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THE DOCTRINE OF PRECEDENT AS APPLIED TO ADMINISTRATIVE DECISIONS*

RAY JAY DAVIS**

WITH the Twentieth Century acceleration of administrative dispensation of justice has come criticism of procedures followed by administrative agencies.¹ Many complaints focus upon procedural differences between administrative and judicial adjudication, considering the latter as the acceptable norm and any deviation therefrom by administrative officials as erroneous.² One such objection is that administrative tribunals do not adhere to the Anglo-American doctrine of precedent; that, instead of acting in accord with generalizations gleaned from their previous adjudications, they treat each case as a single, unique instance.³ Criticism of this sort presupposes that the same values served by judicial adherence to precedent are also present in agency adjudication.⁴ The purpose

* The substance of this article is taken from an essay prepared by the author under a Hughes Graduate Fellowship at the School of Law, Columbia University.

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¹ For an account of some of these criticisms, see DAVIS, *ADMINISTRATIVE LAW* §§ 2, 5-8 (1951).

² DAVIS, *ADMINISTRATIVE LAW* § 5.

³ DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* 35-36 (1927); POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 108-09 (1922); cf. POUND, *ADMINISTRATIVE LAW* 6-7 (1942).

⁴ This essay only deals with administrative and judicial shifts in case decisions from their own prior case determinations. Attempts by agencies to alter in case decisions positions taken in prior informal assurances, *Turner v. State Compensation Commissioner*, 123 W. Va. 673, 17 S.E.2d 617 (1941), 48 W. VA. L.Q. 294 (1942); or by administrative legislation, *Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932); *Mathieson Alkali Works v. Norfolk & W. Ry.*, 147 Va. 426, 137 S.E. 608 (1927); *Hardman, Administrative Finality in Claims for Overcharge*, 51 W. VA. L.Q. 77 (1948); are not covered herein. Nor does this essay concern itself with agency power to reverse itself upon rehearing. Note, 52 W. VA. L. REV. 123 (1950).

of this essay is to examine that premise, and also to note agency practice in respect to following precedent and court action upon review of instances in which quasi-judicial bodies have deviated from precedents.

I. DOCTRINE OF PRECEDENT

The doctrine of precedent or *stare decisis*⁵ is one of the fundamental notions of the common law legal system. Courts follow indications in prior cases as to how issues in instant cases should be resolved. Nevertheless *stare decisis* is the subject of wide dispute.⁶ Disagreement is focused primarily upon two problems: (1) how to derive legal norms from past cases, and (2) how to apply those norms to present cases.

A. WHAT IS A PRECEDENT

There is general agreement that only the "solemn decision upon a point of law"⁷ constitutes the authoritative element, the holding or *ratio decidendi*, of a case. But there are widely varying views on how to find what part of a case constitutes the tribunal's "solemn decision." Methods vary from giving wide scope of authority to a case to giving it limited breadth. The written opinion is heavily relied upon when a case is being stretched to its broadest use. As a matter of fact in some instances any pronouncement in an opinion concerning the law is treated as a legal norm.⁸ This is really a doctrine of *stare dictis* rather than of *stare decisis*.⁹ There is even the

⁵ Throughout this paper the terms "doctrine of precedent" and "*stare decisis*" will be used as synonyms.

⁶ In discussing the 1940 Cincinnati Conference on The Status of the Rule of Judicial Precedent, Professor Llewellyn said that "when it came to *stating* what our system of judicial precedent was, the speakers could find no agreement, and knew in advance that they would be unable to." Llewellyn, *Impressions of the Conference*, 24 U. CIN. L. REV. 343 (1940).

⁷ KENT, COMMENTARIES 442 (1826); cf. CHAMBERLAIN, THE DOCTRINE OF STARE DECISIS: ITS REASONS AND ITS EXTENT 19 (1885).

⁸ The press of large case loads upon tribunals forces such unrefined use of authority in some instances.

Also some cases have become traditionally associated with their dicta and are cited for that alone. See, e.g., *Hadley v. Baxendale*, 9 Ex. (Welsby Hurlstone & Gordon) 341 (1854).

⁹ This criticism is advanced in Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 72 (1928).

notion that what is said in the syllabus constitutes the law.¹⁰ Fortunately this view has been repudiated.¹¹ In other instances judicial reasoning proceeds without the formulation of any articulate major premise, but instead applies a precedent case directly to the instant case.¹² Another theory of precedent placing reliance on the opinion considers as a holding that which is labelled by the court as such.¹³ Unfortunately judges do not always oblige by providing neatly tagged holdings.

Other theories of stare decisis would substantially reduce the role of the opinion in determining the *ratio decidendi*. One method would utilize the material facts, as indicated by the opinion, and the decision as the basis of determining the holding.¹⁴ Another would concentrate on the reaction of the judge to the facts in the case—facts found in the record and from other sources as well as those mentioned in the opinion.¹⁵ These methods narrow the breadth of the holding as well as reduce the use of the opinion.

Each of the above theories seeks to find the holding of a case. However, no case standing alone can give a tribunal adequate guidance. Cases are understood only in respect to their background in other cases.¹⁶ We must examine a line of cases to find legal norms.¹⁷ Furthermore neither the bench nor the bar is wedded to

¹⁰ *Click v. Parish*, 89 Ohio App. 318, 326, 98 N.E.2d 333, 338, *aff'd*, 155 Ohio St. 84, 98 N.E.2d 293 (1950); see *Citizens' Nat. Bank v. Burdette*, 61 W. Va. 636, 637, 57 S.E. 53, 54 (1900). But see *Miller v. Huntington & Ohio Bridge Co.*, 123 W. Va. 320, 15 S.E.2d 687 (1941).

¹¹ *Hardman, "The Law"—In West Virginia*, 47 W. VA. L.Q. 23 (1940); See also *Hardman, "The Syllabus Is the Law"—Another Word by Fox, J.*, 48 W. VA. L.Q. 55 (1941); *Hardman, "The Syllabus Is the Law"—Another Word*, 47 W. VA. L.Q. 209 (1941); *Hardman, "The Syllabus Is the Law,"* 47 W. VA. L.Q. 141 (1941); see also *Comment*, 24 BAR 174 (1917).

¹² For discussion and criticism of this method, see PATTERSON, *MEN AND IDEAS OF THE LAW* 100 (1953).

¹³ MORGAN, *AN INTRODUCTION TO THE STUDY OF LAW* 107-09 (1926).

¹⁴ Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930). This method has been labelled as a "wild goose chase." Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 844 n.82 (1935). For discussions of it, see PATTERSON, *MEN AND IDEAS OF THE LAW* § 3.32 (1953); Gooderson, *Ratio Decidendi and Rules of Law*, 30 CAN. B. REV. 892 (1952).

¹⁵ Oliphant, *supra* note 9. Goodhart considered this view an oversimplification. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 169 (1930). For a discussion of it, see PATTERSON, *MEN AND IDEAS OF THE LAW* § 3.31 (1953).

¹⁶ LLEWELLYN, *THE BRAMBLE BUSH* 49 (1951); *cf.* Pound, *Survey of the Conference Problems*, 24 U. CIN. L. REV. 324, 329-30 (1940).

¹⁷ *Cf.* Pound, *Survey of the Conference Problems*, 24 U. CIN. L. REV. 324, 329-30 (1940).

any particular one of these methods, but instead use differing approaches in different cases. If a case contains language contrary to an advocate's position, he will adopt a strict idea of *stare decisis* to avoid an unwelcome idea. If in another case a narrow notion of precedent will not support him, he will use a broad one. Thus each case has at least two sorts of *rationes decidendi*—one of minimum scope and one of maximum scope.¹⁸

Since this essay primarily deals with reversals of positions taken by judicial and quasi-judicial tribunals in prior cases, the terms "holding" and "*ratio decidendi*" will be used herein to refer to statements in opinions of rules of law which are necessarily relied upon for the decision of the case.¹⁹ Even though such statements might later be considered as either too wide or too narrow,²⁰ they are usually quite persuasive when used before tribunals as legal norms.²¹ At least they generally show what doctrine the court had in mind.²² If no holding is stated either explicitly or implicitly, one must resort to one of the stricter notions of precedent.

B. HOW ARE PRECEDENTS APPLIED BY THE COURTS

While Anglo-American courts utilize judicial precedents as their main source of legal norms, there is no unanimity of practice or opinion in regard to the way in which holdings should be applied. The primary difficulty concerns the authoritativeness of precedents. The problem is particularly acute when a tribunal would, if the proposition before it were new, come to a conclusion different from that previously reached in a cited case.

The English doctrine of *stare decisis* gives binding effect to precedents. Although British courts make narrow factual distinctions between cases,²³ even the House of Lords feels itself bound

¹⁸ LLEWELLYN, *THE BRAMBLE BUSH* 66-69.

¹⁹ This is substantially the same approach as Morgan's. MORGAN, *AN INTRODUCTION TO THE STUDY OF LAW* 107-09.

²⁰ It is for this reason that Goodhart refuses to rely on the court's statement of its holding. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 *YALE L.J.* 161, 165 (1931).

²¹ Llewellyn, *What Is the Doctrine of Judicial Precedent*, 24 *U. CIN. L. REV.* 209-10 (1940).

²² It is essential that the *ratio decidendi* be some doctrine that the court had in mind. WAMBAUGH, *THE STUDY OF CASES* § 29 (1894). But see Oliphant, *supra* note 9.

