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Many current legal scholars argue that factors other than stare decisis are, or should be, the prime motivators in judicial decision making. Though contrary to traditional legal precepts, these arguments have gained widespread acceptance. In this Article Professor Maltz examines the role that precedent plays in judicial decision making. The Article first examines the theoretical justifications for relying on precedent and then sets forth an analytical framework against which the precedential value of a case may be measured. Professor Maltz thereby offers an alternative rationale for the role of precedent which permits competing societal influences to be reconciled with stare decisis.

In contemporary legal scholarship, one fashionable trend is to denigrate the importance of precedent in judicial decision making. Numerous commentators have noted that judges' decisions essentially are political and are influenced by many of the same considerations as those of other governmental actors. Some of these commentators argue that if one wishes to truly understand the nature of the judicial process, she should concentrate on these common political considerations, rather than the vagaries of what is generally described as "legal reasoning."[1]

Few would argue that the actions of courts are not affected profoundly by the basic political/moral culture in which the courts operate. An important tenet of our political/moral culture, however, is that judges should feel strongly constrained by prior case law. The result of the influence of this tenet is that the doctrine of stare decisis does in fact have a profound influence on judicial decision making. Virtually every opinion is replete with references to decided cases. In some situations the opinion will consist almost entirely of such citations; in other cases, judges will engage in complicated reasoning to analogize or distinguish established authority. In any event, even a cursory reading of the reports reveals that reliance on precedent is one of the distinctive features of the American judicial system.

This Article investigates the manner in which precedent operates to influence the decisions of judges.[2] The Article explores the values that are served by

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1. *See, e.g.*, Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473 (1984); Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383.

2. E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948). K. LLEWELLYN, THE COMMON LAW TRADITION (1960), and Simpson, *The* Ratio Decidendi *of a Case and the Doctrine of Binding Precedent*, in OXFORD ESSAYS ON JURISPRUDENCE 148 (A. Guest ed. 1961), are perceptive general studies of the concepts of precedent in the American and British systems, respectively. R. DWORKIN, LAW'S EMPIRE 240-50 (1986), R. DWORKIN, TAKING RIGHTS SERIOUSLY 110-115 (1977), R. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICA-

emphasizing prior case law in the decision making process. It then examines the factors that influence the scope of precedent. Finally, the Article discusses the conditions under which prior case law can be overruled.

I. THE JUSTIFICATIONS FOR FOLLOWING PRECEDENT[3]

A. *Certainty and Reliance*

The most commonly heard justification for the doctrine of stare decisis rests on the need for certainty in the law.[4] In planning their affairs, it is argued, people should be able to predict the legal consequences of their actions. Such predictability can only be obtained if judges can be expected to follow precedent in making their decisions.

Admittedly, any change in the law will generate some social costs as affected parties adjust their behavior. These costs are often overstated, however; many certainty-related problems relate not to the *fact* that a precedent is overruled, but rather to the technique used by the overruling court.

This point emerges most clearly when the argument of certainty is pressed by one who has actually relied on existing law.[5] Suppose, for example, that a party to a contract (*P*) knows that in the past the courts have interpreted a particular term in a manner favorable to him. He then bargains to have that term included in the contract, giving up other points in the process. If the courts were later to interpret the relevant term in a manner unfavorable to *P*, one might well argue that his justified expectations have been defeated.

The difficulty with this argument is that it relates to the *timing* of change in law rather than the fact of change itself. As an illustration of the point, consider the action of the Michigan Supreme Court in *Parker v. Port Huron Hospital*.[6] In *Parker* the court abrogated the doctrine of charitable immunity, which had prevailed in the state since the decision in *Downes v. Harper Hospital*.[7] Challenging the decision to overrule *Downes*, one might well conclude that charitable institutions planned their activities and budgets with the assumption that they would

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TION (1961), Lyons, *Formal Justice and Judicial Precedent*, 38 VAND. L. REV. 495 (1985), and Moore, *A Natural Law Theory of Interpretation*, 58 SO. CAL. L. REV. 277, 359-376 (1985), seek to determine the ideal role for precedent in the judicial system. Writings such as Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 480-89 (1984), Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949), Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982), Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979), and Stevens, *The Life-Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1 (1983), focus on the role of case law in the Supreme Court. Finally, Easterbrook, *supra*, Kornhauser & Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986), and Maltz, *The Concept of the Doctrine of the Court in Constitutional Law*, 16 GA. L. REV. 357 (1982), discuss the problems created by the phenomenon of multimember courts.

3. Other perceptive discussions of this problem include R. WASSERSSTROM, *supra* note 2, ch. 4, and Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

4. *See, e.g.*, R. WASSERSTROM, *supra* note 2, at 68-70; Radin, *Case Law and Stare Decisis: Concerning* Prjudizienrecht in Amerika, 33 COLUM. L. REV. 199, 200 (1933).

5. Wasserstrom draws a sharp distinction between arguments based on certainty and those based on reliance. *See* R. WASSERSTROM, *supra* note 2, at 60-69.

6. 361 Mich. 1, 105 N.W.2d 1 (1960).

7. 101 Mich. 555, 60 N.W. 42 (1894).

be immune from tort liability. Based on the same assumptions, these institutions may have failed to obtain liability insurance. Thus, the argument would conclude, *Parker* was wrongly decided because it defeated the justified expectations of the institutions relying on the *Downes* rule.

The force of the argument is dramatically reduced, however, when one realizes that the Michigan court explicitly limited the effect of *Parker* to causes of action arising after the decision was filed. Charitable institutions are certainly entitled to base their actions only on the law that is *currently* in effect. Once *Parker* overruled *Downes*, the rule in Michigan became that charities were not immune from tort liability. At that time, institutions were no more entitled to rely on *Downes* than on some legislative enactment superseded by later law. Thus, since the *Parker* rule was made prospective only in application, the values of certainty and reliance suffered little damage.

Of course, the defendant in *Parker* itself may have relied on the *Downes* precedent to its detriment. Fear of damage to the expectations of a single defendant, however, hardly seems a sufficient reason to retain a rule that will be unjust in a wide range of cases. Moreover, if the protection of justified expectations is deemed a paramount consideration, the remedy is not to require that the unjust precedent remain intact, but rather to make the announcement of a new rule *entirely* prospective—a practice which, although rare, is not unknown.[8] In short, unless one is willing to require that judicial decisions be retrospective in operation, arguments based on the need to preserve the certainty of individual rules have little force as justifications for the doctrine of stare decisis.

B. *Equality*

A second common defense of stare decisis holds that the use of precedent is necessary to ensure that similarly situated litigants are treated equally.[9] In order to analyze this argument, one must carefully define the concept of "equality." Any two cases will differ in some respect—if only in the identity of the litigants involved. The question thus becomes what types of equality are important.[10]

Virtually all would agree that two incidents adjudicated by the same court, occurring in the same place and at the same time, and arising out of facts which are identical except for the identity of the litigants, should be treated equally. Conversely, it is also clear that society views with equanimity the possibility that rights will change over time. Legislation presents a classic illustration. For example, when a state legislature replaces the Uniform Sales Act with Article 2 of the Uniform Commercial Code (UCC), no one would find it strange that the Uniform Sales Act governs one case while the UCC controls later litigation.

With this example in mind, it becomes clear that, as in the problem of certainty, the problem of equality actually relates to the issue of retroactivity rather

8. For a more elaborate defense of the practice of prospective overruling, see R. KEETON, VENTURING TO DO JUSTICE 25-53 (1969).

9. *See* R. WASSERSTROM, *supra* note 2, at 69-72.

10. *See generally* Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (arguing that rhetoric of equality should be abandoned because it causes confusion and logical errors).

than to the role of precedent generally. So long as a decision is prospective only, one is faced with a situation analogous to the replacement of the Uniform Sales Act by the UCC. In the *Parker* situation, for example, different hospitals would face differing liability rules depending on the time in which the relevant conduct took place. Certainly one would not find anything amiss if this difference were the result of prospective legislative action. Similarly, substantial issues regarding unjustly unequal treatment arise only when an overruling decision is given *retroactive* effect.

C. *Efficiency*

The doctrine of stare decisis often is defended on the ground that it promotes judicial efficiency. Justice Cardozo, for example, argued that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[11] Despite the facial appeal of this argument, a closer analysis undermines much of its persuasive force.

