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The Doctrine of Precedent in the United States of America

Mortimer N.S. Sellers

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The Doctrine of Precedent in the United States of America

American conceptions of precedent developed and are best understood in the context of the American common law tradition in which they have played such an important part since the first English settlement of America in the early seventeenth century. The doctrines of respect for judicial precedent and fundamental human rights were two central pillars of the common law, as it was understood in North America at the time of the Revolution. The newly independent states conceived of themselves as protecting English common-law rights against British oppression, and the primal importance of independent judges, judicial precedents and fundamental human rights has remained central to the self-perceptions of the American legal profession ever since. This does not mean that American theories of precedent were then or ever have been well worked-out in practice. Old common-law attitudes toward precedent are so deeply ingrained in the behavior of American lawyers and judges that they hardly rise to the conscious level. This can produce a certain confusion, when judges try to explain the principles behind their decisions, but there has been a remarkable consistency in practice, maintained by attitudes passed from generation to generation within the American legal profession.

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The lack of any detailed theoretical understanding of precedent has not prevented American judges and lawyers from evangelizing precedent to their colleagues around the world. In fact, many American lawyers see the practical, untheoretical, common-sense elaboration of the law by judges, through precedent, as one of their system's primary virtues. The clarification of the law through cases can also make abstract constitutions and the legislature's formal statutes more useful to citizens, by making the law more certain and more predictable. Understood in this way, as it is by most judges and lawyers, the concept of precedent in the United States is simply the recognition that judicial decisions have the force of law and must be respected, not only by the litigants in particular cases, but also by the government, the public, lawyers and (in most cases) by the courts themselves. The courts usually respect their own internal lines of authority, so that the United States Supreme Court has the ultimate word in federal and constitutional cases, followed by the United States Court of Appeals, followed by the United States District Courts, and so forth. Each state's own courts have a similar hierarchy, culminating in a single high court, whose precedents are followed by all the subordinate tribunals.

The essence of the American system of precedent as experienced in practice resides in the great authority and hierarchical arrangement of the courts. Common-law customs, state and federal constitutions, and the enactments of legislatures all establish broad principles and general rules that are worked out in detail by courts in deciding actual cases and controversies brought by litigants whose real interests are at stake. Judges try to decide these cases on the narrowest possible grounds. This makes it easier to distinguish subsequent cases, which may require different results. The practice of precedent may differ slightly as applied to (1) the common law, (2) constitutions, and (3) legislation, which will be examined separately.

8. Ibid. This is the canonical view.
rately below, but all depend ultimately on the culture of American lawyers, as developed in the course of their separation from Britain, mostly in the eighteenth century, and perpetuated by the tenacity and conservatism of the Courts.

I. The Common Law

From the very beginning of English settlement in North America, the British monarchs encouraged emigration by guaranteeing colonists the same liberties, franchises, and immunities that they would have enjoyed had they remained in England. This commitment slowly dissipated in the practice of the British government during the colonial period, but it remained important to Americans, whose claims to common-law rights provided the rationale that justified their growing antagonism towards their colonial masters. When they finally declared their independence from Britain, Americans justified their decision in part as a defense of "the free System of English Laws," so that when the newly independent states established their written constitutions, they were quick to reaffirm the common law of England, as it existed at the time of their separation from Britain.

English and American conceptions of the common law were diverging already before their separation in 1776, as Americans tried to use law and precedent to constrain governmental power, and British officials denied their pretensions. Americans embraced the arguments of England's seventeenth-century judges and lawyers against the crown, while British officials echoed the arguments of their increasingly authoritarian monarchs. Thus Americans preserved an earlier conception of the common law, as articulated most eloquently by Sir Edward Coke in his Institutes of the Laws of England (1628-1644), and the English drifted gradually towards the attitudes of Thomas Hobbes, as expressed in his Leviathan (1651), and propagated by his disciple Jeremy Bentham, who believed that law is a

12. The Charter of Virginia, April 10, 1606 at XV.
13. E.g., Stephen Hopkins, The Rights of Colonies Examined (Providence, 1764), reprinted in Charles S. Hyneman and Donald S. Lutz, American Political Writing During the Founding Era (Indianapolis, 1983) at I.46-47.
15. See, e.g., A Declaration of Rights, and Constitution and Form of Government agreed to by the Delegates of Maryland, November 11, 1776 at III: "That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to that law, and to the benefit of such of the English statutes as existed at the time of the first emigration, and which, by experience, have been found applicable to their local and other circumstances, and of such others as have been since made in England, or Great Britain, and have been introduced, used and practiced by the courts of law or equity. . . ."
“command . . . addressed to one formerly obliged to obey.” The British command theory pushed English common law towards viewing precedent as a form of judicial legislation, while American judges continued to feel themselves constrained to discover and respect the common law through reason and judicial precedent, rather than to make it themselves.

