1945

Portrait of the New Supreme Court II

Walter B. Kennedy

Recommended Citation
Walter B. Kennedy, Portrait of the New Supreme Court II, 14 Fordham L. Rev. 8 (1945).
Available at: http://ir.lawnet.fordham.edu/flr/vol14/iss1/2

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
ONE year ago, in the first installment of this article, the attempt was made to sketch out the juristic picture of the reconstructed Supreme Court, to consider the changing techniques of the judicial process, the gradual disappearance of the doctrine of *stare decisis*, the multiplication of dissents, the growth of judicial legislation and the resultant chaotic condition of constitutional law. Today it is permissible to repeat the statement that the new Supreme Court is producing more dissents and cross-court criticisms than any other Supreme Court in the same short span of time.

The evidence of these developments may be found in the decisions of the Supreme Court, in the infrequent and occasional extra-judicial utterances of the Justices, and also in the writings of legal scholars—all supporting the view that new judicial methods are unfolding which tend to deal with many cases in the Supreme Court as novel judicial experiences, which permit and indeed invite the Court to make personalized decisions without too much emphasis upon past precedents.

First let us scan the statistical data regarding the recent terms of the Supreme Court, then pause to pick up a few appraisals by competent critics. Thereafter we will turn to the Supreme Court for additional materials disclosing that the Court is passing through a period which points to the erosion of enduring case-law. We do not stop to appraise the new freedom in the judicial approach, but merely to announce its arrival.

A series of articles convince that the trend in the Supreme Court has been in the direction of individualized justice and a theory of judicial decision which emphasizes the freedom of the judicial will rather than the guiding influences of past precedents. Limiting our survey to the period of the recent reorganization of the Supreme Court, the successive terms from 1938 to 1942 show a range of non-unanimous opinions as follows:

1. The reorganization of the Supreme Court through the nomination of eight Justices by President Roosevelt began with the appointment of Mr. Justice Black on August 12, 1937, and was completed with the nomination of Mr. Justice Rutledge on January 11, 1943. Between these dates, Justices Reed, Frankfurter, Douglas, Murphy, Byrnes and Jackson had also been appointed. Mr. Justice Byrnes resigned on October 3, 1942. The only members of the present Court who were on the Supreme Bench prior to 1937 are Chief Justice Stone and Justice Roberts.

2. Pritchett, *The Coming of the New Dissent: The Supreme Court, 1942-43* (1943) 11 U. of Chi. L. Rev. 49. Professor Pritchett has analyzed the records of dissents on the Supreme Court from 1931 through the 1941 terms in three previous articles, which enabled him to reach the following conclusion: "The statistics show, in fact, that from a quanti-
This gradual increase in the total number of dissents reached a new high in the 1943 Term when over 175 dissenting votes were recorded and over 50% of the cases decided with full opinions disclosed a divided court. At the half way mark in the 1944 Term an informal count indicates that there were 31 dissents in the first 70 cases decided, evidencing dissents in 44% of the current cases.3

Here is indeed objective evidence of increasing judicial disagreement and dissent among the justices in the Supreme Court. But it would be gross oversimplification to stop with the counting of dissents and disagreements and summarize therefrom the exact degree of confusion with the Court. Such figures portray the quantitative elements in the judicial decisions but by no means depict accurately the qualitative and enduring consequences of these dissents. The varying importance of the cases, the extent of the disagreement of the justices,4 the emphasis and tone of the dissenting opinions,5 the discovery of a new departure and a new trend in major principles of constitutional law—all these factors cannot be evaluated or even discovered by the mere count of dissents.

tative point of view at least, the reorganized Supreme Court has become by far the most badly divided body in the history of that institution." Id. at 49.


4. This tendency of the Supreme Court to multiply the number of opinions, both in concurrence and in dissent, has grown appreciably in the last few years. For example, Northwestern Airlines v. Minnesota, 322 U. S. 292 (1944) produced a five to four decision but the exact permanent effect of the majority opinion will doubtless be lessened because there were three separate opinions.

A great deal of doubt attaches to the permanent aspects of United States v. South-Eastern Underwriters Association, 322 U. S. 533 (1944) because it was decided by a minority of four Justices, Justices Reed and Roberts not participating in the opinion. If only one of the two Justices who voluntarily withdrew had been on the Court and had voted to affirm, this one additional vote would have resulted in an affirmance of the District Court’s conclusion that “the business of insurance is not commerce, either interstate or intrastate.” See Brandeis, How to Find the Law (1940) 290.

5. Of late there has been a notable tendency on the part of the Justices to bring into the open Court their quarrels and to use in formal opinions expressions usually reserved for their inner conferences. Professor Powell has correctly warned that these cross-court
Fortunately, we need not depend upon a "comptometer approach" in attempting to evaluate the confusion of judicial voices or to appraise the present standing of *stare decisis*. More personal and certainly more persuasive than mass statistics in the discovery of new trends in the Supreme Court are the studied appraisals of careful scholars who warn that the Supreme Court is no longer functioning under the Pound-Cardozo formula: "Law must be stable and yet it cannot stand still." Instead we are told that a new maxim is forming in the Court of last resort: "Law must not stand still long enough to become stable!" A remark that calls to mind Professor Powell's split-second appraisal of the mobility of constitutional law:

"Of late in discussing constitutional questions with a class on Monday mornings, I have thought it wise to look at my watch to see if I could be confident that what I was about to say was still true. At noon the Supreme Court might begin to announce opinions that would rob me of much of my hard earned knowledge."  

In more serious vein the charges are made that *stare decisis* is lightly tossed aside when opportunism or realism beckons. Principles bend to meet the exigencies of the moment; precedents are ignored or by-passed.  

But we also find considerable support for the thesis that *stare decisis* is crumbling from the Justices of the Supreme Court who have by express word or by implication indicated that a judicial reformation is under way, whether for good or ill. Statements in recent judicial opinions show a formal accusation of such infiltration of personal views.  

---

6. It is believed that this favorite aphorism was first phrased by Dean Pound. It was later used by Justice Cardozo at the beginning and at the end of *The Growth of the Law* (1924) 2, 143.


8. Powell, *Changing Constitutional Phases* (1939) 19 B. U. L. Rev. 509. If precedent is necessary to justify a trace of humor, which is certainly needed today more than ever, we have it in the words of Mr. Justice Cardozo: "... I would not convey the thought that an opinion is the worse for being lightened by a smile." *Cardozo, Law and Literature* (1931) 29.


most recent expression regarding the present status of precedents in
the Supreme Court is found in *United States v. South-Eastern Under-
writers Association.*\(^1\) Chief Justice Stone saw in this most impor-
tant decision a violent detour from *stare decisis* and appraised the conse-
quences of the departure in the following words:

"The decision now rendered repudiates this long continued and consistent
construction of the commerce clause and the Sherman Act. We do not say
that this is in itself a sufficient ground for declining to join in the Court's
decision. This Court has never committed itself to any rule or policy that it
will not 'bow to the lessons of experience and the force of better reasoning'
by overruling a mistaken precedent . . . This is especially the case when the
meaning of the Constitution is at issue and a mistaken construction is one
which cannot be corrected by legislative action.