²³ See Montrose, *Distinguishing Cases and the Limits of Ratio Decidendi* 19 *MODERN L. REV.* 525 (1956); Note, "Explaining" Decisions Based Upon Two Grounds, 72 *L.Q. REV.* 341 (1956).

by its own decisions.²⁴ In the United States inferior tribunals generally follow cases of courts above them in the judicial hierarchy, but no tribunal feels itself completely bound by its own precedents.²⁵ From the early days of our nationhood American judges have reserved the power to correct errors previously made by their courts.²⁶ The extent to which they feel free to do so depends primarily upon the type of case before them. The rules of conveyance of land, inheritance and succession, and titles, and the rules on the faith of which contracts and other commercial transactions are entered into are generally considered binding.²⁷ Courts are loath to reconsider prior positions in those cases.²⁸ Also in the field of criminal law the courts do not generally overrule statutory interpretations so as to make criminal conduct previously held innocuous.²⁹ On the other hand in some other areas of the law precedents are apt to be considered as "permissive" rather than "binding,"³⁰ or as "provisional hypotheses"³¹ upon which tribunals can build. Constitutional law³²

²⁴ *London Street Tramways Co. v. London County Council*, A.C. 375, 379 (1898). The Court of Appeal is also bound by its own precedents. *Young v. Bristol Aeroplane Co.*, [1944] K.B. 718.

²⁵ The distinction between the rule as applied by inferior courts and supreme courts is made in Kocourek, *Retrospective Decisions and Stare Decisis and a Proposal*, 17 A.B.A.J. 180, 181 (1931).

For statements of the American rule of stare decisis, see Small, *Stare Decisis on Two Continents: A Saga of Gain and Loss*, 18 ROCKY MOUNTAIN L. REV. 97, 123 (1945). For other views concerning the American doctrine, see Goodhart, *Case Law in England and America*, 15 CORNELL L.Q. 173, 186 (1930); Llewellyn, *Impressions of the Conference*, 24 U. CIN. L. REV. 343, 350-51 (1940); Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1, 6-8 (1941).

²⁶ KENT, COMMENTARIES 442.

²⁷ Ellenbogen, *The Doctrine of Stare Decisis and the Extent to Which It Shall Be Applied*, 20 TEMP. L.Q. 503, 504 (1947); Loughran, *Some Reflections on the Role of Judicial Precedent*, 22 FORDHAM L. REV. 1, 4 (1953); Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 956-57 (1923); Von Msochzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 415-16 (1924).

²⁸ *In re Proposal to Incorporate Town of Chesapeake*, 130 W. VA. 527, 536-37, 45 S.E.2d 113, 118 (1947); *Marguerite Coal Co. v. Meadow River Lumber Co.*, 98 W. VA. 698, 703, 127 S.E. 644, 646 (1925).

²⁹ See, e.g., *People v. Tompkins*, 186 N.Y. 413, 416, 79 N.E. 326, 327 (1906).

³⁰ Cf. PATTERSON, MEN AND IDEAS OF THE LAW 303.

³¹ CARDOZO, THE GROWTH OF THE LAW 70 (1924); see also Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 26 (1924).

³² DOUGLAS, STARE DECISIS 9 (1949). For a study of the decisional twists and turns produced by the Supreme Court of the United States, see POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION (1956). For comments on shifts in constitutional interpretation, see Clark, *Is Law Disappearing?*, 51 W. VA. L.Q. 1 (1948).

and torts³³ are examples of fields where the doctrine is applied with less rigor. Liberalization of stare decisis is also worthwhile in cases involving questions of evidence³⁴ or of procedure.³⁵

An indication of the relaxation of the doctrine of precedent in the United States is that while formerly it was considered as a rule³⁶ it now is generally treated as a judicial policy.³⁷ Also precedents themselves are coming to be viewed as standing for principles or policies rather than for rules.³⁸ Another indication of liberalization is that courts show less care than previously to "reconcile" their precedents. This has led to the confusing situation of more than one line or series of precedents within a jurisdiction concerning the same legal norm.³⁹

C. WHY ARE PRECEDENTS APPLIED BY THE COURTS

Judicial acceptance of the doctrine of precedent comes from the values of the doctrine as a tool of the legal system. These values may be grouped under four main headings: (1) impartiality, (2) stability, (3) efficiency, and (4) political expediency.

³³ SEAVEY, COGITATIONS ON TORTS 65-69 (1954); Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 956-57 (1923); cf. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 137.

³⁴Loughran, *supra* note 27, at 14.

But apparently conflicting West Virginia cases concerning the evidentiary effect of a view by the jury, which on their face indicate departure from stare decisis, are harmonized in Hardman, *The Evidentiary Effect of a View: Stare Decisis or Stare Dictis*, 53 W. VA. L. REV. 103 (1951). See also Hardman, *The Evidentiary Effect of a View—Another Word*, 58 W. VA. L. REV. 69 (1955).

³⁵ Loughran, *supra* note 27, at 14. See, e.g., *Simpkins v. White*, 43 W. Va. 125, 27 S.E. 361 (1897); cf. *Falconer v. Simmons*, 51 W. Va. 172, 179, 41 S.E. 193, 197 (1902).

In the labor law field it is instructive to note the different approaches of the West Virginia Supreme Court of Appeals in *Parker Paint & Wall Paper Co. v. Local Union No. 813*, 87 W. Va. 631, 105 S.E. 911 (1921), and in *Blossom Dairy Co. v. International Brotherhood of Teamsters*, 125 W. Va. 165, 23 S.E.2d 645 (1942). For a discussion of these cases, see Mahan, *Government by Injunction*, 52 W. VA. L. REV. 217, 226-27 (1950).

³⁶ KENT, COMMENTARIES 442; cited in *Clark & Co. v. Figgins*, 27 W. Va. 663, 670-71 (1886).

³⁷ See, e.g., *Helvering v. Hallock*, 309 U.S. 106, 119 (1940); *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis dissenting). See also Hardman, *Stare Decisis and the Modern Trend*, 32 W. VA. L.Q. 163, 191 (1926).

³⁸ PATTERSON, MEN AND IDEAS OF THE LAW 306.

³⁹ *Id.* at 305-06. See also the text and the cases collected in the footnotes in Hardman, *Stare Decisis and the Modern Trend*, 32 W. VA. L.Q. 163, 165-66 (1926).

1. *Impartiality*

In any civilized system of government the law should strive to achieve impartiality. Shifting from a prior position may produce partiality in result because of reliance on that position by one of the parties involved. The psychological tendency of man to rely on what has been settled cannot be protected unless tribunals adhere to *stare decisis*.⁴⁰ Even in cases where there has been no reliance, justice demands that cases with like antecedents should breed like consequences, that the law should be uniformly applied.⁴¹ The doctrine of precedent makes possible securing this value. Should partiality arise through favoritism, caprice,⁴² or errors of individual judgment,⁴³ judicial adherence to precedence can correct the situation. Relying on precedent appellate courts can correct prejudice, arbitrary whims, and incompetency on the part of lower court judges.⁴⁴ Use of precedent can protect one against partiality by courts of last resort too, since the requirements of opinion writing and use of precedents in opinions make those aberrations more obvious than they would otherwise be and hence less likely to occur.⁴⁵

On the other hand following precedent may achieve an undesirable sort of uniformity. "From the standpoint of justice little can be said in favor of equality in error. Because the Court has made an error in the case of A is hardly a sound reason for requiring it to make the same error in the case of B."⁴⁶

Impartiality is only a minimum aim of the law.⁴⁷ It can be

⁴⁰ However, instances of reliance on and because of legal rules themselves may not be too great.

"The feeling is that nine times out of ten, if not oftener, the conduct of right-minded men would not have been different if the rule embodied in the decision had been announced by statute in advance. . . . Consequently, in the vast majority of cases the retrospective effect of judge-made law is felt either to involve no hardship or only such hardship as inevitable where no rule has been declared."

CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 143, 146 (1921). See also discussion in text at notes 51, 52, *infra*.

⁴¹ LLEWELLYN, *THE BRAMBLE BUSH* 43.

⁴² CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112.

⁴³ Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 710 (1913). But see Goodhart, *Precedent in English and Continental Law*, 50 L.Q. REV. 40, 56 (1934).

⁴⁴ Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 709 (1913).

⁴⁵ Goodhart, *Precedent In English and Continental Law*, 50 L.Q. REV. 40, 56 (1934).

⁴⁶ *Id.* at 57.

⁴⁷ PATTERSON, *MEN AND IDEAS OF THE LAW* 102.

achieved by means considerably less complicated than seeking out *rationes decidendi* and applying them to the case at hand. The Rabelaisian character Judge Bridlegoose gave litigants before him absolute judicial impartiality by deciding cases through casting dice.⁴⁸ Nevertheless the chance method is satisfactory only when it can safely be assumed that the claims among which selection is to be made are equal. Since that assumption cannot be made in respect to most litigation, the dispute-settlers must have general directions in order to pass on the claims. The doctrine of *stare decisis* provides those directions.

2. *Stability*

One reason for the doctrine of *stare decisis* is expressed by the second part of the very maxim from which it takes its name, *stare decisis et non quieta movere*—not to disturb what is settled. The law cannot permit each judge to act in accordance with his own private opinions, rather than following precedent. There must be stability in the law to promote stability in society. Without any doctrine of *stare decisis* there would not be the security of acquisitions and security of transaction necessary to our society.⁴⁹ Certainty which adherence to precedent helps bring is the most important value served by the doctrine of *stare decisis*.⁵⁰

Frequently it is more important that the law be settled than that it be settled right.⁵¹ When the law is settled the lawyer has a basis for giving his client professional advice as to the outcome of a given course of conduct and the layman has a basis for reasoned reliance.⁵² Departure from precedent unsettles the law and disappoints the reasonable expectations of the bar and laity.

Stability in the law is closely tied to the conservative notion of treading the path of forbearers because of respect for them and

⁴⁸ RABELAIS, *GARGANTUA ET PANTAGRUEL*, cited in Horack, *In the Name of Legislative Intention*, 38 W. VA. L.Q. 119 (1932); and commented upon in Gest, *The Trail of Judge Bridlegoose*, 71 U.S.L. REV. 503 (1937).