This is not to say either that mutual influence between England and the United States ended with the Revolution, or that Americans frequently discussed or even remembered the sources of their somewhat different conception of precedent in the common law, but the difference remains. Sir Edward Coke had praised the common law as having been “by the wisdom of the most excellent men, in many successions of ages, by long and continual experience (the trial of right and truth) fined and refined.” Coke viewed law as the “artificial perfection of Reason,” understood by generations of judges through long study and experience, and not created by any particular individual, because “no man [is] . . . wiser than the Law.” Thomas Jefferson echoed widespread American attitudes when he said of Edward Coke that “a sounder whig never wrote, nor of profounder learning in the orthodox doctrines of the British constitution, or in what were called English liberties.” Later William Blackstone also came to have a strong influence on American law and legal education, a development which Jefferson deplored, but even Blackstone understood precedent as Coke had, rooted in the reason and experience of England's judicial tradition.

William Blackstone's Commentaries on the Laws of England collected and elaborated his lectures as the first Vinerian Professor of English law at Oxford University. Published in four volumes between 1765 and 1769, Blackstone's Commentaries knew enough about incipient American rebellion to attack and deny its premisses. Admitting that “law is the birthright of every subject, so wherever they go they carry their law with them,” Blackstone viewed the American plantations as “conquered or ceded countries,” so that the common law of England “has no allowance or authority there.” Despite his fundamental disagreement with colonial attitudes on this

16. See Thomas Hobbes, Leviathan (London, 1651) at 26-137. Bentham's adoption of this view can be seen, for example, in his A Fragment on Government (London, 1776) at I.12.11.
21. Ibid., pp. 1513-1514.
point, which was ultimately settled by war, Americans found Blackstone’s well-organized description of the common law extremely useful in developing their own new institutions. James Wilson, signer of both the Declaration of Independence and the United States Constitution (of which he was a principal draftsman), chief author of Pennsylvania’s constitution, and one of the original justices of the United States Supreme Court, explained Blackstone’s influence on American law well in his own Lectures on Law, which summarized the state of legal institutions in the new republic. Although not “a zealous friend of republicanism,” Blackstone was “clear and methodical,” and worthy of consultation (except on questions of public law).

Blackstone described judicial decisions as the “principal and most authoritative evidence, that can be given, of the existence of such custom as shall form part of the common law.” Common law judges had made it their rule to abide by former precedents, he explained, “to keep the scale of justice even and steady, and not liable to waiver with every new judge’s opinion.” This was because judges were sworn to determine cases, “not according to their private judgment,” but “according to the known laws and customs of the land.” Blackstone admitted one exception, “where the former determination is most evidently contrary to reason.” But even in such cases “the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation.” So the attitude that Americans derived from Blackstone was “that precedents and rules must be followed, unless flatly absurd or unjust.”

Coke and Blackstone bequeathed to American common-law judges the general presumption that law is the perfection of reason through experience, so that whatever is not reasonable, cannot be the law. This has had a lasting effect on American jurisprudence, which expected from the beginning that the common law would change with time, applying itself differently to different circumstances. James Wilson explained in his lectures that it is “characteristic of a system of common law, that it be accommodated to the circumstances, the exigencies, and the conveniences of the people,” so that through gradual and successive alterations, it remains materi-

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24. Ibid., p. 80. To the extent that Blackstone embraced the Hobbesian theory of law as a “rule of action prescribed by some superior . . . which the inferior is bound to obey,” Wilson rejected him entirely. Ibid., p. 103.
26. Ibid.
27. Ibid.
28. Ibid., I.70.
29. Ibid.
30. Ibid.
ally and substantially the same, at least in its fundamental principles. Like the ship of the Argonauts, the common law retained its shape, Wilson explained, “though almost every part of her materials had altered during the course of her voyage.”

This older American attitude, insisting on the sanctity of precedents in general as embodiments of reason and experience, but avoiding too rigid a doctrine of *stare decisis* in particular cases, persisted through the nineteenth century, even as British common law became increasingly rigid and formalistic, under the influence of Jeremy Bentham and his disciples. Chancellor James Kent’s *Commentaries on American Law*, even in the late twelfth edition, edited by Oliver Wendell Holmes in 1873, referred to many “hasty and crude decisions,” which “ought to be examined without fear, and revised without reluctance, rather than to have the character of the law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.” Kent added that not even a long series of congruent decisions should always be viewed as conclusive evidence of what is law.

Remembering the early history of the American common law has been necessary, because its application has become so automatic and unreflective in the modern era that it goes almost entirely unexplained, even in the cases that apply it. Kent summarized the consensus that: (1) the best evidence of the common law is found in the decisions of the courts; (2) adjudged cases become precedents for future cases resting on analogous facts; (3) judges are bound to follow these decisions, unless it can be shown that the law was misunderstood; because (4) the community has a right to regulate their actions and contracts by law; so that, (5) “when a rule has been deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon clear manifestation of error.” Kent insisted that the reasoning of the judges in precedent cases is relevant only to the extent that it is strictly necessary to decide the questions at hand.

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34. Ibid., p. 473.
35. Ibid.
36. Ibid., p. 475.
37. Ibid., p. 476.
38. Ibid.
39. Ibid., p. 477.
Expressions of the courts that "go beyond the case" are known as "dicta" and carry less precedential weight. United States Supreme Court Chief Justice John Marshall explained the usual common-law view that dicta "may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."40 This lesser deference towards dicta may sometimes embolden lower courts to disregard the general doctrinal statements of high court judges, who will not feel bound by their own most sweeping or philosophical pronouncements. Marshall considered the reason for this maxim to be obvious: "[t]he 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 other cases is seldom completely investigated."41 Dicta usually provide a useful guide to the future opinions of the Court, without carrying the precedential authority of the central holding in the case.

