3

THE PRACTICE AND PROBLEMS OF PRECEDENT

3.1 Precedent in Two Directions

Law characteristically faces backward. Unlike most forms of policy-making, which are concerned with a proposed policy's future consequences, legal decision-making is preoccupied with looking over its shoulder. Frequently in law, but less so elsewhere, it is not enough that a decision produces desirable results in the future; the decision must also follow from or at least be consistent with previous decisions on similar questions. Indeed, legal reasoning's commitment to *precedent* is even stronger than that. By ordinarily requiring that legal decisions follow precedent, the law is committed to the view that it is often better for a decision to accord with precedent than to be right, and that it is frequently more important for a decision to be consistent with precedent than to have the best consequences.

The practice of precedent is more complex than sketched in the previous paragraph, and this chapter is devoted to exploring variations on the basic theme that courts are expected to follow or obey precedents—decisions from the *past*. But before getting too far into the complexities, it is important to distinguish two different ways in which the obligation to follow precedent arises in the legal system. One we can call *vertical* precedent. Lower courts are normally expected to obey the previous decisions of higher courts within their jurisdiction, and this relationship of lower to higher in the "chain of command" is usefully understood as vertical. Federal district courts are obliged to follow the precedents of the courts of appeals of their circuit, and the courts of appeals are obliged to follow the precedents of the Supreme Court. The same holds true in state systems, which typically have a similar structure and impose equivalent obligations. Indeed, we refer to courts as higher and lower precisely

because higher courts exercise authority over lower ones, an authority manifested principally in the obligation of lower courts to treat the decisions of higher courts as binding upon them.

In addition to being obliged to follow the decisions of courts above them in the judicial hierarchy, courts are also, although less obviously and sometimes more controversially, expected to follow their *own* earlier decisions. Here the relationship is *horizontal,* because the obligation is between some court now and the *same* court in the past. Horizontal precedent is thus not a matter of higher or lower courts, but rather an artificial or imposed hierarchy from earlier to later. The earlier decision is superior not because it comes from a higher court; rather, the earlier decision becomes superior just because it is earlier. This obligation of a court to follow its own previous decisions is typically known as *stare decisis*—Latin for "stand by the thing decided"—and it is a distinct form of constraint by precedent. Under the doctrine of stare decisis, a court is expected to decide issues in the same way that *it* has decided them in the past, even if the membership of the court has changed, or even if the same members have changed their minds. Like vertical precedent, stare decisis—horizontal precedent—is about following the decisions of others. But although both vertical and horizontal precedents involve following the decisions of others, the distinction between a court's following the decision of a higher court and its following its own previous decisions is important enough in numerous contexts to be worth emphasizing even before we see just what the obligation to follow entails, and before we examine the complications that are involved when these obligations arise in actual practice.

3.2 Precedent—The Basic Concept

The core principle of decision-making according to precedent is that courts should follow previous decisions—that they should give the same answers to legal questions that higher or earlier courts have given in the past. What counts as the same question will occupy much of our attention, but first we need to examine just what the obligation to follow a precedent is. In doing so, it will help to introduce some additional clarifying terminology. So although in the case of vertical precedent the earlier decision comes from above, and in the case of horizontal precedent—stare decisis—it comes from the same court in the past, in both instances a court is expected to follow an earlier decision in another case. For the

sake of clarity, we can label the court now making the decision the *instant court* and its current controversy the *instant case*. And we can call the previous court (including the same court in an earlier case) the *precedent court* and its decision the *precedent case*. Questions about the force and consequences of precedent will thus always involve the effect of some decision by the precedent court in the precedent case on the issue now before the instant court in the instant case.

So now we can turn to the nature of precedential obligation. Initially, understanding the idea of precedent requires appreciating the difference between *learning* from the past, on the one hand, and *following* the past just because of the fact of a past decision, on the other. With respect to the former, which is not really precedential reasoning at all, the instant court may *learn* from a previous case, or be *persuaded* by some decision in the past, but the decision to do what another court has done on an earlier occasion is not based on the previous case's status as a precedent. Instead the decision exemplifies the fundamental human capacity to learn from others and from the past. There are many instances in which the instant court will be persuaded by the reasoning of another court, but if the instant court is genuinely persuaded, then it is not relying on—*obeying*—precedent at all.[1] To see why this is so, consider a simple nonlegal example: Suppose I am boiling an egg. I boil it for six minutes, and am pleased to discover that it is cooked to precisely my preferred hardness. Consequently, the next time I boil an egg I do so, not surprisingly, for six minutes. I have learned from the previous "case," but when I boil the second egg for six minutes, I am not boiling it for six minutes *because* I boiled it for six minutes on the previous occasion. I am boiling it for six minutes because six minutes is the right time. I know this because I have learned from the previous action, but on subsequent occasions I make the decision because of what I then know.

This kind of learning from past experience pervades public decision-making. When Ronald Reagan ran for president in 1980, he focused his campaign, unlike earlier Republican candidates, on issues likely to attract Democratic union members and southern Democrats, and he took

1. The conception of *following* or *obeying* offered here is consistent with that in the jurisprudential literature, much of which is focused on the question of whether there is a moral obligation to obey the law. See Donald H. Regan, "Reasons, Authority, and the Meaning of 'Obey': Further Thoughts on Raz and Obedience to Law," 3 *Can. J.L. & Jurisp.* 3 (1990).

positions consistent with the preferences of those groups. The strategy was successful and subsequently adopted by other Republican political candidates. But these other candidates followed Reagan's strategy not because Reagan had used it, but because Reagan's success had convinced them that it was the right strategy.