"To give blind adherence to a rule or policy that no decision of this Court
is to be overruled would be itself to overrule many decisions of the Court
which do not accept that view. But the rule of *stare decisis* embodies a wise
policy because it is often more important that a rule of law be settled than
that it be settled right. This is especially so where as here, Congress is not
without regulatory power."\(^12\)

Justice Jackson joined the dissenting Chief Justice in the *South-
Eastern Underwriters* case. In his separate dissenting opinion Justice
Jackson developed a novel contention regarding the doctrine of *stare
decisis* which deserves mention now and more complete appraisal later.
Brushing aside the general belief that *stare decisis* is a legalistic strait-
jacket which holds back beneficial reforms, the dissenting Justice brought
forth the fact that *stare decisis* may serve as a check against precipitate
and unconsidered change in the law with results that are far reaching
and disastrous. Conceding that if the question were one of first impres-
sion, he would "have no misgivings about holding that insurance business
is commerce," he questions the practical effect which would flow from
a sudden transfer of regulatory powers over insurance from State to
Federal Government.\(^13\)

Oddly enough, one of the most impressive indications of the failing
force of *stare decisis* is found in the *South-Eastern Underwriters* case

---

\(^{11}\) 322 U. S. 533 (1944).
\(^{12}\) *Id.* at 579. Italics inserted.
\(^{13}\) *Id.* at 585-586.
buried and concealed in the prevailing opinion of Mr. Justice Black. After stating that the Supreme Court was deciding for the first time "whether the Commerce Clause grants to Congress the power to regulate insurance transactions stretching across state lines,"\textsuperscript{14} the learned Justice describes the many individual acts done by the insurance companies in the conduct of their business—the "continuous and indivisible stream of intercourse among the states"—and concludes that the multiplicity of such acts as collection of premiums, negotiation of contracts, settlement of claims, placement of insurance on fixed and portable properties clearly spells out interstate commerce.\textsuperscript{15}

Then follow these striking sentences:

"Despite all of this, despite the fact that most persons, speaking from common knowledge, would instantly say that of course such a business is engaged in trade and commerce, the District Court felt compelled by decisions of this Court to conclude that the insurance business can never be trade or commerce within the meaning of the Commerce Clause. We must therefore consider these decisions."\textsuperscript{16}

The pivotal words in the above passage have been emphasized by italics because they bring out more clearly the startling fact that Mr. Justice Black, dealing with this tremendously complicated problem of the legal status of insurance, is willing to accept the "common knowledge" of "most persons" who would "instantly say" that "of course" the insurance business is one which involves trade and commerce. This passage likewise discloses that such "common knowledge" is preferred to the matured judgment of the District Court based upon past precedents of the Supreme Court of the United States. A popular appraisal "instantly" given receives higher rating from Mr. Justice Black than the measured evaluation of earlier cases of the highest court by the Federal District Court.

Having found that the District Court was still constrained to follow precedents which apparently led to the conclusion that insurance was not commerce, Mr. Justice Black stated with some apparent reluctance: "We must therefore consider these decisions."\textsuperscript{17} The implication seems to be that such consideration of precedents became necessary only because the District Court unfortunately failed to recognize "the common knowledge" of laymen generally that insurance is commerce. This easy

\textsuperscript{14} Id. at 534. However, it should be noted that Chief Justice Stone insists strongly that the Supreme Court cases from Paul v. Virginia, 8 Wall. 168 (1869) to the present time uniformly held "that the business of insurance is not interstate commerce. . . ." Id. at 569.

\textsuperscript{15} Id. at 541-542.

\textsuperscript{16} Id. at 542-543. Italics inserted.

\textsuperscript{17} Id. at 543.
disposition of the basic legal question which divided the Supreme Court in this very case—whether insurance is commerce—is apparently accomplished by Justice Black's reference to the judgment of laymen. This substitution of popular referendum for an orderly examination of legal principles and pertinent precedents comes close to the formulas of emotional jurisprudence wherein law is felt rather than studied.

An extreme expression of this emotion-formula of law is found in the tragic-comic career of Lord Hermand as told by Lord Cockburn in his reminiscences of Scottish judges.

"Bacon advises judges to draw their law 'out of your books, not out of your brain.' Hermand generally did neither. He was very apt to say, 'My Laards, I feel my law—here, my Laards,' striking his heart. Hence he sometimes made little ceremony in disdaining the authority of an Act of Parliament when he and it happened to differ. He once got rid of one which Lord Meadowbank (the first), whom he did not particularly like, was for enforcing because the legislature had made it law, by saying, in his snorting, contemptuous way, and with an emphasis on every syllable: 'But then we're told that there's a statute against all this. A statute! What's a statute? Words. Mere Words! And am I to be tied down by words? No, my Laards; I go by the law of right reason.'"

Lord Hermand would seem to qualify for high place in current schools of advanced realism.

However often the Justices individually may stray away from the path of precedents, we are heartened to find that in varying degrees, all the members of the Court have expressed regret at some piece of personalized adjudication by their brethren which aroused their ire.

---

18. Referring to the quoted passage in Mr. Justice Black's opinion, Professor Powell makes the following observations anent the dangers of substituting popular for professional judgment in the matters for technical legal problems: "The common knowledge of persons untrained in the law is a precarious mentor of legal postulates and differentiations. For this, one can adduce melancholy testimony from many lawyers who have suffered from the inapposite arguments of experts in economics and in what is miscalled political science. It is little less than shocking to have a Justice of the Supreme Court invoke the mere supposition of common knowledge among lesser breeds without the law as worthy of consideration against the conclusion of a district court which preferred to respect its obligation to be faithful to superior controlling precedents rather than to traduce them by resort to vaguely indicated ancient locations and to unspecified contemporary supposed common knowledge of suppose most persons." Powell, *Insurance As Commerce* (1944) 57 Harv. L. Rev. 988.


20. From Justice Black, leader of the liberal wing, to Justice Roberts, the most conservative member of the Supreme Court, we find that all the Justices have paid tribute to the value of *stare decisis* and each Justice has at times been accused of departure from the path of precedent. For example, see United States v. Bethlehem Steel Corporation, 315 U. S. 289 (1942) for a defense of *stare decisis* by Justices Black and Murphy; Mulford
is also evidence available that they hold that the doctrine of *stare decisis*, if not a permanent ideal or unchanging concept, is at least recognized as a convenient anchor against whimsical judging and individualized decisions.

**WHY IS STARE DECISIS CRUMBLING?**

What is the explanation of this increasing and mounting departure from precedents by the Supreme Court, and by other courts as well? Is it found in any single cause or is it a result of many interlocking factors of varying weights? We now proceed to consider a series of alleged causes for the erosion of the doctrine of *stare decisis*. The causes for this individualized justice, loss of stability of precedents and break down of continuity of law are not easy to catalogue or to evaluate; there are multiple factors which have brought about this collapse of traditional values.

Is this flexibility of judicial decisions in the field of constitutional law inherent in the nature of constitutional questions? Certain it is that there is a wide difference between private law and public law and these differences have been emphasized early and late in our history. Conceding the presence of this factor, it provides no adequate reason for the present tendency to explain constitutional "law" in terms of constitutional "politics."

Is the judicial confusion of the Supreme Court explainable by the personalized and diversified legal philosophies of the eight Justices come lately to the Supreme Court? It would be dangerous to conclude that the recent influx of new members to the Supreme Court explains the current collapse of *stare decisis*. Such oversimplification is tempting, but inadequate as anything more than a partial explanation. To rest content with this explanation would be to ignore the fact that all eight Justices were appointed after an appraisal of their current legal economic, social and industrial views on matters confronting the federal government.

Is this shifting body of decisional law due to the novel and complex questions of constitutional law that have come forth during the de-

---

21. Despite criticism of *stare decisis* by modern legal scholars (*infra*, 000-000) the importance of stability and predicability of law is stressed by the court and lawyers generally.

22. For a lengthy argument to this effect, see HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835 (1944).

pression decade of 1930-1940, questions which are a necessary overflow of the social, economic, industrial and political disorders of this distressed period? Certain it is that the Supreme Court has faced unusual and original problems in the pre-war decade and that these problems contain legal and extra-legal, political and social consequences, difficult to appraise and to evaluate. Any critique of the Supreme Court must include the concession that the times have been abnormal during the past two decades, calling for a reconsideration of the old constitutional doctrines in their impact upon present-day problems. But once more the warning is in order that these trying times provide but a partial and not a complete explanation of the volatile qualities of current constitutional law.