The common law in the different North American states has inevitably diverged somewhat since each first separately received its own common law from England or from another state, so what the common law of the states now have most in common is the attitudes born of their common origin in eighteenth-century American revolutionary ideas.42 American attitudes toward precedent are the attitudes of Coke, Blackstone, Marshall, and Kent, although courts no longer feel the need to cite these authors, or the decisions on which they relied.43 If anything the old connection between precedent and reason has become more pronounced. For example, the highest court in Maryland recently negated the old common-law interspousal immunity doctrine, which enjoyed considerable antiquity in England, as well as in Maryland itself.44 The court reasoned that "the interspousal immunity doctrine is an antiquated rule of law which . . .

41. Ibid.
42. Justice Harlan explained that "our ancestors brought with them the principles of the common law and claimed it as their birthright" but "adopted only that portion which was applicable to their situation." Moragne v. States Marine Lines, 398 U.S. 375, 386 (1970), quoting Justice Story in Van Ness v. Pacard, 2 Pet. 137, 144 (1829), with numerous citations.
43. Sometimes courts go into a certain amount of detail, e.g., Mayle v. Pennsylvania Department of Highways, 479 Pa. 384, 402, 388 A.2d 709, 718: "The common law consists of those principles, maxims, usages and rules of action which observation and experience of the nature of man, the constitution of society, and the affairs of life have commended to enlighten reason as best calculated for the government and security of persons and property. Its principles are developed by judicial decisions as necessities arise from time to time demanding the application of those principles to particular cases in the administration of justice." citing People v. Randolph, 2 Parker Cr. R. 174, 176 (New York, 1855) with numerous citations.
44. Bozman v. Bozman, Court of Appeals of Maryland, 376 Md. 461 (Sept. Term 2002).
runs counter to prevailing social norms and, therefore, has lived out its usefulness."

The measure of "usefulness" in testing the value of precedents allows the abrogation of precedents which no longer make practical sense. For example, the doctrine of interspousal immunity originated in the concept of coverture, which presumed a legal identity between husband and wife.\textsuperscript{46} Coverture itself ended in Maryland with the Married Women's Act of 1898,\textsuperscript{47} but not the mutual immunity against interspousal lawsuits. Despite numerous cases reiterating the rule of interspousal immunity,\textsuperscript{48} the Court of Appeals of Maryland eventually decided that preventing husbands from suing their wives (and vice versa) served "no sound public policy,"\textsuperscript{49} and was "unsound in the circumstances of modern life."\textsuperscript{50} Exaggerating the inflexibility of \textit{stare decisis} would "mandate the mockery of reality and the cultural lag of unfairness and injustice,"\textsuperscript{51} and since some old rules of common law are simply "no longer suitable to our people,"\textsuperscript{52} the Court of Appeals of Maryland decided to join "the many of our sister States that have already done so" and "abrogate the interspousal immunity rule, a vestige of the past, whose time has come and gone."\textsuperscript{53}

The decision of the Court of Appeals of Maryland in abrogating the spousal immunity rule illustrates both the persistence and the flexibility of American doctrines of precedent. Every one of the descriptive phrases used to disparage the abrogated rule (as quoted in the paragraph above) was repeated from another earlier case. The Court made a complete review, not only of all the relevant cases in Maryland, but also of related cases in other American jurisdictions.\textsuperscript{54} The Maryland Court of Appeals reviewed the history of the doctrine, its rationale, its impact and effect on women's rights, the views of legal scholars and of the academic community,\textsuperscript{55} the opinion of distinguished United States Supreme Court justices,\textsuperscript{56} and the position taken by the \textit{Second Restatement of Torts}.\textsuperscript{57} The Maryland Court quoted the \textit{Second Restatement of Torts} at length, including its rationale for rejecting a rule which was (as the \textit{Restatement} admitted) "for

\begin{itemize}
\item \textsuperscript{45} Ibid., pp. 467-468.
\item \textsuperscript{46} Ibid., p. 469.
\item \textsuperscript{47} Ibid., p. 471.
\item \textsuperscript{48} Ibid., p. 472.
\item \textsuperscript{49} Ibid., p. 477, citing \textit{Lusby v. Lusby}, 283 Md. at 357, 390 A.2d at 88.
\item \textsuperscript{50} Ibid., p. 478, citing \textit{Boblitz v. Boblitz}, 296 Md. at 273, 462 A.2d at 521.
\item \textsuperscript{51} Ibid., p. 483, citing \textit{Moulton v. Moulton}, 309 A.2d 224 at 228.
\item \textsuperscript{52} Ibid. at 494, citing \textit{Boblitz v. Boblitz}, 296 Md. at 274, 462 A.2d at 521-522 and \textit{Harrison v. Montgomery County}, 295 Md. at 459, 456 A.2d at 903.
\item \textsuperscript{53} Ibid., p. 497.
\item \textsuperscript{54} Ibid. at 474-488.
\item \textsuperscript{55} All these listed in \textit{Ibid.} at 479.
\item \textsuperscript{56} Ibid. at pp. 476-477.
\item \textsuperscript{57} Ibid., p. 484.
\end{itemize}
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a long time the universal rule in English and American courts." The Restatement itself followed (and quoted) the dissenting opinion of Mr. Justice Harlan of the United States Supreme Court, who was construing a District of Columbia statute. When the Maryland Court of Appeals abrogated the spousal immunity rule it did so prospectively, for “all causes of action accruing after the date of the filing of this opinion.” This might seem to contradict the usual view that overturned precedents were “mistaken” and therefore never the law, but in fact “prospective” overruling developed to protect the reliance interests that help to make precedent so important and valuable. Justice Benjamin Cardozo was the most famous and influential proponent of this practice, which he promoted in his 1921 Storrs Lecture on “The Nature of the Judicial Process.” Cardozo later held for the Supreme Court of the United States that when a state decides to limit its adherence to precedent, it “may make a choice for itself between the principle of forward operation and that of relation backward.” When common law courts, as in Maryland, overturn precedents rendered “no longer suitable” by time, it makes sense to do so prospectively, so as to disturb as little as possible the settled expectations of those who have relied upon the (obsolescent) law.