The same phenomenon exists in law.[2] In *Henningsen v. Bloomfield Motors, Inc.*,[3] the Supreme Court of New Jersey concluded that there was such disparity of bargaining power between an automobile dealer and the typical purchaser of a car that the court would not enforce a buyer's waiver—even a written and signed one—of what would otherwise have been the normal warranties. So with *Henningsen* having been decided, suppose that an appellate judge from a different state reads the opinion in *Henningsen* and comes away persuaded that it represents the fairest approach to contractual waivers in the modern era of corporate dealerships and impersonal consumer transactions. She had never before considered the possibility of coercively unequal bargaining power, nor even imagined that the terms of a contract should not be enforced except in cases of fraud, duress, or incapacity. But reading *Henningsen* has persuaded her to modify her previous beliefs about the so-called sanctity of contract. She now believes that there are circumstances in which written and signed contractual provisions should be unenforceable even where there is neither explicit fraud nor any of the other traditional grounds for nonenforcement of a contract. Accordingly, when the opportunity arises, she reaches a decision consistent with *Henningsen* and writes an opinion that mostly tracks that case. In order to acknowledge the source of her learning, and also to give research guidance to others, she cites the New Jersey decision. But her current decision is not dictated by the existence of the New Jersey case—she is not *obeying* the decision in New Jersey. She has reached her decision because, having been persuaded by *Henningsen,* she now believes that unconscionable contractual provisions based on extreme disparities of bargaining power in consumer transactions should not be enforced. As with my learning how long to boil an egg from my previous action, and as with political candidates learning strategies from earlier successful ones, the judge in this hypo-

2. See Larry Alexander, "Constrained By Precedent," 63 *S. Cal. L. Rev.* 1 (1989); Lon L. Fuller, "Reason and Fiat in Case Law," 59 *Harv. L. Rev.* 376 (1946): Frederick Schauer, "Precedent," 39 *Stan. L. Rev.* 571 (1987).

3. 161 A.2d 69 (N.J. 1960).

thetical example has not made her decision in the instant case just because of what the New Jersey court did or because she was in any way obliged to follow a court in New Jersey. She made it because she learned something from another case that now genuinely reflects her current beliefs. It is not that much different from having learned about unconscionability from a book about economics or philosophy, or even from a conversation at the gym. The fact that the source of learning happened to be a court in another state is barely more than a coincidence.

These examples illustrate a common way in which judges use prior cases, but it is not, strictly speaking, reasoning from precedent—the prior case's status as a previous judicial decision has actually made no difference. In contrast, reasoning from precedent—and maybe it is a mistake to call it "reasoning" at all—is following a previous decision just because of its status as a decision of a higher court or of the same court on an earlier occasion, not because the follower in the instant case has been persuaded by the reasoning of the precedent case. Some lower court judge in New Jersey, for example, might still believe after *Henningsen* that all nonfraudulent contractual provisions should be strictly enforced according to their terms and that the *Henningsen* court's concern for the consumer was misplaced. Even after reading *Henningsen,* he remains unpersuaded. Yet however much he continues to believe in the strict enforceability of written provisions, and even though he believes *Henningsen* to have been wrongly decided, he is still obliged, as a lower court judge in the same jurisdiction, to follow *Henningsen* despite being convinced of its error. So too for stare decisis. If in 1970, ten years after *Henningsen,* the majority of the New Jersey Supreme Court consisted of justices not on the court at the time of *Henningsen,* and if those new justices believed *Henningsen* to have been erroneously decided, the obligations of stare decisis would still have obliged them to decide the same issue in the same way. They would have been constrained to follow a decision they thought mistaken just because of its existence as a previous decision of the same court. The British legal theorist P. S. Atiyah puts it directly: "The concept of a system of precedent is that it constrains judges in some cases to follow decisions they do not agree with."[4]

4. P. S. Atiyah, "Form and Substance in Legal Reasoning: the Case of Contract," *in The Legal Mind: Essays for Tony Honoré* 19, 27 (Neil MacCormick & Peter Birks eds., 1986). See also Lionel Smith, "The Rationality of Tradition," *in Properties of Law: Essays in Honour of James Harris* 297 (T. Endicott, J. Getzler, & E. Peel eds., 2006).

The basic idea should now be clear. When courts are constrained by precedent, they are obliged to follow a precedent not only when they think it correct, but even when they think it incorrect. It is the precedent's source or status that gives it force, not the soundness of its reasoning[5] nor the belief of the instant court that its outcome was correct. When it is argued, for example, that even those Supreme Court Justices who believe *Roe v. Wade*[6] to have been wrongly decided should nevertheless follow it in subsequent cases, the argument is not (or not only) that those Justices should change their minds about *Roe v. Wade*. Rather, the argument is that those Justices should follow *Roe* even if they continue to think that it was decided incorrectly.

3.3 A Strange Idea

Having seen that following precedent obliges judges to make decisions other than the ones they, in their best judgment, would have made absent the precedent, we can appreciate that constraint by precedent is in many respects counterintuitive, at least from the perspective of the constrained judges. From their perspective, the obligation to follow precedent—whether vertical or horizontal—often instructs them to reach what they think is the wrong decision.[7] So why would the law operate in this way, and why would the legal system require its judges to do something other than make decisions according to their own best legal judgment?

With respect to vertical precedent, the justifications for precedential constraint are fairly obvious. Just as children are expected to obey their parents even when they disagree, as privates are expected to follow even those orders from sergeants they believe wrong, as Catholics are expected to follow the dictates of the pope even if they think those dictates mistaken, and as employees are expected to follow the instructions of their supervisors, lower court judges are expected to follow the "instruc-

5. "If the precedent is truly binding on [the judge], and if he loyally accepts the principle of stare decisis, he will not even pause to consider what substantive reasons may be given for the opposite decision." Atiyah, *supra* note 4, at 20.

6. 410 U.S. 113 (1973).

7. Justice Scalia, who disapproves of stare decisis at the Supreme Court level, has said that "[t]he whole function of [stare decisis] is to make us say that what is false under proper analysis must nevertheless be held to be true." Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 139 (Amy Gutmann ed., 1997).

tions" of those courts above them in what the military calls the "chain of command." Whatever we might think about the obligation of currently disagreeing Justices to follow the Supreme Court's own earlier decision in *Roe v. Wade*, expecting lower courts to follow *Roe* as long as it is not overruled seems hardly surprising.[8] With respect to vertical precedent, constraint by precedent appears to be little more than the legal system's version of the kind of hierarchical authority that exists in most governmental and nongovernmental institutions.

When we turn to horizontal precedent, however, the arguments in its favor are less obvious. Stare decisis is a pervasive principle of the common law,[9] but it is far less so in nonlegal contexts. Scientists, for example, are not expected to reach the same conclusions as their predecessors just because their predecessors have reached them. It would be surprising if Congress were to make the same decisions as previous Congresses only because previous Congresses had made them. And no one believes that presidents should follow those decisions of their predecessors with which they disagree. Indeed, we often elect them not to. Thus it is no surprise that books about logic typically treat arguments from precedent as fallacies, because the fact that someone has reached a conclusion in the past says nothing about whether it is the correct conclusion now.[10] Even in law, the idea of precedent often seems strange, and Oliver Wendell Holmes once remarked that it was "revolting" that courts would be bound by precedents which "persist . . . for no better reasons than . . . that so it was laid down in the time of Henry IV."[11] And Jeremy Bentham, who was a very good hater, reserved special hatred for the system of precedent in general and stare decisis in particular, describing it as

8. It was in an abortion case, for example, that Judge Emilio Garza observed that "[f]or the second time in my judicial career, I am forced to follow a Supreme Court opinion I believe to be inimical to the Constitution." Causeway Medical Suite v. Ieyoub, 109 F.3d 1096, 1113 (5th Cir. 1997) (Garza, J., concurring).

