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Fast Facts

- Although an understanding of the use of precedent should infuse all aspects of appellate advocacy, our theoretical and practical understanding of it is still primitive.
- Advocates should identify applicable precedent and decide what it means.
- Having identified the broad and narrow readings of applicable precedent, the advocate should next evaluate the outcome on the basis of how precedent is interpreted and applied.
- Familiarity with techniques that constrict, modify, create new precedent, and even "kill" precedent allows an advocate to more creatively discuss the decisions and more precisely analyze their strength and scope.

Advocate's Toolbox

By Mary Massaron Ross

Techniques to help appellate lawyers evaluate precedent and craft analytically precise arguments

Precedent, stare decisis, and reasoning by analogy have formed a part of the fabric of the law since the time of Bracton and before.[1] The doctrine of precedent has been described as "a traditional art of judicial decision; a traditional technique of deciding with reference to judicial decision in the past; a traditional technique of developing the grounds of decision of particular cases on the basis of reported judicial experience."[2] It means "the process whereby judges follow previously decided cases" or it "may refer to the decided case itself—a 'precedent' which may be relied on in the future."[3]

Appellate courts are bound by decisions of the past (horizontal stare decisis) and lower courts are bound by those of higher courts (vertical stare decisis).[4] Thus, adherence to precedence fosters the rule of law's requirement that like cases be treated alike. It also fosters certainty and stability in the development of the law.[5] Following precedent is important because of the "desirability that the law furnish a clear guide for conduct of individuals to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments."[6]

An understanding of stare decisis and the use of precedent should infuse all aspects of appellate advocacy.[7] But "[d]espite the centrality of the practice of following precedent, our theoretical [and practical] understanding of the practice is still at a very primitive stage."[8] This overview of precedent is intended to provide a roadmap for the appellate advocate when handling precedent.

Identify Potentially Applicable Precedents

The advocate must carefully analyze prior decisions to determine the "leeways of precedent."[9] Finding decisions that relate to the issue is easy, but evaluating the extent to which they will control the outcome is more important and much more difficult. The successful advocate adeptly uses the techniques for handling precedent to distinguish adverse authority or persuasively argue that it should control the outcome.

Determine What the Precedent Means

It is a truism that later courts are bound by the holding of a decision and not by obiter dicta. But what this means in a given case is subject to debate. One legal scholar explained that "the force of the principle of stare decisis is inversely related to the deciding court's discretion to determine what a rule of precedent stands

for."[10] The amount of discretion depends in part on the theory of precedent adopted by the court.

Precedent Based on Ratio Decidendi

The ratio decidendi is "the principle of law on which the decision is based."[11] A minimalist approach makes only the rule, or ratio decidendi, binding. The precedential constraint under this theory reaches no further than the "part of the rule announced by the precedent court's opinion that was necessary to that decision."[12] This may be narrower than the articulated characterization of the rule; if so, the articulated rule may be seen as dicta.[13]

Precedent Based on Result

The outcome in light of the facts is binding under a result-centered approach. In other words, the binding precedent is the "proposition that on the facts of the precedent (or some of them) the result of the precedent should be reached."[14] This view of precedent ignores or discounts the articulated rationale in favor of binding future courts based on the outcome in light of the material facts. Some academics have tried to formulate mechanical rules for evaluating the material facts but others have insisted that "because every material fact can be stated at different levels of generality, each level of generality will tend to yield a different rule, and no mechanical rules can be devised to determine the level of generality intended by the precedent court."[15] Reading precedent in terms of the result provides little or no constraint since the rule can be reformulated almost endlessly by focusing on different facts or by increasing or decreasing its level of generality.

Precedent Based on Articulated Rule

A third approach, the announcement approach, makes the articulated rule binding.[16] The breadth with which a rule is announced will therefore have a great deal of impact on how broadly the decision will apply as precedent. Likewise, the "degree to which a decision in a particular precedential case will control the outcome in later litigation depends largely on the concreteness of the doctrine established in that case."[17] The announcement approach, nevertheless, "tends to minimize judicial discretion and to maximize replicability." It also conforms to the analysis that courts most often use, since they "normally use announced rules as their starting points."[18]

Llewellyn's Techniques for Following Precedent[19]

Having identified the broad and narrow readings of potentially applicable precedent, the advocate should next evaluate the outcome on the basis of how precedent is interpreted and applied. Advocates should consider Karl Llewellyn's "workbench of tools" when constructing their argument. Some techniques constrict, modify, or create new precedent. Others "kill" the precedent. Familiarity with these techniques allows an advocate to more creatively discuss the decisions and more precisely analyze their strength and scope.