First, the degree to which reliance on precedent actually eases the rigors of judicial decision making can easily be overstated. Admittedly, in most cases judges will be freed from the burden of directly reexamining the policy justifications underlying particular rules of law. In place of this reexamination, however, the courts are faced with the duty of determining which potentially applicable precedent is most nearly like the case at bar—a process that presents its own difficulties. Moreover, because the American doctrine of stare decisis is not an absolute, inflexible rule, another potentially complicating factor is introduced into the judicial decision making process: in some situations advocates will argue a particular precedent should be overruled. In such cases the court will not only reexamine the reasons underlying the adoption of a particular rule of law, but also determine whether countervailing concerns are sufficient to outweigh the force of the concept of precedent itself. In those situations, rather than simplifying the judicial process, the doctrine of stare decisis actually adds an additional level of complexity.

Nonetheless, the ability to rely on precedent no doubt simplifies the task of judging. But efficiency alone cannot justify the prominence of stare decisis in the Anglo-American system. In essence, the argument for efficiency is based on the proposition that it is better to decide cases quickly than correctly. As Wasserstrom points out, if this truly were the primary goal of the system then one would adopt a method such as flipping coins and eliminate the rigors of legal reasoning entirely.[12] Thus, while the promotion of efficient decision making is

11. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1925). *See also* Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147, 154 (1981) (Stevens, J., concurring) (interest in facilitating the labors of judges is not insubstantial); R. WASSERSTROM, *supra* note 2, at 72-74 (considered as one justification for the model of precedent, the argument for efficiency is both plausible and persuasive); Radin, *supra* note 4, at 200 ("[I]f precedents are followed the law is more readily discoverable than if they are not.").

12. R. WASSERSTROM, *supra* note 2, at 73.

one advantage of relying on precedent, other forces also must be at work.

D. *The Appearance of Justice and the Avoidance of Arbitrary Decision Making*

One of the most widely shared values in the American political system is that principles governing society should be "rules of law and not merely the opinions of a small group of men who temporarily occupy high office."[13] The doctrine of stare decisis reinforces this value in two ways. First, it fosters the *appearance* of certainty and impartiality by providing a seemingly neutral source of authority to which judges can appeal in order to justify their decisions. Second, the influence of precedent works to limit the actual impact which any single judge (or small group of judges) has on the shape of the law.

If appearance alone were the criterion, the doctrine of stare decisis primarily would affect the form of judicial opinions rather than the actual content of the decisions made. As any law student knows, virtually any judicial decision can be analogized to or distinguished from any other fact pattern.[14] Therefore, if preserving the veneer of certainty and impartiality for public consumption were the major concerns, judges simply would reach their decisions independently and then write opinions justifying those decisions in terms of preexisting case law.[15]

Predictably, one can find any number of decisions that appear to reflect this phenomenon.[16] However, one also can identify many cases in which precedent actually seems to influence the result. The continuing influence of stare decisis reflects the fact that even in a post-Realist world, society expects judges in some significant sense to be lawfinders rather than lawmakers. As members of society, judges themselves have by and large internalized this view. Their training as lawyers reinforces this perception of the judicial role. Thus, because judges believe that law should be made by reference to "neutral" principles of precedent, those principles in fact have a strong influence on decision making.[17]

One might argue that in reality, the doctrine of stare decisis simply transfers plenary decision making authority from one potentially arbitrary individ-

13. Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147, 154 (1981) (Stevens, J., concurring); *see also* Pollock v. Farmers Loan & Trust Co., 157 U.S. 429, 652 (1895) (White, J., dissenting) ("The fundamental conception of a judicial body is that of one hedged about by precedents that are binding on the court without regard to the personality of its members.").

14. *See* Radin, *The Method of Law*, 1950 WASH. U.L.Q. 471, 484.

15. *Cf.* Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424-25 (1981) (court should decide cases in manner calculated to advance socialism and disguise and couch decisions in legalistic rhetoric).

16. *Compare* Paul v. Davis, 424 U.S. 693 (1976) (court held plaintiff's constitutional rights were not violated as a result of the distribution of a flyer of "active shoplifters," including plaintiff's photograph and name, when plaintiff was arrested for shoplifting, but the charges were subsequently dismissed) *with* Wisconsin v. Constantineau, 400 U.S. 433 (1971) (court held unconstitutional a Wisconsin statute authorizing the posting of notices in retail liquor outlets prohibiting gifts or sales of liquor to persons determined to have caused neglect to their families or to be a potential threat to the peace, without notice or hearing to such persons).

17. For an interesting exchange debating the process of this internalization, compare Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982), with Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1326 (1984).

ual—the contemporary judge—to another—the predecessor judge who generated the relevant precedent.[18] If the doctrine of stare decisis were absolute and the application of precedent a simple, mechanical matter, then this complaint might be justified. However, judges are in fact informed by extrinsic values in their application of preexisting case law to new situations. Moreover, if the relevant case law is sufficiently antithetical to the judge's values, she can in some cases simply overturn prior law. The result is that the overall pattern of the law reflects a blend of the value systems of both past and present judges, leaving room for both continuity and change.

In short, the most convincing explanation for the prominence of precedent in American jurisprudence is simply that the concept of stare decisis reflects very basic notions about the proper function of judges in the lawmaking process. In order to understand more fully the influence of precedent, two sets of issues must be addressed. The first set involves the scope of the impact of any given holding on the decisions in later cases. The second set of issues involves the circumstances under which precedents are to be abandoned. The remainder of this Article discusses these two sets of issues.

II. THE SCOPE OF A PRECEDENT

Typically, the holding in a particular case (the "precedent case") is said to control the result in all future cases in which the facts are similar to the precedent case in all relevant respects.[19] Unfortunately, this description alone is not very helpful. As already noted, all cases will be similar to the precedent case in some respects; conversely, any case could be distinguished from the precedent case on some factual ground. Thus, one must determine which differences are relevant and which are not.

An uncontrovertible answer to the question of which factual differences are relevant to a case's precedential impact cannot be obtained until the precedent case is actually interpreted by later courts.[20] To a certain degree, however, the potential impact of a case as precedent will be determined at the time the relevant decision is rendered. Traditionally, discussion of this point has focused on distinctions between the concepts of holding, *ratio decidendi*, and dictum.[21] A

18. *See* R. WASSERSTROM, *supra* note 2, at 78-79.

19. *See* BLACK'S LAW DICTIONARY 1577 (rev. 4th ed. 1968).

20. *See* Deutsch, *Precedent and Adjudication*, 83 YALE L.J. 1553, 1555 (1974).

21. *See, e.g.*, R. CROSS, PRECEDENT IN ENGLISH LAW 35-102 (1968). For a debate concerning the proper method of determining the *ratio decidendi* of a case see Goodhart, *The Ratio Decidendi of a Case*, 22 MOD. L. REV. 117 (1959) (attempting to clarify the theory he expressed in his 1930 article, in light of the debate between Montrose and Simpson); Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 61 (1930) (establishing what Montrose and Simpson later referred to as the "Goodhart theory"); Montrose, *Ratio Decidendi and the House of Lords*, 21 MOD. L. REV. 124 (1957) (defending the "classical view," which he believed Goodhart had controverted, that "the *ratio* was the principle of law which the judge considered necessary to the decision); Montrose, *The Ratio Decidendi of a Case*, 20 MOD. L. REV. 587 (1957) (disagreeing with Simpson's characterization of Goodhart's theory as "indistinguishable from the classical theory"); Simpson, *The Ratio Decidendi of a Case*, 22 MOD. L. REV. 453 (1959) (rejecting Goodhart's sentiment, expressed in his later article, that "there may be a divergence between the rule of law enunciated by a judge as governing his decision, and a rule which is constructed by ascertaining the facts which the judge

more useful taxonomy, however, distinguishes three different factors that are critical in determining the impact of a decision: general doctrine, specific doctrine, and the rationale of the decision.

A. *General Doctrine*

When determining the scope of a precedent case, the first touchstone is identification of those principles which can be defined as general doctrine. General doctrine includes a variety of conventions, each of which embodies some assumptions concerning the use of language or the proper functioning of the courts in the overall lawmaking process. All of these conventions share a single distinguishing feature: rather than drawing their force from the specific precedent case, they rely on basic postulates that govern the system as a whole. Often these postulates are so deeply ingrained that they remain unarticulated in judicial opinions. Nonetheless, when a principle of general doctrine is clearly applicable, it typically will settle the issue of a particular precedent's relevance.

The principles governing the effect of cases interpreting written authorities—statutes and constitutions—provide a prominent example of general doctrine. Certain linguistic conventions require that the principles governing one group of cases also be applied to other groups defined by the relevant document. Conversely, a related set of conventions limits the precedential effect of statutory or constitutional case law.

