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PRECEDENT AND CONSTITUTIONAL ADJUDICATION

The phrase *stare decisis*, which essentially means "let the decision stand", is used in common law countries to signify the idea that precedents, that is, the rules of law articulated by courts in earlier case decisions, ordinarily should govern the decision of later cases presenting the same questions of law. This idea is consistent with the common law notion that judicial decisions are themselves primary "sources of law". *Stare decisis* thus acts as a restraint on the power of common law judges and limits their discretion to decide legal questions in a more fundamental and demanding way than the civilian notion of *jurisprudence constante*[1].

Although precedent and the principle of *stare decisis* are key aspects of common law systems, these concepts have not necessarily been interpreted in the same way, or accorded the same weight, across the common law world. Nor have they been afforded the same scope of application. In the United Kingdom, for example, the House of Lords traditionally took a strict view of *stare decisis* and did not acknowledge the power to overrule its own precedents until 1966[2]. In that year, the Lord Chancellor issued a "Practice Statement", which stated that:

"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

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[1] *See*, e.g., *In re Orso*, 283 F. 3d 686, 695 & n.29 (5th Cir. 2002) (en banc) (noting uniqueness of Louisiana as hybrid civil law jurisdiction, and recognizing that court decisions are therefore treated only as secondary sources of law in Louisiana, without *stare decisis* effect, but that deference may be given, under the civilian doctrine of jurisprudence constante, to a "rule established in a solid line of cases").

[2] *See London Tramways Co. v. LCC* [1898] A.C. 37. *See* also ZENON BANKOWSKI, D. NEIL MACCORMICK, AND GEOFFREY MARSHALL, "Precedent in the United Kingdom", in Interpreting Precedents: A Comparative Study 315, 326 (D. NEIL MACCORMICK AND ROBERT S. SUMMERS, eds.,1997) ("[T]he House of Lords was, at least in theory, strictly bound to follow its own precedents. But to avoid undue rigidity in law, the House developed ever more refined approaches to 'distinguishing' precedents it later found unsatisfactory"); J.M. KELLY, The Irish Constitution 532–38 (3d ed. 1994) (GERARD HOGAN AND GERRY WHYTE, eds.) (discussing *stare decisis* in constitutional cases in Ireland).

Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so"[3].

Since 1968, when it first exercised the authority articulated in the Practice Statement[4], the House of Lords has acted with great restraint, but has nonetheless overruled a number of significant prior decisions. In 1993, for example, the Law Lords determined for the first time that legislative history could be consulted as an aid to the interpretation of statutes, and thus overruled long-standing precedent to the contrary[5].

Prior to this change in policy, the scope of judicial decision-making was theoretically circumscribed by controlling case law; in some areas of the law, the applicable body of precedent in the United Kingdom consisted of "reasoned judgments reported in various types of law report for close on 700 years"[6]. The House of Lords was thus bound to apply case law that may have been developed in the remote past and spoke to circumstances far different from those of the present day. Minor course corrections were within the power of the courts, but the Law Lords viewed radical corrections of their "mistakes", that is, the overruling of precedent, as a matter for Parliament[7].

The traditional view of precedent generally limited the flexibility of the English courts in dealing with changed circumstances. It was also the case, however, that the principle of parliamentary supremacy and the absence of a written

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3 *See* Practice Statement [1966] 3 All ER 77 (Gardiner, L.C.).

4 *See Conway v. Rimmer* [1968] A.C. 910 (overruling existing precedent that minister's assertion of Crown privilege should be accepted as conclusively preventing court from ordering production of documents).

5 *See Pepper (Inspector of Taxes) v. Hart* [1993] A.C. 593 (overruling judge-made rule of practice categorically prohibiting recourse to legislative materials). The United States Supreme Court has traditionally looked to legislative history as an aid to statutory interpretation, but that view has recently become more controversial. See, e.g., WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, AND ELIZABETH GARRETT, Legislation and Statutory Interpretation 223–36 (2000).

6 RUPERT CROSS, Precedent in English Law 4 (1961).

7 In fact, "the promotion of a statute on matters of this nature [was] often slow and difficult". *Idem*, at 5. According to RUPERT CROSS, "[t]here [were] many instances in which the recommendations of Royal Commissions and Law Reform Committees, designed to ameliorate the situation produced by case-law, have been ignored, apparently for no other reason than pressure on parliamentary time". *Idem*. More generally, CROSS noted in 1961 that "[j]udicial precedent has some persuasive effect almost everywhere", but "[t]he peculiar feature of the English doctrine of precedent is its strongly coercive nature". *Idem*, at 4. Generally speaking, "*stare decisis* [was] a hard-and-fast rule in this country [and] a great deal more than a mere maxim of judicial conduct to be followed if other things are more or less equal". *Id.* Finally, "[t]his rigid adherence to the principle of *stare decisis* on the part of the English judges [was] rendered all the more significant by the vast scope of case-law in England". *Idem*.

constitution restricted the grounds upon which parliamentary enactments or governmental action could be reviewed by the courts, and thus limited the impact that *stare decisis* otherwise might have had in these areas. In recent years, the role of the courts has changed in this respect as well, since Britain's accession to the European Union and the adoption of the Human Rights Act 1998[8].

The circumstances in the United States have been quite different. As in the United Kingdom, precedent in the United States is singularly important to the principled resolution of disputes and to the development of the law. Indeed, as Justice Cardozo noted long ago, "[t]he first thing that [a judge] does is to compare the case before him with the precedents, whether stored in his mind or hidden in the books"[9]. On the other hand, neither the United States Supreme Court nor the state supreme courts have taken the strong position that they lack the power to overrule one of their own prior decisions. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*[10], for example, Justices O'Connor, Kennedy, and Souter explained in a joint opinion:

"The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law [...] requires such continuity over time that a respect for precedent is, by definition, indispensable [...] At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed [...]