A court may exercise a "range of choice" when it follows precedent. For example, a court may announce that a "rule is too firmly established to disturb." Or, while following it, the court may articulate doubts about the rule or disapprove the policy embodied in it. And employing precedent in one area may allow a court to override "a broader principle" that would otherwise come into play. Or the precedent may be applied by translating a holding into rule form. The court may also accept and apply the explicit reason or theory instead of the rule or holding. Furthermore, the court may transform "a practice of judicial action" that was previously "unaccompanied by discussion" into a rule that will now be followed.

Courts may also create new precedent while following existing precedent. For example, the court may follow a prior holding even though the facts of the case are distinguishable on the ground that the reason applies. Or the court may consciously extend a rule to a new fact situation or distinguish it because the rationale does not apply. New precedent is created out of old when the court attributes a "simple positive rule (or concept)" to a "negative twin," and then applies it as though the "negative implication has been considered, announced, and held." New precedent is created when a court distinguishes a prior rule "because its reason does not fit."

Some techniques allow for even more expansive or changed use of authority. For example, a court may apply "an unnecessarily broad basis for decision" to "the edge of is language, in uncharted territory." The court may also redirect the development of the law by applying "an unnecessarily broad basis for decision via language and reason to a bold new area." Or it may quote a "pure dictum" and apply it as "an authoritative rule." Moreover, the court may accept an "unnecessary ruling as a principle" to be "applied or even extended." And the court may quote a dictum about the "reason of the situation" making it the foundation of a principle, which is then applied to a new situation.

Llewellyn's Techniques for Avoiding Precedent

Llewellyn makes clear that some techniques are legitimate methods of handling but avoiding existing authorities. A court may recognize a rule but find "difficulty" in its application. Or the court may announce that "[e]ach case must be dealt with on its own facts."

But techniques that allow a court to avoid precedent without addressing it or explaining why it should not apply are illegitimate. These include basing the decision on the proverbial distinction without a difference or ignoring the constraints of a past decision because of a factual analysis that misinterprets or misclassifies the facts in the record, and "knowingly disregard[s]" the decision "without mention."

Llewellyn identifies other various techniques for narrowing a precedent. The court may limit the rule or provide a "whittling

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'explanation.'" The court may "[u]ndercut or distinguish via the authorities used in the older case." The court may confine a prior decision to its exact facts. Or the court may "kill" the precedent entirely. This may be done by announcing that a decision "can no longer be regarded as authority" in light of some more recent decision, or the court may announce that a decision involved "a misapplication of the true principle" or that it is explicitly overruled.

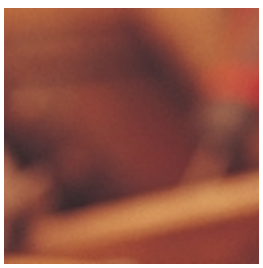
Llewellyn's discussion of techniques for handling precedent is a handy primer for both courts and practitioners alike. Thoughtful use of these techniques expands the realm of possible outcomes in a given case and assists the advocate in making the most persuasive presentation possible. But these are not the only considerations for handling precedent. It is also useful to consider the area of the law—common law, statutory law, or constitutional law.