Is the present World War a sufficient cause to explain the excesses and abnormalities of constitutional decisions? True indeed, the condition of current law may be a resultant of world wide dislocation of peacetime processes, the upside down economy of a world at war, the application of the classic maxim *silent leges inter arma*. Free admission must be made that, while war has not silenced law, it has materially affected the type of legal questions in all courts including the United States Supreme Court. But it is still in order to reaffirm that in the present struggle, America still aims to be and is a government of laws and not of men. War is not alone the cause of the farewell to *stare decisis*, although it may be a factor.

Is the present erosion of *stare decisis* explainable on the ground that the courts and the lawyers have been faced with a monumental output of judicial decisions, the steadily mounting pile of case law, producing diverse decisions which no court can read, no lawyer can digest, no legal scholar can catalogue? More about the multiplication of precedents later. Undoubtedly the stated factor is very real and ever present, but it will be later shown that the confusion of law is also traceable to the decisions of the courts departing from precedents which are clearly marked and in an area wherein the law is not indefinite or difficult to find. 24

Is modern jurisprudence responsible for this sudden urge to depart from settled principles and established precedents? Subject to later development 25 the new jurisprudence is clearly a formidable factor, however hidden and concealed, and must be considered a vital cause of the present-day status of *stare decisis*.

This series of questions, answered in summary fashion, warns that the present trend away from authority in the Supreme Court cannot be

---

24. See infra pp. 16-20.
traced to any single cause. We now turn to consider at some length current explanations of the failure of case law and the enlargement of individualized, judge-made law.

STARE DECISIS IN THE COURTS

A convenient and timely starting point in our appraisal is the scholarly address recently delivered by Mr. Justice Jackson before the American Law Institute under the title Decisional Law and Stare Decisis.\(^\text{26}\) Herein Mr. Justice Jackson offers his explanation for “the depreciation of the precedent”:

“The present low estate of the precedent cannot be dissociated from the enormous multiplication of precedents. . . . I am vaguely aware of a great cloud of current decision of importance, both judicial and quasi-judicial, that I do not have time to read, much less digest. And the total accumulation of judicial utterances is even more formidable. I know that in this great mass of opinions by men of different temperaments and qualifications and viewpoints, writing at different times and under varying local influences, some printed judicial word may be found to support almost any plausible proposition.”

There is a great deal of truth in the stated reason that the multiplication of precedents in recent years has made it difficult, if not impossible, to keep abreast of all current output of the courts, or any single court. Conceding that the multiplication of precedents may be a cause of the lessening of respect for stare decisis, or of the difficulty in following case law, it is submitted that there are other factors that deserve parallel mention, factors which may compete with, if they do not surpass, the principal cause of case-confusion emphasized by Mr. Justice Jackson. There is evidence that the judicial opinion is sometimes framed without benefit of stare decisis not because of the “multiplication of precedents” currently existing and beclouding the legal problem, not because of the confusion of the earlier authorities, but because the judge or judges first depart from the clear path of settled precedents and thereafter seek “some printed judicial word” to support their plausible proposition. In this situation it should be noted that the confusion follows, it does not precede, the writing of such judicial opinions which reach their conclusions first and then search hopefully later for supporting precedents. True, such hasty departures from the settled law very often are the causes of future confusion of judge and lawyer, but in such cases the court first departs from precedents which are clearly marked and yet evaded.

Let us illustrate by reference to a few current cases. Take, for exam-

\(^{26}\) Jackson, Decisional Law and Stare Decisis (1944) 30 A. B. A. J. 334.
In this case, the Supreme Court held that the Government may reopen a naturalization decree which confers citizenship on an alien and set aside the certificate of citizenship as provided in the Federal statutes. A major and important—if not decisive—question was: What is the degree of proof to be sustained by the Government in its charge that the alien was illegally admitted to citizenship? Writing for the majority, Mr. Justice Murphy said: "Assuming as we have that the United States is entitled to attack a finding of attachment upon a charge of illegality, it must sustain the heavy burden which then rests upon it to prove lack of attachment by 'clear, unequivocal, and convincing' evidence which does not leave the issue in doubt." 28

Was this definition of burden of proof based upon any former precedents? It is submitted that the "clear, unequivocal and convincing" test was without support of pertinent precedents in the matter of any previous denaturalization proceedings and was moreover contrary to the clear and frequent decisions by the Federal courts on the construction of the prevailing statutes. Mr. Chief Justice Stone in his vigorous dissent states the prevalent rule in the following words: "Until now this Court, without a dissenting voice, has many times held that in a suit under this statute it is the duty of the court to render a judgment cancelling the certificates of naturalization if the court finds upon evidence that the applicant did not satisfy the conditions which Congress had made prerequisite to the award of citizenship." 29

Let it be carefully noted that we are not now concerned with the wisdom or necessity of a change in the prevailing burden of proof in denaturalization cases, but merely with the fact that this change was made in Schneiderman v. United States and that it was not due to any confusion or uncertainty of prior precedents. True, the Schneiderman case is certainly one where there was what Mr. Justice Jackson calls "an enormous multiplication of precedents," but these precedents laid down a simple rule of procedure and a specific burden of proof which was hurdled by the majority. Moreover the Schneiderman case obtained its only support for the "clear—convincing—unequivocal" test by invoking a line of authority that had nothing to do with the exact issue of proof in denaturalization matters. 30 The majority had to reach far afield to

27. 320 U. S. 118 (1943).
28. Id. at 135. Italics inserted.
29. Id. at 172-173.
30. Lacking any precise precedents imposing upon the government the duty of sustaining the denaturalization action by "clear, unequivocal and convincing evidence which does not leave the issue in doubt," the Court indulged in a few semantic borrowings from remote case-law having nothing to do with denaturalization cases. The "clear—unequivocal—convincing" test came about by lifting a partial sentence from Johannessen v. United
find "some printed judicial word" to support its newly found and freshly framed evidentiary standard. The point of importance is that the departure from the doctrine of *stare decisis* in *Schneiderman v. United States* is not explained by any existing confusion of authorities. The confusion follows, it did not precede, the decision of the Supreme Court in *Schneiderman v. United States*.

Another case, which raises a doubt about the generality of Mr. Justice Jackson's assumption that sheer weight, number and diversity of precedents threaten the solidarity of law, is the recent case of *United States v. South-Eastern Underwriters Association.* Up to the decision of this case, the precedents were uniformly in step with the conclusion of *Paul v. Virginia,* decided in 1869, which held that insurance is not commerce, and therefore cannot be interstate commerce. Following *Paul v. Virginia* there was a succession of cases that were in support of *Paul v. Virginia* and did not depart from the pioneer holding. The basic question whether insurance is commerce was fully reargued in 1913 in *New York Life Insurance Company v. Deer Lodge County* and the Supreme Court reaffirmed the doctrine of *Paul v. Virginia* warning against the danger of the overthrow of ancient landmarks. After reviewing the leading cases from *Paul v. Virginia* down to 1913, Mr. Justice McKenna said: "If we consider these cases numerically, the deliberation of their reasoning, and the time they cover, they constitute a formidable body of authority and strongly invoke the sanction of the rule of *stare decisis*. This we especially emphasize, for all of the cases concerned, as the case at bar does, the validity of state legislation, and under varying circumstances the same principle was applied in all of them. For over forty-five years they have been the legal justification for such legislation. To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the States and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision." The action of the Supreme Court in the *Underwriters* case can hardly

---

States, 225 U. S. 227, 238 (1912) and another fragment from the Maxwell Land-Grant Case, 121 U. S. 325, 381 (1887) and piecing them together for use in an entirely new setting.