[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability [...]; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation [...]; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine [...]; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification"[11].

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[8] *See* European Communities Act 1972, ch. 68; Human Rights Act 1998, (visited December 4, 2003) (incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms into the domestic law of the United Kingdom).

[9] BENJAMIN N. CARDOZO, The Nature of the Judicial Process 19 (1921).

[10] 505 U.S. 833 (1992).

[11] *Idem*, at 854–55 (citations omitted). One commentator has compared the experience of Germany and the United States: "In the 46-year history of the German Federal Constitutional Court, in which

In the United States, precedents are authoritative and presumptively binding on the courts that rendered them. The prior decisions of a court of last resort are normally to be followed in the jurisdiction in which they were rendered, both by the court that rendered the decision and by inferior courts within the jurisdiction; otherwise they must be distinguished in some principled way from the case *sub judice*[12]. But precedents are also provisional in the important sense of being subject to revision, both through curtailment (or a refusal to extend) and through overruling.[13] Justice Cardozo made this point in The Nature of the Judicial Process, in which he quoted Munroe Smith, an earlier American scholar, who wrote that:

"[T]he method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated"[14].

In most instances, of course, the reconsideration and reformulation will be partial. As Justice Holmes explained, judges "legislate, but [...] only interstitially; they are confined from molar to molecular motions"[15]. The logic of a precedent may warrant its extension to new circumstances, but the history of

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it published 3,500 decisions, it departed from precedent in only 14 cases... In a comparable time frame, the United States Supreme Court departed in 115 decisions from 154 previous decisions... In this time period, the U.S. Supreme Court decided 6,553 cases after oral argument... This number excludes a small number of cases within the Court's original jurisdiction". THOMAS LUNDMARK, Book Review, 47 Am. J. Comp. L. 677, 681 n.39 (1999) (citations omitted).

[12] Although the federal courts of appeals are not courts of last resort, their decisions are binding on the lower federal courts sitting within their respective jurisdictions until the United States Supreme Court has established a contrary rule. See, e.g., PAUL D. CARRINGTON, *The Obsolescence of the United States Courts of Appeals: Roscoe Pound's Structural Solution*, 15 J. L. & Pol. 515, 517 (1999).

[13] In addition, an American lawyer often finds that research into the jurisprudence of her jurisdiction will not yield a case "on point", whereas relevant cases in other jurisdictions will prove helpful in analyzing the issue presented. The fifty states, the District of Columbia, and the thirteen federal appellate circuits all have their own bodies of precedent subject, in varying degrees, and according to the circumstances, to review by the United States Supreme Court. In these circumstances, there is substantial room for judicial experimentation and cross-fertilization. Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (BRANDEIS, J., dissenting) (states as laboratories for innovation).

[14] CARDOZO, *supra*, n. 9, at 23, quoting MUNROE SMITH, *Jurisprudence* 21 (1909). Karl Llewellyn articulated a rule for limiting precedent: "the rule follows where its reason leads; where the reason stops, there stops the rule". KARL N. LLEWELLYN, *The Bramble Bush* 157–58 (1951).

[15] *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917).

its past applications may counsel prudence and suggest that further extension would not be justified[16]. In such cases, the courts may either decline to extend a precedent to new circumstances, or they may affirmatively narrow the precedent and constrict the field of its operation. In other cases, the injustice perceived to result from the precedent may be sufficiently general and widespread to warrant overruling the precedent altogether, not simply limiting its effect.

A second aspect of the American approach to precedent relates to the power of judicial review. In *Marbury v. Madison*[17], the Supreme Court established the authority of the federal courts to interpret the Constitution and determine whether federal legislation and administrative action satisfies constitutional standards. Constitutional interpretation presents special issues with respect to *stare decisis*. On the one hand, it might be argued that constitutional interpretation is a particularly solemn endeavor, and that constitutional principles, once settled, ought not lightly to be revisited[18]. On the other hand, the amendment process provided for in the United States Constitution is an exceptionally cumbersome one, and the Supreme Court's constitutional "mistakes" are not likely to be corrected unless the Court does so itself[19]. Justice O'Connor made this point succinctly in *Agostini v. Felton*[20], in which she wrote:

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16 *See* CARDOZO, supra, n. 9, at 51 ("The tendency of a principle to expand itself to the limit of its logic may be counteracted by the tendency to confine itself within the limits of its history").

17 5 U.S. (1 CRANCH) 137 (1803).

18 *See*, e.g., *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 (1983) ("*stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law"). *See* also JAMES BOYD WHITE, *Acts of Hope: Creating Authority in Literature, Law, and Politics* 153–83 (1994) (approving judicial reluctance to overrule in abortion cases); EARL M. MALTZ, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wisc. L. Rev. 467 (asserting that arguments for special freedom from *stare decisis* in constitutional adjudication are overstated and underestimate institutional costs); HENRY P. MONAGHAN, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1988). In addition, of course, the power to determine the unconstitutionality of administrative or legislative action is a power that belongs, not just to the Supreme Court, but to all state and federal courts in the United States. *See* VICKI C. JACKSON and MARK TUSHNET, *Comparative Constitutional Law* 456 (1999).

19 *See* U.S. Const. art. V. In relevant part, Article V provides that: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress[...]".

Idem, The difficulty of amending the Constitution is a central feature of American constitutional government. In this respect, the foregoing provision may usefully be compared to Article 235 of the Polish Constitution of 1997, which provides that an amendment may be proposed by "one-fifth of the statutory number of Deputies; the Senate; or the President of the Republic". Polish Const. of 1997 art. 235. Passage of a bill to amend the Constitution requires adoption "by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of

As we have often noted, "*[s]tare decisis* is not an inexorable command", *Payne v. Tennesse*, 501 U.S. 808, 828 [...] (1991), but instead reflects a policy judgment that "in most matters it is more important that the applicable rule of law be settled than that it be settled right", *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (BRANDEIS, J., dissenting). That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions... Thus, we have held in several cases that *stare decisis* does not prevent us from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law[21].

