

PRECEDENT IN THE FEDERAL COURTS OF APPEALS: AN ENDANGERED OR INVASIVE SPECIES?*

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Our panel's topic is optimizing the law-declaring function, and within its purview is the status of precedent in modern courts of appeal. I take "precedent" to refer to appellate opinions that confront and resolve a perceived gap in the law by the declaration of law that is in some sense novel. I am not concerned today with whether this is making law in some frankly legislative sense or merely declaring law by extrapolation in a more interpretive sense. Sometimes courts confront a novel case, and by deciding it for reasons stated create a precedent for how similar cases should be decided in the future. This is generally thought to be a good thing, by reducing uncertainty about the law and thus encouraging orderly social behavior: We expect extrajudicial behavior to be more predictable when people can make choices in reliance on relatively determinate judicial enforcement of previously declared rules of law.

The system of precedent works to such good ends only when ostensible precedents are in fact followed in later cases. Two conditions contribute interdependently to the success of precedent in clarifying the law and organizing predictable behavior in accordance with law. First, courts empowered to make precedent must discharge that function wisely, by writing opinions that are good examples of the judicial craft: They must produce public declarations of law that are well reasoned and persuasively grounded both in prior law and in present circumstances, whose novelty is carefully described and

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adequately explained. Second, there must be general judicial commitment to stare decisis, so that courts will habitually accept that the existence of a precedent is reason alone for its application to a later case, even if they might decide that case differently were it a case of first impression. Obviously, the more persuasive the articulation of an opinion proffered as precedent, the more likely a later court will be to accord it binding effect—unless, of course, the later court has no choice.

I'll say more in due course about different degrees and dimensions of stare decisis. But first, you have been asked to consider, and I have been asked to address, whether precedent is an endangered species in the decisionmaking of modern appellate courts.

Much of the concern about the current status of precedent, particularly within the federal courts of appeal, is secondary to a phenomenon over which judges have virtually no control: a “crisis of volume” that is decades long and remains unabated, which has caused caseloads per judge to rise to levels once thought unimaginable. In order to keep the judicial enterprise from grinding to a halt, judges have had to make painful compromises in how cases are decided. The rationing of scarce judicial time requires heavy reliance on staff assistance to manage a tracking system in which most cases proceed to disposition without oral argument, without a full-dress opinion, or without either. This frees judicial time for more extensive and personal judicial involvement in a relatively small subset of cases—those orally argued—and especially in an even smaller subset of these argued cases—those decided by a published opinion.¹ When a case is decided by published opinion, it generally means that the deciding panel intends the case to serve as a precedent.

If the institution of precedent is endangered in the federal courts of appeals, it must be because there are too few precedents being published, or because these courts have become too lax in following precedent. I find little support for

1. Even with a publication rate that as of last year had fallen to nineteen percent of all merits terminations, there were over 5,000 opinions published last year by the federal courts of appeals. Federal Judicial Center, *1955-2005 Statistical Data Regarding Federal Courts*, 8 J. App. Prac. & Process, 21, 32 chart 4 (2006) (“Changing Procedures in the United States Courts of Appeals”) [hereinafter *Federal Courts Statistical Data*].

either proposition. Five thousand new published opinions a year does not seem to indicate a drought of precedent to be applied. Nor is it apparent that precedent today is more casually treated than in years past. Indeed, the trend is to the contrary, at least superficially. Vertical stare decisis demands, today as in the past, that lower courts give binding effect to the applicable precedents of higher courts. District courts unproblematically follow circuit law; circuit courts likewise follow the precedents of the Supreme Court. Horizontal stare decisis does not apply between circuits, and never has. Indeed the Supreme Court appears to encourage circuit splits by the parsimonious exercise of its certiorari jurisdiction. But there has been pronounced change in the intra-circuit application of horizontal stare decisis. Virtually every circuit treats a published panel position as the law of the circuit, demanding that other panels follow it, and permitting a change in circuit law only by the cumbersome process of rehearing en banc.

It may be useful to put into perspective just how radically conditions have changed since the heyday of precedent in the federal appellate courts. I think we have to go back not thirty years to find that heyday, for in 1975 the crisis of volume was already mounting. Let's go back another thirty years, to roughly 1945, an era described in Marvin Schick's classic volume, *Learned Hand's Court*.² There we find the six judges of the Second Circuit deciding roughly 125 cases per judge per year, in panels of three. Some cases were decided per curiam or by summary disposition, so that each judge participated in about 105 full-dress panel opinions per year, and was thus responsible for writing the lead opinion in about thirty-five such cases. Moreover, the judges sat together, not only in the sense that they spent most of their time in the same building, but also in the sense that with twenty different possible combinations of three-judge panels drawn from the six sitting judges, there was only a five percent chance that a case decided by a panel of judges A, B, and C would be argued as a precedent before the entirely distinct panel of judges D, E, and F.