32. 8 Wall. 168 (1869).
34. 231 U. S. 495 (1913).
35. *Id.* at 502.
be explained on the ground that the previous authorities were vague or confusing regarding the basic question: Is insurance commerce? It seems that, while confusion will certainly follow, it did not precede the adjudication in the *South-Eastern Underwriters* decision.\textsuperscript{36} It suffices to suggest that the “low estate of the precedent” is not always due to lack of clarity of existing case-law or to the multiplicity of past and current decisions, as suggested by Mr. Justice Jackson. It may be partly due to the purposeful and direct objective to overthrow or skirt cases clearly defined and readily available. Then the search for “some printed judicial word” becomes important, but the tortured statement of a “plausible proposition” in support frequently fails to carry conviction.

The frequency of these judicial detours by the Supreme Court in recent years has already been noted with the consequences that these departures from the travelled highway are now leading to trails and paths none too clearly marked.\textsuperscript{37} Perhaps Mr. Justice Jackson had these devious detours in mind when he said:

“The first essential of a lasting precedent is that the court or the majority that promulgates it be fully committed to its principle. That means such individual study of its background and antecedents, its draftsmanship and effects that at least when it is announced it represents not a mere acquiescence but a conviction of those who support it. When that thoroughness and conviction are lacking, a new case presenting a different aspect or throwing new light, results in overruling or in some other escape from it that is equally unsettling to the law.”\textsuperscript{38}

The quoted passage offers support for the contention herein made

\textsuperscript{36} The *South-Eastern* case is a perfect illustration of a situation wherein there are no signs of any uncertainty in the law until the Supreme Court created it. The entire course of judicial decisions after *Paul v. Virginia*, the failure of the United States government to bring any action under the Sherman Act since 1890 against insurance organizations, the statements in Congress that insurance was without the regulatory powers of the Congress under the Interstate Commerce Clause—all these various elements indicate the well-nigh universal acceptance of the *Paul* case as a fixed precedent negativising the idea that insurance is commerce. See dis. op. of Stone, C.J., 322 U. S. 533, 573-590 (1944).

Equally clear it is that the *South-Eastern* case settled nothing: First, because it is a four-three decision which is not binding upon the full court; and second, because the states and the insurance companies are now completely confused as to the zones of federal and state control.

In its petition for a rehearing, filed September 1, 1944, the South-Eastern Underwriters Association asked the Supreme Court to reconsider its decision because as a result “hazards have been imposed upon the negotiation of every insurance contract, and the very conduct of the insurance business has been rendered perilous." New York Times, September 2, 1944, p. 19. This case seems to be one which illustrates the direful consequences which follows the speedy overthrow of settled precedents and the repentance at leisure.

\textsuperscript{37} Supra pp. 16-20.

\textsuperscript{38} Jackson, J., supra note 26, at 335.
that the present confusion of case law in the Supreme Court is not due alone to the increase in precedents or to the cloudy state of the earlier authorities; it is also in part traceable to the purposeful departure of the Court from past precedents which disclose a fairly clear and definite line of authority. Confusion, it is true, is now following as a result of these frequent departures from \textit{stare decisis} but it is certainly not always the initial cause of the "present low estate of the precedent."

Another explanation currently offered to account for the unprecedented number of dissents and the frequent departures from \textit{stare decisis} is the unusual number of appointments to the Supreme Court during the recent reorganization. The total number of Justices appointed by President Roosevelt is indeed a record unsurpassed by any one President since the original establishment of the Supreme Court by George Washington.\textsuperscript{39} There were many who believed that these appointments by a single Chief Executive would produce sweetness and harmony in judicial decisions. In theory at least, these appointments presupposed a careful consideration of the political and economic as well as the legal views of the nominees in accordance with the formula which has been called "applied politics" in the highest sense of the word.\textsuperscript{40} The antecedent relations of the individual Justices to the administration might account for the superficial conclusion that these appointments would be followed by an era of judicial harmony and a unanimous Court rather than a period of increased discord and dissent.\textsuperscript{41}

\textsuperscript{39} President Washington appointed ten justices between 1789 and 1796, while President Franklin D. Roosevelt appointed eight justices between 1933 and 1944. He has appointed as many justices as the three preceding Chief Executives, Presidents Harding, Coolidge and Hoover. \textit{Hughes, The Supreme Court of the United States} (1936) 42-43.

\textsuperscript{40} Sometimes the "applied politics" does not function according to plan, as for example, in the appointment of Justice Holmes by President Theodore Roosevelt after a careful canvass of Holmes' political, economic and legal views. The famous dissent of Justice Holmes in the \textit{Northern Securities} case, 193 U. S. 197 (1904) nettled the President and later the off-stage appraisal of the incident was given by Holmes in his delightful letter to Sir Frederick Pollock. \textit{2 Holmes-Pollock Letters} 63 (1941).

\textsuperscript{41} "Doubtless many have assumed that with a renovated bench composed preponderantly of appointees of a single President not unconscious of the importance of judicial outlook, there would be an increasing degree of unanimity. Such anticipations have not been realized." \textit{Powell, Our High Court Analyzed, N. Y. Times Magazine, June 18, 1944,} p. 44.

Other commentators are using the tables of mortality to set up the potential "time table of influence" which will permit a President to control the decisions of the Court long after he has retired from office. The theory is that so long as a Justice remains on the Bench he will reflect the political and legal philosophy of the appointing Chief Executive. While it is doubtless true that the Roosevelt appointees were selected in the main from close adherents to the policies of the Administration, it is already clear that they had or have developed a freedom of judicial approach that surmounts narrow partisanship.
To the credit of the reformed Court it should be noted that this easy assumption of judicial subservience to the appointing power was wholly gratuitous and without any foundation in fact. As the record shows, judicial independence and not subservience marks the Supreme Court today. Indeed it is the excess of judicial independence that has brought about the maximum disunity within the Court and it is this superabundance of judicial independence that calls for criticism along with a consideration of current philosophic theories and the general status of law in our day and place.

But the stated factors of multiplication of precedents, change of personnel and chaotic conditions in the world about, fail to exhaust the possible explanations of the breakdown of *stare decisis*. There remains to be considered something more penetrating and deep: A revolutionary upsurge in the law, a revolt against solidarity of the common law, a skepticism and cynicism regarding law in general which cannot be omitted in any study of *stare decisis*. We now turn to consider briefly new philosophies of law—largely American in origin and personnel—which have lately become important in law school teaching and law review writings.

**STORM OVER LAW SCHOOLS**

Two incidents separated by a span of 150 years indicate the startling change in the course of American law in our Universities.

(1) The time was 1778. In the simple study of his rural parsonage at Portsmouth, Reverend Ezra Stiles pondered on the wisdom of accepting the recently tendered Presidency of Yale College. Tormented by conflicting emotions, his decision was no easy one to make. He reflected that the students would be, if rumors were reliable, “like wild fire, not easily controlled”; financial burdens awaited him; collegiate scholarship was at a low ebb; the country was torn by revolutionary strife. Knowing full well that the “diadem of a president is a crown of thorns,” he nevertheless boldly elected to accept the presidency with true Christian fortitude. In the inaugural address which followed, to the one hundred-odd undergraduates and officers of Yale College, Ezra Stiles paid the following tribute to the law:

“Let these youths observe how far the English law, whether by custom or by acts of our legislature, has been embodied in that of America. Students would find it useful also to examine the great principles of the English law, both common and statute, for their own worth; they would find it beneficial to follow the closely reasoned opinions of the English judges by reading the report of the cases decided in Westminster Hall.”

---

42. The incident about President Stiles is taken from Horton, James Kent, *A Study in Conservatism* (1939) 3-4.
43. *Id.* at 5-6.
Thus did President Ezra Stiles pay tribute to the importance and dominance of the English common law in America as the basic foundation for the study of law in our American universities in Colonial times.