In this view, the Court should be especially receptive to good arguments for overruling constitutional decisions that have not stood the test of time. As Justice O'Connor noted in *Agostini*, constitutional decisions can be overruled in only two ways: by constitutional amendment or by judicial reconsideration of the question. Unlike decisions construing the meaning of a statute, the Supreme Court's constitutional decisions cannot be overruled by Congress[22]. Perhaps Justice Cardozo overestimated the ease with which statutes may be amended, but there is truth in the distinction he implicitly drew between constitutional and statutory provisions: "Statutes are designed to meet the fugitive exigencies of the hour. Amendment is easy as the exigencies change"[23]. On the other hand, as Chief Justice Marshall observed, the Constitution was "intended to endure for ages to come, and [...] to be adapted to the various crises of human affairs"[24]. Amendment certainly is not easy; nor was it intended to be.

Deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators". *Idem.* In the case of amendments proposed with respect to Chapter I ("*The Republic*"), Chapter II ("The *Freedoms, Rights and Obligations of Person and Citizens*"), and Chapter XII ("*Amending the Constitution*"), a "confirmatory referendum" may be required, if requested by "one-fifth of the statutory number of Deputies; the Senate; or the President". *Idem*, unlike the United States Constitution, the Polish Constitution imposes strict time limits on the amendment process. *Idem*, unless such provisions are included in the proposed amendment itself, no such time limits are imposed on the amendment process in the United States. Thus, the Twenty-Seventh Amendment was proposed in 1791, but was not ratified until 1992. *See* generally ERWIN CHEMERINSKY, *Constitutional Law: Principles and Policies* 14–15, 132–34 (1997).

[20] 521 U.S. 203 (1997).

[21] *Idem*, at 235–36 (citations omitted).

[22] *See*, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[23] CARDOZO, supra, n. 9, at 83. *See* also BARRY SULLIVAN, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 Yale L.J. 541, 544 n.26 (1989) (noting that "the Court imposes a substantial and costly burden on Congress when it requires the legislative branch to overrule" erroneous judicial interpretations of statutes).

[24] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

In recent years, the Court increasingly has been asked to decide important social issues as a matter of constitutional law, and its constitutional holdings often have been perceived as politically controversial by one segment of society or another. The Court has not infrequently been asked to overrule a prior decision. For example, three of the most important decisions of last Term were cases in which the Court was asked to overrule relatively recent constitutional decisions. In *Gratz v. Bollinger*[25] and *Grutter v. Bollinger*[26], disappointed applicants for admission to the University of Michigan effectively asked the Supreme Court to overrule the Court's 1978 decision in *Regents of the Univ. of Cal. v. Bakke*[27], in which Justice Powell expressed the view that a university's consideration of race as a factor in its admissions process did not invariably violate the Equal Protection Clause, but could sometimes be justified as serving a compelling governmental interest. The Court declined to overrule that understanding in the University of Michigan cases[28]. Similarly, in *Lawrence v. Texas*[29], the Supreme Court was asked to declare unconstitutional a Texas state statute which forbade two persons of the same sex from engaging in certain intimate sexual acts. The Court accepted that invitation and thus overruled *Bowers v. Hardwick*[30], which had upheld the constitutionality of a similar Georgia statute in 1986.

The truth of the matter, however, is that the United States Supreme Court, like other common law courts, is institutionally predisposed not to overrule its own prior decisions. It is surely important that constitutional questions be settled correctly, rather than simply settled, but the values associated with continuity and predictability also cast a long shadow over the process of constitutional adjudication in the common law world. Here, as elsewhere, the need for certainty and predictability is clear[31]. Moreover, as Justice Cardozo argued, "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

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[25] 539 U.S. 244, 123 S. Ct. 2411 (2003).

[26] 539 U.S. 306, 123 S. Ct. 2325 (2003).

[27] 438 U.S. 265 (1978).

[28] In *Gratz*, the court reaffirmed Justice Powell's analysis in *Bakke*, but held that the University's undergraduate admissions program did not satisfy the Equal Protection Clause of the Fourteenth Amendment because the University's use of race in the admissions process was not "narrowly tailored" to achieve its asserted compelling state interest in diversity. *Gratz*, 123 S. Ct. at 2415. In *Grutter*, the court upheld the University of Michigan's law school admissions program on the ground that the program was narrowly tailored to achieve the University's goal of promoting diversity. *Grutter*, 123 S. Ct. at 2329–30.

[29] 539 U.S. 558, 123 S. Ct. 2472 (2003).

[30] 478 U.S. 186 (1986).

[31] See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (official immunity from liability for damages for constitutional tort where right violated was not "clearly established" at relevant time).

one's own course of bricks on the secure foundation of the courses laid by others who had gone before him"[32]. Thus, notwithstanding the bold assertions contained in certain recent decisions, such as Justice O'Connor's statement in *Agostini*, the Court is much more likely to narrow or decline to extend a questionable constitutional precedent than to overrule it expressly. In most cases, of course, the practical task facing the Court will be to decide whether the case is governed by one precedent or another, or whether one precedent or another should be extended to reach the case. Even where one precedent looms far more prominently than others, the real question for the Court may be whether that prior case can be distinguished persuasively from the case to be decided.

It is for these reasons that the initial inclination of most common law–trained lawyers is to try and distinguish an unhelpful case, rather than ask the Court to overrule it. Much of legal education in common law jurisdictions is devoted to learning how to distinguish cases persuasively, and much of the work that lawyers actually do, whether as advocates or counselors, involves that skill. Courts generally are more comfortable with such efforts, and they are more likely to grant relief along those lines. It is natural, then, that this is the way in which we typically approach our cases, and it is the way in which our cases typically are decided[33]. But cases are not invariably decided according to these rules and suppositions, and it is sometimes true that the only way to prevail in a case is by forthrightly challenging the received wisdom. That is particularly true in the context of Supreme Court adjudication, where the Court typically grants review to settle or refine a general principle, not to tinker with individual outcomes or results[34].

