The reality of binding precedent in America

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RESUMO

Este artigo oferece ao leitor uma oportunidade de entender o uso da doutrina do precedente vinculante nos Estados Unidos, tanto no sistema federal quanto no estadual. O autor oferece comentários que adotam a posição segundo a qual o uso do precedente vinculante nos Estados Unidos da América fornece as bases para os estudantes de direito, advogados, professores de direito, juízes e legisladores poderem prever o que um tribunal deve decidir em um caso sujeito a um precedente estabelecido. O artigo explica como o precedente é criado e também como ele é usado pelos tribunais para julgar casos. Ademais, o material explica que o precedente vinculante nos Estados Unidos não significa que o precedente de um caso é escrito em pedra. A maneira pela qual o precedente pode vir a ser mudado é discutida, assim como as características necessárias da formação jurídica e as funções de apoio ao sistema judiciário que precisam existir para permitir a uma cultura jurídica a utilização com sucesso do precedente vinculante. O autor conclui que o método da formação jurídica e o sistema de apoio necessário para garantir o efetivo uso do precedente vinculante nos Estados Unidos é justificado pela estabilidade e previsibilidade das decisões legais que o conceito torna possível

Palavras-chave

Precedente vinculante americano. Constitucional.

ABSTRACT

This article offers the reader an opportunity to understand the use of binding precedent in the United States, both in the State and Federal justice systems. The author offers commentary which supports the position that America's use of binding precedent provides a basis for law students, lawyers, law professors, judges and law-makers to forecast what a court should decide ina case subject to established precedent. The article explains both how precedent is created and how such is used by the courts to adjudicate cases.

The material further explains that binding precedent in America does not mean that the

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precedent of a case is written in stone. The manner in which precedent is changed prospectively is discussed, as well as the necessary legal education characteristics and justice system support functions which must exist to allow a legal culture to use binding precedent successfully. The author concludes thatthe method of legal education and support system necessary to assure the effective use of binding precedent in America is justified by the stability and predictability of legal decisions which the concept makes possible.

Key-words

American binding precedent. Constitution.

I. Introduction

The *stare decisis* doctrine in the United States legal culture requires that oncean appellate court in the State or federal judicial system has selected a principle of law to use in deciding the case before it by a majority opinion of the court, thus establishing the precedent of the case, the court will continue to adhere to that precedent, applying it to future cases where the relevant facts for purposes of decision are substantially the same, even though the parties are different.[2] Therefore, "precedent" is the legal rule used by an *appellate court in the forum in which the case has been decided*, applied to the *relevant facts* which create the issue before the court for decision. *Stare decisis* is the *policy* which requires that the courts subordinate to the appellate court establishing the precedent follow that precedent and not disturb a Asettled point previously decided.[3] This principle, *applying the doctrine of stare decisis* to establish binding precedent, came to the United States legal culture from the English common law tradition.[4] Binding precedent is, therefore, the result of the use of the doctrine of *stare decisis*. This article will, henceforth, designate the principle by its product, i.e., "binding precedent."

The United States gradually departed from following the English precedents and formed a legal system based upon American case law adapted from other States of the United States when there was no binding precedent within the forum State in question, rather than referring back to the English tradition generally.[5] Even today, however, an American State court may use English law as persuasive authority when no other authority exists. The difference between binding precedent and persuasive authority in judicial decision-making in the United States will be discussed, *infra.*

This article has no intent nor desire to champion the use of a limited or generally binding *sumula vinculante*. The article will, however, address what binding precedent is in the United States in an attempt to offer a basis for

[1] *See Horne v. Moody,* 146 S.W. 2d 505, 509-510 (Tex. Civ. App. 1940).
[2] *See Neff v. George,* 4 N.E. 2d 388, 390-391 (111. 1936).
[3] *See* Edward D. Re, *Remarks Regarding Stare Decisis Presented at a Seminar for Federal Appellate Judges Sponsored by the Federal Judicial Center* (May 13-16, 1975), in education and training series, May, 1975, at 1.

understanding how the state and federal systems of the United States affect the use of binding precedent and how binding precedent is used in decision-making by judges and justices. The materials will also discuss how binding precedent affects the practice of law, the affect of the use of binding precedent upon the manner in which legal education occurs in the United States, and the necessary support system for a legal culture such as that which is used in the United States where binding precedent is utilized.