In a statutory context, the development of the law under Title VII of the Civil Rights Act of 1964 [22] clearly reflects the influence of these linguistic conventions. In *Griggs v. Duke Power Co.*[23] the United States Supreme Court held that even without discriminatory intent, absent a showing of "business necessity" Title VII barred an employer from using any employment criterion that disqualified a disproportionate percentage of blacks.[24] The decision in *Griggs* was supported in large measure by reference to race-specific factors. A large part of the Court's rationale was the assumption that the inability of blacks to compete effectively on the test at issue was the result of widespread past, intentional, racial discrimination.[25] Nonetheless, six years later, the Court with little discussion unanimously held the *Griggs* disparate impact standard applicable to sex discrimination in *Dothard v. Rawlinson*[26]—a challenge to a requirement that prison guards be of a certain height and weight.[27] Moreover, on this point the *Dothard* decision attracted the support of a number of Justices who in other

considered to be material and the conclusion based upon them"); Simpson, *The Ratio Decidendi of a Case*, 21 MOD L. REV. 155 (1958) (explaining Simpson's 1957 article); Simpson, *The Ratio Decidendi of a Case*, 20 MOD. L. REV. 413 (1957) (characterizing Goodhart's theory as "indistinguishable from the classical theory" and, therefore, subject to the same criticism Goodhart and others had directed at the classical theory). For a less heated discussion of this topic see Stone, *The Ratio of the Ratio Decidendi*, 22 MOD. L. REV. 597 (1959).

22. 42 U.S.C. § 2000e-2 (1982).
23. 401 U.S. 424 (1971).
24. *Id.* at 431.
25. *Id.* at 430-31.
26. 433 U.S. 321 (1979).
27. *Id.* at 323-24.

contexts had shown themselves hostile to claims of sex discrimination and the concept of impact analysis generally.[28]

The key to understanding *Dothard* lies in an examination of the structure of Title VII itself. The same section of the statute prohibits discrimination in employment on the basis of both race and sex. Given this parallel structure, general doctrines of judicial linguistic analysis require that discrimination be defined in the same way with respect to both protected groups. Thus, once the *Griggs* Court had decreed that disparate racial impact raised a presumption that use of an employment criterion was illegal under the statute, the same presumption necessarily applied to criteria with a sexually disparate impact.

In *Dothard*, linguistic conventions operated to expand the scope of a Title VII precedent. By contrast, in *Espinoza v. Farah Manufacturing Co.*,[29] related aspects of general doctrine worked to limit the impact of judicial decisions. *Espinoza* involved a claim that Title VII prohibited employers from discriminating on the basis of alienage.[30] Plaintiff claimed that the explicit statutory prohibition on discrimination based on "national origin" was intended to cover discrimination against aliens generally.[31] Rejecting this claim, eight Justices of the Court, including some normally sympathetic to claims of alien rights, held Title VII inapplicable to the relevant discrimination.[32]

On one level, *Espinoza* can be viewed as a simple exercise in determining the intent of the legislature—an exercise governed largely by general legal conventions. The case can also be seen, however, as presenting the question of whether the resolution of claims resting on alienage-based discrimination should be governed by the same standards that determine the outcome in cases claiming racial or sexual discrimination. In essence, the *Espinoza* Court held that the race and sex precedents were not controlling—that because cases such as *Griggs* and *Dothard* purported to rest on the authority of Title VII, the impact of those cases was limited by the structure of the statute.[33] Thus, the scope of a prece-

28. For example, Justice Stewart—the author of the majority opinion in *Dothard*—also wrote for the Court in Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979), holding that disparate sexual impact was insufficient to raise the level of scrutiny under the equal protection clause. Similarly, although Justice Rehnquist was the only member of the Court to dissent from the proposition that discrimination against women should be subjected to heightened constitutional scrutiny, *see* Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Rehnquist, J., dissenting), he explicitly accepted the basic concept of impact analysis in *Dothard*. *See Dothard*, 433 U.S. at 337-40 (Rehnquist, J., concurring in part and concurring in the result).

29. 414 U.S. 86 (1973).

30. *Id.* at 87.

31. *Id.* at 87-88.

32. *Id.* at 95-96. Justice Douglas alone dissented. *Id.* at 96-99 (Douglas, J., dissenting).

33. Admittedly, at times courts will refer to statutorily-created principles in deciding cases to which the statute by its terms is clearly inapplicable. *See, e.g.*, Moragne v. States Marine Lines, 398 U.S. 375 (1970) (recovery for wrongful death allowed under federal maritime law, under which it previously had not been allowed—wrongful death statutes applying in other circumstances as the reason); Williams, *Statutes as Sources of Law Beyond Their Terms in Common Law Cases*, 50 GEO. WASH. L. REV. 554 (1982) (urging the recognition by courts, lawyers, and law students that statutes "have the potential to provide starting points from which judges may, in their discretion, reason in developing common law"). The statutes and case law decided thereunder are not considered controlling precedent in such situations; instead, they simply form part of the background from which the court determines the relevant social values that will influence its decisions.

dent was defined in large measure by general doctrinal concerns embodied in linguistic conventions.

The same types of conventions have also strongly influenced some areas of constitutional law. The state action problem provides a prime example. Under generally accepted principles, the fourteenth amendment proscribes only actions that can be attributed to the state. Purely private actions are left unaffected. Not surprisingly, a large quantity of litigation has focused on the issue of whether particular activities should be viewed as "state action" for constitutional purposes. The decisions of the Supreme Court in this area have produced a variety of seemingly irreconcilable results. One point emerges clearly, however. The Court plainly views state action as a unitary concept; that is, state action analysis in connection with the due process clause is governed by precisely the same principles that govern state action analysis in connection with the equal protection clause. For example, because the denial of a hearing by a privately owned utility does not constitute state action, racial discrimination by the same utility would not be barred by the fourteenth amendment.[34]

A number of commentators have criticized the unitary approach.[35] One popular argument rests on the observation that the state is in some way involved in virtually all state action controversies. Therefore, it is argued, the state action decisions should be viewed as implicitly resolving a conflict between the challenged practice and the asserted right to be free from that practice. Because some practices are more odious than others, the degree of state involvement required to bring those practices within the reach of fourteenth amendment constraints should be correspondingly lower. For example, the public utility's denial of a hearing might not be considered state action, but racial discrimination by the same utility could nonetheless constitute state action and therefore be subject to fourteenth amendment constraints.

In order to analyze this argument, one first must recognize that the question of whether to abandon the unitary approach revolves around the concept of precedent. The issue is whether the decision in a race discrimination case, for example, should control a later procedural due process case, and vice versa. Further, as in the Title VII cases, the state action litigation involves the interpretation of a written source of law—in this case, the fourteenth amendment. And just as the same clause of Title VII connects the term "discrimination" with both "race" and "sex,"[36] the same constitutional clause connects "[n]o State shall" with "deprive any person of life, liberty or property without due process of law" and "deny to any person . . . the equal protection of the laws."[37] Thus, the same linguistic conventions which required the Court to apply the *Griggs* standards in *Dothard* support the unitary approach to state action cases.

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34. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 373-74 (1974) (Marshall, J., dissenting).

35. *See, e.g.*, Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221; Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CALIF. L. REV. 1 (1964).

36. 42 U.S.C. § 2000e-2 (1982).

37. U.S. CONST. amend. XIV, § 1.

In short, general doctrine has a profound impact on the scope of many precedents. In a large number of cases, however, simple reference to general doctrine will not yield clear answers. In these situations, the next important reference point is specific doctrine.

B. *Specific Doctrine*

Specific doctrine consists of the rule or rules of law that a court describes as controlling the particular case before it. Typically, the specific doctrine involved consists of two components. The first is a "breadth" component—a description of the classes of cases to be governed by the legal rule enunciated. The second is a "content" component—the nature of the legal standard itself. Obviously, each component has important ramifications for the influence of the case as precedent.

1. The Breadth Component

The influence of the breadth component on the power of a precedent is illustrated by comparing the impact of *Plyler v. Doe*[38] with that of *Hampton v. McConnell*[39] and *Mills v. Duryee*.[40] *Plyler* was an equal protection challenge to a Texas statute which declared that the children of resident undocumented aliens were not entitled to a free public education. Applying an elevated level of judicial scrutiny, the Supreme Court struck down the Texas statute. At the same time, however, the scope component of the specific doctrine employed by the opinion substantially diluted the value of the case as precedent. The majority opinion indicated that the decision not to apply the deferential rational-basis test was premised both on the specific identity of the disadvantaged class—children of undocumented aliens—and the importance of the right to which they were denied access—free public education.[41] Because the confluence of these two factors will be quite rare, the impact of *Plyler* as a precedent is necessarily extremely limited.

