

II. THE DOCTRINE OF *STARE DECISIS*

A legal realist, to solve a problem involving the U.S. Constitution or the Uniform Commercial Code, would first search for an appellate judicial decision that interprets the provision in question. This approach is analogous to the one that would be used to solve a common law tort issue. Upon finding a decision, or many decisions made over a number of years, the doctrine of *stare decisis* (precedent) becomes important. *Stare decisis* dictates that like cases should be decided today the same way they were decided in the past. The doctrine makes use of a short statement from an earlier judicial opinion known as the *ratio decidendi* or holding of the case, which is the narrow rule necessary to resolve the dispute that emerged from a specific fact situation. All the remaining language in the opinion is referred to as (mere) *dicta*, which carries less weight in legal argument. One may contrast a *ratio decidendi* to a legal principle, which emerges from a line of decisions as a broader norm pregnant with reasons for those decisions; it therefore carries greater weight in legal argument.

*Stare decisis* affects three types of courts. First, all lower courts in a jurisdiction are bound to follow the holding declared by a higher court. Second, the high court is expected to follow its own precedents. The high court may avoid a previous holding by determining that the facts in an instant case are sufficiently dissimilar from an earlier case that the precedent may be distinguished. Or the high court may overrule a precedent, since the American judiciary does not follow a rigid view of *stare decisis*, and justify in its opinion why a new rule is necessary. See Chap. 18, pt. III. Third, courts in other jurisdictions may use a precedent as persuasive authority in fashioning a rule for their systems, which among the American states might become a majority or minority rule.

The power of precedent as a source of law depends on how broadly or narrowly courts construe the holdings of earlier cases. The doctrine furthers three goals more generally related to the process of adjudication. First, fairness requires that like cases be treated alike. A judge's written justification explaining why he failed to follow an apparently applicable precedent makes it harder to base decisions on arbitrary or impermissible criteria. Second, *stare decisis* enhances the predictability of law, which enables people to plan their lives and reduce the risks of becoming involved in litigation. Third, the doctrine improves judicial decision making by permitting judges to more efficiently resolve cases without reconsidering legal issues already decided and to create an aura of similarity among themselves that enhances the judiciary's credibility.

It is possible that the whole concept of *stare decisis* today may be in decline. This results from the computerization of the bulk of American case law, which has eliminated a natural restraint on the proliferation of available judicial opinions. Networks of computers, located in Ohio or Minnesota and accessed through fee-based telecommunications systems or Web sites, overwhelm the law with sheer masses of data. These systems have an unlimited storage capacity and an enormous ability to find things: cases, concepts, phrases, and words. Lawyers have become used to the rapid manipulation of facts and rules. They make ever more arguments to the judge, who must select from the blizzard of options. In this environment the fairness, predictability, and improved decision making behind *stare decisis* become an illusion.