⁴⁹ Cf. Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 709-10 (1913).

⁵⁰ Goodhart, *Precedent in English and Continental Law*, 50 L.Q. REV. 40, 58 (1934).

⁵¹ *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis dissenting); Salmond, *The Theory of Judicial Precedents*, 16 L.Q. REV. 376, 382 (1900).

⁵² KENT, *COMMENTARIES* 443.

their abilities.⁵³ Blackstone asserted that "we owe such a deference to former times as not to suppose that they acted wholly without consideration."⁵⁴ Yet to have no better reason for a rule than that it was laid down in the past by remote ancestors is "revolting,"⁵⁵ especially when the reason for the rule has vanished. Blind faith in the past ties living of the present to the dead hand of past generations.⁵⁶

The law requires more than mere stability; it must also be flexible. Cardozo put it this way:

"Law must be stable, and yet it cannot stand still." Here is the great antinomy controlling us at every turn. Rest and motion, unrelieved and unchecked, are equally destructive. The law, like human kind, if life is to continue must find some path of compromise. Two distinct tendencies, pulling in different directions, must be harnessed together and made to work in unison."⁵⁷

The search for perfect static security is doomed to failure.⁵⁸ Security can be achieved only through constant change, through sloughing old norms that have outlived their utility, and through adapting others to prevailing conditions.

"There is only an illusion of safety in a Maginot Line. Social forces like armies can sweep around a fixed position and make it untenable. A position that can be shifted to meet such forces and at least partly absorb them alone gives hope of security."⁵⁹

The doctrine of precedent must be applied in such a manner as to make allowance for correction of errors⁶⁰ and to take account

⁵³ Mr. Justice Roberts, dissenting in *Smith v. Allwright*, 321 U.S. 649, 666 (1944), said that the Court's action in that case indicated an "intolerance for what those who have composed this court in the past have conscientiously and deliberately concluded, and involve[d] an assumption that knowledge and wisdom reside in us which was denied to our predecessors."

⁵⁴ BLACKSTONE, COMMENTARIES *70; see also opinion of Coke in *Calvin's Case*, 7 Co. Rep. 6b (1609).

⁵⁵ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

⁵⁶ Note, 40 W. VA. L.Q. 270 (1934).

⁵⁷ CARDOZO, THE GROWTH OF THE LAW 2; see also CARDOZO, THE PARADOXES OF LEGAL SCIENCE 8 (1928); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 28.

⁵⁸ Holmes, *supra* note 55, at 466.

⁵⁹ DOUGLAS, STARE DECISIS 7; see also Dewey, *supra* note 31, at 25

⁶⁰ *Lovings v. Norfolk & W. Ry.*, 47 W. Va. 582, 590, 35 S.E. 962, 965 (1900); *Weston v. Ralston*, 46 W. Va. 544, 554-55, 33 S.E. 326, 330 (1899); *Simpkins v. White*, 43 W. Va. 125, 129, 27 S.E. 361, 362 (1897); Wyckoff, *Our Changing Common Law*, 48 W. VA. L.Q. 24, 33 (1941).

of changes in conditions.⁶¹ "If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie in helpless submission, the hands of their successors."⁶² This is especially true of constitutional law where the legislature cannot mitigate the rigors of *stare decisis*.⁶³

The notion that allowance for flexibility damages the doctrine of *stare decisis* is erroneous. Litigation deals with at least two levels of judicial precedents. The foundation stratum is composed of principles and standards which have survived the test of experience and of reason. It is not in the process of being shifted. The upper level is an accretion of decisions applying rules.⁶⁴ Here the constantly changing process is both natural and proper, if law is to keep current with the needs of society.⁶⁵ It is in this area that it is important to reconcile or unify the principles of change and growth with the idea of a fixed basis for the legal order.

⁶¹ In *Edwards v. California*, 314 U.S. 160, 174-75 (1941), the Court took cognizance of the fact that the attitude concerning the role of government in providing assistance has changed, and consequently, the California "anti-Okie" law no longer enjoyed its former firm basis. The statute was declared unconstitutional.

See also Hardman, *The Changing Law of Competition—Rehabilitation After Impeachment by Contradiction*, 34 W. VA. L.Q. 290, 291 (1928); Arnold, *The Changing Law of Competition in Public Service—A dissent*, 34 W. VA. L.Q. 183, 187-88 (1928).

⁶² CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 152.

⁶³ Correction of constitutional decisions depends upon constitutional amendment rather than mere legislative relief. Even in states where amendment procedures are relatively liberal it requires a major effort to alter constitutions. Loughran, *supra* note 27, at 13. In the federal area even the most pressing need cannot accomplish an overthrow of precedent by the amending process without considerable delay. For example, eighteen years elapsed before adoption and ratification of the sixteenth amendment that recalled the decision of the Court in the Income Tax Cases. *Pollock v. Farmer's Loan & Trust Co.*, 158 U.S. 601, 617 (1895).

For comments concerning the doctrine of *stare decisis* in the constitutional law realm, see DOUGLAS, *STARE DECISIS* (1949).

Some recent federal cases in which the Supreme Court overruled constitutional decisions are: *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Smith v. Allwright*, 321 U.S. 649 (1944); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

Lists of cases overruled paired with cases overruling them may be found in *Smith v. Allwright*, 321 U.S. 649, 665 (1944); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405, 407 (1932).

⁶⁴ For a more conservative view, see Covington, *The American Doctrine of Stare Decisis*, 24 TEX. L. REV. 190, 193 (1946).

For a discussion of the terms "rule," "principle," and "standard," see POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 115-20; Pound *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 482, 483, 485 (1933).

⁶⁵ Cf. Pound, *What Is Law?*, 47 W. VA. L.Q. 1, 11 (1940).

3. *Efficiency*

Proper administration of the judicial machinery makes it necessary to follow precedent. By so doing judges avoid the need constantly to redetermine basic legal norms. This makes possible efficient operation of the judiciary, for "the labor of judges would be increased to the breaking point if every past decision could be reopened in every case. . . ." ⁶⁶ Even if the courts had the manpower to consider anew every question before them, such activity would be a tremendous waste of time and energy. Among other things, it would encourage litigation, for there would always be a substantial chance that the rule might be changed in favor of a litigant.

The backlog of case holdings is a storehouse of centuries of judicial experience. Following precedent makes possible effective use of past learning. The experience of the past will complement the necessarily limited experience of the judge. ⁶⁷ It will guide him as to the social standards of justice and the moral concepts of the community. ⁶⁸

As well as developing dependable legal norms following the doctrine of precedent has helped shape legal techniques of both lawyers and judges. It aids the lawyer in preparation of his case. ⁶⁹ Rather than being faced with a "wilderness of single instances" ⁷⁰ he is given a body of material from which he can extract the necessary *rationes decidendi*. ⁷¹ Stare decisis also assists the lawyer in

⁶⁶ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149; see also STONE, *THE PROVINCE AND FUNCTION OF LAW* 192 (1950). Perhaps failure to re-examine principles results as much from inertia as from desire for efficiency. LLEWELLYN, *THE BRAMBLE BUSH* 64-65.

⁶⁷ This notion is expressed by Coke's statement that no man is wiser than the law. COKE ON LITTLETON 97b.

⁶⁸ Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 711 (1913).

⁶⁹ Ellenbogen, *supra* note 27, at 504.

⁷⁰ TENNYSON, *POEMS AND PLAYS* 681 (Modern Library ed. 1938). The full quotation, taken from his poem "Aylmer's Field," is:

"Mastering the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances . . ."

⁷¹ Perhaps this body of precedent is becoming too large for efficient use. Even as early as Kent's day there was fear of too many precedents: KENT, *COMMENTARIES* 441. Since that time there has been a tremendous expansion of the size and number of reports. Assuming that decisions continue to be produced at the pace they were turned out during the first half of this century, the proportions which they can reach will be astronomical. Moran, *The Avalanche of Case Law*, 12 IND. L.J. 420 (1937). See also Hardman, *Stare*

presenting cases before tribunals, since use of precedents gives rise to the argumentative procedure followed in controversies over questions of law. The lawyer is given a technique whereby he can bolster his own case by presenting cases in point and can weaken his opponent's case by showing that no cases support it.

Judicial technique is also shaped by utilization of the doctrine of *stare decisis*.⁷²

"In the first place precedents present for the instant case a rapid if incomplete review of social contexts comparable to the present, and of a rule thought suitable for those contexts by other minds after careful inquiry. In the second place precedents serve to indicate what kind of result will be reached if a particular premiss or category is chosen for application in the instant case, and permit comparison with the results if some other premiss or category is adopted, either drawn from other cases, or judicially invented."⁷³

Moreover by using precedents a judge is enabled to make up his mind without re-thinking through all the problems. This painful process is avoided by adopting the thinking done by some other judge in a prior case. Also the application of precedents gives the judge something substantial upon which he can justify in his opinion the decision which he has reached.

4. *Political Expediency*

The judiciary, which is composed of only a small group of men, has been given tremendous power. In order to maintain its position of respect the judiciary must justify to the public its use of power. It cannot say: "I am the law!" and let it go at that. It must not only render justice, but it must also give the appearance of rendering justice.⁷⁴

Although the notion of rigid separation of powers has long since been discredited by experts in the fields of political science and law,⁷⁵ it still has an important place in the thinking of the American

Decisis and the Modern Trend, 32 W. VA. L.Q. 163, 180, 182 (1926). But see Holmes, *supra* note 55, at 458.

⁷² Ellenbogen, *supra* note 27, at 504.

⁷³ STONE, *op. cit. supra* note 66, at 192.

⁷⁴ See Hardman, *Stare Decisis and the Modern Trend*, 32 W. VA. L.Q. 163, 188-89 (1926).