(2) One hundred and fifty years later President Robert M. Hutchins of the University of Chicago, who had previously served as Dean of the Yale Law School, delivered an address before the Association of American Law Schools in Chicago and reviewed the current trends in legal education. His scholarly paper Autobiography of An Ex-Law Student created a mild sensation among the law teachers assembled in peaceful convention. It was the matured judgment of a legal educator as to current legal reforms and their value. President Hutchins depicted the arrival of the new functional and experimental attitude in the teaching of law—the Dewey system of education belatedly transplanted into the law schools. \(^{44}\) He described the advent of psychologists, economists and other experts from adjoining disciples who promised to be of material aid in the development of the new law and in the eradication of the shortcomings of the common law. The net result of the arrival of the men of science was socially pleasant but educationally worthless. \(^{45}\)

Comparing the words of President Stiles in 1778 and the warning words of President Hutchins in 1933 (150 years later) we have in brief

President Stiles prophesied that if the students pursued this course of law studies, a native genius would arise, an American Bracton, Coke or Selden who would shape our law and produce a learned commentary. In his audience was a young man not yet fifteen, James Kent, who later fulfilled the prophecy in the publication of his great Commentaries.

\(^{44}\) The introduction of Professor John Dewey is not a mere incident in the treatment of current legal education and its effect upon the present methods of adjudication. The Dewey-Hutchins debate is a major event for it symbolizes a Great Divide in American education and philosophy; and this gulf has now made its appearance in the law. For present purposes we may say that the antagonistic positions of President Hutchins and Professor Dewey in the matter of education in general parallel the presently formulating antagonisms in the field of legal education.

Elsewhere the writer has phrased this effect as follows: "Today in America a real struggle is emerging between two polar and antithetical theories of law. For present purposes we are going to entitle the issue between these contesting schools of juristic thought, Scholasticism or Realism? The issue is between the old and the new jurisprudence; between scholasticism, aptly called the philosophia perennis, and realism, primarily American in origin and personnel, which has but recently attained its jural majority. If these terms are too elusive or flexible, the same crucial jurisprudential problem may be restated by substituting other contrasting isms; Transcendentalism or functionalism? Conceptualism or positivism? Rationalism or behaviorism?" Kennedy, My Philosophy of Law (1941) 147.

\(^{45}\) "Empirical operations do not make a science. Facts do not organize themselves. Let me emphasize as strongly as I can that we must accumulate cases, facts, and data. I simply insist that we must have a scheme into which to fit them." Hutchins, The Autobiography of an Ex-Law Student (1934) 7 Am. L. School Rev. 1051, 1055.
summary the wide differences between the concept of law in Colonial
days and the sweeping changes in the common-law techniques which
were proposed in the early decades of the twentieth century. The most
startling change from President Stiles to President Hutchins is the loss
of faith in the common law, the skepticism regarding objective standards
and permanent principles, in fine, the erosion of the doctrine of *stare
decisis*.

We do not now stop to enumerate or to evaluate the antagonistic legal
philosophies all aimed at the common law structure in varied degrees.
This evaluation will be attempted later. These opposing legal theories,
many and diverse and yet overlapping and interlocked, are currently
taught in some law schools and publicized in the pages of law reviews
and journals. The importance of this absorption of current jurispru-
dential theories by our law students in competition with traditional law
is noteworthy. In the most extreme form, the progressive theories main-
tain that there is no permanent law, natural or constitutional, common
or uncommon; that law is realistically defined as a series of single judi-
cial experiences dependent upon the environment of the judges, their
hunches or heredity, the effect of the impact of behavior patterns,
even the influence of gastronomical impulses.

The arrival of the new jurisprudence was heralded in these words
by Justice Cardozo twelve years ago: "The most distinctive product
of the last decade in the field of jurisprudence is the rise of a group
of scholars styling themselves realists, and content with nothing less
than revision to its very roots of the method of judicial decision which
is part of the classical tradition."

When it is recalled that Justice Cardozo, by virtue of his judicial
and extra-judicial writings, is entitled to speak with considerable author-
ity concerning jurisprudential reforms, the quoted appraisal gains in
strength and validity. Certain it is that he accurately and moderately
predicted the course of legal realism in the succeeding years. The ex-
tremists in this movement have not only cut the methods of adjudication
to the "very roots" but are advocating the pulling up of the roots!

First, let us consider the definition of constitutional law as it is
"realistically" defined by leading legal reformers. Max Lerner offers
a medicine-man interpretation in the following words: "Every tribe

Decisions* (1929) 14 CORN. L. Q. 274.
47. Moore and Callahan, *Law and Learning Theory: A Study in Legal Control* (1943)
53 YALE L. J. 1.
48. Cardozo, Address before New York State Bar Association, 55 REPORT OF NEW YORK
STATE BAR ASSOCIATION (1939) 267.
49. Infra, notes 50-58.
needs its totem and its fetish, and the Constitution is ours.” Thurman Arnold seconds the Lerner interpretation: “The language of the Constitution is immaterial since it represents current myths and folklore rather than rules.” It is needless to add that such definitions of Constitutional principles do not leave much space for permanency of Constitutional law; *stare decisis* is not only reduced in area, it is virtually non-existent because all so-called Constitutional principles and rule are dismissed as superstitious symbols and fantastic notions. Constitutional law becomes merely the say-so of the Court without external guide or norm to stay the whim or caprice of the Justices. Dean Pound discussed critically this type of thinking regarding Constitutional law in these words:

“Also in the United States the realists and on the Continent a type of nationalist consider the idea of a state ruling according to law and not according to will as superstitious or as decadent. They scoff at the idea of a people solemnly covenanting by constitution or bill of rights to hew to announced principles of right and justice and to reason, and striving by continued adherence to judicial construction of their covenant to make it real in their political behavior.”

This political philosophy emphasizing will and power is perfectly consonant with the eradication of precedent and the ouster of solidarity of law. Indeed these theories feed upon the basic notion that law is merely the individualized judgment of the Justice and nothing more stable; that there is no external norm or standard in Constitutional law. But this extreme viewpoint regarding the fluidity of law is not limited to the definition or application of Constitutional law. The realists’ attack is also spreading through the whole body of the common law. A few expressions of the realist pessimism and cynicism regarding common-law traditions follow:

“The doctrine of precedent is a habit of mind in which stupidity may be perpetuated on the ground that it is well established.”

“Why should we keep on sacrificing both justice and common sense on the altar of legal principles? Why not get rid of the lawyers and their law.”

“Let us banish from our professional tenets the absurd dogma ‘a government of laws and not of men’ . . . there is no place for it in legal science.”

"Jurisprudence . . . is a special branch of the science of transcendental nonsense."

*. . . judicial decision is reached after an emotive experience in which principles and logic play a secondary part.*

It should again be recalled that we are not attempting to approve or to criticize the quotations above stated. Our present objective is merely to establish the claim that American legal realism in its various forms and titles is the most important single factor accounting for and applauding the general let-down in the doctrine of *stare decisis*.

But—it may be asked—why blur the *Portrait of the New Supreme Court* with a double exposure which depicts the detours of legal scholars from the main highways of Constitutional and common law? What connection is there between these facts and current trends in the Supreme Court? The first reason for this snap shot of the new jurisprudence is that these departures from precedent and these pleas for individualization of judicial decisions are strangely reminiscent of current open-court comments by the Justices of the Supreme Court imploring their brethren to exercise "self restraint"; warning them that it is "dangerous business" to follow personal whim or caprice in the formulation of judicial decisions; predicting that such excessive flexibility brings the law into disrepute; combating the distortion of the Supreme Court into a Superlegislature and concluding with the give-it-up words of Justice Roberts that adjudications in the Supreme Court were degenerating "into the same class as a restricted railroad ticket, good for this day and train only."

If there is one dominant note of complaint which runs through the recent dissenting opinions of the Supreme Court it is the plea for a return to *stare decisis*, a grim warning that law spells order and permanency, that ours is a government of laws and not of men. The oddity and also the comfort of this repetitious appeal for a return to precedents is that all the Justices of the Court at some time or other have joined in the expression that the doctrine is something more than a curio derived from the common law. In the words of Justice Jackson, "We would not much disagree about the theoretical significance of the doctrine of

---

stare decisis however sharply we might divide about applying it to specific cases.’’