9. It has not always been so. Although the obligations of vertical precedent go back to the beginnings of appellate courts in the eighteenth century or earlier, the constraints of stare decisis did not become accepted until the nineteenth century. See Thomas R. Lee, "Stare Decisis in Historical Perspective," 52 *Vand. L. Rev.* 647 (1999); Edward M. Wise, "The Doctrine of Stare Decisis," 21 *Wayne L. Rev.* 1043 (1975).

10. See, e.g., D. Q. Mcinerny, *Being Logical: A Guide to Good Thinking* 142 (2005); Christopher W. Tindale, *Fallacies and Argument Appraisal* 201 (2007).

11. Oliver W. Holmes, "The Path of the Law," 10 *Harv. L. Rev.* 457, 469 (1897).

"acting without reason, to the declared exclusion of reason, and thereby in opposition to reason."[12]

Yet as Holmes at other times recognized, even if Bentham did not, stare decisis does have something to be said for it. One argument in its favor was recognized by Justice Brandeis when he observed, famously, that "in most matters it is more important that [the question] be settled than that it be decided right."[13] In life, and especially in law, it is often valuable to have things settled so that others can rely on those decisions and guide their behavior accordingly. A company planning a commercial transaction needs to know which transactions are legally permissible and which not, and this confidence and reliance would be lost were the risks too great that the relevant legal rules would be continually subject to change. From the perspective of those who are subject to law's constraints, the gains from marginal improvements in the law are rarely sufficient to outweigh the losses that would come from being unable to rely even on imperfect legal rules and imperfect precedents.

From the perspective of the constrained court, stare decisis brings the advantages of cognitive and decisional efficiency. None of us has the ability to keep every issue open for consideration simultaneously, and we could scarcely function if all of our decisions were constantly up for grabs. Especially in a court, where narrowing the issues increases the ability to focus the arguments, treating some matters as simply settled makes life easier for the court, just as it does for those who are expected to plan their lives and their activities around the decisions that courts make. Justice Cardozo, while still a judge of the New York Court of Appeals, observed that "the labor of judges would be increased to the breaking point if every past decision could be reopened in every case,"[14] and in this pithy phrase he captured that human beings can only do only so much, and that doing some things well requires that we treat other things as best left for another time.

Stare decisis, in thus valuing settlement for settlement's sake and consistency for consistency's sake, serves a range of values all having something to do with *stability.* Stability is not all there is, of course, and even

12. Jeremy Bentham, "Constitutional Code," in 1 *Collected Works of Jeremy Bentham* 434 (F. Rosen & J. H. Burns eds., 1983).

13. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

14. Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (1921).

Brandeis recognized that just as it is sometimes more important that things be settled than that they be settled correctly, so too is it sometimes more important that things be settled correctly than that they be settled incorrectly or imperfectly just for the sake of settlement. Yet however important it is on occasion to be right, following the past without regard to its rightness is pivotal to how law operates. Stare decisis, far from being a silly appendage to a decision-making system whose principal aim is to make the right decision now, in fact reflects something deep and enduring about a decision-making system that often serves the values of stability, consistency, settlement, and respect for the past just as other branches of government and other decision-making systems remain more flexible, less stable, less predictable, and more focused on the future.

3.4 On Identifying a Precedent

It is easy to *say* that a court is expected to follow a past decision—whether its own in the case of stare decisis or that of a higher court in the case of vertical precedent—but it is rarely easy to determine what counts as a past decision. Occasionally the task will be straightforward. A Supreme Court case dealing with the permissibility of a state's total ban on abortion, for example, could hardly escape confronting *Roe v. Wade* as the relevant precedent. If someone argued in New Jersey that consumer purchasers of automobiles from corporate dealerships should be strictly held to their written waivers of warranties, *Henningsen* would dominate the arguments. And if the question were one of determining which of two conflicting statutes applied to a particular class of cases,[15] then a court's determination of that abstract issue of statutory interpretation would establish the law for future cases. More commonly, however, it is not nearly so clear which cases are to count as precedent cases, and, even more importantly, it is rarely obvious what those cases will be taken to stand for.

The task of identifying the relevant precedent and its holding is problematic largely because no two events are exactly alike. Therefore, no two cases will be exactly alike. In *Raffles v. Wichelhaus,*[16] for example, the English Court of the Exchequer concluded that there was no meeting of the minds and therefore no contract when a buyer of cotton thought

15. See Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), *vacated as moot,* 235 F.3d 1054 (8th Cir. 2000).

16. 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864).

he was buying the shipment of cotton coming on one ship named *Peerless* and the seller thought he was selling the cotton shipment on a different ship that also happened to be named *Peerless*. Every case subsequent to *Raffles* will vary in some way, at the very least in terms of time. Still, it would be silly for someone to argue that *Raffles* was not a precedent for an otherwise similar case that arose in London rather than Liverpool, or in which both ships were named *Excelsior* instead of *Peerless,* or in which the cargo was tea and not cotton. When there is a precedent case that so resembles the instant case that any differences are trivial, lawyers and judges often say that the precedent is "on all fours," and in such cases the identification of the precedent rarely creates problems.

Typically, however, the differences between the instant case and some possible precedent case are more substantial than those between *Raffles* and a *Raffles*-like case with only different ships, different ports, and different cargos. When that happens, two interrelated problems arise. The first is the initial identification of the relevant precedent. Is some previous decision to be treated as a precedent case at all? The second problem is the determination of what that precedent case will now be taken to stand for. In a world in which there is no complete identity between any two cases or any two events, these tasks involve determining whether there is a *relevant* similarity between some possible precedent case and the instant case, for only when there is will the instant court be under an obligation to follow what the precedent court has held.