⁷⁵ See, e.g., Davis, *Judicial Review of Administrative Action in West Virginia—A Study in Separation of Powers*, 44 W. VA. L.Q. 270 (1938).

public. The people are convinced that it is the business of courts to interpret and apply the law rather than to create it. Any departures from precedent are apt to be considered as judicial lawmaking and beyond the constitutional pale.⁷⁶ Thus adherence to precedent becomes the expedient thing to do, for, generally, it keeps the courts in the good graces of the people.⁷⁷

During the time when the American courts expressly followed the Blackstonian view that courts discover rather than create the law, there was little problem over how they should treat any break with the past. The overruled decision was not *bad law*, but, rather, was *not the law* at all.⁷⁸ Now that the courts have, at least implicitly, departed from that position,⁷⁹ the question arises how they should handle departures from precedent. On the one hand it would seem good politics to hide judicial legislation through departure from precedent by failure explicitly to overrule the old view. This is, however, likely to be a futile thing, for in important cases an informed public will be able to penetrate judicial disguise. Failure frankly to overrule precedents which are in fact overruled might hurt judicial prestige and create confusion.⁸⁰ Consequently modern judges have openly recognized that they do legislate,⁸¹ albeit on a very small scale,⁸² and have specifically noted cases which they are overruling.⁸³ This open course of conduct is in accord with democratic traditions.⁸⁴

⁷⁶ A discussion of the furor caused by the Segregation Cases, *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Board of Educ.*, 349 U.S. 294 (1955), may be found in Fairman, *The Attack on the Segregation Cases*, 70 HARV. L. REV. 83 (1956).

For discussion of an earlier controversial reversal, see Burton, *The Legal Tender Cases A Celebrated Supreme Court Reversal*, 42 A.B.A.J. 231 (1956).

⁷⁷ However, if there is great pressure for change and precedent stands in the way, following *stare decisis* will create unpopularity for a court.

⁷⁸ BLACKSTONE, COMMENTARIES *69-70. Blackstone is cited as authority in *Falconer v. Simmons*, 51 W. Va. 172, 173, 41 S.E. 193, 194 (1902); *Harbert v. Monongahela River R.R.*, 50 W. Va. 253, 255, 40 S.E. 377, 378 (1901).

⁷⁹ The fiction of the declaratory theory was overthrown in *Gelpcke v. Dubuque*, 68 U.S. (1 Wall.) 175 (1863).

⁸⁰ See, e.g., *Union Producing Co. v. FPC*, 127 F. Supp. 88 (D.D.C. 1954).

⁸¹ See, e.g., CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 69.

⁸² *Southern Pac. Co. v. Jenson*, 244 U.S. 205, 221 (1917) (Holmes).

⁸³ See lists cited in note 63, *supra*. See also *Weston v. Ralston*, 46 W. Va. 544, 554-55, 33 S.E. 326, 330 (1899).

⁸⁴ DOUGLAS, *STARE DECISIS* 30.

II. APPLICATION OF DOCTRINE OF PRECEDENT BY ADMINISTRATIVE AGENCIES

A. HOW ARE PRECEDENTS APPLIED BY ADMINISTRATIVE AGENCIES

There is a common assumption that administrative agencies differ from courts in the extent to which they prepare reasoned opinions and rely on the principle of stare decisis. This assumption is found in, but by no means limited to, jurisprudential writings.⁸⁵ It has received judicial backing.⁸⁶ And administrative agencies themselves have asserted it.⁸⁷

In spite of these generalizations, which unfortunately lump the legislative functions of agencies with their judicial functions, those who have studied the operations of quasi-judicial bodies testify that even though agencies might proclaim the inapplicability of stare decisis, they actually follow precedents as do the courts. For example, the 1941 Attorney General's Committee on Administrative Pro-

⁸⁵ See, e.g., the assertion of John Dickinson:

"The substantive difference between the administrative procedure and the procedure at law is that the administrative tribunals decide controversies coming before them, not by fixed rules of law, but by the application of governmental discretion or policy."

DICKINSON, *op. cit. supra* note 3, at 35-36.

Also Dean Pound wrote:

"Typically judicial treatment of a controversy is a measuring of it by a rule in order to reach a universal solution for a class of causes of which the cause at hand is but an example. Typically administrative treatment of a situation is a disposition of it as a unique occurrence, an individualization whereby effect is given to its special rather than to its general features."

POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 108-09.

For other writings of Dean Pound indicating the same general philosophy, see POUND, CONTEMPORARY JURISTIC THEORY 24 (1940); POUND, ADMINISTRATIVE LAW 6-7.

⁸⁶ See, e.g., *Virginian Ry. v. United States*, 272 U.S. 658, 665-66 (1926); *State Airlines v. CAB*, 174 F.2d 510 (D.C. Cir. 1949); *Kentucky Broadcasting Corp. v. FCC*, 174 F.2d 38 (D.C. Cir. 1949); *Northern Pac. Ry. v. United States*, 41 F. Supp. 439 (D. Minn. 1941), *aff'd per curiam*, 318 U.S. 346 (1942).

The notion that stare decisis is inapplicable to administrative decisions is so strong that last summer the Court of Appeals for the Third Circuit felt it necessary to explain that "it certainly is not arbitrary for an administrative agency to be guided by its own prior exercise of expert judgment as reflected in its recent decisions." *Panhandle Eastern Pipe Line Co. v. FPC*, 236 F.2d 606, 609 (3d Cir. 1956).

⁸⁷ See, e.g., *Musick v. Colorado Springs*, 81 P.U.R. (N.S.) 142, 146 (Colo. Pub. Util. Comm'n 1949); *American Glue Co. v. Boston & M. R.R.*, 191 I.C.C. 37, 39 (1932).

cedure, which surveyed the subject of "Reliance Upon Precedents by Administrative Agencies," noted:

"[It is a] striking fact that in almost every instance the agencies' officers who were interviewed expressed the belief that they accorded to the precedents of their respective agencies as much weight as is thought to be given by the highest court of a state to its own prior decisions."⁸⁸

Studies of individual agencies such as the Patent Office,⁸⁹ the NLRB,⁹⁰ the SEC,⁹¹ the Tax Court,⁹² the New York Rent Control Commission,⁹³ the ICC,⁹⁴ the National Railroad Adjustment Board,⁹⁵ and state public service commissions⁹⁶ have reached substantially the same conclusion.

Administrative reliance upon *stare decisis* is clearly proclaimed by agency preparation, publication, and use of opinions. Although many agencies do not prepare opinions,⁹⁷ most of the more important federal administrative bodies⁹⁸ and some state commissions

⁸⁸ *Rep. Att'y Gen. Comm. Ad. Prac.*, S. Doc. No. 8, 77th Cong., 1st Sess. 466 (1941).

⁸⁹ *Lee, Stare Decisis as to Patentability*, 23 J. PAT. OFF. SOC'Y 745 (1941).

⁹⁰ Note, 16 N.Y.U. L.Q. REV. 618 (1939). But see Note 55 COLUM. L. REV. 852 (1955).

⁹¹ Note 16 N.Y.U.L.Q. REV. 618 (1939). But cf. Note, 62 HARV. L. REV. 478 (1949).

⁹² *Roehner, Are Tax Court Judges Bound by One Another's Decisions?*, 23 TAXES 310 (1945). But see Marcossion, *Stare Decisis in Tax Law*, 20 TAXES 137 (1942).

⁹³ *Weiss, Administrative Reconsideration: Some Recent Developments in New York*, 28 N.Y.U.L. REV. 1262 (1953).

⁹⁴ *Pittman, The Doctrine of Precedents and the Interstate Commerce Commission*, 5 GEO. WASH. L. REV. 543 (1937).

⁹⁵ *Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567 (1937).

⁹⁶ *Pittman, The Doctrine of Precedents and Public Service Commissions*, 11 MO. L. REV. 31 (1946).

⁹⁷ *E.g.*, Post Office Department.

⁹⁸ *E.g.*, CAB, FCC, FPC, ICC, NLRB, and SEC. Also the Agriculture and Interior Departments, as well as the Comptroller General, the Attorney General, and the Commissioner of Patents publish opinions.

Not only does the ICC prepare reports, but also its Motor Carrier and Valuation divisions publish opinions.

In the tax area there are many pages of published material constantly emanating from the Internal Revenue Service; so many in fact that even tax experts are hard put to keep up with the flood. Other agencies, recognizing that bulk does not always enhance utility, have adopted the policy of publishing only certain selected opinions. The Social Security Board is a good example of that practice. However, the FTC has so limited its publication that it has been criticized for this and for failure to utilize legal reasoning in those opinions which it does publish. *Davis, Administrative Findings*,

do.⁹⁹ The mere act of preparation of an opinion tends to bring into play the doctrine of stare decisis, for setting forth written reasons for a result invites reference to past cases similarly decided. The publication of opinions and the doctrine of precedent interact upon each other; they each make the other more likely.¹⁰⁰ It is difficult to rely upon precedent unless there is a written record of opinions. Publication of opinions gives the official a tempting source of norms which can be used to justify his conduct.

In use of their own prior opinions quasi-judicial bodies show reliance upon precedent. They speak of "following" prior decisions, or refer to them as "controlling," "decisive," or "conclusive."¹⁰¹ They

Reasons, and Stare Decisis, 38 CALIF. L. REV. 218, 245 (1950); see also *Rep. Att'y Gen. Comm. Ad. Proc.*, S. DOC. NO. 8, 77th Cong., 1st Sess. 136-37 (1941); LANDIS, *THE ADMINISTRATIVE PROCESS* 105 (1938); HENDERSON, *THE FEDERAL TRADE COMMISSION* 334 (1925).

⁹⁹ The three series of Public Utilities Reports and the supporting P.U.R. Digest contain systematically reported and digested state public service commission opinions and also reports of some federal bodies.