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[32] CARDOZO, *supra*, n. 9, at 149. More recently, PAUL KAHN has observed that "the rule of law is for us the manner in which the authoritative character of the past appears". PAUL W. KAHN, *The Cultural Study of Law: Reconstructing Legal Scholarship* 44 (1999). Thus, "[w]e can imagine a policy science that is wholly unbounded by the past, but it is not law's rule". *Idem*, at 45 (footnote omitted).

[33] As ROBERT SUMMERS has suggested, "Sometimes a judge will radically reformulate the rule of a line of precedent, effectively overturning the rule yet still say [that] he or she is following precedent... Thus CARDOZO radically transformed the law of products liability, allowing recovery in tort by a plaintiff not in contractual privity with the defendant on the basis of negligence, and discarding the contract-based requirement of privity, while not expressly overruling a single case and, indeed, purporting to follow a body of precedent". ROBERT S. SUMMERS, "*Precedent in the United States (New York State)*", in D. NEIL MACCORMICK and ROBERT S. SUMMERS, *supra*, n. 2, at 355, 402–03.

[34] The Supreme Court, as a court having discretionary jurisdiction, is not required to hear all of the cases in which one of the parties petitions for review. The Court chooses the cases that it will decide on the merits. In recent years, approximately 8,000 petitions for review have been filed each year. See, e.g., DAVID M. O'BRIEN, Opinion, *Justice: Supreme Court Can No Longer Duck The Big Issues*, Los Angeles Times, Oct. 3, 1999, at M1. The Court now typically selects about 80 to 90 cases to consider on the merits each year, which is less than half the number it accepted for review as recently as 20 years ago. See, idem.; LINDA GREENHOUSE, *In Year of Florida Vote, Supreme Court Also Did Much Other Work*, N.Y. Times, July 2, 2001, at A-12 (commenting on 79 merits cases decided in October Term 2000).

In such circumstances, the lawyers' task is a daunting one. First, the lawyer must correctly identify the case as one which is not likely to be won through the usual gambit of comparing and distinguishing the case at hand from the seemingly controlling precedents. If the lawyer's judgment in that respect is incorrect – either because she fails to perceive the exceptional quality of the case, or because she erroneously perceives that a case is exceptional when it is not – there will be little point to the lawyering that follows. Second, the lawyer must not only recognize that the case is exceptional, she must also have sufficient confidence in her own judgment to formulate a strategy that is both bold and seemingly indifferent to the customary demands of her professional training and experience, and to her deeply ingrained habits of mind. Of course, this is no time for temporizing or for ambivalence. If the strategy is to succeed, it must be pursued clearly and unambiguously. As scripture says, who shall heed an uncertain trumpet[35]? Third, the strategy must be carefully executed. The bold argument necessary to win the case is not to be governed by the usual craft rules of comparing and distinguishing precedent, but that does not mean that the lawyer's formulation of the argument is immune to the demands of craft. If it is to succeed, the argument for overruling precedent cannot be undisciplined, but it must follow a different discipline than that applicable to the ordinary case. It must be persuasive on its own terms and in its own way. An example may give some flesh to these points.

In 1965, the Supreme Court decided *Swain v. Alabama*[36]. In *Swain*, the Court addressed for the first time the question whether the government's discriminatory use of peremptory challenges in the selection of a criminal jury could constitute a violation of the Equal Protection Clause of the Fourteenth Amendment, and, if so, how such a violation might be proved[37]. In *Swain*, the

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35 *See* 1 Corinthians 14:8 (King James Version) ("For if the trumpet give an uncertain sound, who shall prepare himself to the battle?").

36 380 U.S. 202 (1965).

37 The jury selection process in the United States consists of two steps. First, the government compiles a list of those persons within the jurisdiction who are eligible for jury service. Persons from this list are called to the courthouse periodically, and on a random basis, to make themselves available for jury service. Those called to the courthouse are referred to as the "jury venire". Under the Sixth Amendment, it is now established that the venire must represent a "cross-section" of the community and cannot be selected in a way that systematically excludes identifiable groups, such as women or members of minority groups. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522 (1975). Second, when an individual case is called for trial, a randomly selected portion of the venire will be made available for possible service on the petit jury that will hear the case. Members of the venire will be questioned to determine suitability for jury service, in view of the facts and circumstances of the particular case. The jury may consist of 6 or 12 persons, depending upon the jurisdiction and the type of case involved. Each member of the venire will be questioned in order until the appropriate number of jurors has been selected. There are two grounds for challenging a prospective juror in the United States. If a prospective juror suffers from bias or some other disabling characteristic, either party may challenge her for "cause". If the disability is properly demonstrated, the trial judge will excuse

court acknowledged the continued validity of the principle that jurors "should be selected as individuals, on the basis of individual qualifications, and not as members of a race"[38]. Thus, the Court held that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause"[39]. Based on the perceived need to balance an individual's Fourteenth Amendment rights against the discretion traditionally afforded the prosecutor in the exercise of her peremptory challenges, however, the Court also held that a criminal defendant could not establish a violation of the Fourteenth Amendment by proving (through whatever means) that the state had practiced racial discrimination in his individual case[40]. Permitting discrimination to be proved through an examination of the prosecutor's conduct in one case was thought to endanger the prosecutor's traditional right to exercise her challenges without being required to give an explanation. Thus, the Court held that a defendant could establish a violation of the Equal Protection Clause in this context only by proving that the state had a longstanding, systematic practice of employing peremptory challenges to exclude members of a particular racial group from service on petit, that is, trial juries[41]. In other words, discrimination against an individual was actionable only if the individual could establish a pattern or practice of discrimination against others. As future cases demonstrated, this requirement made it virtually impossible for a defendant to establish the existence of discrimination in jury selection[42].