Common-law and Text-based Precedent

Reasoning from prior judicial decisions is sometimes called common-law reasoning. The "basic pattern of legal reasoning is reasoning by example."[20] In contrast, reasoning from statutes or a constitution is grounded on the words. As a result, the words remain the touchstone for future courts as much or more than any judicial gloss that has been placed upon them. Courts and scholars have long debated whether stare decisis should be given more weight when considering precedent involving the common law, precedent interpreting a statute, or precedent applying a constitutional provision.[21] Some argue that the judiciary should be more free to overturn existing precedent when it deals with the common law because that area of law is judge-developed. They suggest that once a statute has been interpreted, the interpretation should not be modified because the legislature's failure to legislatively override the judiciary's interpretation suggests approval.[22]

More recently, some courts (including the Michigan Supreme Court) have rejected this reasoning and refused to give special weight to precedent interpreting statutes. The Michigan Supreme Court, for example, has questioned one of the rationales for upholding precedent interpreting statutes, the doctrine of legislative acquiescence, and concluded that it is not an accurate measure of legislative intent.[23]

The Michigan Supreme Court has also observed that "stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions determining the meaning of statutes." In the Court's view, when a court "confound[s] those legitimate citizen expectations by misreading or misconstruing a statute, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction." Based upon its unwillingness to let "judicial usurpation" stand, the court concluded that precedents that could be so characterized "gain no higher pedigree as later courts repeat the error."[24]



Similarly, some insist that constitutional interpretations should be more readily subject to change because it is so difficult to correct a judicial error by amending the constitution. But others argue that constitutional interpretations should be less readily changed by the Court because it evidences unprincipled decisionmaking and threatens the court's legitimacy.[25] No single approach to precedent is consistently embraced by all members of any court. The advocate will need to carefully analyze the precedent in a jurisdiction to determine the weight likely to be given to these categories of precedent and the analytical approach that is most widely accepted.

Factors Affecting Whether to Overrule or Uphold Erroneous Precedent

Precedent is traditionally subject to reversal when "there has been an intervening development of law, when the rule it promulgated has proved unworkable, or when its underlying reasoning is outdated or inconsistent with contemporary values."[26] Moreover, changes in "the law, either through judicial doctrine or legislative intervention, [may] have removed or weakened the conceptual underpinnings from the precedential ruling."[27] And the "facts [may] have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[28] Arguments based on the passage of time render older decisions easier to attack. But Justice Scalia has said that the "respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity."[29]

One factor that weighs heavily in favor of overturning precedent is a court's conclusion that the existing law is unworkable. In *Nawrocki v Macomb County Road Commission*, for example, the court observed that the "failure to consistently follow Ross, specifically with regard to the interpretation and application of the highway exception, has precipitated an exhausting line of confusing and contradictory decisions."[30] According to the court, past decisions "have created a rule of law that is virtually impenetrable, even to the most experienced judges and legal practitioners." Thus, the court was willing to overrule some precedent in order to "set forth a clear rule of law."

Justice Harlan likewise relied on this type of analysis to overrule a prior decision. He observed that the past precedent was based on a distinction that was "in practice unworkable."[31] He also noted that the precedent had "been uniformly criticized by commentators" and that "lower courts have quite evidently sought to avoid dealing with its applications or have interpreted it with uncertainty." The judge concluded that the "formulation, whatever its abstract justification, cannot stand as an every-day test." Similarly, the United States Supreme Court overturned *National League of Cities v Usery*[32] because the rule it adopted had proven to be unworkable in practice and any rule that the Court could adopt in its place would "inevitably invite an unelected judiciary to make decisions about which state policies it favors and which ones it dislikes."[33]

Courts have sometimes considered the margin of victory when evaluating the strength of precedent. So an advocate may argue that stare decisis carries less force in decisions by a split court.[34] On the other hand, the Supreme Court justified upholding *Roe v Wade*

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because stare decisis should be given "rare precedential force" where "the Court acts to resolve the sort of unique, intensely divisive controversy reflected" in the Court's original decision. The Court feared that "[o]nly the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance."[35]

Precedent may be overruled based on a successful attack on the decision's soundness. Courts may criticize an earlier court's unexplained departure from prior precedents, a substantial error in the historical analysis that gave rise to the decision, a limited and insufficient discussion of the issue in existing precedents, or a decision that is at odds with prior decisions. Courts may also overrule a precedent because it is based on an uncritical acceptance of an illogical or poorly reasoned doctrine or because it has been extensively criticized. Courts also consider the reliance interest in any existing rule, particularly in the context of property rights, commercial cases, or other areas where the reliance interests are likely to be high.