In West Virginia some agencies report opinions. *E.g.*, Public Service Commission, in the P.U.R. and its own annual report, Court of Claims, in its biennial reports [this agency's functions are now taken over by the Attorney General's office, W. VA. CODE c. 14, art. 2, §§ 3-12 (Michie 1955)], Attorney General, in his biennial report.

But these state case reports are not widely available and are not generally read. *Cf.* Wise and Baer, *Some Comments on Rate Making in West Virginia*, 57 W. VA. L. REV. 33 (1955).

¹⁰⁰ *Cf.* PARKER, *ADMINISTRATIVE LAW* 251 (1952). This is illustrated by the fact that in their reports some agencies, such as the ICC, FCC, and CAB, include a list of cases cited—including prior decisions of the agency.

¹⁰¹ See, *e.g.*, cases collected in Pittman, *The Doctrine of Precedents and the Interstate Commerce Commission*, 5 GEO. WASH. L. REV. 543, 562-68 (1937).

For other agency cases indicating impact of past decisions upon instant cases, see *Delta Air Lines, All-Cargo Flight Amendments*, 14 C.A.B. 1148, 1164-65 (1951) (proposal seems within "the Board's policy" as stated in previous case); *Re United Fuel Gas Co.*, 10 P.U.R.3d 31, 56-57 (W. Va. Pub. Serv. Comm'n 1955) (use of prior cases in making present determination); *The Chesapeake & P. Tel. Co.*, 51 W. VA. PUB. SERV. COMM'N ANN. REP. 151, 154 (1954) (reasons set out in previous cases still sound, so they are "incorporated herein by reference"); *Holliday v. State Auditor*, 6 Ct. Cl. (W. Va.) 111, 113 (1952) ("has been held"); *Webb v. State Road Comm'n*, 6 Ct. Cl. (W. Va.) 62, 65 (1952) (has been "frequently . . . declared").

The view of the Interstate Commerce Commission is set out in *American Glue Co. v. Boston & M. R.R.*, 191 I.C.C. 37, 39 (1932), as follows:

"We are not bound by any rule of *stare decisis* But when, upon a given state of facts, we reach a conclusion regarding certain rates we will adhere to that conclusion in subsequent proceedings regarding the same or similar rates unless new facts are brought to our attention, conditions are shown to have undergone a material change, or we proceeded on a misconception or misapprehension."

make very careful efforts to "distinguish" cases.¹⁰² Even when they "overrule"¹⁰³ a previous holding, they are recognizing the force of the doctrine of precedent, for an overruling would be unnecessary if prior decisions were not regarded as precedents.

In spite of the fact that administrative agencies do extract the *rationes decidendi* from prior adjudications for use in instant cases, it can still be argued that they do not adhere to the doctrine of precedents. That contention could be made concerning the authoritative-ness of precedents in the eyes of administrative officials. It is clear that they are bound to follow the precedents of courts reviewing their decisions.¹⁰⁴ It is also obvious that they are not going to pay any more attention to precedents developed by other agencies than courts do to opinions from other jurisdictions,¹⁰⁵ unless of course, the other agency is a predecessor in handling the same sort of problems committed to the body in question.¹⁰⁶ The real question concerns the authoritative quality agencies attach to their own prior quasi-judicial determinations.¹⁰⁷ Here a distinction similar to that drawn in the judicial realm can be educed. The extent to which bureaucrats feel free to reconsider courses previously taken by them depends, at least in

¹⁰² See, e.g., *Matter of American Potash & Chemical Corp.*, 3 N.L.R.B. 140, 146 (1937).

The officials of the Post Office Department justified their failure to publish fraud order opinions on the ground that each case is unique—i.e., distinguishable. *Rep. Att'y Gen. Comm. Ad. Proc.*, S. Doc. No. 8, 77th Cong., 1st Sess. 473-74 (1941). *Cf. Re Manufacturers Light and Heat Co.*, 13 P.U.R.3d 251 (W. Va. Pub. Serv. Comm'n 1956) (rate investigation couched in terms of fact finding; no cases cited).

¹⁰³ See, e.g., references in Pittman, *The Doctrine of Precedents and Public Service Commissions*, 11 Mo. L. Rev. 31, 59 (1946).

¹⁰⁴ *Huntington Brick and Tile Co. v. United Fuel Gas Co.*, P.U.R. 1929 D 502, 516 (W. Va. Pub. Serv. Comm'n). Although the commission said that "stare decisis is applied" by it, it is clear from the rest of its statement that all it means is that the agency is bound by the principles of law announced by the West Virginia Supreme Court of Appeals.

The reverse, however, is not true. "If it is correct to say that the issue is for judicial determination, that the Commission holding would have to be consulted but not accorded the status of *stare decisis*." *Long Island R.R. v. Delaware, L. & W. R.R.*, 143 F. Supp. 363, 365 (E.D. N.Y. 1956).

¹⁰⁵ The West Virginia Public Service Commission has considered decisions of the Interstate Commerce Commission as persuasive, but not binding, authority. *National Tube Co. v. Baltimore & O. R.R.*, P.U.R. 1918 D 68, 81 (W. Va. Pub. Serv. Comm'n).

¹⁰⁶ See e.g., *In the Matter of Haddam Distillers Corporation*, 1 S.E.C. 37, 39, 40, 46 (1934); *In the Matter of American Gyro Company*, 1 S.E.C. 83, 84 (1935). In those cases the Securities and Exchange Commission relied upon cases of the Federal Trade Commission, the body by which the regulatory statute previously had been administered.

¹⁰⁷ See note 4, *supra*.

part, upon the type of case presented before them. It is significant that the Land Office definitely committed itself to the doctrine of stare decisis.¹⁰⁸ On the other hand in cases involving moral judgments of conduct one finds little adherence to precedent. Thus the loyalty program has had a checkered course of shifting standards.¹⁰⁹ Also postal fraud order cases have never been considered by the Post Office Department as creating precedents.¹¹⁰ Generally, in handling their own precedents agencies have not rejected the American doctrine of stare decisis, but they have refused to accept an inflexible rule depriving them of power ever to undo what they have set down as law in previous cases.¹¹¹

B. WHY ARE PRECEDENTS APPLIED BY ADMINISTRATIVE AGENCIES

There is a clash between the theory of adjudication by quasi-judicial bodies and the actual practice, "for the theory was to substitute discretion for rule, and the practice seems to be to follow rule rather than discretion."¹¹² The question can be raised whether or not this deviation from theory is wise. Are the values of impartiality, stability, efficiency, and political expediency as well served in the area of administrative adjudication as they are in the judicial arena? Or are they overshadowed by defects in the system of following precedent?

1. Impartiality

The charge of bias has been hurled frequently at administrative agencies.¹¹³ Since they typically work at the "cutting edge" of the law where their substantive programs deal with strong, well-organized segments of the public, this is only natural. Use of precedent can substantially undercut such charges, unless of course the agency

¹⁰⁸ McClintock, *The Administrative Determination of Public Land Controversies*, 9 MINN. L. REV. 638, 639 (1925). See also Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 619 (1927).

¹⁰⁹ Some of this vacillation is due to changes in the executive orders establishing the loyalty boards, but much is also caused by the failure of the members of the boards to follow the standards which they themselves adopted in their own prior decisions.

¹¹⁰ *Rep. Att'y Gen. Comm. Ad. Proc.*, S. Doc. No. 8, 77th Cong., 1st Sess., 473-74 (1941).

¹¹¹ PARKER, ADMINISTRATIVE LAW 251.

¹¹² Konvitz, *Administrative Law and Democratic Institutions*, 3 J. Soc. PHIL. 139, 144, 150-51 (1938); see also Note, 35 GEO. L.J. 69 (1946).

¹¹³ For a discussion of the law of bias as it relates to administrative agencies, see DAVIS, ADMINISTRATIVE LAW §§ 109-17.

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official has a personal "interest" in the litigation in that he stands to gain or lose by a decision.¹¹⁴ Reliance upon the doctrine of *stare decisis* also can secure against errors made through administrative caprice or the incompetency of an individual official in the agency. Such aberrations cannot be hidden when the agency's opinion is available for public scrutiny or is considered upon judicial review.

Agency reconsideration, as well as judicial shifts in position, can produce partiality in result because of reliance by a party on prior action of the tribunal. Just as it is necessary for courts sometimes to upset their prior holdings, it is also occasionally necessary for administrative commissions to alter their previous stands. They, however, are not obliged to do so *through the use of their judicial powers*. Most agencies possess a well-stocked supply of legislative tools for altering the law which they administer; they can proceed by promulgation of rules,¹¹⁵ giving informal assurances,¹¹⁶ rendering advisory opinions, or giving a case only prospective effect.¹¹⁷ Of course there might be instances where only case-by-case changes can be effective, since it is not always possible to provide for every contingency through legislation.¹¹⁸ It has been contended, though, that they could judicially legislate by case modification of prior principles, since they can openly legislate.¹¹⁹ However, possession

¹¹⁴ For the various meanings of the term "bias," see DAVIS, ADMINISTRATIVE LAW § 110.

¹¹⁵ For general information concerning alternative agency techniques, including exercise of the rule making power, see Note, 62 HARV. L. REV. 478 (1949).

¹¹⁶ *Ibid.* See also LANDIS, *op. cit. supra* note 98, at 84; Note, 35 GEO. L.J. 69, 77 (1946).

¹¹⁷ In the Matter of Engineers Public Service Co., 8 S.E.C. 366, 377 n.4 (1940); In the Matter of Virginia Public Service Co., 6 S.E.C. 419 (1939).