But whether the seeds of legal realism have been planted in the Supreme Court or not, the Justices, and particularly the former law professors now sitting on the Court, would probably agree with Chief Judge Crane that law reviews and law schools have some effect upon the course of law and the decisions of the Courts. Chief Judge Crane once said:

“I may say—again speaking for myself, although I know of others who follow similar practice—that in difficult cases dealing with intricate subjects of law, about which there is much dispute and many conflicting decisions, I eagerly turn to these college reviews, scan the index to see if any of these college professors or teachers have written a paper upon the subject.’’

The importance of the contributions of law school and law review has grown down the years. Hence, it certainly is not an over-exaggeration to say that the continued emphasis upon change and flux in the law must inevitably reach the chambers of the Supreme Court and have some effect upon their decisions. Whatever the sum total of present-day effect may be, it is submitted that an examination of these current philosophies is necessary as a potential and increasing factor in the explanation of the breakdown of stare decisis.

The inevitable nature and effect of this new liberalism in judicial decision are reflected in this plea for a judicial laissez faire where each Justice is “on his own”; where pronouncements of the Court are “for the day only” and even lower courts are urged to “beat the gun” by overruling precedents before the Supreme Court has a chance to do so; and where judicial precedents are evaluated in terms of the current advertising slogan—“the fresher, the better”—all adding up to the conclusion that there is warrant for the statement above made, that

60. See note 26 supra.
61. There are five justices of the Supreme Court who formerly taught law in American Law Schools: Chief Justice Stone at Columbia University, Mr. Justice Roberts at University of Pennsylvania Law School, Mr. Justice Douglas at Yale University, Mr. Justice Frankfurter at Harvard University, Mr. Justice Rutledge at Washington University.
63. An example of the effect of professional opinion upon the decisions of the Supreme Court is found in the brief history of Minersville School District v. Gobitis, 310 U. S. 586 (1940). This case was followed by a well-nigh unanimous criticism of the majority opinion by the law reviews on the same. Kennedy, The Schneiderman Case—Some Legal Aspects (1943) 12 FORDHAM L. REV. 231n; The Bethlehem Steel Case—A Test of the New Constitutionalism I (1942) 11 FORDHAM L. REV. 133, 135-136n. Mr. Justice Jackson, writing the majority opinion in Board of Education v. Barnette, 319 U. S. 624 (1943) directed attention to the strong criticism of the Minersville case by commentators and law reviews. Id. at 635n.
American legal realism may be charged with a substantial degree of responsibility for the breakdown of *stare decisis*.

**Is Stare Decisis Worth Saving?**

As a result of the examination of current case law in the Supreme Court, it seems clear that the doctrine of *stare decisis* is suffering from judicial erosion in the Supreme Court and that its collapse is traceable to many detached and separate causes of varying weights. This breakdown is partial or substantial depending upon the individual judge and his degree of attachment to the common-law techniques or his avowal of the new order which bears many labels of pragmatic or realist brands of jurisprudence.

Before condemning or applauding this swing from precedents and the infiltration of tailor-made law, to be fitted to individual case by the judge according to his own pattern and without too much reliance on past precedents, it may be in order to ask: Is *Stare Decisis* Worth Saving? Certain it is that if an impartial review of this traditional method indicates that the ancient doctrine is no longer able to defend itself, such doctrine may require revision if not elimination. In answering the first question, another naturally comes to mind: Was *Stare Decisis* worth acquiring? Two queries are interlocked: The first analyzes the reasons for the continuance of this doctrine in the future; the second appraises the causes which produced *stare decisis* in the past. Unless the new judicial methods promise and produce improvement over the past techniques, the current trial-and-error program with its emphasis upon free judicial decisions may result in a *trial* of the patience of the clients, if not of the lawyers and the courts, and the probability that *error* will be the final result of the substitution of judicial independence for the stability of the old order.

Let us therefore analyze the essentials of the doctrine of *stare decisis*, then consider its good and bad features, ending with a comparison of *stare decisis* and the modern substitutes now beginning to appear.

The doctrine of *stare decisis* presents in abbreviated form the classic legal maxim: *Stare decisis et non quiesca movere*. To adhere to precedents, and not to unsettle things that are established. Thus stated, the double objective apparent in this maxim is to hold fast to former case law, and also to stabilize the law in action by refusing to overthrow the existing precedents and to substitute novel and untried doctrines.

---

64. Rather oddly, the stated maxim despite its long years of service in the interest of the common law, is treated collaterally in Broom, LEGAL MAXIMS (10th ed. 1939) 90-93. Herein it is considered as an appendage of another maxim, *Omnis innovatio plus novitate perturbat quam utilitate prodest*. See infra p. 30.
Amplified by courts and commentators, the doctrine of precedent may be further explained and defended on several grounds which are not wholly separate, but tend to overlap and coalesce. The arguments run in these general channels:

(1) The law should be **fixed** because it is composed of a relatively static and permanent body of rules and principles. Here we may detect the lasting effect of the natural law, in its many forms—a norm or standard for evaluating human law. In this sense *stare decisis* posits some superior rule and guide which controls and shapes the course of positive law and presupposes that the human law must or may be tested by some external principles. This fixity of law has an ancient origin and finds substantial support in the earliest traditions of the common law in England and in America. Latent also is the subsidiary aphorism that ours is a government of law and not of men. Each litigant or suppliant in our courts should be tried by one rule and one standard and not be subjected to the whim or caprice of individualized justice determined by the judge without the restriction of objective principles. One can also discern in this idea of *stare decisis* the constitutional mandates guaranteeing equal protection of the laws and due process of law.

(2) The law should be **definite** because its precise definition is necessary in the interests of public declaration and accurate prediction. In stressing the definiteness of law we recognize the practical importance of settled principles, known and knowable, so that all may be informed of the legal consequences of a proposed plan or program about to be put into effect. Ignorance of the law may not excuse the layman, but impossibility of predicting the law is certainly embarrassing to the lawyer who seeks to advise his client and fatal to the client who is basing his action upon such elusive advice. When it is considered that these changes in judicial decisions are retroactive and not predictable by virtue of the former state of the precedents, it seems unfair to visit the consequences of such change upon an innocent individual who is law-abiding but cannot be told where the law abides!

(3) The law should be **stable** because it generally represents the growth, refinement and distillation of many years of experience, trial and error. The theory of *stare decisis* is that the common law which prevails at a given time did not just grow up, like Topsy, but is based upon long years of gradual change and improvement. Perhaps the most important reason for *stare decisis* is that the old established doctrine

---

65. Professor Hall has given us one of the best collection of authorities on the natural law in recent years. Hall, readings in jurisprudence (1938) 1-86. He also lists ten meanings or interpretations of the term, natural law, in book review (1939) 52 Harv. L. Rev. 1191. See generally, LeBuffe & Hayes, Jurisprudence (3d ed. 1938).

should not be lightly dismissed without an opportunity to contest in
court the validity and efficacy of the old rules in comparison with the
new doctrines now proposed.67

These pertinent questions should be asked as preliminary queries
before ancient precedents are erased:

1. Why should the old precedents be overruled?
2. What are the proposed substitutes for the established rule?
3. How are the new rules going to work?

These are not rhetorical questions; The Why, What and How ques-
tions are important. Stare decisis finds its most basic raison d'être in
its insistence that ancient precedents generally have something more
than mere age to explain their continued existence despite the cynical
reference by Justice Holmes to the senseless adherence to laws of Henry
IV,68 that their replacement should be made only when the substituted
proposal proves its superiority in competition with the rule to be dis-
regarded; that this comparison should not be superficially made but

67. Realists attack one vulnerable point of the common law tradition in stating that
the inclination of the law is to move slowly and to resist change. This overemphasis upon
the status quo is typified by the dismayed New York lawyer who suddenly awoke to
the realization that the New York legislature had substituted the Civil Practice Act for
the Code of Civil Procedure thereby repealing at one stroke all the adjective law that
he knew. Despite the possibilities of conservatism in resisting changes, at the moment it
appears that the danger of harm is in the opposite direction, namely, the repeal of ancient
precedents and the adoption of new rules without considering the consequences of the
rapid change.