The Maryland Court of Appeals’ use of the Restatement and the views of the United States Supreme Court in interpreting Maryland law, illustrates the extent to which high courts, with the authority to abrogate their own previous holdings, feel a clear responsibility to do so only when the law ceases to be “sound” or “useful,” and even then still always buttress their holdings with extensive external authority, which tends to follow the consensus of their profession, as reflected in the opinions of the American Law Institute and of prominent judges. The culture of American judges constrains them to respect higher authority, whenever such authority exists, and to seek persuasive authority, even when they sit on the highest court in their jurisdiction. Courts tend to chip away at old doctrine, before rejecting it entirely, so that even the Bozman case overturning spousal...
immunity could cite older Maryland cases which had criticized the interspousal immunity rule, without yet entirely destroying it.66

The Restatements of law, published by the American Law Institute, have had a considerable influence over the development of the common law. Created in 1923 "to promote the clarification and simplification of the law and its better adaptation to social needs,"67 the American Law Institute is made up of prominent judges and lawyers, but the Restatements are the work primarily of law professors, who are charged with presenting "an orderly statement of the common law of the United States."68 The feeling in the legal profession when its leaders first launched the Restatement project was that the large number of decisions of the courts, and the numerous instances in which the decisions were irreconcilable, "taken in connection with the growing complication of economic life," was so productive of uncertainty and lack of clarity, that the common law would have had to give way to a "rigid legislative code," unless the profession could provide some authoritative restatement to promote certainty and clarity in the courts.69

The handbook for American Law Institute reporters stresses the extent to which Restatements purport to speak for the Institute as a whole and to represent the "informed consensus" of practitioners, judges and scholars.70 "Restatements are addressed to courts and others applying existing law." They presume to describe the law "as it is"71 – or rather they "assume the stance of describing the law as it is," which is not exactly the same thing as actually doing so.72 The Restatements aim not only to "recapitulate the law as it presently exists," but also to "reformulate it, thereby rendering it clearer and more coherent while subtly transforming it in the process."73 The Restatements, like common-law judges, assume the existence of a body of shared doctrine "enabling courts to render their judgments in a consistent and reasonably predictable manner."74 The Restatement project seeks to "restore the unity of the common law as properly apprehended."75

The Restatements have had a tremendous influence on common-law judges, both in encouraging the coherence and consistency of

67. Certificate of Incorporation, American Law Institute, February 23, 1923.
69. Ibid. at pp. viii-ix.
71. Ibid. p. 3.
72. Ibid. p. 4.
73. Ibid.
74. Ibid.
75. Ibid., p. 5.
their doctrine, and in encouraging uniformity between the otherwise entirely separate state jurisdictions across the North American continent. The Restatement assumes the perspective of a common-law court, "attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a whole."\(^{76}\) Viewed in another way, the Restatements resemble codifications, while purposely avoiding the statutory form, to preserve the flexibility which is characteristic of the common law.\(^{77}\) The Restatements seek to anticipate the direction in which the law is "tending" and to assist this development by building on previously established principles.\(^{78}\) In effect, the Restatements often promote changes in the law "which make the law better adapted to the needs of life."\(^{79}\)

The tremendous influence of the Restatements in promoting the harmonization of American law is matched and reinforced by the influence of the United States Supreme Court. The same Maryland case used above to illustrate the most recent practices of common-law courts, turned directly from the Restatement of Torts to the practice of other states (while making it clear that "the decisions of our sister jurisdictions are not binding on this Court and ought not dictate the course of jurisprudence in the State of Maryland.").\(^{80}\) But when it came to discussing the rules of precedent that would apply in the case, which is to say, the underlying precedents governing the application of precedent in Maryland, the Maryland Court of Appeals turned almost entirely to United States Supreme Court cases, and specifically the Supreme Court’s decisions in Planned Parenthood v. Casey (1992), which refused to overturn a precedent protecting abortion,\(^{81}\) and Payne v. Tennessee (1991),\(^{82}\) which rejected precedents forbidding “victim impact” statements at the sentencing phase of trial.