Administrative agencies have no monopoly on this approach. The Supreme Court approved such action by the Montana court in the face of argument that it constituted denial of due process of law. *Great Nor. Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). Various proposals for general judicial adoption of prospective declaration of law have been advanced. Hanner, *A Suggested Modification of Stare Decisis*, 28 ILL. L. REV. 277 (1933); Kocourek, *supra* note 25. Arguments against this proposal may be found in Von Moschzisker, *supra* note 27.

Nevertheless courts generally give retroactive application to new doctrines. *Herbert v. Monongahela River R.R.*, 50 W. Va. 253, 255-57, 40 S.E. 377, 378 (1901). For an exception to this rule, see *Falconer v. Simmons*, 51 W. Va. 172, 41 S.E. 193 (1902).

¹¹⁸ This apparently was the view taken by the SEC in connection with the *Chenery* litigation. For a discussion of these cases, see Davis, *Administrative Findings, Reasons, and Stare Decisis*, 38 CALIF. L. REV. 218, 249-58 (1950).

¹¹⁹ CHAMBERLAIN, DOWLING, HAYS, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* 62 (1942).

of legislative power cuts stronger in favor of stare decisis than against it. Since agencies can openly legislate, they do not need to resort to judicial legislation. In general possession of nonjudicial means of alteration of policy lays the basis for a strong argument that there is more reason for agencies acting in their quasi-judicial capacity to adhere to stare decisis than for the judiciary to follow precedent.

It should be noted that because of the notion that agencies do not follow precedent, reliance is probably less likely in the area of administrative action than it is in the judicial realm. Also, since agencies generally do not operate in fields where reliance is strong, such as *intervivos* and testamentary transfers of realty,¹²⁰ they are less likely to incur instances of persons acting on the basis of what they have previously done. Then too, in the case of new agencies, reliance is sometimes not as reasonable as it is in cases of courts, since the administrative body is feeling its way and is not possessed of guides so that it might take some wrong turns which need correcting.¹²¹

Nevertheless there is as much, if not more, reason for administrative adherence to precedent to make possible securing impartiality as there is cause for courts to follow their opinions.

2. Stability

Stability, certainly, predictability, and security are all desiderata operating within the administrative process as well as the judicial. They can be achieved by courts through the long tenure of judges, who in the federal judiciary hold lifetime appointments and who in most state systems are regularly re-elected or reappointed,¹²² as well as through the use of precedent. Such is not the case in the administrative process. There is a rapid turnover of administrative officials—including agency heads¹²³—which means that without use

¹²⁰ But See McClintock, *supra* note 108.

¹²¹ GELLHORN AND BYSE, *ADMINISTRATIVE LAW* 1225 (1954).

¹²² But see Von Moschzisker, *supra* note 27, at 409-10.

¹²³ Although the terms of agency heads are typically for long periods, they often resign before their time is up. Also upon shift in political administrations administrative officials of the "wrong" party are likely to be replaced at the end of their terms (or sooner, if possible) rather than reappointed. For a leading case on the presidential power of removal, see *Humphrey's Executor (Rathbun) v. United States*, 295 U.S. 602 (1935). For an account of the effect of the recent shift from the Democratic to a Republican administration on the NLRB, see Note, 55 *COLUM. L. REV.* 852 (1955).

of precedent there is more likelihood of case made changes in the law than there is in the judicial process.

Stability is important to the agencies themselves as well as to those dealing with them. Administrative bodies are legislative delegates which have been given certain duties as well as powers to carry them out. Without some sort of uniform application of policy they will lose much of their effectiveness. By following precedent they can tie the future to the past and curb the "opportunity for interminable shifting"¹²⁴ of positions.

While it is true that stability demands that what was decided one year as to A should be the basis of a decision the next year in the case of B, if the facts are similar, still such logical extension of past principles by agencies is not always proper. "In administrative law we are dealing preeminently with law in the making; with fluid tendencies and tentative traditions."¹²⁵ Because of this, agencies should be better able than the courts to observe the practical operations of their own prior actions and quicker to perceive practical needs for change.¹²⁶ We must guard against any undue quest for certainty, born of the desire to create security, which would harmfully curb their discretionary power.

A foundation of the existence of administrative agencies is flexibility through discretion. Sometimes the very justification for creation of an administrative body is that it may exercise discretion in handling individual problems which are difficult to fit within inflexible boundaries laid down by precedents.¹²⁷ Any attempt to impose rules of rigid adherence to the notion of *stare decisis* would strike at that basis of agency existence.

Because administrative agencies are usually charged by statute with attempting to accomplish some specified end they ". . . cannot take a wholly passive attitude toward the issues which come before

¹²⁴ Weiss, *supra* note 93, at 1266.

¹²⁵ Frankfurter, *supra* note 108, at 619.

¹²⁶ Frank, *Advance Administrative Decisions* (1939) (An address before the Association of the Bar of the City of New York, May 5, 1939) quoted in GELLHORN AND BYSE, *ADMINISTRATIVE LAW* 1226.

¹²⁷ JAFFE, *ADMINISTRATIVE LAW* 3-9 (1953). Judge Wyzanski maintained in *Shawmut Association v. SEC*, 146 F.2d 791, 796-97 (1st Cir. 1945) that:

"Flexibility was not the least of the objectives sought by Congress in selecting administrative rather than judicial determination of the problems of security regulation. . . . The administrator is expected to treat experience not as a jailer but as a teacher."

them."¹²⁸ In order to take a dynamic approach they must be free to act flexibly. They must be "especially wary against the danger of premature synthesis, of sterile generalization un nourished by the realities of 'law in action,'"¹²⁹ Such rigidifying of policies would hamper them in their necessary tasks of correcting errors and of making provisions for changes of conditions and of policies.¹³⁰

Ofttimes a particular administrative case made rule is determined or directed along a certain course by the hard circumstances of the particular case where it was first considered.¹³¹ Also the newness of the problems handed to agencies gives them very little by way of guidance to head them in the right direction.¹³² Then too the complexity of many cases committed to administrators for decision is so great that "we should have to endow them with almost supernatural powers, if they are not . . . at the onset stunned and confounded by the fantastic proliferation which emerges," when they attempt to decide them.¹³³ Thus precedents can become established which executive tribunals upon later reflection find were erroneous. Administrative agencies must have at least the same amount of power as do the courts to correct their own errors.¹³⁴

Quasi-judicial bodies also need free-wheeling powers in order to keep abreast of changes in social and economic conditions. Just

¹²⁸ *Rep. Att'y Gen. Comm. Ad. Proc.*, S. Doc. No. 8, 77th Cong., 1st Sess., 19-20 (1941).

¹²⁹ Frankfurter, *supra* note 108, at 619.

Courts also face the same danger. Pound, *What Is Law?*, 47 W. VA. L.Q. 1, 11 (1940).

¹³⁰ A desire on the part of the FPC to improve methods of allocation for rate making was manifested in *Re Panhandle East Pipe Line Co.*, 3 P.U.R.3d 396, 411-12 (F.P.C. 1954).

¹³¹ Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 942 (1923).

¹³² Concerning this proposition Professors Gellhorn and Byse have written:

"Many an agency sets forth upon an uncharted sea with very little in the way of legislative guidance. Having started off in one direction, the agency may later learn that a different course is a preferable one. Especially where the subject matter under governmental regulation is not a static one, too tight an application of stare decisis might produce poor results."

GELLHORN AND BYSE, *ADMINISTRATIVE LAW* 1125-26. See also Madden, *Administrative Procedure: National Labor Relations Board*, 45 W. VA. L.Q. 93, 99 (1939).

¹³³ *Dairymen's League Cooperative Ass'n. v. Brannon*, 173 F.2d 57, 65 (2d Cir.), *cert. denied*, 338 U.S. 825 (1949).

¹³⁴ *American Glue Co. v. Boston & M. R.R.*, 191 I.C.C. 37, 39 (1932) (*dictum*).

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as in the case of the judicial process the administrative process has little or no justification for retaining a rule merely because it was laid down in days gone past, if the reason for it has long since disappeared¹³⁵—unless of course another valid reason can be substituted for it. Experience should govern the law administered through government boards.¹³⁶

Agencies are to a great extent subject to executive influence.¹³⁷ When there is a change of executive, the new administration has traditionally used its power to select subordinates and terminate the appointment of those who are unacceptable to it in order to bring agency action into accord with governmental political philosophy. Even in respect to the so-called independent regulatory commissions, where in theory the removal power does not exist, there is a great deal of executive influence.¹³⁸ There is much to be said in favor of this, since it gives the public, through its choice of the executive, some voice in agency policy. However, if administrative bodies are restricted to their prior precedents, such changes in policy will be thwarted. Thus again it appears that stability must be tempered with flexibility.

The flexibility necessary for correcting errors, taking care of changes in conditions, and changing policy must at least to some degree be provided through deviation from prior case law. The courts upon judicial review of administrative adjudication cannot themselves bring about change; their scope of review is limited.¹³⁹ The legislature, while it can intervene, usually does not do so unless a great head of popular pressure is built up.¹⁴⁰ The job is in agency hands. While, as noted above, most agencies can bring a number of weapons to bear in changing policy, there are cases where the only really effective one will be through case-to-case decisions. Ad hoc procedure is advantageous in that it permits the agency to consider each problem on its own merits, to recognize subtle factual variations, and then to develop the law as its experience accumulates.¹⁴¹

¹³⁵ Holmes, *supra* note 55, at 469.

¹³⁶ See Dewey, *supra* note 31, at 25.

¹³⁷ See GELLHORN AND BYSE, ADMINISTRATIVE LAW 159-69.

¹³⁸ *Id.* at 162-62. For an example of the exercise of such influence by means of appointing partisans to an agency, see Note, 55 COLUM. L. REV. 852 (1955).

¹³⁹ See Part III A, *infra*.

¹⁴⁰ Covington, *supra* note 64, at 199.

¹⁴¹ Note 62 HARV. L. REV. 478, 482 (1949).