By contrast, the breadth of the doctrines announced in *Hampton* and *Mills* substantially contributed to the impact of those decisions on the future course of the law. Both cases involved the specific question of whether a plea of *nil debet* constituted a good defense to an attempt to enforce the judgment of a court in the courts of another jurisdiction. Holding that the plea was not a good defense, Chief Justice Marshall stated the specific doctrine of *Hampton* in sweeping terms:

> [T]he judgment of a state court [has] the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced, and . . . whatever pleas would be good to a

38. 457 U.S. 202 (1982).

39. 16 U.S. (3 Wheat.) 234 (1818).

40. 11 U.S. (7 Cranch) 481 (1813).

41. The Court found that by denying the children a basic education, the Texas statute imposed "a lifetime hardship on a discrete class of children not accountable for their disabling status." *Plyler*, 457 U.S. at 223-224.

> suit thereon in such state, and none others, [can] be pleaded in any other court in the United States.[42]

By its terms, the *Mills/Hampton* doctrine controls every suit that seeks to enforce a judgment from one state in the courts of another state. Thus, for example, it no doubt had a strong impact on the resolution of *Fauntleroy v. Lum*.[43] *Fauntleroy* was a Mississippi action to enforce a Missouri judgment on a cotton futures contract. In Mississippi, enforcement of such contracts was against a strong public policy, embodied in a criminal statute; moreover, the Missouri action had been based on a Mississippi contract, and defendant was a Mississippi resident. Nonetheless, citing the *Mills/Hampton* doctrine, a majority of the Supreme Court held that the Mississippi courts were required by the full faith and credit clause to enforce the Missouri judgment.[44]

In short, the nature of the class defined by specific doctrinal rules plainly has a major impact on the strength of the precedent creating the doctrine. The impact of the precedent further depends in large measure on the precise content of the legal principle adumbrated in the precedential case. The next subsection examines the impact of the content component.

2. The Content Component

The degree to which the 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. Concrete standards leave later judges little room to maneuver, making the doctrine itself the dominant force in the decision making process. By contrast, vague doctrinal formulations do not, in and of themselves, dictate results. Thus, courts in later cases will have more leeway to consider other factors without damaging the basic concept of stare decisis.

The development of the constitutional constraints on quasi in rem jurisdiction provides a prime illustration of this point. *Pennoyer v. Neff*[45] initially established the rule that a state might constitutionally seize any property within its jurisdiction and use that seizure as a basis to adjudicate a claim against the owner for the value of that property. Under *Pennoyer*, this rule applied even if the basis of the claim was entirely unrelated to the property itself.[46] In 1977, the Court overruled *Pennoyer*, holding in *Shaffer v. Heitner*[47] that henceforth quasi in rem cases were to be governed by the standards set forth in *International Shoe Co. v. Washington*.[48] Thus, jurisdiction over an absent defendant can be sustained only if the defendant "[has] certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[49]

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42. *Hampton*, 16 U.S. (3 Wheat.) at 235.
43. 210 U.S. 230 (1908).
44. *Id.* at 236-37.
45. 95 U.S. 714 (1877), *overruled by* Shaffer v. Heitner, 433 U.S. 186 (1977).
46. *Id.* at 723.
47. 433 U.S. 186 (1977).
48. 326 U.S. 310 (1945).
49. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

The difference in impact between the *Pennoyer* and *Shaffer* doctrines is dramatic. Under the *Pennoyer* regime, doctrine dominated all constitutional challenges to quasi in rem jurisdiction. The only real question was whether property existed within the forum state. Although that issue might be unclear in a small minority of extremely marginal cases,[50] in most cases resolution of the issue presented no problem. Thus, while still good law, *Pennoyer* effectively disposed of all due process attacks on the exercise of quasi in rem jurisdiction.

By contrast, *Shaffer* alone decides almost none of these challenges. The appeal to "traditional notions of fair play and substantial justice" by its nature directs the judge to consider each case individually, based on its own equities. In controlling the outcome of future cases, *Shaffer* is a much less powerful precedent than was *Pennoyer.*

This contrast should not be taken to suggest that a case such as *Shaffer* has no impact on the development of subsequent case law. By announcing a new legal standard *Shaffer* established the basic framework under which future quasi in rem claims would be resolved. Moreover, together with later case law addressing the same issue, the decision on the specific factual situation in *Shaffer* might form part of a pattern of results that would not be plausibly distinguishable from some later case before the Court. Thus, even a case based on some vaguely formulated doctrine can influence later decisions in important ways.

Conversely, even the most concretely defined rules may not be totally dispositive of all later cases to which the doctrine is defined to be applicable. At times such rules are intended to be subject to implicit limitations so familiar to the precedential court that they are not mentioned in the relevant opinion. When a later court finds that the case before it falls within one of these exceptions, the court will issue a decision seemingly at variance with the previously announced doctrine.

The development of the law of full faith and credit provides an excellent example of this phenomenon. The *Hampton/Mills* doctrine seems to clearly require that a state court recognize and enforce *all* judgments rendered by courts of other states. Yet in *Huntington v. Attrill*[51] the Supreme Court carved out an exception to this principle. *Huntington* involved an attempt to enforce a judgment based on a statute that rendered the officers of a corporation liable for corporate debts when they had signed and recorded a false certificate of the amount of the capital stock of the corporation. Rather than simply citing the *Mills/Hampton* doctrine to dispose of the case, the Court instead referred to the "fundamental maxim of international law" that " '[t]he courts of no country execute the penal laws of another.' "[52] Although it held that the particular statute at issue in *Huntington* did not constitute a penal law, the Court's opinion

50. *See, e.g.*, Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966) (an insurer's contractual indemnity on insured defendant is a debt owing to defendant and is subject to attachment).

51. 146 U.S. 657 (1892).

52. *Id.* at 666 (quoting The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825)).

clearly stated that states were not required to give full faith and credit to penal judgments of the courts of other states.

On its face the rule announced in *Huntington* might seem to be an important change in the *Mills/Hampton* doctrine. In fact, however, Chief Justice Marshall no doubt would have felt that the penal law exception was necessarily implicit in his initial formulation of the principles governing full faith and credit litigation. Indeed, it was he who stated the "fundamental maxim of international law" upon which the *Huntington* Court relied. Because the maxim plainly had no application in *Mills* or *Hampton*, he simply neglected to include the penal law exception in his formulation of the general rule. Thus, rather than being a modification of the original *Mills/Hampton* doctrine, the *Huntington* exception was simply a gloss that accurately reflected the intentions of those who formulated the original doctrine.

None of the foregoing analysis should obscure the basic principle that the force of an individual precedent as a controller of later results depends on the scope and concreteness of the doctrine established by the court in the relevant opinion. As the analysis indicates, however, one must often look to other factors to gain a clear understanding of the impact of the precedent. In many cases, the impact of the doctrine will be modified by the rationale underlying the precedential decision.

C. *Rationale*

The rationale of a case is the reason given for adopting the specific doctrine governing that case. *Graham v. Richardson*[53] illustrates the difference between rationale and specific doctrine. In *Graham*, plaintiffs challenged a variety of state rules limiting the access of aliens to welfare benefits.[54] Striking down these rules, the Supreme Court asserted that "classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular minority' for whom such heightened judicial scrutiny is appropriate."[55] The *doctrine* established by *Graham* is that alienage-based classifications are subject to close judicial scrutiny. The *rationale* for adopting that doctrine is that aliens are a "discrete and insular minority."[56] Although not always so sharply distinguished by the courts, the two concepts affect the force of precedents in quite different ways.

