be applied by further deduction, or may require balancing. In short, precedent can be used directly in an analogical argument, but in addition there are materials to be found in precedents that can be used in conjunction with deduction and balancing. Precedent has multiple uses.

The Court frequently uses the *ratio decidendi* from a precedent in conjunction with an argument based on **analogy**. For example, using *Zobel* as an analogy, one could argue that it would be unconstitutional for a state to apportion the size of a *tax exemption* in terms of the length of time a person resided in the state. Similarly, again by analogy, it arguably would be unconstitutional to give to longtime residents the opportunity to cast a vote worth five times the vote cast by a new arrival. Of course, one can always question whether the analogy is appropriate, and one might even ask whether my two conclusions are sound.

THE ENGLISH DOCTRINE OF PRECEDENT

The Ratio Decidendi, Obiter Dictum, and Distinguishing Cases

The doctrine of precedent that influences American law has its origin in English common law. English common law courts express the justifications for their decisions in terms of reliance upon previous decisions. English courts do this in the name of the doctrine of precedent, which says that two cases must be decided the same way if their "material" facts are the same. The reasons for this doctrine are several: it is only *fair* that like cases should be decided alike; it is rational to decide like cases alike; and adhering to precedent helps to assure stability in the law, stability that allows people to make plans.

Here is a simple example of the doctrine of precedent in operation. In what we shall call case "B," the defendant threatened to bring criminal charges against the plaintiff, a foreign servant girl, if she did not provide certain information (*Janvier v. Sweeney [1919]*). The defendant's threat was an empty lie because he knew that any charges he might bring against the girl were baseless. Nevertheless, the girl became ill from the distress caused her by the threat. The girl became the plaintiff in a suit by bringing a suit against the defendant. The court's opinion can be summed up in a syllogism that goes roughly as follows:

Legal Premise: Where the defendant has willfully told the plaintiff a lie that is likely to so frighten the plaintiff as to cause the plaintiff physical distress, the defendant is liable. (Premise based on precedent in prior case "A.")

Factual Premise: The defendant in this case told the plaintiff a lie that was likely to, and in fact did, so frighten the plaintiff as to cause the plaintiff physical distress (based on facts determined at the trial).

Conclusion: The defendant is liable.

Our concern is how the judge in case "B" went about developing his argument, and more specifically, how he went about establishing the legal premise that began his justification. Before we turn to the examination of the syllogism, it is useful to note that the syllogism is the preeminent example of "deductive" reasoning, which will be examined in more detail in chapter 7. Notice that the syllogism takes the following general form:

Legal Premise: If "A," then "B," i.e., if the defendant did "X," then defendant is liable.

Factual Premise: It is the case that "A" is true, i.e., the defendant did "X".

Conclusion: Therefore "B," i.e., the defendant is liable.

We now need to ask where the judge obtained the first premise. (The second premise was established by the trial in the trial court.)

Step 1. First, judge "B" undertook a search for relevant precedent-precident with material facts similar to the case before him. This search brought him to *Wilkinson v. Downton* (1897). The defendant in *Wilkinson*, as a practical joke, told the plaintiff that her husband had been seriously injured in an accident and had been sent with two broken legs to the Elms hospital at Leytonstone. This false statement so shocked the plaintiff that it produced vomiting, other serious physical consequences, and weeks of suffering. Previous to this "joke" she had not been in ill health, nor had she ever exhibited any predisposition to nervous shock. The judge in *Wilkinson* (case "A") noted that the defendant willfully did an act calculated to cause physical harm to the plaintiff, and that this was a proper legal basis on which to sue since there was no justification for the lie.