The struggles in the United States Supreme Court over questions of precedent have been so public and so prolonged, that they have shaped the attitudes of lawyers and judges throughout the American federation, despite the court’s lack of authority over the common law in the states. The Maryland Court of Appeals cited Casey for the proposition that "stare decisis is not an inexorable command."\(^{83}\) The relevant passage in Payne v. Tennessee was quoted in full and bears repetition here. "Stare decisis is the preferred course, because it promotes the evenhanded, predictable and consistent de-

\(^{76}\) Ibid., p. 5.
\(^{77}\) Ibid.
\(^{78}\) Ibid.
\(^{79}\) Ibid., p. 6.
\(^{80}\) Bozman v. Bozman, 376 Md. 461, 490.
velopment of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Adhering to precedent is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. Nevertheless, when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent. *Stare decisis* is not an inexorable command; rather it is a principle of policy and not a mechanical formula of adherence to the latest decision.\(^8\)

This state court policy of citing United States Supreme Court decisions to explain the states' own common-law interpretation of precedents illustrates the strong desire for a continental harmonization of law that exists between the states, and the great prestige of the United States Supreme Court, even when it does not have jurisdiction. The Maryland Court of Appeals was typical in turning, first to its own decisions (which it overturned, but showed to have been tending towards abrogation for many years),\(^8\) then to the persuasive example of other states (many of which had already abrogated the doctrine),\(^8\) then to the views of scholars (who condemned the doctrine),\(^8\) then to the *Restatement*\(^8\) and finally to the United States Supreme Court.\(^8\) The example of the United States Supreme Court was particularly important in explaining the doctrine of precedent, and the Maryland Court of Appeals cited the example of *Brown v. Board of Education*, the federal case which nullified racial segregation in the schools, to show that the disgraceful practice of racial separation would have remained legal were it not for the Court's power to overturn its own previous decisions, when they proved to be "clearly wrong."\(^9\)

II. THE CONSTITUTION OF THE UNITED STATES

The Constitution of the United States of America establishes the United States Supreme Court at the pinnacle of the system of federal tribunals.\(^9\) The Supreme Court must therefore frequently examine its own precedents, and explain their continued validity.\(^9\) The stud-

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91. *Constitution of the United States of America* (1787), Art. III: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."
92. On the use of precedent by the United States Supreme Court, see Michael J. Gerhardt, "The Role of Precedent in Constitutional Decisionmaking and Theory," 60
ied terseness of the United States Constitution, and the great importance of the fundamental rights that it protects, has produced several Supreme Court decisions that excite public controversy, and rest on heavily disputed interpretations of ambiguous clauses of the founding document. Prominent among these is the case of *Roe v. Wade* (1973), which discovered a woman’s right to abortion in the Due Process clause of the United States Constitution and invalidated state laws that restrict that right. The possibility that the Court might overturn *Roe* has provoked strong interest ever since in the nature and effect of Supreme Court precedent. The Court had an opportunity to overturn *Roe* in the case of *Casey v. Planned Parenthood of Pennsylvania*, but declined to do so.

The Supreme Court’s decision in *Casey* provides a good example of a case in which the Court considered itself bound by precedent to make a decision that might well have turned out differently in a case of first impression. *Casey* concerned fundamental rights, derived ultimately from Magna Carta and the old common-law protections preserved by the Constitution. These therefore required the same application of “reasoned judgment” that is expected of common-law courts. Justices O’Connor, Kennedy and Souter relied on the academic reflections of well-known judges (Benjamin Cardozo and Lewis F. Powell) to set out a framework for their discussion of the use of precedent by the United States Supreme Court. They described the use of precedent as “prudential” and “pragmatic,” depending upon: (1) the rule of law ideal; (2) the workability of the old rule; (3) the hardship caused by upsetting reliance on prior decisions; (4) the extent to which subsequent decisions have undermined old precedents; and (5) whether facts have changed in the interim.

The two key factors in *Casey* turned out to be the reliance of society on old cases protecting abortion and the damage that the rule of law ideal would suffer in overturning such a famous and controversial precedent. Many previous Supreme Court cases had recog-
The American Journal of Comparative Law recognized the importance of reliance on legal precedents in a commercial context. The Casey opinion insisted that reliance could be equally important in "intimate relationships," which have important implications for the "economic and social life of the Nation." Moreover, to overrule such a prominent case would seriously undermine the Court's legitimacy, by calling into question the principled character of its own variable decisions. "Frequent overruling would overtax the Country's belief in the Court's good faith," particularly when revisiting divisive and controversial cases.

It is important to note that the authors of the Casey opinion reiterated the common wisdom that *stare decisis* is not an "inexorable command" and provided a list of factors to be taken into account in overruling precedents that closely followed a similar discussion offered by former Justice Lewis F. Powell, shortly after his retirement. The dissenters in Casey challenged Powell's concern for "legitimacy," but accepted the importance of reliance, and the other factors cited by the majority.