The problem of determining relevant similarity can be illustrated by examining two cases often used to explore the nature of precedent. First is Judge Cardozo's decision for the New York Court of Appeals in *MacPherson v. Buick Motor Company.*[17] At more or less maximum particularity, *MacPherson* held that the Buick Motor Company, a manufacturer of passenger automobiles, would be liable to a purchaser of a Buick for damages produced by Buick's incorporation into its automobile of a defective wheel manufactured by someone else, despite the lack of privity of contract between the purchaser and the Buick Motor Company. Yet even though *MacPherson* would pretty obviously be a precedent for a claim about a defective Oldsmobile or Toyota or for a case involving defective automobile parts other than wheels, most subsequent cases will not be so similar. If the injury in a subsequent case were caused by a foreign substance in a product normally less dangerous than a car, for

17. 111 N.E. 1050 (N.Y. 1916).

example, would *MacPherson* still be considered controlling precedent? Some time after *MacPherson* was decided, there arose in Great Britain an equally prominent case resembling it, *Donoghue v. Stevenson*.[18] In that case the consumer, Mrs. Donoghue, a patron at the Wellmeadow Café in Paisley, Scotland, was with a companion who ordered a glass of ginger beer for her. Mrs. Donoghue drank about half a glass of the ginger beer, and the proprietor then refilled her glass from the opaque bottle, at which time the remnants of a dead snail tumbled into Mrs. Donoghue's glass. The sight and smell of the decomposed snail caused Mrs. Donoghue gastric distress and mental shock, and she subsequently sued the manufacturer (which was also the bottler) of the ginger beer.

As in *MacPherson,* the defendant manufacturer claimed in *Donoghue* that the action was barred because of the lack of privity between consumer and manufacturer. Were the case to have arisen in New York after *MacPherson,* the plaintiff would undoubtedly have argued that the issue had already been decided, thus obliging the court to reach the same result that had been reached in *MacPherson*. But the defendant would have argued that the two cases were different and that *MacPherson* did not stand for the proposition that privity was unnecessary in a case not involving inherently dangerous machinery such as an automobile. And with these as the two opposing positions, how is the court in the instant case—the hypothetical post-*MacPherson* New York ginger beer case—to decide whether *MacPherson* is a precedent and just what it is a precedent for?

Precisely this question has been the subject of debate for generations. A common view is that the precedent case is a precedent not only for more or less identical cases arising in the future, but also for *similar* cases—cases involving similar facts. But what is it that makes one nonidentical factual situation similar to another? We are confident that cases involving defective Toyotas are similar to ones involving defective Buicks, but is an opaque beverage container with a nauseating foreign substance in it similar to or different from a car with a defective wheel? The two situations have in common that both were consumer transactions, the defects caused injury or illness, and the defect was not immediately apparent (which is why it was important in *Donoghue* that the bottle was opaque). They are different in that cars are different from ginger beer, cars are costly and ginger beer is not, and cars were sold by

18. [1932] A.C. 562 (H.L.).

manufacturer-specific dealerships but ginger beer was sold in cafés that stocked all sorts of different beverages. Like any two sets of facts, the facts of *MacPherson* and the facts of the ginger beer case are similar in some respects and different in others.[19] And if that is so, then how is the instant court to decide whether the two are similar enough for the first to be a (binding) precedent for the decision of the second?

One possibility is that some things just *are* similar to others, with the responsibility of law being to treat as similar those things that really are similar in some deep and prelegal sense. Under this view, what makes a variant on *MacPherson* involving Toyotas and not Buicks and another involving brakes and not wheels sufficiently similar to *MacPherson* is that Toyotas are similar to Buicks in that both are passenger cars, and brakes are similar to wheels in that both are parts of cars whose defective manufacture can cause serious injury. But this approach to similarity—one premised on the idea that there are natural similarities—will not work. *MacPherson,* as we know, was a case about tort liability and defective manufacture, but in some subsequent case about securities regulation or banking it might not be so clear that the Toyota Corporation, based in Japan, should be treated the same as the Buick Motor Company, based in Detroit. And if it turned out that wheels were ordinarily purchased from a wheel manufacturer but that brakes were manufactured by the automobile company itself, then in some kinds of products liability cases brakes might no longer be relevantly similar to wheels.

Philosophers often talk about natural kinds, by which they mean things that are fundamentally different from each other in nature and not as a matter of human categorization or sorting. Zebras are different from rocks not because humans have decided that they are, but because they are different in nature. What makes a zebra a zebra and a rock a rock is not decided by humans or their institutions, but by the natural design of the universe. But even with respect to natural kinds, law has its own goals and its own values, and so it might elect to treat things that are naturally different as similar, as when it applies the same products liability rules to sales of fruit trees and sales of bottled water, and the fact that there might be the same products liability rule for both is independent of

19. And because any two acts, events, or cases are alike in some respects and unalike in others, the value of a system of precedent cannot be grounded in the mandate to treat like cases alike. See David Lyons, "Formal Justice and Judicial Precedent," 38 *Vand. L. Rev.* 495 (1985).

the fact that fruit trees and water are different natural kinds. Conversely, the law might have different rules for things that are naturally similar. The diamond I purchase is (usually) mine in the eyes of the law, but the diamond I steal is (usually) not, and this is so even though the diamond I purchase and the diamond I steal are naturally and prelegally similar.

If even natural kinds are not naturally similar for the law, then nothing is naturally similar for the law. Two items might appear prelegally similar, but that is usually because their similarity is based on some common need or goal. Most people might take red handbags and blue handbags to be similar, for example, because they perform a similar function, but if the question were whether the handbags matched a certain pair of shoes, the two would no longer seem so similar. Nor would they be similar in an intellectual property case in which the different colors might make the products easily distinguishable. So too with why Toyotas may not be similar to Buicks for purposes of import tariff legislation, and why vodka is similar to water in the eyes of the airport inspectors of the Transportation Safety Administration but not in the eyes of those who enforce the laws prohibiting the sale of alcohol to minors. To suggest that there are certain natural similarities that answer the question of which cases are similar to others appears to send us down a quite false path.

This is not to say that the law never bases its determinations of similarity and difference on the similarities and differences that exist in the prelegal world. In *The Path of the Law,* Holmes offered the following probably apocryphal story:

> There is a story of a Vermont justice of the peace against whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant.[20]

Holmes was obviously making fun of the Vermont justice of the peace, and Holmes's point was that no one but a non-legally-trained bumpkin could possibly imagine that "churn" could be a legally relevant category. This becomes clear when Holmes goes on the observe that

> [a]pplications of rudimentary rules of contract or tort are tucked away under the heads of Railroads or Telegraphs or . . . Shipping

20. 10 *Harv. L. Rev.* 457, 474–75 (1897).