Step 2. Judge "B" recognized that the facts of case "A" were similar to, but not identical with, the facts of the case with the foreign servant girl. Thus, his second step was to decide if the facts were similar enough in important respects that case "A" should be treated as precedent for case "B," or whether case "A" was **distinguishable** from case "B." In fact he concluded that case "A" was *analogous* to case "B"; thus he decided not to distinguish case "A," and used it to justify his decision in case "B." (The judge in case "B" could have **distinguished** case "A" from "B," and written an opinion saying prosecutors should be allowed to use threats of prosecution as a means of gathering information.)¹

Step 3. The third step was to determine the *ratio decidendi* of the decision in case "A." We know already that judge "B" interpreted the decision in case "A" to stand for the *ratio decidendi* stated above as the legal premise of the syllogism (let us call it version 1). But how did judge "B" decide that this legal principle was the *ratio decidendi* of case "A"? The answer is that it took an act of *interpretation* to settle upon this particular version of the *ratio decidendi*. Here is another possible version of the *ratio decidendi* of case "A."

Where the defendant has willfully lied to the plaintiff by saying that a close family member has suffered a grievous injury, and this he causes such distress that the plaintiff suffers severe physical distress for a period of weeks, the defendant is liable. (version 2)

This is a *narrower* version of the *ratio decidendi* because this rule would only cover cases in which the deliberate he was about the well-being of a family member and the effect of the he showed up as physical symptoms. If this were the "holding" of case "A," then the court in case "B" would have a harder time using the precedent to justify a decision in favor of the servant girl.

But, as we saw, judge "B" chose to interpret case "A" as establishing a more abstract and general *ratio decidendi*. Yet how did judge "B" conclude that the more general *ratio decidendi* was the better interpretation? And why did not judge "B" interpret case "A" to stand for an even more abstract or general rule, namely, that any false statement told to anybody that causes any degree of mental distress is a basis for liability (version 3)?

In English practice, interpreting a case and choosing among possible versions of the *ratio decidendi* are guided by an important rule: "Courts do not accord to their predecessors an unlimited power of laying down wide rules." Based on this principle, a British judge would reject version 3 as an unnecessarily broad description of the holding of case "A."

As for version 2, though it is a plausible candidate, judge "B" might conclude that the first version best fits what he understands precedent "A" to have said; that is to say, the judge might conclude that according to precedent "A" even lies *not* told about family members were harmful and a basis for suit.

Before moving on to step 4, I would like to interject a comment about the concept of **obiter dictum**, or just plain **dictum**. Dictum takes several forms. It can be an "aside," a "remark by the way," on a point of law not necessarily involved in the case before the court. For example, judge "A" noted that the plaintiff also sued the defendant for "deceit" as well as for intentionally inflicting emotional harm. To prove deceit the law requires that the plaintiff establish that the defendant lied, that the defendant intended the plaintiff to act on the lie, that the plaintiff relied on the lie, and that in so acting the plaintiff was injured. But judge "A" noted that the injury to the plaintiff did not arise because she "acted" on the basis of what the defendant said. Her shock and physical distress were simply a spontaneous reaction to the lie. Thus, judge "A" hinted, without actually deciding, that a suit for deceit would fail. But he did note that the plaintiff had another basis upon which to collect damages for the harm done, namely, her claim of infliction of emotional suffering. Accordingly, judge "A's" comments on the claim for "deceit" were dictum, a statement about the law unnecessary to the actual decision in case "A."

One also finds dictum in an opinion when a judge makes what appears to be a legal ruling but his comments are based on hypothetical facts, facts not proven in the case. For example, suppose that judge "B" had said that he would have ruled differently if the defendant had lied to the plaintiff to force her to provide information necessary to protect the national security. This "exception" to liability for deliberately causing emotional distress would not be law, would not be binding on future courts, because it was not an issue argued before the court and the pronouncement of such an exception would have been unnecessary to the actual decision before the court in case "B."

Finally, we can identify as dictum a holding or rule that is phrased by the judge in a manner that is unnecessarily broad for the purposes of the case he or she is deciding. Version 3 of the holding of the case discussed above, for example, covers problems and issues not actually before the court in case "A."; hence this version is broader than necessary to describe the case. Accordingly, a judge who announced this as the holding of his or her decision could be said to have announced mere dictum.