3. Efficiency

An important factor in administrative adjudication is the vast number of cases flooding agencies.¹⁴² Even more than judges, administrators would be faced with an impossible task were they asked to reconsider doctrines well established by themselves. That would drain their time not only by requiring them to consider additional issues, but also by creating uncertainties which would probably increase their case load with cases which, if the law were certain, would be informally considered.

Deviation from precedent by an appellate court often leaves the judge of a trial court in a quandry as to what the law really is.¹⁴³ Similarly, departure from established doctrines by agency heads leaves their subordinates without a clear picture as to the content of legal norms developed by the agency. Since the passage of the *Administrative Procedure Act* in 1946, federal trial examiners have to submit, as a part of their report to the agency, recommended or tentative decisions.¹⁴⁴ This makes it important for them to know what the agency-developed law is. Confusion by them, created by agency shifts, wastes time and effort.

Although even students of administrative law often point up the differences between administrative and judicial procedure, there are great similarities. In fact cases resolved by formal adjudication

¹⁴² *Rep. Att'y Gen. Comm. Ad. Proc.*, S. Doc. No. 8, 77th Cong., 1st Sess. 466-74 (1941), gives the case load statistics on federal agencies.

For a comment on the load of the West Virginia Public Service Commission, see Peairs, *The West Virginia Public Service Commission*, 46 W. VA. L.Q. 201, 219 (1940).

¹⁴³ *Helvering v. Hallock*, 309 U.S. 106, 129 (1940) (Roberts dissenting). See also criticism of conflicting Supreme Court cases by a district court judge in *Union Producing Co. v. FPC*, 127 F. Supp. 88, 93 (D.D.C. 1954) (Holtzoff, D.J.).

Trial court judges are also often uncertain as to the law when an appellate court delivers only a memorandum decision. See Note, 69 *HARV. L. REV.* 707, 715, 716-17, 720 (1956).

¹⁴⁴ A.P.A. § 8, 5 U.S.C. § 7 (1952).

It has recently been suggested that the position of the hearing examiners be strengthened and that their relationship to the agency in making decisions be nearly equated with the relationship between trial and appellate courts. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURES 372 (1955); Fuchs, *Hearing Commissioners*, 30 N.Y.U.L. REV. 1342 (1955). *United States ex. rel. Brzovich v. Holton*, 222 F.2d 840, 843 (7th Cir. 1955), adopts the position that the view of the Task Force is already the law under the Supreme Court's holding in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). But see *Allentown Broadcasting Corp. v. FCC*, 222 F.2d 781 (D.C. Cir. 1954), *rev'd*, 349 U.S. 358 (1955).

are handled before agencies in a pattern similar to that used before courts. This adoption of judicial technique and methodology is, in part, related to administrative reliance on precedent. The availability and use of cases as a source of norms presents a parallel with the judicial process. It invites the administrative bar to deal with those cases in a manner similar to the way they would be used in court proceedings.

Adoption of judicial methodology is of great practical importance to those practicing before agencies as well as to the agencies themselves. It provides the lawyer with a familiar method of preparation for his case. He proceeds as he would for a court action. It gives him a superb argumentative technique through which he can illuminate each of his cases with the light of all that has gone before. In the resolution of cases the doctrine of precedent not only is a "godsend to men harrassed by the necessity of making up their minds in close cases,"¹⁴⁵ but also of justifying them to the persons involved, their legal representatives, and to the world at large. They are provided with authoritative norms and with a technique of utilizing them.

4. *Political Expediency*

During the past quarter century critics of the administrative process have had a field-day. The common use of unfriendly terms, such as "red-tape," "the mess in Washington," "bumbling bureaucrats," "the wonderful wizards of Washington," etc., in relation to agencies, their officials, and practices, indicates that they have to work at keeping their fences mended. Ofttimes they operate in politically sensitive fields where misunderstandings can be explosive. They are in a position where not only do they have to dispense justice, but also they must convince the general public, those whose activities they regulate, the courts which review their actions, the legislature, and the executive that they do so. This is a large order; but it is one which a successful agency must fill.¹⁴⁶

This need to justify to others conclusions reached and decisions made has fostered logical operations throughout society.¹⁴⁷ It is at least in part satisfied by administrative adherence to the doctrine of stare decisis.

¹⁴⁵ Garrison, *supra* note 95, at 584.

¹⁴⁶ Cf. GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS* 3-48 (1956).

¹⁴⁷ Dewey, *supra* note 31, at 24.

"Publicity through opinions is an advantage to an agency which is only too likely to be accused of using star chamber methods and of favoring certain interests or persons who have political support. Malcontents there will always be; the disappointed suitor is rarely satisfied with the fairness of the decision against him, but the best proof of the fairness of the agency and of the decision is the published opinion itself."¹⁴⁸

That is especially true, if the opinion clearly indicates that the agency has not departed from its moorings in the past, but instead has applied norms previously developed.

On the other hand agencies can lose "face" by falling victim to "administrativitis," the hardening of the administrative arteries.¹⁴⁹ Strict adherence to precedence by courts is something which is familiar, even though upon certain occasions it might not be desirable; strict adherence to the doctrine of stare decisis by agencies is not so well known. In those fields where the public expects active law, agency reliance on past holdings, in place of bending with the tide of social and economic changes, is apt to bring scorn.

III. JUDICIAL REVIEW OF ADMINISTRATIVE APPLICATION OF DOCTRINE OF PRECEDENT

An examination of appellate court cases in which administrative action has been reviewed, affords insight into determination of whether the courts have treated administrative application of the doctrine of precedent with regard to the values it brings to the administrative process, or whether they have adopted other measures of gauging agency departures from precedent.

A. SCOPE OF JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

Generally, the courts have power to review administrative acts, including agency adjudication—a power partly based on judge-made law and partly on statutory provisions.¹⁵⁰ In exercising this authority it is incumbent upon the judiciary to walk a narrow path between usurpation of administrative prerogatives and abnegation of judicial responsibilities. Under the *Administrative Procedure Act* fed-

¹⁴⁸ CHAMBERLAIN, DOWLING, AND HAYS, *op. cit. supra* note 119, at 61-62.

¹⁴⁹ See Senate subcommittee hearings cited in GELLHORN AND BYSE, ADMINISTRATIVE LAW 38-41.

¹⁵⁰ For a general discussion of the scope of judicial review, see PARKER, ADMINISTRATIVE LAW 260-70 (1952); see also Davis, *Judicial Review of Administrative Action in West Virginia—A Study in Separation of Powers*, 44 W. VA. L.Q. 270 (1938).

eral courts have been given power to "decide all relevant questions of law" upon judicial review, but that grant is qualified by excepting from it instances where there has been (1) statutory preclusion of judicial review or (2) commission by law of action to agency discretion.¹⁵¹ Insofar as matters are left to the discretion of administrative bodies, the courts can only decide whether discretion has been abused. Judges cannot substitute their own judgment as to what a decision should have been, even though, if they were determining it as an initial matter, they would have made a different determination than did the agency. The building of large bodies of administrative case law is the result of administrative exercise of discretionary power.¹⁵² Thus federal agencies, and also to a great extent state administrative bodies,¹⁵³ are left free to determine their own case law doctrines. Their action is subject to judicial overthrow only when they abuse it, or, as the formula is usually worded, when their action is arbitrary.

B. EFFECT OF RELAXATION OF PRECEDENT ON SCOPE OF REVIEW

The first question to be determined in relation to the effect of relaxation of precedent by agencies upon the scope of judicial review is whether courts will apply the same standards of review to cases wherein agencies reverse prior policies as they apply in other cases. This question is sharpened in the area where the agency's action, if taken as an original matter rather than as an alteration of a prior policy, would have been within its discretion. A common ground for judicial deference to agencies is that expert bodies are more qualified than courts to decide certain questions.¹⁵⁴ It is arguable that this reason does not apply to an agency reversal. Nevertheless the courts have indicated that they will not alter their standards of review merely because the agency has seen fit to exercise its adjudicative power in such a way as to reject a past agency case made doctrine.¹⁵⁵

¹⁵¹ A.P.A. § 10, 5 U.S.C. § 9 (1952).

¹⁵² DAVIS, ADMINISTRATIVE LAW 925.

¹⁵³ Usually judicial interference with actions of state administrative agencies is more pronounced than it is in the federal area. See, e.g., Parker, *Administrative Law in Arkansas*, 4 ARK. L. REV. 107, 120-27 (1950).

¹⁵⁴ For an account of administrative expertise, see *Rep. Att'y Gen. Comm. Ad. Proc.*, S. Doc. No. 8, 77th Cong., 1st Sess. 18 (1941).

¹⁵⁵ *NLRB v. Seven up Bottling Co. of Miami*, 344 U.S. 344, 350-51 (1953); But cf. *State Airlines v. CAB*, 174 F.2d 510, 518 (D.C. Cir. 1949); ("... though the courts may take those prior determinations into consideration.")

The question then which comes before the courts upon agency non-adherence to stare decisis is whether action is "arbitrary" when the body in a later case does not follow its earlier position. If that change constitutes an arbitrary or a capricious act, the court is free to reject it. Otherwise the court is bound. In general legislative provisions establishing and governing activities of administrative groups are either silent as to the question of agency power to reconsider past actions or else are so ambiguously worded so as to give little guidance.¹⁵⁶ The matter has thus been left to the courts.