> . . . , or are gathered under an arbitrary title which is thought likely to appeal to the practical mind, such as Mercantile Law. If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy.[21]

Holmes's little story has become famous, but Holmes may nonetheless have been wrong.[22] It is true that law often treats as similar those things that are prelegally or extralegally different, as when it uses legal categories like contract to encompass contracts for labor and contracts to sell lettuce, and when the category of "security" under the Securities Act of 1933 is understood to encompass not only stocks and bonds, but also some insurance policies, some bank accounts, and some fractional ownership interests in land, racehorses, oil paintings, fruit trees, and wine.[23] But just as often, and more so each day, law bases its determinations of legal similarity on the similarities that exist in the extralegal world. Under the lead of Karl Llewellyn, whose contributions to Legal Realism will be featured in Chapter 7, much of the Uniform Commercial Code is designed to reflect and track the practices of real merchants in their ordinary dealings.[24] That most aspects of contracts for the sale of securities are governed by securities-specific federal statutes and not by the state law of contracts shows that the genuine distinction between securities and other objects of contracting is reflected in the law as well. And the fact that long before he became a Supreme Court Justice, Louis Brandeis could be the coauthor of an article entitled "The Law of Ponds[25] exemplifies the way in which legal categories such as ponds are, more often than Holmes supposed, built on the categories of the prelegal world. Holmes might have been right that there was no such thing as churn law, but he was quite mistaken in suggesting that there *could be* no such thing as churn law.

21. 10 *Harv. L. Rev.* at 475.

22. See Frederick Schauer, "Prediction and Particularity," 78 *B.U. L. Rev.* 773 (1998).

23. See, e.g., Rutheford B. Campbell, Jr., "Racing Syndicates as Securities," 74 *Ky. L.J.* 691 (1985).

24. See, e.g., Zipporah Batshaw Wiseman, "The Limits of Vision: Karl Llewellyn and the Merchant Rules," 100 *Harv. L. Rev.* 465 (1987).

25. Samuel D. Warren & Louis D. Brandeis, "The Law of Ponds," 3 *Harv. L. Rev.* 1 (1889).

Thus, it is possible that determinations of similarity for the purpose of assessing what is to be a precedent will in some contexts reflect law's sense of similarity for law's purposes only, and will in other contexts reflect those judgments of similarity that come from the outside world. But as long as both of these possibilities exist, and as long as even prelegal determinations of similarity and difference are based on context and purpose, then it seems impossible to conclude that a legal determination of similarity is just a matter of seeing whether the facts in the instant case really *are* similar to the facts of the precedent case.

With the path of natural similarity being a false one, we must look for something else that will tell us whether and when an earlier case claimed to be a precedent is actually a precedent for the instant case. And this something else is often thought to be what is called, especially in common-law jurisdictions outside the United States, the *ratio decidendi* of the precedent case—the basis or rationale for the court's decision.[26] We need to know not only *what* the precedent court decided, but *why* it decided it. So a common view in England and elsewhere is that, like rules, precedent cases have justifications or rationales lying behind their outcomes, and a precedent case is a good precedent, and thus binding, for all subsequent cases falling within the ratio decidendi of the precedent case. So far so good, but now how do we know why the precedent court decided what it did? How do we know what the ratio decidendi was? One possibility is to look to the facts of the precedent case as described by the precedent court and to take those facts, in conjunction with the outcome of the case, as the ratio decidendi; indeed, this was what the legal theorist Arthur Goodhart influentially proposed.[27] But Goodhart's solution turns

26. See Geoffrey Marshall, "What is Binding in a Precedent?," *in Interpreting Precedents: A Comparative Study* 503 (D. Neil MacCormick & Robert S. Summers eds., 1997).

27. Goodhart, an American, was professor of jurisprudence at Oxford from 1931 to 1951. His claim that the ratio decidendi consisted of the material facts as found by the court combined with the result was set forth in Arthur L. Goodhart, "Determining the Ratio Decidendi of a Case," 40 *Yale L. Rev.* 161 (1930). Goodhart's claim spawned a vigorous debate some years later. See Arthur L. Goodhart, "The Ratio Decidendi of a Case," 22 *Mod. L. Rev.* 117 (1959); J. L. Montrose, "Ratio Decidendi and the House of Lords," 20 *Mod. L. Rev.* 124 (1957); J. L. Montrose, "The Ratio Decidendi of a Case," 20 *Mod. L. Rev.* 587 (1957); A. W. B. Simpson, "The Ratio Decidendi of a Case," 20 *Mod. L. Rev.* 413 (1957); Julius Stone, "The Ratio Decidendi of the Ratio Decidendi," 22 *Mod. L. Rev.* 597 (1959).

out not to help very much. If the facts are that Mr. MacPherson bought a Buick from a dealer who had bought it from the Buick Motor Company and the wheel of the Buick broke, causing an injury to Mr. MacPherson, and the outcome is that Mr. McPherson prevailed against the Buick Motor Company, we still do not know the *level of abstraction,* or *level of generality,* at which to understand these facts, and without more we cannot know *why* the court decided the way it did.[28] Was it something about Buicks, something about cars, something about wheels, something about consumer products, something about inherently dangerous products (as cars were thought to be in 1916), or something else? By themselves the facts and the result are not going to provide the reasons for the precedent court's decision, and without the reasons we have no way to tell whether *MacPherson* is a Buick case, a wheel case, a car case, a consumer product case, or something else entirely. Similarly, if a court decides that a person who unlawfully sells liquor to a minor is liable for alcohol-related injuries caused by that minor,[29] is that to be understood as supporting (or dictating) similar vicarious liability for one who lawfully sells liquor to an adult? Or one who unlawfully sells a gun that is subsequently used in an armed robbery? Or one who lawfully sells a gun that is used for the same purpose? And is the actual case of *Donoghue v. Stevenson* precedent for a case in which the bottle is transparent and thus capable of being inspected by the consumer? In none of these cases is it possible to say, Goodhart's view notwithstanding, that the court's statement of the facts combined with the result gives us anything close to an answer.