Rationales generally assume their greatest importance in situations in which a party attempts to expand the doctrine of a particular case beyond the limits defined by that case. One classic example is the demise of the concept of privity in products liability cases. Initially, the general rule was that when a consumer was injured by a defect in a product purchased from a retailer, the nonnegligent manufacturer of the goods who sold those goods to the retailer for resale was not liable for the injuries. Relatively early, however, the courts recog-

53. 403 U.S. 365 (1971).
54. *Id.* at 366-68.
55. *Id.* at 372 (citation omitted).
56. *Id.*

nized an exception to this doctrine for injuries caused by adulterated food.[57] The rationale for creating such an exception often remained unstated; however, the exception seemed to rest on the principle that "the consequences of eating unsound food are so disastrous to human health and life, that the law imposes a warranty of purity in favor of the ultimate consumer as a matter of public policy."[58]

In *Henningsen v. Bloomfield Motors, Inc.*,[59] the New Jersey Supreme Court seized this rationale to expand the exceptions to the privity doctrine. Addressing a claim based on an alleged defect in an automobile, the court held the manufacturer liable for injuries caused by such defects.[60] Citing cases involving adulterated food, the court argued:

> We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile. The unwholesome beverage may bring illness to one person, the defective car, with its great potentiality for harm to the driver, occupants, and others, demands even less adherence to the narrow barrier of privity.[61]

At times the impact of a rationale can even override the dictates of apparently clear specific doctrine. The development of the "market participant" exception in dormant commerce clause analysis provides a particularly forceful example of the influence of rationale. Prior to 1976, a number of commerce clause cases had established the doctrine that discrimination against out-of-state commercial interests was either per se illegal or at the very least subject to the strictest scrutiny.[62] In 1976 and 1980, respectively, the Court faced two cases that seemed on their face to fall squarely within this rule. In *Hughes v. Alexandria Scrap Corp.*[63] a Maryland program that paid bounties for wrecked cars imposed greater documentation requirements on cars proffered by out-of-state scrap yards;[64] in *Reeves, Inc. v. State*[65] a cement factory owned by the State of South Dakota reserved its production for South Dakota customers.[66] Each case provided a clear example of state discrimination against out-of-state commerce. Nonetheless, the Supreme Court found both schemes constitutional, holding that the strictures of the dormant commerce clause did not apply when the discriminating state was a "market participant" rather than a market regulator.[67]

Both cases drew sharp dissents[68] as well as generally unfavorable scholarly

57. *See, e.g.*, Race v. Krum, 222 N.Y. 410, 414-15, 118 N.E. 853, 854 (1918); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 614, 164 S.W.2d 828, 830 (1942).

58. *Capps*, 139 Tex. at 612, 164 S.W.2d at 829.

59. 32 N.J. 358, 161 A.2d 69 (1960).

60. *Id.* at 384, 161 A.2d at 84.

61. *Id.* at 382, 161 A.2d at 83 (citations omitted).

62. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322 (1979); Philadelphia v. New Jersey, 437 U.S. 617 (1978).

63. 426 U.S. 794 (1976).

64. *Id.* at 796-99.

65. 447 U.S. 429 (1980).

66. *Id.* at 432-33.

67. *Id.* at 440; *Hughes*, 426 U.S. at 809-10.

68. *See Reeves*, 447 U.S. at 447-454 (Powell, J., dissenting); *Hughes*, 426 U.S. at 817-32 (Brennan, J., dissenting).

comment.[69] Established doctrine provided a primary theme for the criticism of the decisions. Preexisting case law, it was argued, established without exception the unconstitutionality of discrimination against out-of-state interests. Both *Hughes* and *Reeves* involved such discrimination. Thus, the critics concluded, both the Maryland and South Dakota plans should have been held to violate the dormant commerce clause.[70]

Both decisions are explicable, however, when the rationale behind the general prohibition against discrimination is examined. Dormant commerce clause analysis generally is intended to preserve the federal structure of the American system. The requirement that states not adopt commercial regulations which discriminate against outsiders is simply a specific incident of this more general intention. Allowing states to provide benefits to their own citizenry without also providing similar benefits to outsiders, however, is hardly inconsistent with American federalism. Indeed, state responsibility for its own citizenry is one of the core values of that federalism. Describing a state as a market participant is essentially synonymous with saying that the state is providing a benefit. Viewed from this perspective, *Hughes* and *Reeves* simply represent the triumph of the rationale for a specific doctrine over the doctrine itself.

If only cases involving products liability and the commerce clause were examined, one might well overstate the importance of rationales in the development of case law. In fact, courts are generally more likely to ignore or modify the rationale of a prior case than the clear doctrine announced in that case. In part, this tendency reflects the fact the rationale stated in an opinion is often incomplete; the pressure of time and space constraints can preclude the full expression of the court's reasoning process. Thus, a judge often will content herself with giving the bare outline of her analysis, leaving subtleties and unstated premises to be explored in situations in which they become relevant.

Of course, as the development of full faith and credit law demonstrates, the same problem can afflict judges attempting to formulate doctrine. But in the case of doctrine, basic notions of legal process intervene. Once a position is clearly formulated as doctrine, only powerful considerations can move a future court to ignore that position. By contrast, although rationales plainly influence the course of case law, to ignore such a rationale generally is viewed as less damaging to the concept of stare decisis.

One corollary of these principles is that the development of the law under the commerce clause is somewhat atypical; more commonly, when there is a clear conflict between a doctrine and a rationale, the former will prevail. Here the alienage cases provide an excellent example. Soon after the decision in *Gra-*

69. *See, e.g.*, Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 503-08 (1981); Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1124-35 (1980). *But see* Maltz, *How Much Regulation Is Too Much: An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47, 67-69 (1981) (stating that *Hughes* and *Reeves* were correctly decided).

70. *See, e.g.*, Varat, *supra* note 69, at 505; Wells & Hellerstein, *supra* note 69, at 1129; Note, *State Purchasing Activity Excluded From Commerce Clause Review*—Hughes v. Alexandria Scrap Corp., 18 B.C. INDUS. & COM. L. REV. 893, 921-22 (1977) (stating that the decision in *Hughes* runs counter to prior well-reasoned Supreme Court precedent in the commerce clause area).

ham, the Court was faced with *Nyquist v. Mauclet*.[71] At issue in *Mauclet* was a New York statute that limited participation in a state scholarship program to citizens and aliens who either had applied for citizenship or, if not currently eligible for citizenship, had certified they would apply when eligible.[72] As the dissent pointed out, the class discriminated against was not "discrete and insular"; its members could escape the class whenever they chose to do so.[73] Nonetheless, applying the seemingly unqualified doctrine of *Graham*, a majority of the Court held that New York could not enforce the discrimination against a subclass of aliens.[74] Thus, the Court plainly preferred the *Graham* doctrine to the rationale announced in that case.

Moreover, even in cases in which doctrine is unclear, rationales often are ignored or distorted. The opinion in *Plyler* reflects the general approach toward the use of rationales as authority. Unlike the *Graham* line of cases, *Plyler* involved a claim that discrimination against *illegal* aliens violated the fourteenth amendment.[75] The majority opinion clearly recognized that such discrimination raised different issues than that decided in *Graham*.[76] The opinion also noted, however, that in cases striking down discrimination against illegitimates the Court had relied heavily on the theory that it is fundamentally unjust to punish individuals on the basis of a characteristic over which they have no control.[77] Noting that children of illegal aliens clearly constituted such a class, the Court relied on this observation in holding the challenged discrimination unconstitutional in *Plyler*.[78]

If one were faced only with the bare holding in *Plyler*, she might well conclude that the force of rationales in judicial decision making was very strong indeed. The structure of the opinion, however, creates a very different impression. The majority plainly viewed the illegitimacy cases as simply suggestive, rather than controlling. Indeed, as already noted, the Court explicitly limited its holding to the issue of education; the majority implied that in other circumstances, discrimination against the children of illegal aliens might be subject only to the rational basis test.[79] Therefore, the overall message of *Plyler* is not that the rationales of prior cases are to be given the same respect as doctrine. However much weight such rationales are to be given in the judicial decision making process, only doctrine itself is formally protected by the concept of stare decisis.

In short, although the factors determining the scope of a precedent case are diverse, they fall into a fairly clear hierarchy. The most powerful precepts are those of general doctrine, followed by the elements of specific doctrine. Typically, the rationale of a case assumes great importance only when the impact of

71. 432 U.S. 1 (1977).
72. *Id.* at 3-4.
73. *See id.* at 17-20 (Rehnquist, J., dissenting).
74. *Id.* at 12.
75. Plyler v. Doe, 457 U.S. 202, 205 (1982); *see supra* notes 38-41 and accompanying text.
76. *Plyler*, 457 U.S. at 227-30.
77. *Id.*
78. *See id.* at 218-20.
79. *See id.* at 223-25.

the other factors is unclear. Even in those cases, judges will more readily ignore rationales than either general or specific doctrine.

In any event, any precedent case is always subject to at least the possibility that it will be overruled, rendering the discussion of the scope of the precedent irrelevant. The remainder of this Article discusses the concept of overruling precedents.

III. OVERRULING AND MODIFYING PRECEDENTS

A. *General Principles*

Because of the dynamics of the judicial decision making process, the process must contain some mechanism for discarding precedents in order to function properly. Indeed, in some circumstances the operation of the doctrine of stare decisis itself is enhanced by such a mechanism. In situations in which the relevant doctrine is vague, early interpretations of that doctrine are likely to generate somewhat inconsistent results. As the number of interpretations accumulates, however, a clearer picture of the dominant approach should emerge. By overruling earlier cases inconsistent with this dominant approach, the court can eliminate confusion in the law.