Step 4. The last step judge "B" took in writing the opinion was to **apply** the *ratio decidendi* of case "A" to the facts of case "B." Thus judge "B" concluded that the He told the foreign servant girl was the sort of lie likely to cause emotional distress, and the distress felt by the foreign servant girl was of magnitude sufficient to allow recovery of damages. As I indicated above, judge "B" did make such findings of "fact," as reflected in the second, or factual, premise of the syllogism.

The Theory of the Doctrine of Precedent

The doctrine of precedent requires that a judge determine the *ratio decidendi*. By imposing this requirement on future courts the doctrine assumes that there really is a *ratio decidendi* to be 'discovered.' Stated differently, the doctrine of precedent presupposes that the legal meaning of a prior opinion is not simply a rule subjectively read into the precedent by the judge in case "B." That is, the doctrine assumes that judge "B" is not wholly free to imaginatively develop any version of a *ratio decidendi* he may want.

The doctrine of precedent also assumes that future courts are bound by the *ratio decidendi*. That is, when the precedent is relevant, these future judges must follow the precedent, even if they personally do not like the decision to which they are driven. Regardless of personal ideology, as noted earlier, like cases, as a matter of fairness and rationality, should be treated alike.

Additional considerations other than fairness and rationality also support adherence to the doctrine. Besides the fact, as noted earlier, that the doctrine of precedent preserves the predictability and stability of the law, it also improves the efficiency and speed of judicial decision making, since it is easier and faster to reach decisions in cases based on preexisting rules than to invent new rules each time a dispute comes to court.

One should now be able to predict some of the effects of the doctrine of precedent. The doctrine of precedent tends to make the law change slowly, a step at a time, incrementally. It limits sudden changes

of direction or new doctrines. And it points to a set of special criteria for the selection of judges. That is, judges should be people who can be dispassionate and fair in interpreting and applying precedent. Under this system a judge's personal ideology becomes a matter of lesser importance than in a system in which judges are expected to "make" law. Finally, one would expect to find in the opinions of the judges operating under this system extensive and careful analysis of precedent.

THE DOCTRINE OF PRECEDENT (*STARE DECISIS*) IN THE SUPREME COURT

The Legal Status of the Doctrine of Precedent

Let us begin with an obvious, but important, point. Because the Supreme Court is the *supreme* court, there is no higher court whose precedents it must follow. This also means that a nineteenth-century Supreme Court has no greater legal authority than a twentieth-century Court merely because it sat earlier in history.

Now let us turn to a more fundamental observation. The basic starting point of an constitutional justifications must be the Constitution itself. Thus, to paraphrase Chief Justice Marshall's opinion in *Marbury v. Madison* (1803):

It is a proposition too plain to be contested that either the Constitution controls any Supreme Court act repugnant to it, or the Court may alter the Constitution by an ordinary judicial opinion. Between these alternatives there is no middle ground. But certainly those who framed the Constitution contemplated that as the fundamental law of the nation, an opinion of the Court repugnant to the Constitution is void.

Given these assumptions, it follows, as night does the day, that the Supreme Court cannot and should not be bound to follow a precedent that it has itself concluded is not a sound interpretation of the Constitution. Stated differently, the justices are in a sense duty bound to *overrule* their own precedent if they conclude upon further reflection that a decision was wrong. "[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function" (*United States v. Scott* [1978], quoting from *Burnet v. Coronado Oil & Gas Co.* [1932][Brandeis, J., dissenting]). Similarly, the Court has written that "In constitutional questions, where correction depends upon amendment and not upon legislative action, this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions" (*Smith v. Allwright* [1944], and that

Stare decisis is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. (*Webster v. Reproductive Health Services* [1989])²

Yet the Court finds itself on the horns of a dilemma. To overrule precedent undermines the principles behind the doctrine of precedent: the principle of fairness, predictability, and stability in the law, and the rule of law itself. The Court acknowledged this problem when it wrote, "[A]rguments continue to be made, in these cases as well, that we erred in interpreting the Constitution. Nonetheless, the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today and reaffirm *Roe v. Wade* [1973]" (*City of Akron v. Akron Center for Reproductive Health, Inc.* [1983]). In a similar vein Justice Marshall. wrote:

[T]oday's, decision is supported, though not compelled, by the important doctrine of stare decisis, the means by which to ensure that the law will not merely change erratically, but will develop in a principled and intelligent fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact Delivery successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by stare decisis yield in favor of a great objective. [Here] we have been offered no reason to believe that any such metamorphosis has rendered the rule of reversal outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration. (*Vasquez v. Hillery* [1986])

The justices also consider overruling precedent when the precedent has proven to be unworkable; when related principles of law have developed in a way to leave the original rule in the precedent but in reality render it a mere remnant of a doctrine that has already been abandoned; and when facts that were relied upon in the precedent have changed or come to be seen so differently that the original rule has lost its justification (*Planned Parenthood of Southeastern Pennsylvania v. Casey* [1992]).⁴

The Court is also constrained in overruling precedent by the understanding that it may work a special hardship when people have come to rely on the rule's continued application, such as when people in business plan and invest in a commercial venture on the assumption that the "rules of the game" will not change in the middle of the game (*Planned Parenthood of Southeastern Pennsylvania v. Casey* [1992]).

Some justices have also expressed a concern that overruling too frequently would undermine the legitimacy of the Court-"frequent overruling would overtax the country's belief in the Court's good faith.... There is a limit to the amount of error that can plausibly be imputed to prior courts." In refusing to overrule the Court's controversial abortion decision in the face of political pressure, these same justices wrote that "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question" (*Planned Parenthood of Southeastern Pennsylvania v. Casey* [1992]).

Clearly the justices face a difficult choice in working with principles pointing both toward and away from overruling a precedent. They must decide how to weigh the competing considerations, for example, should they stick with a precedent upon which people have come to rely even though the justices believe the facts that supported the precedent no longer hold true? How are they to interpret these general principles? For example, when an opinion such as the abortion opinion is controversial and both supported and opposed by large segments of the population, does the Court appear to be caving in to political pressure by sticking with the precedent or by overruling the precedent?

The difficulties the Court faces in working with these principles can be illustrated by considering the decision of the Court in *Brown v. Board of Education* (1954) to overrule its decision in *Plessy v. Ferguson* (1896). In *Plessy* the Court had upheld the policy of racial segregation as long as the separate facilities and services were equal. A unanimous Court came to the conclusion that the separate-but-equal doctrine was not consistent with the equal protection clause, yet a vast social, political, and legal system had developed in reliance on that principle. It was also the case that there was massive political support for *Plessy*, offset by a smaller group of active and politically less powerful citizens convinced of the wrongfulness and harmfulness of the doctrine. The Court, of course, in this case proceeded to overrule *Plessy* despite strong countervailing considerations that pointed toward not disturbing the status quo.

The Judicial Attitude: A Closer Look

Judicial pronouncements aside, if we look at the Court's behavior we can see that the doctrine of precedent has little real hold upon the justices. First there is the fact that the Court has so often and so quickly reversed direction and overruled precedent. In 1932 Justice Brandeis noted 28 instances in which the Court had overruled or qualified constitutional decisions (*Burnet v. Coronado Oil & Gas Co.* [1932] [Brandeis, J., dissenting]). Professor Maltz writes that

even Justice Brandeis would have no doubt been surprised at the lack of respect among succeeding justices for the doctrine of stare decisis. In the twelve-year period from 1937 to 1949, for example, the Court overruled earlier constitutional decisions in twenty-one cases [footnotes omitted]--nearly as many as in the 140 years preceding *Coronado Oil & Gas*. By 1959, the number of instances in which the Court had reversals involving constitutional issues had grown to sixty; in the two decades which followed, the Court overruled constitutional cases on no less than forty-seven occasions. It seems fair to say that if a majority of the Warren or Burger Court has considered a case wrongly decided, no constitutional precedent -- new or old -- has been safe.

The meandering course of constitutional doctrine was no more vividly on display than in *Chimel v. California* (1969), an opinion dealing with the proper scope of a search incident to a lawful arrest. The Court in *Chimel* concluded that an arresting officer constitutionally may search, without a warrant, the area within the arrestee's immediate control in order to remove weapons the arrestee might try to use, or to seize evidence he might try to conceal or destroy. In justifying this conclusion the Court reviewed the

relevant precedent. Its review identified five previous changes of doctrine (its decision in *Chimel* represented a sixth change), and at one point the Court said about these changes that precedents "were thrown to the winds."