If in such cases the bare statement of the facts and the outcome cannot tell us what the precedent case fully "stands for," then it is tempting to say that the question of legal similarity is itself determined by the law. That is why discussions of precedent, including Goodhart's, commonly talk not about facts but about *material* facts. In concluding that the *holding* of the case—the term more common in the United States than ratio decidendi, although there are slight differences in meaning—is a combination of the material facts and the outcome, Goodhart and others solved the level of generality problem, but at the cost of undermining the core of their view. So to Goodhart it would have been an error to say that the car being a Buick was a material fact, because the car's "Buickness"

28. See John Bell, "The Acceptability of Legal Arguments," *in The Legal Mind: Essays for Tony Honoré* 45, 47 (Neil MacCormick & Peter Birks eds., 1986).

29. See, e.g., Congini v. Portersville Valve Co., 470 A.2d 515 (Pa. 1983).

was no more material than the fact that Mr. MacPherson's last name began with the letter "M." Under this view, a fact is material when a legal rule makes it legally important. It is a legal rule that tells us when two things are similar, and thus it is a legal rule that tells us the level of generality at which the facts should be understood and described by the deciding court. It is therefore a legal rule that would tell us that "automobile" is a legally material category while "Buick" is not. But although this is often so, relying on a legal rule to tell us which cases are materially similar and which are not avoids the very question we are trying to answer. If the standard for materiality comes from outside the precedent case—a statute, for example—then the statute is doing the work and we do not have an example of precedential constraint at all. That is, if a statute says that properties *p, q,* and *r* are material, and if the precedent case exhibits those properties, then the search for those properties in the instant case is a search for the properties that the statute and not the precedent case have made legally relevant. And much the same applies to determinations of materiality made by single or multiple cases other than the precedent case. If a preexisting legal rule makes some part of the precedent case material, then we need to look to the source of the understood rule and just apply that, rather than thinking that it is the precedent case that is exerting the constraint. If it is a legal rule that tells us why "Buickness" is not a legally material property, then a court in a post-*MacPherson* case ought to be following *that* legal rule and not anything that can be found in *MacPherson* itself.

It is thus difficult to understand how materiality can come from the statement of even material facts by themselves. If a rule external to those facts determines materiality, it is that rule and not the precedent case that is carrying the load. And if the determination of materiality does not come from a rule external to the case, then it looks as if the idea of precedential constraint might be illusory, because there is no barrier to the instant court calling on similarities if it wishes to reach a result consistent with that reached in an earlier case or calling on differences if it wants to reach the opposite result. And because any two events or factual situations resemble each other in some respects and differ in others, the response that the law determines relevant similarity is no response at all.

Before we throw up our hands in despair, however, and conclude that there really is no effective precedential constraint in most situations, we need to remember that in the overwhelming majority of cases the precedent court not only gives us facts and the outcome, or conclusion, but

also tells us *why* it reached the conclusion it did. In other words, the question is not so much one of extracting the ratio decidendi from a case as of simply reading what the court said the ratio decidendi was.[30] If in *MacPherson* Judge Cardozo had said something like, "We reach this outcome because purchasers of consumer products have less of an ability to detect or correct manufacturing flaws and because manufacturers like Buick have a greater ability to insure against or bear the loss," then it would be far easier than without that statement to say that *MacPherson* is precedent for any case involving a consumer and a manufacturer, and that would be because that is just the way Judge Cardozo said it.

Sometimes a court will be even clearer and simply say what the rule is. If Judge Cardozo had said, "We hold that in all cases involving a nonbusiness consumer and a manufacturer of goods, the consumer may recover against the manufacturer for defects in manufacture without regard to privity between manufacturer and consumer," the question of what the case stood for—what it was a precedent for—would virtually disappear, because now there would be a court-generated *rule* that could be applied in future cases.[31] But even when the holding is not signaled in quite so explicit a form, the court's words remain the lodestar for locating its holding. When asked to say *why* it reached the result it reached, a court will describe the facts of the case before it as an example of a type, but the type is necessarily more general than the particular example of

30. The extraction of the ratio decidendi is a much more important issue in Great Britain than in the United States, because under traditional British appellate practice, as well as that in some other British Commonwealth countries, there is no requirement that there be a single majority opinion or opinion of the court. The three or five or more judges who hear a case typically will each give his own individual opinion. The outcome reached by the majority of those judges is the outcome in the case, but determining what the case stands for is inevitably a process of determining which propositions of law and which rationales attracted the agreement of a majority of the judges. So if Judge A decides for the plaintiff for reasons *x, y,* and *z,* and Judge B decides for the plaintiff for reasons *p, q,* and *x,* and if Judge C decides for the defendant, then the ratio decidendi is *x,* the reason (and the only reason) shared by a majority of judges. Where this practice of individual opinions does not exist, as it does not in the United States (except to the extent to which an increasingly divided Supreme Court appears to be moving in that direction), the question of determining the ratio decidendi is less complex.

31. See Larry Alexander, "Constrained By Precedent," note 2 *supra*. See also Larry Alexander & Emily Sherwin, "Judges as Rule Makers," *in Common Law Theory* 27 (Douglas E. Edlin ed., 2007).

the type—philosophers call it a "token"—that happened to arise in the specific case. So when, for example, the Supreme Court decided *New York Times Co. v. Sullivan,*[32] which dramatically revamped American libel law on First Amendment grounds, it described the plaintiff, Commissioner Sullivan, not only as a police commissioner (which itself would have been an abstraction from Sullivan himself and from Sullivan's particular job), but also as a "public official." And it described the *New York Times* not just as the unique *New York Times,* and not even just as a newspaper, but as "the press." As a result, *New York Times v. Sullivan,* from the beginning, stood as a precedent for all libel cases involving public officials suing the press, and that is precisely because, and only because, the Supreme Court *said* just that. If the Court had described Sullivan as a police official, and if in a subsequent case it were to have been argued that *New York Times v. Sullivan* was precedent for a case in which the libeled plaintiff had been a public official having nothing to do with law enforcement, one side would have argued that it would be good to understand *Sullivan* as being about all public officials, and the other side would have argued for a narrower interpretation, but neither side would have been able to maintain that its preferred interpretation was *compelled* by the earlier case, as would have been possible under the language of the Supreme Court's actual opinion.[33]

3.5 Of Holdings and Dicta

The perceptive legal sophisticate will detect some tension between the foregoing account and the traditional distinction between the *holding* of a case and the *dicta* that may accompany it.[34] On the traditional account,[35] the holding—which is very close to but not identical with the ratio decidendi—is the legal rule that determines the outcome of the case. So when we say that the holding in *International Shoe Co. v. Washington*[36] is that states may exercise personal jurisdiction over out-of-state de-

32. 376 U.S. 254 (1964).