The overruling of *Morey v. Doud*[80] by the Supreme Court is a good illustration of this point. In *Doud*, plaintiffs challenged the validity of a provision of the Illinois Currency Exchange Act, which excepted the American Express Company from a requirement that any firm selling or issuing money orders in the State secure a license and submit to State regulation. In response to an equal protection challenge to this statute, the Court found that the granting of special treatment to American Express was unconstitutional because the classification lacked a rational basis.[81]

As the jurisprudence of the rational basis test developed, *Doud* emerged as an anomaly in an otherwise unbroken line of cases that left the states generally free to make classifications in cases involving purely economic regulations. Nonetheless, so long as *Doud* remained a viable precedent, it confused those who (for whatever reason) needed to understand the constitutional constraints imposed by the equal protection clause. This confusion was evident in the lower courts, which at times relied on *Doud* in striking down local business regulations.[82] By overruling *Doud* in *City of New Orleans v. Dukes*,[83] the Supreme Court ameliorated this confusion and thus removed an obstacle to the efficient functioning of the doctrine of stare decisis.

Respect for stare decisis is not, however, the sole or even the primary reason why courts diverge from prior case law. Although it is a powerful force in

80. 354 U.S. 457 (1957), *overruled by* City of New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam).

81. *Id.* at 466-69.

82. *See, e.g.*, City of Miami v. Woolin, 387 F.2d 893, 895 (5th Cir. 1968); Mayhue v. City of Plantation, 375 F.2d 447, 450-51 (5th Cir. 1967).

83. 427 U.S. 297, 306 (1976) (per curiam).

the decision making process, the concept of respect for precedent must compete with other values respected by judges. Often this competition ends with some modification of the doctrine or rationale that underlies a seemingly relevant precedent; on rarer occasions a troublesome precedent is abandoned entirely or restricted to its facts.

Even in the latter context, however, the force of the concept of precedent is such that judges generally wish to *appear* to be following a course consistent with prior case law. They often solve the problem by restating the doctrine or rationale of the precedential case in a way that is consistent with the desired result in the later case. As *Huntington* demonstrates, at times this device can be used in a good faith attempt to explicate the doctrine of the precedential case. In other situations, however, courts simply are trying to avoid the appearance of ignoring the rule of stare decisis.

One problem with this dichotomy is that it often is difficult to determine whether a court is deliberately altering preexisting doctrine or making a good faith effort to interpret prior case law. Particularly on a multimember tribunal such as the Supreme Court, the two elements are likely to be mixed. The treatment of the *Graham* doctrine in *Sugarman v. Dougall*[84] and *Ambach v. Norwick*[85] illustrates this difficulty. In *Sugarman* the Court held that a New York statute barring aliens from all government employment violated the equal protection clause.[86] In so doing, the majority applied the *Graham* analysis to the challenged classification and thus subjected the state law to strict scrutiny.[87] The *Sugarman* opinion was careful to note, however, that the rule would not apply to citizenship classifications for suffrage or "persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy functions that go to the heart of representative government."[88] The majority noted that the authority to exclude aliens from such positions derives from the power and duty of the state " 'to preserve the basic conception of a political community.' "[89]

Sugarman itself established a significant exception to the principles announced in *Graham*. The exception, however, plainly constituted a good faith interpretation of the intentions of the members of the *Graham* majority. One clear indication is the fact that seven members of the *Graham* majority participated in *Sugarman*, and all concurred without comment in the formulation of the exception in the latter. On its face the exception seemed rather narrow, apparently establishing a policymaking/nonpolicymaking dichotomy for classifications based on alienage. If a position involved the formulation of broad policies or the selection of those who would make such policies, then restrictions based on citizenship would have to pass only a rational basis test. In all other

84. 413 U.S. 634 (1973).
85. 441 U.S. 68 (1979).
86. 413 U.S. at 646.
87. *See id.* at 647.
88. *Id.* at 647-49.
89. *Id.* at 647 (quoting Dunn v. Blumstein, 405 U.S. 330, 344 (1972)).

cases strict scrutiny would apply to exclusions of aliens from public employment.

The majority in *Ambach* took a different view, however. *Ambach* was a challenge to a state statute forbidding certification of aliens as public school teachers. Under the *Sugarman* approach, strict scrutiny seemed appropriate; however important their function, teachers plainly are not policymakers. Nonetheless, five Justices in *Ambach* held the rational basis test to be the appropriate standard.[90] They argued that the relevant question was whether teachers performed a "governmental function" or a " 'fundamental obligation of government to its constituency.' "[91] Given the "importance of public schools in the preparation of individuals as citizens,"[92] the *Ambach* majority found the rational basis test the appropriate standard of review and held the citizenship requirement constitutional.

On its face the *Ambach* opinion seems to represent a deliberate attempt to cut back on the clear import of *Sugarman* by intentionally misstating the doctrine of the latter. Indeed, one noted commentator confidently predicted that *Ambach* presaged the overruling of *Sugarman* itself.[93] But contextual factors suggest that this analysis is simplistic. Three of the five members of the *Ambach* majority had concurred in *Sugarman* and never renounced allegiance to the principles of that majority opinion.[94] Moreover, Justice Powell—the author of the majority opinion in *Ambach*—thereafter repeatedly emphasized the centrality of education in a variety of contexts.[95] Thus, it seems likely that for at least some of the Justices, *Ambach* simply was an idiosyncratic but good faith attempt to interpret the *Sugarman* doctrine. By contrast, other members of the *Ambach* majority—Justices Rehnquist and Stewart—had evinced general dissatisfaction with the basic *Sugarman* analysis of discrimination based on alienage.[96] They were no doubt willing to seize any device to restrict the scope of that analysis. Such ambiguities necessarily created substantial uncertainty regarding the post-*Ambach* status of *Sugarman* as a precedent.

Subsequently, the Court emphatically reaffirmed the basic *Sugarman* rule in *Bernal v. Fainter*.[97] *Bernal* was a challenge to a California statute which provided that only citizens could be appointed notaries public. Applying strict scrutiny, the Court struck down the statute, noting that "a notary's duties, important as they are, hardly implicate responsibilities that go to the heart of rep-

90. *Ambach*, 441 U.S. at 80-81.

91. *Id.* at 76 (quoting Foley v. Connelie, 435 U.S. 291, 297 (1978)).

92. *Id.*

93. *See* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1064-65 (1979).

94. The three were Chief Justice Burger and Justices Powell and White.

95. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 236-41 (1982) (Powell, J., concurring); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29-30 (1973) (discussing the constitutionality of a school financing system, with Justice Powell writing for the majority) .

96. *See* Foley v. Connelie, 435 U.S. 291, 300 (1978) (Stewart, J., concurring); *Sugarman*, 413 U.S. at 649-64 (Rehnquist, J., dissenting).

97. 467 U.S. 216 (1984).

resentative government."[98] Every still-active member of the *Sugarman* majority joined the opinion of the Court.

The Court's zig-zag course from *Sugarman* to *Bernal* has engendered considerable uncertainty regarding the constitutionality of many restrictions on the rights of aliens. Such uncertainties could have been avoided, or at least ameliorated, if the Court had directly and forthrightly addressed prior case law and either overruled the relevant doctrine or limited its scope in some manner. In other contexts, judges adopt this forthright approach when two elements conjoin. First, the judge must believe that following existing doctrine would threaten other important values—values more important than those underlying the doctrine of stare decisis itself. Second, the judge must conclude that to adopt an *Ambach*-type solution in the particular case before her would either be inconsistent with general principles of judicial candor or rest on a distinction that would be facially implausible.

The issues presented by the first element of this analysis are central to an understanding of the power of precedent in the American legal system. Judges vary substantially on the question of what values are sufficiently compelling to justify the abandonment of prior doctrine. However, two general themes recur throughout the case law. The first is the principle of the supremacy of statutes. The second is the relative significance of common-law, statutory, and constitutional precedents.

B. *The Supremacy of Statutes*

Theoretically, the influence of preexisting precedents ceases upon passage of a statute that is applicable to a particular situation. In interpreting the statute, the court is expected to seek "the intent of the legislature," applying conventions entirely different from those which govern the doctrine of stare decisis. In fact, however, prior case law continues to influence judicial decision making even when a relevant statute has intervened.