The decades of the 1960s and the 1970s were a period of intense development in civil rights law in the United States[43]. In 1965, when *Swain* was decided, much of that development still lay ahead. For example, the three most important civil rights statutes since the Civil War Period – the Civil Rights Act

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the prospective juror. Because the recusal of the juror rests on his or her disability, there is no limit to the number of prospective jurors who may be excused on the motion of either party in this way. As a general matter, the law also affords to each party the right to have a small number of potential jurors excused without explanation, and without the necessity of seeking the court's approval. These are called peremptory challenges. The question presented in *Swain* was whether the exercise of such "peremptory challenges" could be examined when it appeared that the prosecution was deploying these challenges for racially discriminatory purposes. *See Swain*, 380 U.S. at 221–22.

38 *Swain*, 380 U.S. at 204, quoting *Cassell v. Texas*, 339 U.S. 282, 286 (1950).

39 *Idem*, at 203–04.

40 *Idem*, at 221–22.

41 *Idem*, at 223–24.

42 *See* WAYNE R. LAFAVE and JEROLD H. ISRAEL, *Criminal Procedure* §21.3(d) at 739 (1984).

43 *See* e.g., BARRY SULLIVAN, *On the Borderlands of Chevron's Empire.* An Essay on Title VII, *Agency Procedures and Priorities, and the Power of Judicial Review*, 62 La. L. Rev. 317, 347–348 (2002); BARRY SULLIVAN, JOHN WISDOM: *Watchman of the Republic, Forester of the Soul*, 69 Miss. L.J. 1 (1999).

of 1964[44], the Voting Rights Act of 1965[45], and the Fair Housing Act of 1968[46] – would acquire increasing influence through governmental and private enforcement, and from judicial interpretation, over the following decade. With those developments would come an increasing clarity and sophistication about the nature of discrimination and its proof. In addition, the Court decided in 1968 that the Sixth Amendment right to trial by jury applies to state as well as federal criminal prosecutions[47]. In 1975, the Court further held that a criminal defendant's constitutional right to trial by an impartial jury includes the right to be tried by "a jury drawn from a fair cross-section of the community"[48].

Increasingly, the *Swain* Court's Fourteenth Amendment holding would seem out of step with the Court's evolving Sixth Amendment jurisprudence. It was also the case, however, that the Court's path-breaking Sixth Amendment decisions involved systematic discrimination in the manner by which jury lists and venires were assembled; they did not involve the process by which members of the venire were selected for (or excluded from) service on a petit jury[49]. More important, reliance on the central distinction posited in *Swain* – the difference between systematic and individual discrimination – would increasingly appear to be aberrational within the case law applying the requirements of the Equal Protection Clause of the Fourteenth Amendment to other contexts. *Swain* was seen to confuse two separate and distinct questions, namely, what constitutes a constitutional violation and how such a violation might be proved. Proof that discrimination occurred in previous cases might be proba-

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[44] 42 U.S.C. §2000e–2(a)(1) (1999).

[45] 42 U.S.C. §§1971, 1973 (1994).

[46] 42 U.S.C. §§3601–3619, 3631 (2001).

[47] *See Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (WHITE, J.) ("The position of Louisiana... is that the Constitution imposes upon the States no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed. Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which – were they to be tried in a federal court – would come within the Sixth Amendment's guarantee").

[48] *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). In 1961, the Supreme Court had upheld a Florida statute that made men eligible for jury service unless they applied for and were given a waiver, but automatically excluded women unless they affirmatively demonstrated their desire to be included in the pool from which jurors would be drawn. *See Hoyt v. Florida*, 368 U.S. 57 (1961). In *Taylor*, the court effectively overruled *Hoyt*, holding that the exclusion of women from potential service as jurors violated the defendant's right to a fair trial with a jury drawn from a cross-section of the community. Taylor, 419 U.S. at 537.

[49] *See supra*, n. 48. Indeed, in *Taylor v. Louisiana*, the Court stated that, "in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population". *Taylor*, 419 U.S. at 538.

tive as to the existence of present discrimination, but the absence of past discrimination could not logically establish the absence of present discrimination. Moreover, because the right to be tried by an impartial jury is a personal right, a defendant is constitutionally entitled to the protection of that right even if the state has not previously denied the right to others[50].

Swain established the federal constitutional rule to be applied both by the federal courts and by the state courts when called upon to apply federal constitutional law. Of course, the states have their own constitutions and laws and are free to apply their own constitutional principles, so long as those principles do not impermissibly conflict with federal constitutional law in areas in which federal law is controlling[51]. Beginning in 1978, the state courts began experimenting in this area. In *People v. Wheeler*[52], the California Supreme Court adopted a different approach. While holding that the prosecutor was entitled to a presumption that she had exercised her peremptory challenges on constitutionally permissible grounds, the *Wheeler* court permitted the defendant to interpose an immediate objection, which could be substantiated by making a complete record of the proceeding, establishing the exclusion of a cognizable group, and showing from the overall circumstances that there was "a strong likelihood" that those excused were excluded based on group association, rather than for personal characteristics[53]. If the trial court found that the defendant had made this showing, the burden would then shift to the state to show the existence of valid reasons for the exercise of its challenges[54]. If the state failed to sustain that burden, the selected jurors would be discharged and a new jury selected. Otherwise, the case would proceed to trial[55].

The rule established by the California Supreme Court focused on the individual case; there was no requirement that discrimination be shown in case after case. Subsequently, state courts in Massachusetts and New Mexico also adopted the *Wheeler* rule[56]. As these developments continued, many constitutional lawyers

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50 The *Swain* decision was the subject of extensive scholarly attention. *See Batson v. Kentucky*, 476 U.S. 79, 90 n.14 (1986) (POWELL, J.) (collecting secondary sources).