The Casey opinion referred frequently to the case of Payne v. Tennessee, which closely preceded it. Payne too had insisted on the importance of respecting public reliance on established legal precedents, the desirability of creating "settled" rules of law, and the necessity of overturning "unworkable" or "badly reasoned" precedents. Reiterating that *stare decisis* is not an "inexorable command" or "mechanical formula of adherence to the latest decision," but rather a useful "principle of policy," the Supreme Court gave

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103. Ibid. at 865-866.
104. Ibid. at 866-867.
105. Ibid. at 854, citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-411 (Brandeis dissenting) and Payne v. Tennessee, 501 U.S. 808, 842 (Souter concurring).
107. Casey at 958.
108. Ibid. at 956.
109. Ibid. at 944.
110. Ibid. at 956.
several further guidelines for identifying those cases in which overruling precedents would be appropriate. Chief Justice Rehnquist explained for the Court that constitutional cases should be particularly susceptible to judicial correction, because in such cases, “correction through legislative action is practically impossible.”

Cases involving property and contract rights, on the other hand, deserve special deference, because of the reliance interests involved.

As in the state court decisions overturning common-law precedents, the Supreme Court in Payne felt it necessary to support almost every sentence in its opinion with citations to previous cases. In addition to parenthetical references to well-known cases (such as those listed in the previous paragraph), there were footnotes to long lists of as many as fifty cases, supporting the reasoning of the court.

Opinions cited were selected for their antiquity (The Genesee Chief v. Fitzhugh (1852)) or for the reputation of the judge pronouncing them (Brandeis in Burnet v. Coronado Oil & Gas Co.) rather than for necessarily being the most recent decision on point. The 1932 dissent of Justice Brandeis in the Burnet case has come to be the opinion most often cited to support the proposition that mistakes in constitutional cases require judicial correction more often than wrongly interpreted statutes, which could be revisited by the legislature. Brandeis wrote in dissent, but his opinion is remembered more than that of the majority. This possibility of persuading future courts and lawyers encourages appellate judges to write careful and reasoned dissents, when they believe the majority to be mistaken. The Payne case corrected a decision made just four years earlier in Booth v. Maryland.

The two recent opinions overruled by Payne v. Tennessee were both decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. Both cases had been questioned by members of the Court in later opinions. This emboldened the Supreme Court of Tennessee to disregard United States Supreme Court precedents, which the Tennessee Court

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120. This at least is how they were characterized in Payne v. Tennessee, 501 U.S. 808, 828-829 (1991).
surmised (correctly) had ceased to represent the Supreme Court's actual understanding of the law. This illustrates an interesting aspect of constitutional precedent as applied by United States courts. Subordinate courts may sometimes anticipate changes in the higher court's understanding of precedent, based on hints in other high court opinions or discernible trends in the law. Dissents in previous cases had indicated the Supreme Court's desire to correct "the freshness of error" before it gained the respect of a long-established practice.121 The Supreme Court of Tennessee responded to the federal court's hints, by disregarding the mistaken rule.122 This does not contradict the underlying assumption that Supreme Court precedents "must be followed by the lower federal courts no matter how misguided the judges of those courts may [consider them] to be."123

The Supreme Court of the United States has felt particularly free to overrule its own constitutional precedents when, as in Payne, they concern procedural and evidentiary rules rather than property rights or contracts.124 This does not, however, mean the Court will do so readily, without some "special justification" to support a departure from precedent.125 Dickerson v. United States provides a recent example of a case in which the Court declined to overturn a procedural rule, the so-called "Miranda" warnings to criminal suspects, because "Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture."126 The Supreme Court is most likely to overturn its precedents when subsequent cases have undermined their doctrinal underpinnings.127 This was not the case when Dickerson reaffirmed Miranda.128

In the tradition of common-law courts since the beginning of the republic, the United States Supreme Court has always been extremely solicitous of personal liberty. The most celebrated recent examples of overruled precedents concern the "liberty" protected by the Fourteenth Amendment of the United States Constitution. For example, in the case of Lawrence v. Texas (2003), the Supreme Court declared all state laws against consensual "deviate sexual inter-

122. Payne v. Tennessee, 501 U.S. 808, 826 (1991), quotes with approval the Supreme Court of Tennessee's statement that the existing rule was "an affront to the civilized members of the human race."
124. Ibid. at 828.
127. Ibid. at 2336; Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989).
course” (anal sex) to be unconstitutional, despite earlier cases allowing such prohibitions.129 The Constitution forbids any state to “deprive any person of life, liberty, or property without due process or law.”130 Liberty “protects the person against unwarranted government intrusions,”131 and the Supreme Court has found some intrusions to be so unwarranted that to tolerate them in any circumstances would violate the due process of law.132 So although proscriptions against consensual “sodomy” have ancient roots,133 the Lawrence Court insisted that “later generations can see that laws once thought necessary and proper in fact serve only to oppress.”134

Lawrence v. Texas gives a striking example of the limits of precedent as applied to liberty (or its denial) by United States courts. “As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”135 The Constitution promises “a realm of personal liberty which the government may not enter,” whatever courts may have said in the past.136 Nevertheless, in overturning Bowers v. Hardwick, the United States Supreme Court felt compelled to argue that “precedents before and after its issuance contradict its central holding.”137 The Court cited Justice Stevens’ dissent in Bowers to support its conclusion that the Bowers holding “was not correct when it was decided and it is not correct today.”138 Using the framework for evaluating precedents laid out in Payne v. Tennessee and Casey, the Court found that there had been no detrimental reliance, the status quo was unworkable, and subsequent cases had undermined the rationale of the original decision.139 Casey upheld precedent. Lawrence overturned precedent. Both extended liberty and this was probably the most important factor in determining their results.