33. This is not to say that the hypothetical narrower *New York Times v. Sullivan* would not have been relevant to a subsequent case seeking to broaden it. The nature of such arguments will be the focus of Chapter 5.

34. We will return to the topic of holding and dicta in Chapter 9, which focuses even more closely than we do here on the nature of judicial opinions.

35. See, e.g., Glanville Williams, *Learning the Law* 62–88 (10th ed., 1978).

36. 326 U.S. 310 (1945).

fendants as long as there are sufficient minimum contacts with the state as not to offend traditional notions of due process, we have stated a legal rule. Sometimes the court is making up the rule anew, and sometimes it is simply echoing a statement of the rule that can be found in an earlier case or distilled from multiple previous cases. But there is nothing very mysterious about the idea of a holding—it is the legal rule that, as applied to the facts of the particular case, generates the outcome. So it is no error to say that the Court held in *International Shoe* that there must be minimum contacts with the forum state in order to support personal jurisdiction, but neither is it an error to include within the idea of a holding the stated reasons behind the rule and the application of that rule to the facts of the particular case. Thus, we might describe the *International Shoe* holding as the requirement of minimum contacts coupled with the Court's statement that it would be unfair to expect a defendant to defend a suit in a state to which it had virtually no connection, this general statement then being combined with the conclusion that because the International Shoe Company's salesmen had done business in Washington, there were sufficient minimum contacts to uphold the exercise of personal jurisdiction.

Nothing in this account of a holding is problematic by itself. The court states the rule of law on which it bases its decision, applies the rule of law to the facts before it, and announces a result. That is the holding. The problems come when a court does not explicitly say what its holding is and leaves it up to readers of the opinion to try to determine it. Under the traditional account, determining the holding can be accomplished by combining the court's statement of the material facts with the court's outcome, but we have seen that this approach is unsatisfactory. If the court does not say *why* the material facts are material, we are left with a statement of facts that can be interpreted at numerous levels of abstraction, and so we are left with no firm notion of what the court held and no way of reliably applying the precedent decision in the future. Only by stating its holding does the court allow subsequent courts actually to rely on (and obey) its holding, for without the statement, the holding could be almost anything at all. But with such a statement, and with our understanding of the central role that such a statement plays in marking the court's holding, the idea of a holding, just like the idea of a ratio decidendi, becomes much less mysterious.

Traditionally, everything other than the statements of the facts and the statement of the holding is an *obiter dictum*—literally, in Latin, some-

thing said in passing, or something said by the way. It is something extra, and something that is not strictly necessary to reach, justify, or explain the outcome of the case. Commonly shortened to "dicta," these unnecessary statements are often a court's observations about issues not actually before it, or conclusions about matters unnecessary to the outcome the court actually reached, or wide-ranging explanations of an entire body of law, or simply largely irrelevant asides. So in *Marbury v. Madison,*[37] Chief Justice John Marshall held that the Judiciary Act of 1789, upon which the subject-matter jurisdiction of the Court had been asserted, was unconstitutional. But he also went on to say that the Supreme Court possessed the power to exercise jurisdiction over the president of the United States, a conclusion that infuriated President Thomas Jefferson, not least because it was wholly unnecessary to the Court's conclusion and thus clearly dicta. If the Court had no subject matter jurisdiction after all, then there was no need for it to say anything at all about who would have been subject to that hypothetical jurisdiction. Somewhat less consequentially, when Justice Blackmun in *Flood v. Kuhn,*[38] the case that continued professional baseball's historical exemption from the antitrust laws, provided several pages on the history, poetry, literature, and great names of baseball throughout the ages, he included in his opinion material whose status as unnecessary to the outcome and thus as dicta would be difficult to deny.

Yet if providing reasons for their decisions is part of what we expect courts to do, and if providing reasons is a key to the actual workability of a system of precedent, then the traditional distinction between holding and dicta may be more problematic than commonly thought. Because a reason is necessarily broader than the outcome that it is a reason for,[39] giving a reason is saying something broader then necessary to decide the particular case. And that seems to be dicta. What is technically dicta—not totally necessary for the result—is precisely what it is that makes it possible for us to generalize from a very specific ruling and thus to use it

37. 5 U.S. (1 Cranch) 137 (1803).

38. 407 U.S. 258 (1972).

39. The basic idea is that what makes a reason a reason is that it is more general than what it is a reason for. When I say that I go to the gym regularly because it helps me lose weight, I am saying that something helping me to lose weight is a reason for any action (although not necessarily a conclusive one), and not just for my going to the gym on one particular occasion. For a full explanation, see Frederick Schauer, "Giving Reasons," 47 *Stan. L. Rev.* 633 (1995).

as a precedent in the future. So although at the extremes the distinction between holding and dicta is moderately clear—the statement of a new rule of law, as in *New York Times Co. v. Sullivan,* is a holding, and Justice Blackmun's ruminations about baseball lore are dicta—the realization that the system of precedent itself depends on what strictly speaking is dicta should give us pause before we make too much of the distinction, no matter how venerable a provenance it may have.

3.6 On the Force of Precedent—Overruling, Distinguishing, and Other Types of Avoidance

The chief purpose in distinguishing between vertical and horizontal precedent was to set the stage for explaining how the two differ in terms of constraining subsequent courts. Vertical precedent is commonly referred to as being *binding*. That is, a lower court is ordinarily understood to have no choice about whether to obey a precedent from a higher one. The lower courts in New York have no more of an option to disregard the holding in *MacPherson v. Buick* than to disregard a statute passed by the state legislature, and federal and state courts in the United States must treat Supreme Court rulings in cases like *Roe v. Wade* and *International Shoe v. Washington* as, in both the figurative and the literal sense, laying down the law.[40]

That the decisions of higher courts are binding does not mean that there is no play in the joints at the lower court level, even when there seems to be a binding precedent "on point." Sometimes it can be argued that the decision of the higher court is mere dicta and no part of the holding the lower court is expected to obey. In theory such an argument is possible, because even the doctrine of vertical precedent has traditionally been understood as being limited to what the higher court held and not including what the higher court happened to say along the way. In practice, however, the advocate in a lower court urging a result plainly inconsistent with the language in a higher court opinion has a steep uphill

40. In reality, of course, the law that is laid down would include the most recent decisions on the subject, including Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), in the case of abortion; and Burnham v. Superior Court, 495 U.S. 604 (1990), Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988), and World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980), in the case of personal jurisdiction.

climb, and arguments that the obstructing language is mere dicta, or not part of the ratio decidendi, are usually unavailing.