51 See, e.g., WILLIAM J. BRENNAN, JR., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

52 22 Cal. 3d 258, 583 P. 2d 748 (1978).

53 *Idem*, at 280.

54 *Idem*, at 281–82.

55 *Idem*, at 282.

56 *See Commonwealth v. Soares*, 377 Mass. 461, 387 N.E. 2d 499, cert. denied, 444 U.S. 881 (1979); *State v. Crespin*, 94 N.M. 486, 612 P. 2d 716 (Ct. App. 1980). Subsequently, two other state courts adopted similar rules. *See State v. Neil*, 457 So. 2d 481 (Fla. 1984); *State v. Gilmore*, 199 N.J. Super. 389, 489 A. 2d 1175 (N.J. Super. Ct. App. Div. 1985).

anticipated that the Supreme Court might agree to reconsider *Swain*. That feeling intensified in 1983, when the Court denied certiorari in *McCray v. New York*[57]. In that case, Justices Marshall and Brennan filed a dissent from the denial of certiorari. Among other things, the dissent noted that *Swain* had been decided before the Court held that the Sixth Amendment must be applied to the states, and that the *Swain* decision "should be reconsidered in light of Sixth Amendment principles established by our recent cases"[58]. Occasionally, some Justices will give reasons for dissenting from the denial of certiorari. Virtually never does one of the Justices explain why she voted not to grant certiorari. In an extremely unusual move, three Justices thought themselves obliged to explain their reasons for not voting to grant review in *McCray*. In an opinion joined by Justices Blackmun and Powell, Justice Stevens stated that the issue was an important one, but that a present grant of certiorari would be premature: "I believe that further consideration of the substantive and procedural ramifications of the problem will enable us to deal with the issue more wisely at a later date"[59]. Thus, five of the Court's nine Justices were on record as supporting the proposition that *Swain* either warranted reconsideration then or might well at some point in the future. Normally, the votes of only four justices are necessary for certiorari to be granted[60].

In 1985, the Court granted review in *Batson v. Kentucky*[61]. The question upon which Batson sought review was whether the trial court should have empanelled an all-white jury after the prosecutor had used four of his six peremptory challenges to strike all of the black potential jurors "in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross-section of the community"[62]. While framed in relatively general terms, the question presented for

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57 461 U.S. 961 (1983).

58 *Idem*, at 967. In their dissenting opinion, Justices Marshall and Brennan also questioned the continued validity of the Fourteenth Amendment holding in *Swain*.

59 *Idem*, at 962.

60 *See* ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO and KENNETH S. GELLER, *Supreme Court Practice* 296–300 (8th ed. 2002). Following the denial of certiorari in *McCray*, two other state courts decided to follow the California Supreme Court's decision in *Wheeler*. *See supra*, n. 56. In addition, two federal courts of appeals weighed in on the issue. A petition for a writ of habeas corpus was subsequently filed in the *McCray* case itself, and the Second Circuit decided on appeal in that case that the prosecution's use of its peremptory challenges violated the Sixth Amendment. *McCray v. Abrams*, 750 F. 2d 1113 (2d Cir. 1984). In *United States v. Leslie*, 759 F. 2d 366 (5th Cir. 1985), vacated, 479 U.S. 1074 (1987), on remand, 813 F. 2d 658 (1987), the Fifth Circuit adopted a similar rule under its supervisory authority with respect to the conduct of federal criminal proceedings within the circuit.

61 471 U.S. 1052 (1985) (order granting certiorari).

62 *Batson v. Kentucky*, No. 84–6263, O.T. 1984, Pet. Br. at i.

review by Batson's lawyer reflected the lawyer's approach to the case: he would focus on the Sixth Amendment aspect of the case, asking the Court to decide in Batson's favor on Sixth Amendment grounds, but not ask the Court to overrule the interpretation of the Fourteenth Amendment which the Court had adopted in *Swain*. Batson's lawyer obviously had been influenced by Justices Brennan and Marshall, who invoked the Sixth Amendment in their dissent from the denial of certiorari in *McCray*. But Batson's lawyer also had learned his lessons in law school all too well; he would not ask the Court to overrule a precedent that might be worked around.

Swain had decided the applicability of the Fourteenth Amendment to the question of racial discrimination in jury selection and had framed a rule for proving the existence of such discrimination. But the Sixth Amendment issue had not been presented or decided in *Swain*. In Batson's lawyer's view, therefore, there was no need for him to ask the Court to overrule *Swain*. According to Batson's argument, the same conduct might pass muster under the Court's interpretation of the Fourteenth Amendment in *Swain*, but constitute impermissible racial discrimination under the Sixth Amendment. Of course, that was a logical possibility, but one that did not seem to present a viable solution to the problem. It would not make sense to hold that prosecutors selecting a petit jury should be held to one standard under the Fourteenth Amendment, but to a different one under the Sixth Amendment. Nor would it make sense to hold that one mode of inquiry should be used to determine the existence of invidious discrimination in the selection of a petit jury under the Fourteenth Amendment, while a different mode of inquiry was to be applied in deciding the same question under the Sixth Amendment. Moreover, the applicability of the Sixth Amendment to the selection of the petit jury was far from clear under existing Supreme Court case law. As the United States pointed out in its amicus curiae brief, "nothing in [the Supreme Court's] decisions recognizing a qualified Sixth Amendment right to a jury drawn from a fair cross-section of the community requires reconsideration of *Swain*"[63]. The existing case law addressed only "the fair cross-section doctrine [as] applie[d] [...] to jury venires and lists, and not to actual petit juries chosen from them"[64]. The existing Sixth Amendment jurisprudence did not require that a particular petit jury constitute a "fair cross-section" of the community, or that it otherwise reflect the composition of the community.