There is a "Green Pastures far away" complex sometimes visible in the rapid change
of old doctrines for new which is not without a touch of humor. For example, the New
Hampshire Supreme Court recently changed the established law in that state by providing
that federal estate taxes, instead of being prorated among all the distributees should be
deducted and paid out of the residuary estate, where there was no direction by the testator
as to the payment of the tax. Amoskeag Trust Co. v. Trustees of Dartmouth College,
89 N. H. 471, 200 Atl. 786 (1938). In support of the change, the Supreme Court of New
Hampshire refers to In re Hamlin, 226 N. Y. 407, 124 N. E. 4 (1919) and other cases.

The Supreme Court of New Hampshire was seemingly unaware that New York in 1930
had abandoned the rule of In re Hamlin and adopted, by legislation, New Hampshire's
discarded doctrine of apportionment. N. Y. DEC. EST. LAW (1930) § 124. The statutory
change in New York was only made after careful study of the relative values of the two

68. "It is revolting to have no better reason for a rule of law than that so it was
laid down in the time of Henry IV. It is still more revolting if the grounds upon which
it was laid down have vanished long since, and the rule simply persists from blind imi-
tation of the past." HOLMES, COLLECTED LEGAL PAPERS (1921) 187.

This oft-quoted passage has been used to justify change without emphasis upon the
consequences of the change, but it should be noted that Justice Holmes carefully limited
his statement to situations wherein there was no reason but age to justify the continuance
of the rule of law.
should take into consideration the probable results and consequences of the new departure.

It may be safely concluded therefore that *stare decisis* is a doctrine deeply imbedded in the common law and that it is based upon something more substantial than a formal rule or rule of form. It has been long defended as a doctrine which combines the valuable qualities of stability, certainty and predictability of law, and subordinates the possibility of the individual viewpoint of a single judge or court however inspired, determining the rights and liabilities of the litigants.

**Stare Decisis Today**

Conceding then the inherent value of *stare decisis* as a sound working rule, a concession which is clearly visible in many of the utterances of the reorganized Supreme Court, however frequently the Court may depart from the doctrine in practice, it is helpful to consider some of the practical consequences of the doctrine and of the opposing theory of free judicial decisions. Is *stare decisis* able to establish itself as something more than an antiquated curio and to justify itself at pedestrian level of daily life? Has the doctrine any "salvage value" in our modern age?

A convenient starting point in the evaluation of the advantages of durable precedents is found in an ancient aphorism which has been long since forgotten. The maxim runs like this: *Omnis innovatio plus novitate perturbat quam utilitate prodest.*

Every innovation occasions more harm by its novelty than benefit by its utility. This moth-eaten aphorism will doubtless startle our modern reformers and with good reason. We need not pause very long in noting the extreme and absolutist manner in which the ancient maxim is framed, nor need we withhold an immediate admission that its liberal application would virtually outlaw all change and modification of current precedents. But we revert to this maxim for the limited purpose of pointing out that there are evidences that the Supreme Court and other courts have forgotten that within the discarded shell of this abandoned maxim there is still a remnant of truth to be kept in mind. A modern and modified counterpart of this ancient rule has appeared in critical opinions by the dissenting Justices of the Supreme Court. The most recent warning was phrased by Chief Justice Stone in the *South-Eastern* case: "And before overruling a precedent in any case it is the duty of the Court to make certain that more harm will not be done in rejecting than in retaining a rule of even dubious validity." Here the Chief Justice strikes the core of

---

69. BROOM, *LEGAL MAXIMS* (10th ed. 1939) 90.
70. 322 U. S. 579 (1944). The text quotation from the Chief Justice's dissenting opinion refers with approval to the sentiment expressed in Mr. Justice Brandeis' well-known
the problem of *stare decisis* as it is developing in the Supreme Court today. He serves notice that one of the gravest dangers in the multiple fluctuations and changes running through the Supreme Court opinions is the growing fear that more harm than good will follow the many changes of the settled precedents without adequate consideration of the consequences which will follow the establishment of the new rules.\footnote{71}

A frequent criticism of the doctrine of *stare decisis* is the complaint that it freezes the common law, prohibits all change or improvement and develops into a straitjacket which defies the translation of all social and economic reforms into the law. This excessive rigidity is not, and never was, a necessary part of *stare decisis*, although it is true that zealous justices have sometimes erected an insurmountable barrier and opposition against any and all legislative changes by the federal or state legislatures on the ground that the legislative program offended fundamentals of natural or common law. Apart from this unwarranted use of the "natural law" theory or the "due process" or "equal protection of the law" clauses of the Constitution to check beneficial and helpful social and economic legislation, the doctrine of *stare decisis* is broad enough to permit progressive legislation. The principles of stability and change are likewise joined in the true common-law formula. Another old maxim of the common law is: *Cessante ratione legis cessat ipse lex.*\footnote{72} Reason is the soul of the law and when reason ceases, so does the common law itself. This right of the Court within the framework of the common law to revalue a line of precedent and to reconsider the reasons that shaped the original rule and to modify or change it—reason demanding and experience justifying the change—has long been recognized. This necessity of change is not the discovery of any new school of jurisprudence,\footnote{73} although it is true that legal realism has contributed much to
the warning that legal inertia was frequently present in the habit of judicial acceptance of old cases without any attempt to revalue or re-examine their foundations.

This maxim which emphasizes reason as the core of law found expression in the early English case-law and runs through later American state decisions. Such measure of flexibility is defended by liberal judges, but also by conservative judges in our own day. It is certainly not the possession of any one legal cult however progressive or modern it may be. Today this same maxim provides an adequate opportunity to test out an ancient rule carefully and fully and to propose a new one after a studied consideration of the consequences of the proposed change.

Another classic maxim in the common-law which recognizes a flexible factor in the evaluation of law is the following: *Ex facto jus oritur.* Law is based upon facts. With a change in the material facts there may come a change in the law. Mr. Justice Brandeis accepted the present-day utility of this opinion in *Adams v. Tanner:* "The judgment should be based upon a consideration of relevant facts, actual or possible—*Ex facto jus oritur.* The ancient rule must prevail in order that we may have a system of living law."

Thus it appears that the doctrine of *stare decisis* combines reason and experience, logic and fact. It does not require or demand continued and servile adherence to any and all precedents. It permits growth, ordered and planned. But the doctrine of *stare decisis* refuses to concede that change necessarily connotes progress. It respects the ages, if not age; it recognizes that judicial intelligence may have been present in the formation and painful growth of the original rule and that judicial inertia is not always the cause for its retention.

**Dangers Ahead**

It seems very likely that the trend away from *stare decisis*, the turn about from precedents, the tendency to build up and expand "that to natural law and fixed legal rules and principles. Yet St. Thomas, the leading exponent of scholasticism, says regarding the change in laws: "On the part of man, whose actions are regulated by law, the law can be rightly changed on account of the changed conditions of man, to whom different things are expedient according to the difference of his condition. . . . human law is rightly changed, in so far as such change is conducive to the common weal." *The Summa Theologica of St. Thomas Aquinas* (Translated by the Fathers of the English Dominican Province) Part II, First Part, Third No., QQXCVII, pp. 77, 79.

76. *Broom, Legal Maxims* (10th ed. 1939) 57.
77. Brandeis, J., *dis. op.,* 244 U. S. 590, 600 (1917).
wilderness of single instances” which aroused the poetic fire of Tennysonare now under way and are not going to be easy to stop. But we may venture a glance into the future in the belief that present signs may portray the dangers ahead if the excesses of juristic individualism are not checked.