This influence is most pervasive in the definition of terms used in statutes. In drafting laws, legislatures act against the background of the existing body of case law. Thus, in seeking to ascertain the intended meaning of words used in legislation, courts naturally turn to the definitions established in that case law.

Common-law doctrine also influences the interpretation of statutes in some cases in which the language of the written law seems on its face to displace that doctrine. Judges at times strain to preserve precedents that they believe establish just rules. This tendency is readily discernible in the maxim that "statutes which are in derogation of the common law are to be strictly construed."[99]

Kaiser v. Kaiser[100] provides an excellent example of the operation of this maxim. *Kaiser* involved the interpretation of a New York statute making parents responsible for the support of children under the age of twenty-one who are,

98. *Id.* at 225.

99. *E.g.*, Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952).

100. 93 Misc. 2d 36, 402 N.Y.S.2d 171 (N.Y. Fam. Ct. 1978).

or are prospects for, receiving public assistance. The statute also provided that " '[s]tep-parents shall in like manner be responsible for the support of children under the age of twenty-one years.' "[101] At issue was a petition for support filed by a child against a stepmother whose husband, the child's father, had died.

The petitioner argued that under New York law, the death of the father did not terminate the stepchild relationship.[102] Given this position, the language of the statute seemed to make the stepmother clearly liable for the support requested. Nonetheless, the court denied the petition. Noting that the relevant provision was in derogation of the common law and thus should be strictly construed, the court relied on the absence of specific language that would extend the obligation of the stepparent beyond the death of the natural parent.[103] In so doing the court placed the statute in the context of existing common law rather than reaching the result that, in isolation, the clear statutory language seemed to require.

The same forces can operate to preserve the power of case law interpreting statutes even when that case law has seemingly been superseded by amendments to the statutes. The California experience with civil rights statutes is illustrative. An 1897 state law provided that "all citizens . . . shall be entitled to the full and equal [use of] all . . . places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens."[104] Interpreting this statute in *Orloff v. Los Angeles Turf Club*[105] and *Stoumen v. Reilly*,[106] the California Supreme Court held that under this statute "[m]embers of the public . . . have a right to patronize a public [establishment] so long as they are acting properly and are not committing illegal or immoral acts; the proprietor has no right to exclude or eject a patron 'except for good cause.' "[107] Thus, the statute barred a race track from expelling a patron who had acquired a reputation as a man of immoral character[108] and established the right of homosexuals to obtain food and drink in a bar and restaurant.[109]

In 1959 the state legislature amended the statute to provide that "[a]ll citizens . . . are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations . . . in all business establishments of every kind whatsoever."[110] On its face, this amendment seemed to supersede *Orloff* and *Stoumen* by limiting the applicability of the statute to specified types of discrimination. Nonetheless, in *In re*

101. *Id.* at 38, 402 N.Y.S.2d at 171-73 (quoting N.Y. JUD. LAW § 415 (McKinney 1983)).

102. *Id.* at 38, 402 N.Y.S.2d at 173.

103. *Id.* at 39-40, 402 N.Y.S.2d at 173.

104. Act of March 13, 1897, ch. 108, § 1, 1897 Cal. Stat. 137 (codified at CAL. CIV. CODE § 51 (1901)).

105. 36 Cal. 2d 734, 227 P.2d 449 (1951).

106. 37 Cal. 2d 713, 234 P.2d 969 (1951).

107. *Id.* at 716, 234 P.2d at 971 (quoting CAL. CIV. CODE § 51 (1901)).

108. *Orloff*, 36 Cal. 2d at 740-42, 227 P.2d at 453-54.

109. *Stoumen*, 37 Cal. 2d at 716-17, 234 P.2d at 971.

110. Unruh Civil Rights Act, ch. 1866, § 1, 1959 Cal. Stat. 4424 (codified at CAL. CIV. CODE § 51 (West 1982)).

Cox[111] the court applied this statute to prohibit discrimination against a person "who wore long hair and dressed in an unconventional manner."[112] Holding that "identification of particular bases of discrimination is illustrative rather than restrictive" and that "[t]he Legislature intended to prohibit all arbitrary discrimination by business establishments,"[113] the court continued:

> We cannot infer from the 1959 amendment any legislative intent to deprive citizens in general of the rights declared by the [predecessor] statute and sanctioned by public policy. "Without the most cogent and convincing evidence, a court will never attribute to the Legislature the intent to disregard or overturn a sound rule of public policy."[114]

Thus, once again the doctrines established by the courts prior to the passage of a statute had a strong influence on the judicial interpretation of that statute.

Of course, this is not to say that statutes never have the effect of abrogating prior doctrine. The point is that the mere fact the legislature has acted does not totally extinguish the influence of prestatutory judge-made law. Instead, legislative action simply changes the dynamic, with preexisting doctrine being one of a number of factors that influence judicial interpretation of the relevant statute.

C. *Common-Law, Statutory, and Constitutional Precedents*

Courts often assert that the doctrine of stare decisis has varying force, depending on the specific type of precedent involved. Common-law precedents provide the benchmark against which other case law is measured. Typically, precedents relying on statutory interpretation are viewed as more sacrosanct than their common-law counterparts. By contrast, the doctrine of stare decisis often is described as less important in the constitutional context than in that of either pure judge-made law or statutory interpretation.

Discussions of these principles often rely heavily on the ability of the legislature to correct judicial "mistakes." When discussing their extraordinary reluctance to overturn statute-based precedents, judges often cite the ability of the legislature to reverse erroneous interpretations of legislative intent.[115] Conversely, the perceived invulnerability of judicial interpretations of the Constitution is generally viewed as the main justification for taking a more flexible attitude toward overruling precedent in such cases.[116]

In the statutory context, the legislative correction rationale is clearly overstated. In its strongest form, the argument is that legislative silence suggests the judicial decision correctly reflects the intention of the legislature. The majority

111. 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970) (en banc).

112. *Id.* at 210, 474 P.2d at 994, 90 Cal. Rptr. at 26.

113. *Id.* at 216, 474 P.2d at 999, 90 Cal. Rptr. at 31.

114. *Id.* at 215, 474 P.2d at 998, 90 Cal. Rptr. at 30 (quoting Interinsurance Exchnage v. Ohio Cas. Ins. Co., 58 Cal. 2d 142, 152, 373 P.2d 640, 645, 23 Cal. Rptr. 592, 597 (1962).

115. *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977); Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 240 (1970).

116. *See, e.g.*, Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting).

in *Johnson v. Transportation Agency of Santa Clara City*[117] recently captured the essence of this argument: " 'When a court says to a legislature: "You (or your predecessor) meant X," it almost invites the legislature to answer: "We did not." ' "[118]

Admittedly, the legislature is free to correct statutory precedents it views as erroneous. For example, when the Supreme Court held in *General Electric Co. v. Gilbert*[119] that Title VII of the Civil Rights Act of 1964 did not outlaw discrimination based on pregnancy, Congress moved quickly to reverse the decision.[120] As a number of commentators have noted, however, the fact the legislature fails to overrule a judicial interpretation of a statute does not *guarantee* that the interpretation accurately reflects the intention of the legislature which enacted the statute.[121] The inappropriateness of relying on legislative inaction in this regard can be traced to a number of factors. First, the relevant intent in interpreting a statute is that of the legislature which enacted the statute—a body whose composition might well have changed significantly by the time a judicial interpretation has been handed down. Given such a change, the judicial action might be contrary to the intention of the enacting legislature, but entirely consistent with the biases of a majority of current legislators. In such a case, one would not expect the judicial error to be corrected.

More importantly, any judicial decision will be protected by the phenomenon of legislative inertia. Even if the majority of legislators believe a judicial decision is wrong, any number of factors might prevent the legislature from acting on that belief. For example, parliamentary maneuvering might block the will of the majority, legislators might trade off their votes for support on unrelated issues, or the matter addressed by the judicial decision might be viewed as too insignificant to occupy the time of a busy legislature. Thus, even in the absence of a significant change in the makeup of the legislature, there is no guarantee that an erroneous judicial interpretation of a statute will be corrected.

This point is well illustrated by congressional inaction in the face of both *Sinclair Refining Co. v. Atkinson*[122] and *Boys Markets, Inc. v. Retail Clerks Union, Local 770.*[123] Both *Sinclair Refining* and *Boys Markets* dealt with the interaction between the Norris-LaGuardia Act[124] and section 301 of the Labor Management Relations Act (LMRA).[125] Norris-LaGuardia generally prohibits the federal courts from issuing injunctions against labor strikes. Conversely,

117. 107 S. Ct. 1442 (1987).