The Supreme Court’s test of the validity and influence of its own old precedents rests in the end, as in common-law courts, on reason and experience, applied to the circumstances and exigencies of the day.140 The Court considers whether the foundations of prior deci-

130. UNITED STATES CONSTITUTION (1787), Amendment 14.
134. Ibid. at 579.
135. Ibid.
136. Ibid. at 578.
137. Ibid. at 577.
138. Ibid. at 578.
139. Ibid. at 577.
sions have been "eroded" by subsequent cases, whether precedents have been subject to "substantial and continuing" criticism, and whether there has been "individual or societal reliance" on past holdings, but must recognize in the end (particularly with regard to protected fundamental liberties) that "history and tradition are the starting point but not in all cases the ending point" of necessary judicial deliberation.

The Supreme Court of the United States begins its deliberations in every constitutional case with the text of the United States Constitution, but then, like common-law courts, must turn to "history and tradition" to give that text meaning. In the Lawrence case, this included (in the order in which they were raised) previous Supreme Court cases, the holdings of the State courts, the suggestions of the American Law Institute, and the example of the European Court of Human Rights. This final authority (an attempt to put American practices into the context of "Western Civilization") excited some criticism in a dissent as not being "deeply rooted in this Nation's history and tradition," but many other cases show that American courts have always referred to foreign decisions, treaties and legislation as evidence of what reason requires as applied to American law.

III. Statutes and Precedent

Statutes require interpretation by courts, just as constitutions and the common law do, but they differ from constitutions in that legislatures can revise them, and from the common law in reflecting

142. Justice Kennedy's majority opinion in Lawrence v. Texas at 572, citing his own concurring opinion in County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998). Justice Scalia's dissent in Lawrence agrees that even liberty interests unsupported by history and tradition deserve "heightened scrutiny" to determine whether laws that restrict them are rationally related to a legitimate state interest. Ibid. at 593, note 3.
143. Cf. Justice Scalia's dissent in Lawrence at 593.
144. Lawrence v. Texas at 564.
145. Ibid. at 571.
146. Ibid. at 572.
147. Ibid. at 573.
148. Ibid. (Scalia dissent) at 598.
149. See, for example, the recent case of Roper v. Simmons, 125 S.Ct. 1198 (2005), which mentioned the United Nations Convention on the Rights of the Child (never ratified by the United States) and the International Covenant on Civil and Political Rights (to which the United States had made significant reservations). The majority opinion in Roper v. Simmons gives several examples of previous Supreme Court citations to foreign law (ibid. at 1199) as does the dissenting opinion of Justice O'Connor (ibid. at 1215-1216): "Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency." (with citations).
the legislature’s will. This raises questions of deference that are absent in other precedents.\\footnote{150} Justice Brandeis introduced the often-repeated idea that precedents deserve the most deference when legislatures have the opportunity to correct them.\\footnote{151} According to this reasoning, the Court should overrule its erroneous constitutional decisions more readily, because “legislative action is practically impossible,” but leave its own erroneous interpretations of statutes in place, so long as the legislature continues (tacitly) to approve them.\\footnote{152} The Supreme Court has suggested that: “Considerations of \textit{stare decisis} have special force in the area of statutory interpretation,” because “the legislative power is implicated” in the Court’s decision.\\footnote{153}

The Supreme Court of the United States suggested in 1989 that statutory precedents should only be overruled when there has been: (1) intervening development in the law, weakening the conceptual underpinnings of the decision; (2) later law has rendered the decision irreconcilable with competing legal doctrines; (3) the precedent has become a positive detriment, because of inherent confusion created by an unworkable decision; or (4) having been “tested by experience, has been found to be inconsistent with the sense of justice or with social welfare.”\\footnote{154} This list differs very little from the considerations taken into account in overruling constitutional precedents, and it now seems in retrospect that Justice Brandeis hoped to introduce a more relaxed standard for constitutional precedents, rather than a stricter precedential standard for statutes.\\footnote{155} In practice this seems to be a distinction without a difference and the Court has recognized that it is “impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court’s statutory interpretation.”\\footnote{156}

Despite occasional efforts to draw fine distinctions, the rules of precedent applied throughout the United States in common law, stat-
utory and constitutional cases seem usually to converge, and to follow the practice of the United States Supreme Court. It is not uncommon for cases that must excise unconstitutional elements from statutes, also to interpret the remaining elements of the statute in the light of common law and constitutional principles of liberty and due process. This would make it difficult to decide which standards to apply, were the standards in fact different, but in practice the courts have not been troubled by this possible inconsistency, since the legislature can still claim the last word, if it wishes to devise new legislation that better respects the Constitution, common-law liberties, or its own previous intent.