**Anticipatory Reversals.** One of the most ominous developments of the present era marked by the departure from the pathway of precedent, is the late arrival of a new phase of free judicial thinking. Following closely the striking increase in the number of overthrown precedents and decisions in the Supreme Court, we are now faced with a new phenomenon which may be called “Anticipatory Reversals,” a budding process of adjudication which allows and even invites the Circuit Court of Appeals to anticipate departures from precedent by the Supreme Court and to take the initiative by forecasting the reversal of the Supreme Court decisions by the inferior appellate court. This new development which permits the lower courts to “beat the gun” and to reverse decisions of the Supreme Court by a sort of juristic preview apparently originated in an unsigned Comment in the Yale Law Journal entitled *The Attitude of Lower Court to Changing Precedents.* This proposal seems to have been incorporated into the opinion of the Circuit Court of Appeals in the Second Circuit by Judge Jerome Frank in *Perkins v. Endicott Johnson Corp.*, when he said:

“We would stultify ourselves and unnecessarily burden the Supreme Court if—adhering to the dogma, obviously fictional to any reader of its history, that alterations in that court’s principles of decision never occur unless recorded in explicit statements that earlier decisions are overruled—we stubbornly and literally followed decisions which have been, but not too ostentatiously, modified. ‘The life of the law,’ as Mr. Justice Holmes said, ‘has been experience.’ Legal doctrines, as first enunciated, often prove to be inadequate under the impact of ensuing experience in their practical application. And when a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it.”

Later cases in the Circuit Court of Appeals give evidence that this new policy of anticipatory reversals is catching hold.

---

78. “Mastering the lawless science of our law, That codeless myriad of precedent, That wilderness of single instances, Thro’ which a few, by wit or fortune led, May beat a pathway out to wealth and fame.” Tennyson, *Aylmer’s Field* (1927), Macmillan Ed. 139, 146.

79. See notes 2-4 supra.

80. (1941) 50 YALE L. J. 1448.

81. 128 F. (2d) 208 (C. C. A. 2d, 1942).

82. Id. at 217-218.

Certain observations may be made regarding the possibilities of this new development in free judicial thinking. If the Circuit Court of Appeals is privileged to reverse the Supreme Court by anticipation, why not extend the same privilege to all inferior courts? The proponents of this reversal formula would doubtless nod assent. This process brings back memories of Judge Hutcheson's hunch theory with something new added. In fact, it will now be necessary for the lawyer to prepare his brief with an eye to inspiring the trial judge to indulge in a hunch as to the possibility of the Circuit Court's risking a hunch regarding the ultimate hunch of the Supreme Court, "when, as and if" the given problem reaches the highest court in our land. Otherwise stated, the anticipatory-reversal program gives promise of the evolution of a new hunch—with a triple aspect!

**Judicial Legislation.** Time was and not so long ago when the old Supreme Court was condemned, not infrequently with reason, because it was holding back social and economic legislation through the unwarranted distortion of general phrases of the constitution. The charge was attractively phrased by contending that the Supreme Court since the turn of the Twentieth Century had increasingly arrogated to itself the functions of a Super-legislature, evaluating the wisdom, expediency and even necessity of legislative reforms passed by the Congress and the State legislatures.

But alas it seems that the new Court under the guise of "interpretation" is increasingly guilty of similar usurpation of the functions of the legislature and creating a new Super-legislature. This process of judicial legislation has had a slow, but steady growth. We may begin with the classic statement of Lord Bacon that the function of the justice is only "jus dicere et non jus dare," to interpret law not to make law. Then follows Justice Holmes' famous statement that "Judges do and must legislate, but they can do so only interstitially, they are confined from molar to molecular motions." Now we are informed that "it would be hardihood to deny that judges can, and do, legislate massively as well as molecularly."

Limiting our comment to judicial legislation which seeks to enlarge statutes through the process of "interpretation" or "explanation" or

---

84. The typical example of this enlargement of constitutional law centers around the XIV Amendment with its illusive terms, "due process of law," "liberty," and "equal protection of the laws." It was such expansion which Mr. Justice Holmes attacked so severely in his dissenting opinions. For example, see Holmes, J., dis. op. in Lochner v. New York, 198 U. S. 45, 74 (1905).

85. Broom, Legal Maxims (10th ed. 1939) 91.

86. Southern Pacific Co. v. Jensen, 244 U. S. 205, 221 (1917).

through the device of assuming a legislative "policy" which permits of the judicial gloss, it appears that a growing dissent against this practice is visible among the Justices of the Supreme Court. It seems that there is a danger that the justices who indulge in the methods of judicial legislation will readily "see" policies in the statute which are not there and "read in" policies which are deemed to be advisable in reinforcement of the statutory enactment.

A typical phrasing of the evils of the judicial legislation is found in Mr. Justice Jackson's dissent in Anderson v. Abbott.88 There the question was precisely one of statutory construction. Said Mr. Justice Jackson:

"We have been unable to find that Congress ever has announced a legislative policy such as the Court announces. And the Court nowhere points it out. . . . The Court is not enforcing a policy of Congress; it is competing with Congress in creating new regulations in banking, a field peculiarly within legislative rather than judicial competence."89

The gathering signs indicate that the time will come, if it is not already here, when the same criticism directed against the old Supreme Court for its invasion of the functions of the legislature will be directed to the new Supreme Court on the ground that it has gradually created a new Super-legislature, not for the purpose of overthrowing social and economic reforms as did the old Court, but for the purpose of amplifying and expanding legislative enactments according to its own superior wisdom.

Ultra Legal Realism. More remote, but still possible within the pronouncements of the advanced group of realists, is the overthrow of constitutional and common law,80 and the substitution of emotional jurisprudence reminiscent of Lord Hermand's jurisprudence of "feeling."91 One commentator has phrased this new way of diagnosing judicial personalities in these words: "It is now possible in all social circles, the most conservative as well as the most radical, to lift the skirts of the Court and see the boots of the Justices."92 This metaphor is not without a semblance of literal truth, for it expresses the present tendency to intermix the judge's powers of digestion, decision and perambulation. Podiatric jurisprudence has arrived.

Lest it be thought that this warning of the possible termination of the seven-century reign of the common law and the century and a half of constitutional law is without foundation, it might be well to recall

---

89. Id. at 375, 380.
90. See supra, notes 50-57.
91. See supra, p. 13.
92. McLeish, Foreword, Frankfurter, Law and Politics (1939) xii.
that this very collapse of law has been a parallel phenomenon arriving in every instance with totalitarian and dictatorial governments.93

But a distinguishing mark of Western Civilization has been the guaranty of Rule by Law94—the promise and performance of regularized rules, reasonably predictable and predetermined, known or knowable by all and applied for the benefit of all—and equally. Correspondingly the common law tradition rejects the right of the individual—king, judge or commissioner—to act or decide arbitrarily. A benevolent despot is not saved by alluring adjectives. More precious than any plan or program of political policy or legal philosophy is Rule by Law, symbolized by the deeply imbedded doctrine of \textit{stare decisis}. Let us not fritter it away for the genius of any judge, however brilliant, or any court, however benign.

93. "As things are today, I cannot but think that much of the attack on \textit{stare decisis} is a part of the revival of absolutism which is so prominent in political and juristic thought throughout the world." Pound, \textit{What of Stare Decisis?} (1941) 10 \textsc{Fordham L. Rev.} 1. Timasheff, \textit{The Legal Regimentation of Culture in National Socialist Germany} (1942) 11 \textsc{Fordham L. Rev.} 1.

94. "Nothing distinguishes more clearly a free country from a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules that make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." Hayek, \textit{The Road to Serfdom} (1944), condensed in the \textsc{Reader's Digest}, April 1945, p. 13.