118. *Id.* at 1451 n.7 (quoting G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31-32 (1982)).

119. 429 U.S. 125 (1976).

120. Act of Oct. 31, 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1982)).

121. *See, e.g., Johnson*, 107 S. Ct. at 1472-73 (Scalia, J., dissenting); H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1386-87 (tentative ed. 1958).

122. 370 U.S. 195 (1962).

123. 398 U.S. 235 (1970).

124. 29 U.S.C. § 104 (1973).

125. 29 U.S.C. § 185(a) (1978).

section 301 of the LMRA, as interpreted in *Textile Workers Union v. Lincoln Mills*[126] and its progeny, gives the federal courts authority to interpret collective bargaining agreements and, when appropriate, to order arbitration of labor disputes arising under such agreements. The question in *Sinclair Refining* and *Boys Markets* was whether section 301 should be interpreted to create an exception to the Norris-LaGuardia prohibition, and thus empower federal courts to enjoin strikes that violate no-strike provisions in collective bargaining agreements. In *Sinclair Refining*, the Court held that no such exception had been created.[127] *Boys Markets*, however, overruled *Sinclair Refining* and held that section 301 had in fact modified the prohibition on labor injunctions.[128]

Under accepted canons of statutory interpretation, either *Sinclair Refining* or *Boys Markets* must have been incorrectly decided—that is, Congress either intended to create an exception to the Norris-LaGuardia prohibition, or it did not. Yet Congress took no action to reverse either decision. Such inaction dramatically illustrates the unreliability of legislative inaction as a measure of the correctness of a judicial interpretation of a statute.

Given the inadequacy of the rationale based on the possibility of legislative correction, the special status of statutory precedents must reflect some other value. Edward Levi makes a weaker claim to justify a special status for statutory precedents. Levi suggests that maintenance of such precedents is necessary to preserve the proper relationship between the courts and the legislature:

> Legislatures and courts are cooperative law-making bodies. It is important to know where the responsibility lies. If legislation which is disfavored can be interpreted away from time to time, then it is not to be expected, particularly if controversy is high, that the legislature will ever act. It will always be possible to say that new legislation is not needed because the court in the future will make a more appropriate interpretation. If the court is to have freedom to reinterpret legislation, the result will be to relieve the legislature from pressure. The legislation needs judicial consistency. Moreover, the court's own behavior in the face of pressure is likely to be indecisive. In all likelihood it will do enough to prevent legislative revision and not much more.[129]

Levi's explanation justifies respect for precedent generally in cases of statutory interpretation. It does not, however, differentiate statutes from the common law. Pure judge-made law also is subject to legislative modification. For example, in many states in which the courts themselves have not replaced the common-law rule of pure contributory negligence with some form of analysis based on comparative negligence, the same change has been accomplished by statute.[130] Further, legislators are no more likely to embrace controversial issues in areas currently governed by common law than in those controlled by

126. 353 U.S. 448 (1957).

127. 370 U.S. at 213-15.

128. 398 U.S. at 253-55.

129. E. LEVI, *supra* note 2, at 32.

130. *See* P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS 471-74 (5th ed. 1984).

statutes. Thus, if the purpose of the doctrine of stare decisis is to force legislators to confront their responsibility to effectuate the public interest, then common-law precedents should have the same force as precedents interpreting statutes.

On its face, the argument for less stringent application of the doctrine of stare decisis in the constitutional context seems more persuasive. In this context the analysis rests on the established doctrine of judicial supremacy in constitutional interpretation. Given the inability of the legislature to override judge-made law in this area, it is argued that when an earlier decision is demonstrably wrong, it is incumbent on courts to defer "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,"[131] and to overrule the erroneous precedent.

This argument has its greatest force in situations in which the court has adopted an activist posture—for example, when the decision to be overruled held some government action to be unconstitutional. In *Lochner v. New York*[132] the Supreme Court held that laws setting the maximum number of hours that bakers could be required to work violated the due process clause of the fourteenth amendment. Thus, so long as the case remained good law, no legislature could adopt such a law and have it enforced. Only after *Lochner* was overruled[133] did maximum hour regulations become generally viable.

The situation is quite different, however, when the controlling precedent finds the challenged practice not to be inconsistent with the relevant constitutional constraints. In those cases, the legislature can effectively neutralize the constitutional holding by adopting a new statute. The interaction between Congress and the Supreme Court on the issue of the relevance of disparate racial impact to voting rights analysis illustrates this point. In *City of Mobile v. Bolden*[134] the Court held that disparate racial impact alone was insufficient to support a holding that an apportionment scheme violated the fifteenth amendment. In response to this decision, Congress amended the Voting Rights Act to provide specifically that such an impact was a relevant factor in assessing the legality of apportionment plans.[135] Thus, the importance of *City of Mobile* was substantially reduced.[136]

Of course, the amendment of the statute did not have precisely the same impact as would a reversal of *City of Mobile*. The statute could be repealed, but an analogous judicial decision could only be changed by constitutional amendment. On this point, however, a statute "reversing" a constitutional decision

131. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting).

132. 198 U.S. 45 (1905).

133. Identifying the precise date at which *Lochner* was formally overruled is surprisingly difficult. However, the case was clearly moribund by 1963. *See* Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963).

134. 446 U.S. 55 (1980).

135. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1971 (1985)).

136. The Court itself further limited the impact of *City of Mobile* in Rogers v. Lodge, 458 U.S. 613 (1982).

stands on precisely the same footing as legislative action changing a common-law rule. Thus, to distinguish nonactivist constitutional precedents from common-law decisions on the basis of legislative reversibility seems unsound.[137]

In short, attempts to rely on tangible factors to justify the different degrees of respect accorded to different types of precedent are unpersuasive. Instead, the divergent attitudes toward stare decisis can be traced to very basic perceptions regarding the judicial function in common-law, statutory, and constitutional litigation, respectively. In cases of statutory construction, the initial judicial decision on an issue is viewed as the final and necessary step in the legislative process itself. Although the legislature passes a statute without the direct intervention of the judiciary, the rights created by the statute remain largely inchoate and to some degree uncertain until a court interprets the new law. Once the initial interpretation is rendered, however, all steps necessary to effectuate the legislative scheme have been taken. Not only has the statute been passed, but the rights established by the statute have been fixed. Because alteration of the rights established by the legislature is a legislative rather than a judicial function, judicial alteration of a prevailing statutory interpretation can be viewed as a usurpation of authority. A Georgia court captured the essence of the values underlying the unusually powerful force of statutorily based precedent:

> It is true that "stare decisis" is a matter of judicial policy rather than judicial power. In this regard the common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. However, even those who regard "stare decisis" with something less than enthusiasm recognize that the principle has even greater weight where the precedent relates to interpretation of a statute. Once the court interprets the statute, "the interpretation . . . has become an integral part of the statute." This having been done, any subsequent "reinterpretation" would be no different in effect from a judicial alteration of language that the General Assembly itself placed in the statute.[138]

Analogous concerns are reflected in the decision to accord precedent less weight in the constitutional context. Constitutional decision making operates on a variety of different levels. On one level, a decision holding that a particular course of action is constitutional simply permits that course of action to be continued. On another level, the same decision places a kind of moral imprimatur on the challenged government activity, declaring it to be not inconsistent with the document that establishes the basic parameters within which government operates.[139] Legislative change can alter the course of action; it cannot, however, remove the moral imprimatur. Thus, even in this context, constitutional

137. *See* Maltz, *supra* note 2, at 371; Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 389-90 (1981).

138. Walker v. Walker, 122 Ga. App. 545, 546, 178 S.E.2d 46, 46-47 (1970) (quoting Gulf v. Moser, 275 U.S. 133, 136 (1927)); *see also* Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 257-258 (1970) (Black, J., dissenting) (Court should reverse statutorily based precedent only in extraordinary circumstances).

139. *See generally* Levinson, *The Constitution in American Civil Religion*, 1979 SUP. CT. REV. 123 (proposing that the Constitution is a "sacred text" that provides Americans with a civil religion).

precedent arguably should be treated differently than its common-law counterpart.

IV. CONCLUSION

Rather than being a simple, easily defined monolith, the doctrine of stare decisis is a complex, multifaceted phenomenon whose diverse components reflect a variety of values. Such phenomena typically defy full and accurate description. Nonetheless, by isolating and examining the various elements comprising the concept of precedent, we can deepen our understanding of the way in which that concept influences the judicial decision making process. This Article has focused on some of these elements. It is not intended to provide a complete picture of the operation of stare decisis. It is hoped, however, that the analysis has both clarified some critical points and provided a useful framework for further study.