In other words, Batson's lawyer's approach would require a substantial extension of existing Sixth Amendment doctrine. To hold that the "fair cross-section" principle applied not simply at the level of the venire, but also to the selection of

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[63] *Batson v. Kentucky*, No. 84–6263, O.T. 1984, U.S. Br. 5 (emphasis in original).

[64] *Idem.*

each petit jury, might require even greater judicial boldness than simply overruling *Swain*. In addition, such an extension would doubtless raise the specter of racial and other quotas, as well as other serious problems concerning implementation[65].

Justice Powell, who delivered the opinion of the Court, recognized these facts at the outset, when he stated: "This case requires us to reexamine that portion of *Swain v. Alabama*, 380 U.S. 202 (1965), concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury"[66]. The Court answered that question by deciding that a criminal defendant should not be required to demonstrate the existence of discrimination in "case after case", but could "establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial"[67]. Significantly, Justice Powell declined to grasp the nettle offered by Batson's lawyer. On the contrary, he specifically noted that the question he had answered on behalf of the Court was not the question articulated by Batson's lawyer in his petition for certiorari, his brief, or his oral argument to the Court:

"In this Court, [Batson] has argued that the prosecutor's conduct violated his rights under the Sixth and Fourteenth Amendments to an impartial jury and to a jury drawn from a cross-section of the community. [Batson] has framed his argument in these terms in an apparent effort to avoid inviting the Court directly to reconsider one of its own precedents. On the other hand, the State has insisted that [Batson] is claiming a denial of equal protection and that we must reconsider *Swain* to find a constitutional violation on this record. We agree with the State that resolution of petitioner's claim properly turns on application of equal protection principles and express no view on the merits of any of [Batson's] Sixth Amendment arguments"[68].

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65 In *Teague v. Lane*, 489 U.S. 288, 292 (1989), the Court again declined to decide the question whether the "fair cross section requirement should now be extended to the petit jury". Subsequently, in *Holland v. Illinois*, 493 U.S. 474, 478 (1990), the Court held that "[a] prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment, is without support in our prior decisions, and would undermine rather than further the constitutional guarantee of an impartial jury". While the Equal Protection Clause of the Fourteenth Amendment prohibited racial discrimination both in the selection of the venire and in the selection of the petit jury, the fair cross-section requirement of the Sixth Amendment was concerned only with the selection of the venire. *Idem*, at 479. According to the Court, "[t]he Sixth Amendment requirement of a fair cross section on the venire is a means of assuring not a representative jury (which the Constitution does not demand), but an impartial one (which it does)". *Idem*, at 480 (emphasis in original).

66 *Batson*, 476 U.S. at 82.

67 *Idem*, at 96.

68 *Idem*, at 84 n.4.

The Court will sometimes redefine the question presented by the petitioner at the time review is granted, but it is not customary for the Court to do so at the conclusion of the proceeding, when all the briefs have been filed and the oral arguments made. Here, of course, Batson's lawyer not only failed to press the winning theory, but expressly disavowed it throughout the case. That point was troublesome, not only to Justice Powell, but also to other members of the Court. Justice Stevens addressed the point in a concurring opinion, and Chief Justice Burger discussed it at length in his dissent.

Justice Stevens acknowledged that Batson's lawyer had not argued in favor of overruling *Swain*, but he also noted that the other parties to the case had recognized that that was the issue to be decided. For example, Justice Stevens pointed out that the Attorney General of Kentucky had begun his oral argument by stating that "the issue before this Court today is simply whether Swain versus Alabama should be reaffirmed"[69]. Moreover, Kentucky had "explicitly rested on the issue in question as a controlling basis for affirmance"[70]. In addition, Justice Stevens noted that the issue had been squarely addressed in the briefs filed by several amici curiae on both sides of the case, including the United States, the NAACP Legal Defense Fund, and the Lawyers' Committee for Civil Rights Under Law[71].

In his dissent, Chief Justice Burger argued at length that the question whether *Swain* should be overruled had not been properly preserved for review, and that the Court could not therefore properly consider it:

In the Kentucky Supreme Court, petitioner disclaimed specifically any reliance on the Equal Protection Clause of the Fourteenth Amendment, pressing instead only a claim based on the Sixth Amendment... As petitioner explained at oral argument here: "We have not made an equal protection claim [...] We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking Swain as such [...]". Petitioner has not suggested any barrier prevented raising an equal protection claim in the Kentucky courts. In such circumstances, review of an equal protection argument is improper in this Court...

Even if the equal protection issue had been pressed in the Kentucky Supreme Court, it has surely not been pressed here. This provides an additional and completely separate procedural novelty to today's decision. Petitioner's "question presented" involved only the "constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community [...]" These provisions are found in

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[69] *Idem*, at 109.

[70] *Idem.*

[71] *Idem*, at 110 & nn.2 & 3.

the Sixth Amendment, not the Equal Protection Clause of the Fourteenth Amendment relied upon by the Court. In his brief on the merits, under a heading distinguishing equal protection cases, petitioner noted "the irrelevance of the *Swain* analysis to the present case [...]"; instead petitioner relied solely on Sixth Amendment analysis...[72]

Chief Justice Burger emphasized the point more fully by quoting extensively from the transcript of the oral argument, in which Batson's lawyer repeatedly insisted that he was neither relying on the Fourteenth Amendment nor asking the Court to overrule *Swain*[73]. In these circumstances, according to the Chief Justice, the Court was "depart[ing] dramatically from its normal procedure without any explanation" by "reaching the equal protection issue despite petitioner's clear refusal to present it"[74].