Not so, however, when an advocate or a lower court judge can *distinguish* the instant case from the precedent case. Although it might be said that a binding precedent from a higher court simply obliges the lower court to follow it, it would be more accurate to say that a binding precedent obliges a lower court to follow it *or* to distinguish it from the instant case. In practice, a great deal of legal argument involves the attempt by one side to claim that some higher court case controls the result in the instant case, while the other side insists that there is a sufficient distinction between the two that the outcome in the precedent case need not be the outcome in the instant case.

Recall from Chapter 2, for example, the case of *Riggs v. Palmer,*[41] in which the New York Court of Appeals held that Elmer Palmer, having murdered his grandfather, could not claim an inheritance under his grandfather's will, the literal language of the New York Statute of Wills notwithstanding. Many years later, the effect of *Riggs* as a precedent was central to a case called *Youssoupoff v. Columbia Broadcasting System, Inc.,*[42] in which a man who had been a coconspirator in the 1916 murder of Rasputin (the adviser to the Russian royal family) sued for invasion of privacy as a result of a CBS television movie in which he was a featured character. The suit was brought in the New York state courts, and thus *Riggs* was controlling if applicable. CBS claimed that Youssoupoff's undeniable participation in the murder of Rasputin brought him within the "no man should profit by his own wrong" principle in *Riggs,* and Youssoupoff argued that the two cases could be distinguished because his wrong was not directly connected with the money he sought to recover. And in agreeing with Youssoupoff and refusing to dismiss the case, the trial court did not deny the binding force of *Riggs*. Instead, it said that the factual situation in the instant case was sufficiently distinguishable that there was no obligation on the part of the court to have reached the same outcome as in *Riggs*.

Another example, again from New York, comes from the cases of *Campo v. Scofield*[43] and *Bravo v. C. H. Tiebout & Sons, Inc.*[44] Both are

41. 115 N.Y. 506 (1889).
42. 265 N.Y.S. 754 (Sup. Ct. 1965).
43. 95 N.Y.S.2d 610 (App. Div. 1950).
44. 243 N.Y.S.2d 335 (Sup. Ct. 1963).

lower court cases involving "downstream" users of a negligently defective product that caused injury, just as in *MacPherson v. Buick*. And in both, the plaintiffs argued that *McPherson* was controlling. But in both of the cases the defendants argued that *MacPherson* was distinguishable, and the courts agreed. In *Campo,* which involved an injury caused by a machine designed to remove the tops of harvested onions, the court concluded that *MacPherson* applied only to defects not reasonably identifiable by the user. The existence of an "obvious and patent" defect could not support a claim against a remote manufacturer, even assuming the manufacturer was negligent. In *Bravo,* the plaintiff's failure to install a statutorily required safety device on a grinding wheel again rendered *MacPherson* distinguishable, even where there was manufacturer negligence and even where there would have been liability despite the statutory violation in the case of a claim brought by a direct purchaser.

In these and countless other cases, the lawyer for one party will argue that the instant case falls under a binding precedent and the lawyer for the other party will attempt to distinguish it. The arguments take the character they do precisely because the lower court is compelled to reach the same result in the instant case as in the precedent case when the facts are not distinguishable. With respect to stare decisis, however, things are different. Often the arguments resemble those of vertical precedent, with one party relying on the court's own past ruling and the other party seeking to distinguish it. But even where there are no plausible grounds to distinguish the cases, the obligation to obey a previous decision is rarely absolute in the way that the obligation to obey the decision of a higher court is. Unlike lower courts faced with higher court decisions, courts considering their own previous decisions have the capacity to *overrule* them on occasion.[45] They can recognize that the instant case presents the same issue decided in the precedent case but decide nevertheless to reject the earlier ruling.

Although courts may occasionally overrule their own previous decisions, doing so requires more than just the belief that the previous de-

45. Prior to the Practice Statement on Judicial Precedent of 1966, even the House of Lords in England was prohibited from overruling its own precedents, the view being that such a power was for Parliament alone. And the practice remains far less common in England than in the United States, indicating a stronger stare decisis norm there than here. See Rupert Cross & James Harris, *Precedent in English Law* (4th ed., 1991).

cision was in error. If that were all that were necessary, stare decisis would become meaningless, because it is precisely the point of stare decisis that a court should treat a previous decision as binding just because of its existence and not because it is perceived to be correct. If every time a court believed an earlier decision to be mistaken it could overrule that decision, then there would be no principle of stare decisis at all.

At times, however, a court will believe that one of its previous decisions is extremely wrong or that the consequences of a previously mistaken holding (in the eyes of the instant court) are so grave as to demand overruling. When the Supreme Court in *Brown v. Board of Education*[46] overruled *Plessy v. Ferguson,*[47] which held that separate but equal governmental facilities were constitutionally permissible, the *Brown* Court premised its action on the existence of what it then perceived to be a grave constitutional wrong. So too when the Supreme Court in *Mapp v. Ohio*[48] overruled *Wolf v. Colorado*[49] to hold that illegally obtained evidence would be inadmissible in a criminal trial in state as well as federal court. In these and other cases, the act of overruling is premised not on a current perception of mere error in the past, but rather on a current perception of error that is well beyond the range of normal mistakes, whether in the size of the mistake or in its consequences. The United States Supreme Court has described this heightened burden before overruling one of its own previous decisions in terms of the requirement of a "special justification,"[50] and the standard in England is that the previous decision be "manifestly wrong."[51] The modifiers—"special" and "manifestly"—are important, because it is the modifiers that make clear that the principle of stare decisis becomes meaningless if a court feels free to overrule all of those previous decisions it believes to be wrong. By requiring an elevated standard for the identification and consequences of perceived past error, the modifiers ensure that the obligation of a court to follow its own previous decisions is a genuinely constraining obligation, even if it is not an absolute one, one that cannot be overridden.

46. 347 U.S. 483 (1954).
47. 163 U.S. 537 (1896).
48. 367 U.S. 643 (1961).
49. 338 U.S. 25 (1949).
50. Dickerson v. United States, 530 U.S. 428, 443 (2000); Arizona v. Rumsey, 467 U.S. 203 (1984).
51. See William Twining & David Miers, *How to Do Things with Rules* 318 (4th ed., 1999).