An Advocate's Reading of Precedent

A successful advocate will evaluate the scope of precedent, carefully consider whether it can be distinguished, narrowed, expanded, or applied to a new area. If possible, an argument can then be constructed using Llewellyn's toolbox of techniques. If necessary for the desired outcome, the advocate may argue that existing precedent should be overturned. Although this is the most difficult argument because it requires violating the normal rule of stare decisis, advocates may be successful if they can point to some of the factors counseling a reversal. Providing a careful, analytically precise argument is among the most satisfying tasks that appellate advocates can undertake. With these considerations in mind, their task should be easier. ✦

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Footnotes

1. Rupert Cross, Precedent in English Law 21 (2nd ed 1968) quoting Bracton, *De Legibus*, f. I (b).
2. Roscoe Pound, *The Theory of Judicial Decision*, 36 Harv L Rev 641, 648–649 (1923).
3. Terence Ingman, The English Legal Process 283 (7th ed 1983).
4. Rafael Gely, *Of Sinking & Escalating: A (Somewhat) New Look at Stare Decisis*, 60 U Pitt L Rev 89, 94 (1998); Cross at p 35.
5. See generally, Frederick Schauer, *Precedent*, 39 Stan L Rev 571 (1987); Earl Maltz, *The Nature of Precedent*, 66 NC L Rev 367 (1988).
6. *Moragne v States Marine Lines, Inc*, 398 US 375, 403 (1970).
7. See Gely at 94.
8. Larry Alexander, *Precedent* 3, 253 in A Companion to Philosophy of Law and Legal Theory (ed. Dennis Patterson 1996).
9. Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 62-117 (1960).
10. Melvin Aaron Eisenberg, The Nature of the Common Law 51 (1988).
11. Ingman at 284.
12. Eisenberg at 52.
13. See Cross at 79–86. See also Arthur Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L J 161 (1930).
14. Eisenberg at 52; Alexander at 30.
15. Eisenberg at 53.
16. Id. at 55.
17. Maltz.
18. Eisenberg.
19. Llewellyn.
20. Edward H. Levi, An Introduction to Legal Reasoning 1 (1949).
21. See Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 66 Geo Wash L Rev 68 (1991), Lawrence L. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 Mich L Rev 177 (1989); William N. Eskridge, *Overruling Statutory Precedents*, 76 Geo L J 1361 (1988).
22. See *Patterson v McLean Credit Union*, 491 US 164 (1989).
23. *Donajkowski v Alpena Power Co*, 460 Mich 243, 258–259 (1999). See also Stephen Markman, *On Interpretation and Non-Interpretation*, 3 Benchmark 291 (1987); Frank H Easterbrook, *Stability and Reliability in Judicial Decisions*, 78 Cornell L Rev 422 (1988).
24. *Robinson v City of Detroit*, 462 Mich 439 (2000).
25. See Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L Rev 401 (1988); Philip B. Kurland, Politics, The Constitution, and The Warren Court 37–38, 90–91 (1970); William W. Justice, *The New Awakening: Judicial Activism in a Conservative Age*, 43 SW L J 657, 666–67 (1989); Erwin Chemerinski, *Foreword: The Vanishing Constitution*, 103 Harv L Rev 43, 103–04 (1990); Philip Frickie, *Stare Decisis in Constitutional Cases: Reconsidering National League of Cities*, 2 Const Commentaries 123 (1985); Maurice Kelman, *The Forked Path of Dissent*, 1985 Sup Ct Rev 227 (1985).
26. Amy L. Padden, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis after Payne v Tennessee*, 82 Geo L J 1689, 1694 (1994).
27. Gely at 141.
28. *Planned Parenthood v Casey*, 505 US 833, 855 (1992).
29. *South Carolina v Gathers*, 490 US 805, 824 (1989) (Scalia, J, dissenting), overruled by *Payne v Tennessee*, 501 US 808 (1991).
30. 463 Mich 143 (2000).
31. *Swift & Co v Wickham*, 382 US 111 (1965).
32. 426 US 833 (1986).
33. *Garcia v Metropolitan Transit Authority*, 469 US 528, 546 (1985).
34. See *Payne v Tennessee*, 501 US 808, 829 (1991).
35. *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 836 (1992).