IV. Conclusion

The use of precedent by courts in the United States of America should be viewed as a tradition or a practice, rather than a legal doctrine in the strictest sense of the word, because it is so deeply embedded in the culture of the legal profession and the judiciary that it takes place without much reflection by judges. In its simplest and most important sense, the doctrine of stare decisis requires all tribunals of inferior jurisdiction to follow the precedents of courts of superior jurisdiction, to accept the law as declared by superior courts, and not to attempt to overrule their decisions. American lawyers have come to believe that "[t]he slightest deviation from this rigid rule would destroy the sanctity of the judicial practice. There would be no finality or stability in the law and the court system would be chaotic in its operation and unstable and inconsistent in its decisions." This strict rule of stare decisis, which governs lower courts in all common-law, statutory and constitutional cases, does not clarify the circumstances in which courts may overrule their own previous decisions, or deviate from their own precedents. Americans have never wandered very far down the Benthamite road of extreme stare decisis, which once bound English common-law courts to respect their own erroneous or unreasonable precedents. Perhaps this distinction between English and American practice arose in part from amor-

157. This seems to be the case in United States v. Booker, 125 S.Ct. 738 (2005).
158. Ibid. at 768. The dissenters in Booker still criticized the court for embracing "a policy choice which Congress has considered and decisively rejected." Ibid. at 771. This problem arose because the Court invalidated a part of the statute as unconstitutional while trying to preserve the rest.
159. The most frequently cited case on this point, which is such a truism that cases are rare, is Auto Equity Sales v. Superior Court of Santa Clara County, decided en banc by the Supreme Court of California, 57 Cal.2d 450, 455, 369 P.2d 937, 939-940 (1962).
161. For a discussion of the distinction between English and American practices in 1932, see Burnet v. Coronado Oil & Gas, 285 U.S. 393, 410, 52 S.Ct. 443, 449 (1932) (Brandeis dissenting), citing London Street Tramways Co. v. London County Council
phousness of the English Constitution, which leaves Parliament free to correct any perceived errors of the judiciary, but the more fundamental difference follows from the American view of law as intimately connected to reason, not a command, but truth as revealed by experience. "It is more important that the Court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience."  

This is not to say that American courts have not accepted that "very weighty considerations underlie the principle that courts should not lightly overrule past decisions." Justice Harlan listed the importance of giving the public a "clear guide," the value of helping individuals "to plan their affairs," the benefits of "expeditious adjudication," and "the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgements" as all strongly indicating that Courts should respect their own precedents. But none of these purposes would be well-served by "continued adherence to a rule unjustified in reason." American courts, steeped as they are in the common-law tradition, do not overturn precedents lightly, and when they do so, it is always with copious citations to their own prior cases, to precedents in other American courts, to the Restatement (if appropriate), to the opinions of scholars, and to whatever other courts and authorities can be found to support their interpretation of the law.  

Whether they are interpreting the common law, statutes or constitutions, American judges respect their own precedents as a "principle of policy," rather than an "inexorable command." Attitudes toward precedent have been remarkably stable throughout American history, with small changes of rhetoric, usually in dissents, depending upon the perceived needs of the day. At the moment, more "lib-

165. Ibid.
166. Ibid. at 405.
167. Most of these sources are "persuasive" rather than "binding" precedent. The concept of "binding" precedent is only really valid in the American context when following courts of superior authority.
eral” judges tend to exaggerate the binding force of precedent,\textsuperscript{169} while more “conservative” judges tend to disparage the precedents of earlier “liberal” courts,\textsuperscript{170} but neither view has had much influence on the traditional consensus that departures from precedent require some “special justification” to justify the damage to settled expectations they inevitably represent.\textsuperscript{171}

American judges find it easiest to overturn old precedents, when experience has proved them to be unworkable or a long line of subsequent precedents has gradually undermined their foundations.\textsuperscript{172} They find it hardest to do so when property, contracts,\textsuperscript{173} or liberty\textsuperscript{174} is at stake.\textsuperscript{175} Common-law judges sometimes overrule precedents prospectively\textsuperscript{176} but usually not,\textsuperscript{177} because overruled precedents must be viewed as having been “mistaken” or “unreasonable” even before the high court declared them to be so.\textsuperscript{178} “\textit{Nihil quod est contra rationem est licitum},” but “reason” lies in the precedents of judges, “gotten by long study, observation and experience” of an “infinite number of grave and learned men.”\textsuperscript{179}

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\textsuperscript{171} This view was recently restated by Chief Justice Rehnquist in \textit{Dickerson v. United States}, 530 U.S. 428, 443, 120 S.Ct. 2326, 2336 (2000).


\textsuperscript{175} See also \textit{Casey} at 844: “Liberty finds no refuge in a jurisprudence of doubt.”

\textsuperscript{176} E.g., \textit{Bozman v. Bozman}, the Maryland case discussed above, applied the abrogation of the spousal immunity rule “to this case and to all causes of action accruing after the date of filing this opinion,” 376 Md. 461, 497 (2003).

\textsuperscript{177} E.g., \textit{United States v. Booker}, 125 S.Ct. 738 (2005), which has called into question all the cases decided under the U.S. Federal Sentencing Guidelines.

\textsuperscript{178} “Most evidently contrary to reason.” Blackstone, \textit{Commentaries} at I.69.

\textsuperscript{179} So we return in the end to Edward Coke, the ultimate origin of American attitudes towards precedent in law. Sir Edward Coke, \textit{Institutes I}, sec. 138 (Frankal-moin, part 5).