I invoke this era as the heyday of precedent because judges had time to think cases through without a great deal of self-

2. Marvin Schick, *Learned Hand's Court* (Johns Hopkins U. Press 1970).

conscious or staff-delegated decisionmaking about whether a given case was important enough, or likely enough, to give rise to a new precedent, and hence to justify close judicial attention. Likely precedents would emerge at the end of the decisionmaking process, not at the beginning. There was no express rule of intra-circuit, horizontal stare decisis. Precedents were the end-product of a collegial process. Despite occasional sharp differences among judges, panel opinions generally reflected the shared thought and values of the entire court, and not just the views of the judges on the decision panel. Precedents were followed by other judges of the same court more out of conviction than compulsion.

Today only the First Circuit is a six-judge court, and in 2004 it had 287 filings per judge—up from fifty-one in 1955, the closest data point we have to the conditions of the Learned Hand era.³ Every other circuit now has eleven or more judgeships, and except for the D.C. Circuit and the Tenth Circuit, their caseloads per judge match or exceed that of the First Circuit.⁴ The Second, Ninth, and Eleventh Circuits exceed 500 filings per year per judge.⁵ And the judges of most circuits maintain chambers dispersed in multiple cities and states within the circuits. More than ever, panels typically work in isolation from the court as a whole.

It is interesting that as caseloads have risen by a factor of ten or more, the rate of reversal of the court below in appeals decided by the federal courts of appeals has fallen sharply, from not quite twenty-eight percent in 1955 to eighteen percent in 1975 and roughly ten percent in 2005.⁶ For me this is a matter of concern, because district court caseloads per judge have also risen substantially, if not as dramatically as caseloads per judge among the courts of appeals.⁷ I see no reason to think that this has led to a lower rate of erroneous decisions than used to be the case. And this leads me to question whether modern federal

3. *Federal Courts Statistical Data*, *supra* n. 1, at 26 chart 2A (2006) (“Filings Per Appellate Judgeship, by Circuit”).

4. *Id.*

5. *Id.*

6. *Federal Courts Statistical Data*, *supra* n. 1, at 32 chart 4 (“Changing Procedures in the United States Courts of Appeals”).

7. *Id.* at 25 chart 2 (“Filings Overall and Per Judgeship in U.S. District Courts and Regional Courts of Appeals”).

courts of appeals have become so concerned with preserving their precedent-making function that they are neglecting their error-correction function.

The federal courts are, of course, intermediate courts of appeal, exercising a largely mandatory function of reviewing judgments and other final orders as a matter of right. I fear that their tracking and screening systems have instituted what is, in effect, a gloss of discretionary appellate jurisdiction for the appeal as of right to which federal litigants are statutorily entitled. The mine run of cases don't make the cut; these cases are decided by expedited means that discourage reversal. This may be socially efficient, but it is not without moral cost if indeed caseload pressures are leaving too many needlesome cases undiscovered in the fast-track haystack.

I have no answer to the legitimate question of how many is too many. We cannot expect perfection of any human system. But surely there is cause for concern when reversal rates drop so sharply. And the way we should address this concern is not at the level of individual cases, whose outcomes we cannot individually second-guess. But it seems fair, even imperative, that we reconsider whether the present norms of internal federal appellate decisionmaking procedures have struck the right balance between the somewhat self-glorifying task of creating precedents and the more mundane task of reviewing and correcting the application of established law by the courts below. Precedent is not an endangered species, in my opinion. Has it become an invasive one?

I mean to do more than murmur "tut-tut." There is one feature of the modern practice of precedent in the federal appellate courts that I'm going to nominate as eligible for reform. I'm now going to cast myself as a contrarian, inviting reconsideration of that relatively modern judicial phenomenon I have identified as intra-circuit, horizontal stare decisis. This is not, I hasten to remind you, a law of nature. Indeed, I will show you that it is not even plausibly a minimum condition for the functional operation of a modern, high-volume, intermediate court of appeal. It is largely a product of the past thirty years' mounting caseloads.

Let me return briefly to the two conditions I posited earlier for the efficacy of a system of judicial precedent. It requires

good opinions, opinions that are specific, articulate, and persuasive, and it requires that they generally be given binding effect. Mushy opinions permit distinction, sapping their value as precedent. Peremptory opinions that fail fully to develop a rationale for decision invite such distinction. Modern appellate courts, charged with deciding too many cases in too little time, have responded by producing arguably over-written opinions in cases deemed to be precedent making. And the supplanting of a collegial culture of deference to precedent with strict rules of horizontal stare decisis has arguably encouraged competition among panels to be the first to address some perceived novel issue, thus winning the high ground of circuit-binding precedent by imposing a contestable view of the law on the rest of the circuit. Screening systems suppress reevaluation by fast-tracking later like cases—indeed, this is what makes strict rules of the law of the circuit appealing as an efficiency device. But even when a later panel not only encounters but identifies a putatively binding precedent that it regards as unsound, there are substantial disincentives to devoting scarce judicial time to an overt challenge to the arguably mistaken precedent in the thin hope of provoking a rehearing en banc. There are also substantial incentives to distinguish the ostensible precedent on shaky if not candidly spurious grounds, and, because such distinction will largely turn on how the facts are characterized, to bury this departure from or narrowing of precedent in the nether world of cases decided by summary disposition or unpublished opinion.