The cavalier attitude of one justice toward precedent can be illustrated with the opinions of Justice William Douglas. Justice Douglas wrote the majority opinion in *Skinner v. Oklahoma* (1942), which struck down an Oklahoma statute providing for compulsory sterilization after the third conviction for a felony involving moral turpitude, but excluding such felonies as embezzlement. His opinion contained a long passage that made the claim that procreation was one of the basic civil rights of man—a claim he made without citing a single precedent or any other source material. And in *Harper v. Virginia Board of Elections* (1966) Justice Douglas wrote the majority opinion striking down the poll tax, a small fee a voter had to pay before being allowed to vote. His opinion brushed past the two previous cases in which the Court had upheld the poll tax. He made no reference to the doctrine of precedent. Instead, after a cursory summary of a number of other opinions, he announced that the earlier poll tax cases were now overruled. His reason was simply stated: "Notions of what constitutes equal treatment for purposes of the Equal Protection clause do change."

In short, it is the rare justice who consistently takes an existing precedent as settled law and follows it despite the fact that it means he must adopt a conclusion with which he personally disagrees. Justice Scalia has written, "[I] would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face" (*Booth v. Maryland* [1987]). But from time to time such adherence to precedent does occur. For example, in *Board of Education v. Allen* (1968) the Court declared that a complex system for lending secular textbooks to Catholic school pupils for use in secular courses did not violate the establishment clause; that is, the Court concluded that loan of these books had neither the purpose nor primary effect of advancing religion. By 1976 a majority of the Court had become more wary of financial arrangements that might, even indirectly, aid religion. (I am shamelessly summarizing here a great deal of complex and confusing material.) Thus, in *Wolman v. Walter* (1977) the Court struck down as unconstitutional the loan to nonpublic school students of such instructional materials as wall maps; but in that same case the Court also, once again, upheld the loan of secular textbooks. Now note the peculiar result the Court reached in this case. The Court concluded, based on *Allen*, that it would uphold the textbook loan as a matter of *stare decisis*, yet the Court also refused to rely on *Allen* to guide its decision regarding the loan of maps and other equipment. Having decided to follow *Allen* as to the loan of textbooks, but having refused to follow it as to the loan of maps, the Court might have been expected to distinguish books from maps. But it did not. Hence the Court reached inconsistent results on problems that we must assume the Court saw as identical.

DISTINGUISHING, RESTRICTING, AND EXPANDING PRECEDENT

Overruling precedent is only one way for the Court to change direction. The more usual methods employed by the Court are different, less obvious, and less dramatic. Let me classify these techniques into two general categories: *narrowing the implication* of a precedent and *broadening the*

implications of a precedent. The narrowing interpretation of precedent takes two forms: (1) **distinguishing** the precedent so as to limit its implications, and (2) interpreting the holding (i.e., the *ratio decidendi*), rules, doctrines, principles, and tests of the precedent narrowly or *restrictively* so as to limit the implications of the holding. The broadening interpretation of precedent also takes two forms: (3) **generalizing** or **abstracting** from the facts of the precedent so that it applies to a wide range of new cases, and/or (4) interpreting the holding (i.e., the *ratio decidendi*), rules, doctrines, principles, and tests of the precedent broadly so as to expand the implications of the precedent.

Let us now relate, in the form of a matrix, the broad and narrow interpretation of precedent to different categories of precedent: (1) precedent that involved a judgment to strike down as unconstitutional a governmental policy and (2) precedent that involved a judgment to uphold a governmental policy.

The rest of this chapter will elaborate on this matrix. For the moment, note that cells I and IV are in a sense two sides of the same coin. That is to say, narrowing the area of impermissible actions (by narrowly interpreting precedent that struck down a governmental policy) has similar practical effects to broadening the area of permissible actions (by interpreting broadly precedent that upheld a governmental policy). The same is true of cells I and III: narrowing the area of permissible action has the same practical effect as broadening the area of impermissible action.