Generally the courts have approved an agency's action of announcing a new norm and applying it to the instant case.¹⁵⁷ In the leading case of *FCC v. WOKO*, the Supreme Court approved the refusal by the Federal Communications Commission to renew a broadcasting license for conduct which had previously been considered innocuous. It said:

"[T]he apparently unannounced change of policy . . . is a consideration appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable."¹⁵⁸

On the other hand, though, courts occasionally have reversed agency cases because of abandonment of established legal norms. For example, in *NLRB v. Guy F. Atkinson Co.*, the Court of Appeals for the Ninth Circuit refused to enforce a labor board order on the ground that at the time of the conduct complained of the board was not asserting jurisdiction over the industry involved.¹⁵⁹ Another court, also dealing with an NLRB case, has said:

"Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. Under such circumstances, affirmative orders violate administrative discretion and become punitive, rather than remedial measures, outside the scope of the Board's power."¹⁶⁰

¹⁵⁶ Note, 68 HARV. L. REV. 1251, 1253 (1955); see also Weiss, *supra* note 93, at 1266.

¹⁵⁷ *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 350-51 (1953); *Courier Post Pub. Co. v. FCC*, 104 F.2d 213, 218 (D.C. Cir. 1939); *Chein v. United States*, 102 F. Supp. 320 (D.N.J. 1951); *Motor Transit Co. v. Railroad Comm'n of California*, 189 Cal. 578, 209 Pac. 586 (1922).

¹⁵⁸ 329 U.S. 223, 228 (1946).

¹⁵⁹ 194 F.2d 141 (9th Cir. 1952).

¹⁶⁰ *NLRB v. Mall Tool Co.*, 119 F.2d 700, 702 (7th Cir. 1941).

The judiciary has also at times ordered the agencies to mitigate the effect of a retroactive application of a new policy.¹⁶¹

In reaching these varying conclusions the courts have not expressly placed their decisions on any comparison between the judicial and the administrative processes in regard to the values found through adherence to precedent. Rather they seem to have been concerned with (1) the reason why the agency departed from precedent, (2) the effect of agency departure, and (3) whether courts were enforcing the prior agency doctrine.

1. *Why Agency Departed*

Although administrative bodies, like courts, must have power to change their minds as to their prior case made norms, "if it is the rule of law which controls, there must be some basis to indicate that it is reason and judgment that has brought the change."¹⁶² The reasons for administrative quasi-judicial shifts of position which could be most frequently asserted by them and by persons attacking their new positions are: (a) correction of error, (b) change of conditions, and (c) shift in political philosophy.

It is noteworthy that in many of the cases wherein the courts have stated that the administrative tribunal involved was not bound by stare decisis, they have also noted that the old norm which was overthrown by the agency was incorrect.¹⁶³ Thus they have recognized the power of administrative bodies to depart from their own precedents in order to correct an erroneous earlier position. Inasmuch as our courts do not feel bound to perpetuate their own errors, it is not at all surprising that they concede the same freedom of action to quasi-judicial tribunals.

The argument that conditions have changed under which the old norm was developed and hence it should no longer be followed, is quite close to the "error" argument. Refusals to follow a case because of change of circumstances could be accompanied by a

¹⁶¹ See, e.g., *E. Brooke Matlack v. United States*, 119 F. Supp. 617 (E.D. Pa. 1954).

¹⁶² *Dixie Carriers v. United States*, 143 F. Supp. 844, 854 (S.D. Tex. 1956).

¹⁶³ See, e.g., *Helvering v. Hallock*, 309 U.S. 106 (1940); *Virginian Ry. v. United States*, 272 U.S. 658 (1926); *Lanolin Plus Cosmetics v. Marzall*, 196 F.2d 591 (D.C. Cir.), cert. denied, 344 U.S. 823 (1952).

showing that its *ratio decidendi* would be erroneous as applied to facts today.¹⁶⁴

Courts are unlikely to be tolerant of agency refusal to follow a norm merely because its political philosophy has changed. But, while it is quite clear that agencies are sensitive to political pressures and that they change personnel frequently, it would be quite difficult to show that the reason for rejection of *stare decisis* in a case is the change in agency political philosophy.¹⁶⁵ Conjectures might be made and extra-judicial statements of administrative officers might be pointed to,¹⁶⁶ but in looking at individual cases, as a court reviewing administrative decisions must, it is hard to pin down any agency reversal of policy to a change in its philosophy induced by political changes.

2. *Effects of Agency Departures*

There are certain effects of agency departures which have seemed to judges to be so severe as to warrant them in overturning the administrative action. Cases where the judiciary has seen such hardships are generally cases in areas where the values of *stare decisis* have been long recognized. For example, the NLRB was denied the right to impose a penalty on an employer in the form of a back pay award for a period of time for which prior case law would not have covered. An award of that sort would be quasi-criminal in result.¹⁶⁷ In 1955 the eighth circuit court of appeals denied an agency the right to reject a contract provision of which its prior case law approved at the time the contract in question was executed.¹⁶⁸ Thus reliance on a rule of contract law was protected. In another

¹⁶⁴ This is somewhat similar to the doctrine of *rebus sic stantibus* which is used in the field of international law. See 4 OP. ATT'Y GEN. 119 (1941).

¹⁶⁵ Comparison of writings of present and past agency members often shows a political cleavage. See, e.g., Madden, *supra* note 132, as compared with Farmer, *The National Labor Relations Board*, 56 W. VA. L. REV. 79 (1954), and Farmer, *The Taft-Hartley Act and the Balance of Power in Labor Relations*, 51 W. VA. L.Q. 141 (1949).

¹⁶⁶ See, e.g., *Rosenblum v. FTC*, 214 F.2d 338, 339 (2d Cir. 1954) (Clark dissenting); Note, 55 COLUM. L. REV. 852 (1955); see also *The Disputed Policies of the New Labor Board—A Symposium*, 43 GEO. L.J. 335 (1955); Kaczmarek, *Change in Labor Relations: Progress or Pendulum*, 43 GEO. L.J. 477 (1955); Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93 (1954); Note, 4 UTAH L. REV. 380 (1955).

¹⁶⁷ *NLRB v. Mall Tool Co.*, 119 F.2d 700 (7th Cir. 1941).

¹⁶⁸ *NLRB v. International Brotherhood of Teamsters*, 225 F.2d 343 (8th Cir. 1955).

labor board case the agency was not permitted to assume jurisdiction over a new area through use of its quasi-judicial powers.¹⁶⁹ This too is an instance where the hardship to those caught in the retroactive reversal of policy is obvious.

3. Court Enforcing Prior Agency Doctrine

In the recent case of *Rosenblum v. FTC*,¹⁷⁰ a question was raised whether courts should be as ready to accept an administrative reversal of an established policy when that policy is being enforced by the courts as they would otherwise be. The Federal Trade Commission had decided that the use of the word "free" in advertising under certain circumstances violated the *Federal Trade Commission Act*,¹⁷¹ and subsequently it had been successful in a court proceeding against Rosenblum for similar practices.¹⁷² Then it altered its interpretation of the statute and in another case announced its new policy.¹⁷³ Since under that modification the practices from which it had had the court exclude Rosenblum were now permissible, the FTC asked the court to dissolve its enforcement order. Although the motion vacating the decree was granted per curiam, Judge Clark entered a dissenting opinion.¹⁷⁴ He indicated a fear that expunging the decree merely because the agency did not like it was dangerous. If agencies are permitted to turn judicial decrees off and on by shifting whims, Clark felt that the courts would be abdicating their functions. There is a great deal to commend his position. Agency departure from stare decisis is one thing when only the administrative tribunal and the litigants are involved; it is something else again when the judiciary is necessarily brought into the picture.

CONCLUSION

In conclusion it might be said that agencies adhere to precedent to approximately the same extent, for the same general reasons, and in the same type of cases as do courts of last resort in this country. Also courts treat agency departures from precedent in much the

¹⁶⁹ *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952).

¹⁷⁰ 214 F.2d 338 (D.C. Cir. 1954).

¹⁷¹ *FTC v. Standard Educ. Soc'y*, 302 U.S. 112 (1937).

¹⁷² *Rosenblum v. FTC*, 192 F.2d 392 (2d Cir. 1951), *affirming*, *Joseph Rosenblum*, 47 F.T.C. 712 (1937).

¹⁷³ *Walter J. Black* FTC Dkt. No. 5571 (Sept. 11, 1953), abstracted in 2 CCH TRADE REG. REP. § 5095.40.

¹⁷⁴ *Rosenblum v. FTC*, 214 F.2d 338 (D.C. Cir. 1954).

same way they would treat judicial departures, even though their formula for review is different. There is little that should be surprising in this. Precedent has its analogue in individuals in habit and in society in folkways or mores.¹⁷⁵ The doctrine of stare decisis came to be recognized and applied by courts of equitable jurisdiction,¹⁷⁶ even though at first Chancery operated on the basis of discretion. A similar development is currently taking place in the field of arbitration.¹⁷⁷ Continental legal systems utilize a doctrine of precedent,¹⁷⁸ though in a different form than that of the common law system.¹⁷⁹ Adherence to precedent "is a rule of all law."¹⁸⁰ Thus it is only natural that administrative agencies should also follow the admonition of Paul to the Thessalonians: "Prove all things; hold fast that which is good."¹⁸¹

¹⁷⁵ LLEWELLYN, *THE BRAMBLE BUSH* 64.

¹⁷⁶ However, equity still retains flexibility to grant or to deny relief as a matter of judicial discretion. Note, 45 W. VA. L.Q. 154 (1939).

¹⁷⁷ Elkouri, *The Precedential Force of Labor Arbitration Awards*, 3 OKLA. L. REV. 954 (1950).

¹⁷⁸ Lobingier, *Precedent in Past and Present Legal Systems*, 44 MICH. L. REV. 954 (1950).

¹⁷⁹ Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 646 (1923); see also GOVERNMENT UNDER LAW 90 (Sutherland ed. 1956) (France). But see Ireland, *Precedent's Place in Latin Law*, 40 W. VA. L.Q. 115 (1934) (civil law jurisdictions).

¹⁸⁰ CHAMBERLAIN, *op. cit. supra* note 7, at 26.

¹⁸¹ I THESSALONIANS 5:21.