Now let us suppose a different regime of precedent. The imperative of vertical stare decisis would remain unchanged, as would the absence of horizontal stare decisis between circuits. This would mean the district courts would have to follow a panel opinion on point, except to the extent that a different panel of its circuit issued a conflicting opinion, making district courts efficient barometers of when en banc resolution of the law of the circuit is needed. But suppose there were no intra-circuit, horizontal stare decisis accorded to panel opinions as opposed to en banc opinions? I doubt that in the current conditions of intense caseload pressure this would spark the making of mountains of controversy out of the molehills of most panel decisions that at present count as circuit law. Deference would

continue to be the dominant response, and by the accretion of panel-by-panel reaffirmation of the point in question, a less peremptory sort of circuit law would take firm root. On the other hand, there would be a reduced incentive to rush to decide a point of likely controversy within the circuit, or to over-write an opinion in order to increase the scope of its binding effect. Judges would still have good reason, however, to craft with care an opinion likely to be cited as a precedent, because its lasting effect would be contingent on its persuasiveness. But perhaps, just perhaps, a reorientation of panel decisionmaking primarily toward deciding cases for the panel, with circuit-wide effects left to the independent decision of other panels in other cases, would promote marginally more attention to the error-correction function of an intermediate court of appeal.

There is in fact one large appellate system, the Courts of Appeal of the State of California, that self-consciously operates today without horizontal *stare decisis*. The Courts of Appeal are divided into six districts, and most of these districts are further divided into divisions. Many of the divisions have more than three judges (or “justices” by California’s nomenclature). Panels of the California Courts of Appeal are free to depart not only from decisions by other districts of the Courts of Appeal, but even from decisions by other divisions within the same district, or by different panels of the same division or undivided district.

I must say that I long regarded this lack of horizontal *stare decisis* at the California Courts of Appeal as misguided. From 1997 to 2001 I served on the California Appellate Process Task Force, where, supported only by Professor Clark Kelso,⁸ I staged a lonely and wholly unsuccessful campaign to persuade the Task Force that horizontal *stare decisis* was fundamental to the rational operation of any intermediate court of appeal. Let me quote the responsive section from the Task Force’s report:

There are critics of California’s rejection of the horizontal component of *stare decisis* who raise two primary concerns. First, absent a doctrine of horizontal *stare decisis*, it is possible for conflicts to arise between districts and divisions that remain unresolved for many years (because the California Supreme Court may not intervene

8. Professor Kelso, the Reporter for the Task Force, was the only other academic participating in its work.

to resolve the conflict). Conflicts create confusion and disharmony in the law. Second, even absent clear conflicts, the absence of horizontal *stare decisis* fosters an undercurrent of uncertainty in the development of the law, over-emphasizing for each three-judge appellate panel its independence from other panels of the Courts of Appeal. Critics note that California's approach to horizontal *stare decisis* is unique among state courts.

These criticisms may, as a practical matter, be somewhat exaggerated. The number of conflicts between published Courts of Appeal opinions does not appear to be large, and the Supreme Court appears to be taking up most conflicts under its review jurisdiction. Moreover, conflicts permit an issue to be fully vented in the Courts of Appeal before being taken up by the Supreme Court. Thus, conflicts between districts and divisions have both positive and negative features.

As for the asserted undercurrent of uncertainty, although one panel of the Courts of Appeal is technically not bound to follow decisions from other panels, panels in practice appear to respect the views of other panels and to reject such views only for important reasons that are set forth in the court's opinion. In other words, an informal version of horizontal *stare decisis* may operate in practice, if not in theory.⁹

The Task Force did decide that if horizontal *stare decisis* were to be introduced at the California Courts of Appeal, on either an intra-district or inter-district basis, it should be accompanied by en banc procedures, which that court presently lacks. Its reasoning is again illuminating:

If horizontal *stare decisis* were introduced, disagreements between panels might not be expressed as readily in published opinions, but the disagreements might persist below the surface and affect decision-making and opinion writing in subtle ways. The en banc procedure serves, in part, as a safety valve for the expression of these differing viewpoints. It permits difficult issues to be addressed by a larger number of Courts of Appeal justices thereby

9. California Appellate Process Task Force, *Report of the Appellate Process Task Force* 61, <http://www.courtinfo.ca.gov/reference/documents/appellate.pdf> (2000) (accessed June 29, 2006; copy on file with Journal of Appellate Practice and Process).

reflecting the collective wisdom of a wider range of experiences and viewpoints.¹⁰

I am happy to report that despite the rejection of my advice, the California Courts of Appeal remain fully functional. There are some important differences between them and the federal courts of appeal that I cannot elaborate here, most significantly the expressly discretionary jurisdiction that they have over some types of cases. But these differences pale beside the similarities, and so I must conclude that horizontal stare decisis within the circuits of the federal courts of appeal is no more indispensable than between the circuits, where it has never existed. It exists by choice, not by necessity. I invite your consideration whether it remains the right choice.



10. *Id.* at 62-63.