The materials that follow illustrate the techniques the justices have used in interpreting precedent narrowly or broadly. These are techniques employed by both liberal and conservative justices. That is, justices, regardless of political preference, use these techniques to step around precedent they find embarrassing, and to bring to their aid precedent they think useful.

	Precedent Striking Down a Governmental Policy	Precedent Upholding a Governmental Policy
The Narrow Interpretation of Precedent	<i>Cell I</i> Limiting the Area of Impermissible Actions	<i>Cell II</i> Limiting the Area of Permissible Actions
The Broad Interpretation of Precedent	<i>Cell III</i> Expanding the Area of Impermissible Actions	<i>Cell IV</i> Expanding the Area of Permissible Actions

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CONCLUDING OBSERVATIONS

Our discussion has illustrated the following techniques for interpreting precedent: distinguishing precedent; determining the *ratio decidendi* strictly in light of the facts of the case (i.e., counting as

material all the facts of the case); determining the *ratio decidendi* loosely (i.e., eliminating as not material to the decision certain facts of the precedent); generalizing and abstracting from the specific facts of a case; arguing by analogy; restrictively reading a rule or test announced in the case; broadly reading a rule announced in a case; determining that what appears to be either the *ratio decidendi* or rule is in fact *obiter dictum*.

It is common for a justice to employ all these techniques in budding a justification. When you read an opinion you will see the opinion writer distinguish away the precedent he or she wants to avoid. You will see the justice seeking to declare as *obiter dicta* other comments made in an opinion he or she wishes to dispose of. You will see the writer accept other precedent as relevant, and then by use of an analogy support his or her decision. Yet other precedent will be interpreted to determine the opinion's rules, tests, or its *ratio decidendi*. These rules, tests, and *ratio decidendi* may themselves undergo further interpretation—either a broad or narrow construction. The writer will then apply these rules and tests to the facts of the case in order to justify the decision.

By now it should be clear that precedent is a fairly plastic substance that can be used in a variety of ways to support and challenge a variety of positions. I am not saying that precedent is infinitely plastic, but certainly it is hard to say that there is a single correct interpretation of a precedent. Precedent is available to be used by both the majority and the dissenting justices in ways they think best supports their position. Thus, you should be wary when a justice announces with great certitude that precedent "A" means "X." You can be sure that there may be yet other plausible versions of the precedent, and more often than not the dissent will bring at least some of these alternative interpretations to your attention.

NOTES

1 Suppose, however, that the only precedent the judge in case "B" could find was cases in which the plaintiff deliberately inflicted physical harm by hitting the defendant. These cases, involving a "battery," are *distinguishable*. Hence, finding no case like case "B", the judge would have two choices: He could conclude that the plaintiff could win her suit since there is no binding rule that he could use to write justification in support of the plaintiff, or he could "extend" the battery cases, using them to justify decision that essentially made "new law."

2 Glanville Williams, *Learning the Law*, 11 th ed. (London: Stevens and Sons, 1982), p. 75.

3 The Courts attitude toward the doctrine of *stare decisis* is different regarding decisions interpreting a federal statute. The Court has written, "The burden home by the party advocating the abandonment of

an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done" (*Patterson v. McLean Credit Union* [1989]). See also *Booth v. Maryland* (1987) and *Smith v. Allwright* (1944).

4 For example, in *Adarand Constructors, Inc., v. Peña* (1995) the Court specifically overruled a recent affirmative action decision, *Metro Broadcasting, Inc., v. FCC* (1990) on the basis that the decision represented a "surprising turn" and was inconsistent with its other affirmative action decisions.

5 Earl M. Maltz, "Some Thoughts on the Death of Stare Decisis in Constitutional Law," *Wisconsin Law Review* (1980): 467. In a more recent opinion justice Rehnquist noted that over the past 20 terms the Court overruled in whole or part 33 of its decisions (*Payne v. Tennessee* [1991]).