At the end of the day, Batson won his case, and an important principle of American law was established[75]. It is also the case, however, that the work of Batson's lawyer had little to do with the outcome. Batson's lawyer read too much into the tentative views of the two dissenting Justices in *McCray*, who clearly invoked the Sixth Amendment, but did so without serious reflection. They also formed their judgments without the benefit of briefing more extensive than that allowed at the certiorari stage, when the parties' submissions are necessarily short and aimed at demonstrating that the question presented is worthy of review, rather than how it should be decided. Nor were the views of these two Justices necessarily representative of the Court.

Batson's lawyer obviously took a false cue from Justices Marshall and Brennan, but that was not the main problem. The main problem was that Batson's lawyer had learned all too well one of the basic lessons common law lawyers learn in law school: that we should always attempt to distinguish inconvenient precedents rather than ask a court to overrule its prior decisions. That is ordinarily a sound principle, but it was a strategy that could not succeed in Batson's case. If the Sixth Amendment were made applicable to the selection of the petit jury, there could not be one standard for determining the existence of invidious discrimination under the Sixth Amendment, but another

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[72] *Idem*, at 112–13 (citations omitted).

[73] *See idem*, at 113–15.

[74] *Idem*, at 115.

[75] The impact of the *Batson* decision on the jury system is difficult to overstate. Since *Batson*, the Court has extended the principle to include discrimination in the exercise of peremptory challenges based on gender as well as race, has applied the principle to the use of peremptory challenges by the defense as well as the prosecution, and has also applied the principle to civil cases. *See* CHEMERINSKY, *supra*, n. 19, at 572. *See* also BARBARA D. UNDERWOOD, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 Colum. L. Rev. 725 (1992); *Davis v. Minnesota*, 511 U.S. 1115 (1994) (THOMAS, J., dissenting).

to be applied to the same inquiry under the Fourteenth Amendment. Moreover, the practical difficulties involved in applying the fair cross-section principle to the selection of a petit jury made the option of extending existing Sixth Amendment jurisprudence seem even more unattractive to the Court than simply overruling *Swain*. Fortunately, these were circumstances that others appreciated, and the Court was willing to address a question that Batson refused to put forward.

Streszczenie artykułu „Precedens a rozstrzygnięcie konstytucyjne"

Zasada *stare decisis* posiada centralne znaczenie w systemie prawa precedensowego *common law*. Zapewnia ona nie tylko stabilność systemu, ale również zezwala na rozwój prawa w odpowiedzi na zmienne okoliczności sprawy. Stabilność jest zapewniona poprzez silne domniemanie prawidłowości poprzednich decyzji sądowych. Zmienne okoliczności są uwzględniane poprzez analizę różnic pomiędzy istniejącymi precedensami i nowymi stanami faktycznymi. Niektóre sprawy wymagają jednak całkowitego odrzucenia poprzednich precedensów. Pomimo centralnego znaczenia zasady *stare decisis* we wszystkich systemach prawnych common law, była ona stosowana odmiennie w poszczególnych krajach, w różnych okresach dziejowych i w odmiennych sytuacjach.

Tradycyjne prawo angielskie do niedawna dopuszczało jedynie możliwość ograniczonego stosowania lub odróżniania poszczególnych precedensów, uznając, że uchylanie poprzednich decyzji leży poza zakresem władzy sądów. Stany Zjednoczone zawsze podchodziły do tego problemu w sposób bardziej elastyczny, zwłaszcza w sprawach z zakresu prawa konstytucyjnego, ze względu na większe, właściwe dla sądów amerykańskich uprawnienia i obecność pisanej konstytucji, która nie podlega łatwemu procesowi nowelizacji. W przypadku braku właściwej normy konstytucyjnej, decyzja Sądu Najwyższego (*Supreme Court*) dotycząca zagadnień o charakterze konstytucyjnym nie podlega zmianom, o ile Sąd najwyższy sam nie zdecyduje się, aby ograniczyć albo uchylić swój własny precedens.

Argumenty mające na celu ograniczenie zakresu zastosowania precedensów stanowią treść codziennej praktyki prawnika oraz sędziego w systemach common law. Każdy amerykański prawnik w swojej pierwszej, profesjonalnej reakcji na przeszkody stawiane przez niepomyślny precedens zapewne dążyć będzie do odróżnienia stanu faktycznego w danej sprawie od poprzedniej niepomyślnej decyzji Sądu. W niektórych sprawach jednak nie jest to możliwe i strona w procesie przed sądem może uzyskać korzystne dla siebie rozstrzygnięcie, jedynie przekonując Sąd Najwyższy co do słuszności obalenia istniejącego precedensu. Strategia ta zyskuje szansę na powodzenie tylko wtedy, gdy Sąd jest przekonany co do tego, że poprzednie rozstrzygnięcie jest błędne, albo jeżeli wykaże się, że rozstrzygnięcie to pozostając słusznym z punktu widzenia

poprzedniego procesu, nie prowadzi do sprawiedliwej decyzji w bieżącej sprawie. Naturalnie, sama gotowość do zmian jest niewystarczająca i strona musi przytoczyć przekonywające argumenty przed Sądem. Treść argumentów zależy od stawianego celu, który może obejmować ograniczenie bądź całkowite obalenie obowiązującego precedensu.

Sprawa *Batson v. Kentucky* jest przykładem jednej z bardziej doniosłych spraw, gdzie kwestionowany precedens był stosunkowo niedawny i praktycznie niepoddający się technice odróżnienia. Sąd Najwyższy miał w tej sytuacji do wyboru trzy możliwości: zastosować obowiązujący precedens, pominąć ten precedens milczeniem i podjąć decyzję na podstawie innej doktryny prawnej (co mogło również doprowadzić do powstania innych problemów), albo uchylić obowiązujący precedens. Pomimo niejasności co do gotowości Sądu, aby obalić własny precedens, droga ta oferowała jedyny sposób na zwycięstwo w sprawie stronie poszukującej rewizji wyroku. Prawnicy wyszkoleni w sztuce prawniczego rozumowania właściwego dla *common law* stanęli przed trudnym wyborem.