The conclusion will offer a statement of the benefits and detriments of the use of binding precedent in the United States legal culture and reach the ultimate conclusion that binding precedent in the United States serves the legal culture in an admirable manner; however, the text and conclusion of the paper will offer a sufficient basis for the reader to be advised of the impact that the general application of binding precedent could have upon the legal culture of any country, requiring re-evaluations and redesign of aspects of the system of judicial decision-making, including the manner in which lawyers are trained to both practice law and become judges in any justice system.

II. The nature of binding precedent in the United States

The normal responsibility of judges is to interpret the law which the legislative branch has enacted, not to "make" the law. Even so, in the American legal culture, the interpretations and determinations of an appellate court in a State, involving state law, or an appellate court of the United States, a federal court of appeals,[6] or the United States Supreme Court (hereinafter "Supreme Court"), involving federal law, constitutes binding precedent *if* the opinion of the court is rendered by a *majority* of the respective court. Thus, in essence, a holding of the court which is precedent is "law" and binding upon the courts subordinate to the appellate court of last resort in question until such precedent is overruled or modified by a subsequent precedent.

One must be aware, however, if one knows how to define the precedent of a case and to properly limit the application of that precedent to the relevant facts upon which it is based, one can, in many cases, distinguish the precedent under consideration in such a manner that the formal holding of a precedential case is said not to be binding in a subsequent case before the court because it is distinguished on its facts. In essence, a precedent of the Supreme Court, during the life of such precedent, is "law" because the precedent determines what

[4] Lewellyn, *The Case Law System in America* 6 (and Saldi trans., Gewirtz ed. 1989) (1928).

[5] One should recognize that a majority opinion of the intermediate appellate courts in both the state and federal systems of the United States is precedent; however, the court of last resort in the state for decisions based on state law, and the Supreme Court of the United States, for decisions based upon federal law are rendered, such will constitute binding precedent in the respective judicial systems.

the Constitution means until the Supreme Court changes the precedent in a subsequent case.

The appellate courts of either the state or federal system in the United States, acting within their appropriate sphere of influence,[7] will either establish precedent (where no such precedent existed before the consideration of the case before the court), or follow outstanding precedent. In attempting to explain the process of judicial decision-making in the United States legal culture it is necessary to comment upon the spheres of influence of both the state and federal courts, the historical and constitutional basis for the American system of federalism and how the relationship between the State and federal governments is affected by binding precedent of the Supreme Court. We shall also consider how a court in either of the two court systems will determine what precedent is applicable to the case before it, how the court deciding a case will establish precedent when no precedent is outstanding, and how courts either follow precedent, distinguish the prior precedential case on its facts, or overrule the prior precedent because it is no longer viable. Discussion of each of these topics follows, in the order enumerated.

a. The spheres of influence of both the state and federal courts and the application of binding precedent

In reviewing the role of precedent in the United States one must first recognize that the Supreme Court of *each State* establishes the binding precedent for cases involving *State law.* In essence, the court of last resort of each State establishes the proper construction to be given to the State Constitution and State statutes for that State as long as the law in question does not conflict with the federal Constitution, federal statutes enacted pursuant to the Constitution, treaties or *cases* construing the federal Constitution, statutes and treaties. The sphere of judicial influence for the State courts in the United States is broad because State courts generally have concurrent jurisdiction with the federal Courts to decide cases involving federal questions other than when the United States Congress has given exclusive jurisdiction to the federal system to decide the particular federal question. Thus, State courts can decide both non-exclusive federal and state questions; however, decisions relating to *federal questions* are subject to appellate review by *the federal Supreme Court,* while questions which involve State law merely are subject to review only by the State court within the respective state system.

[6] The "appropriate sphere of influence" for both the federal and state judicial systems in the United States will be discussed in section II. A., *infra.*

One must remember, however, in viewing the spheres of judicial power in the United States, that the United States federal judiciary is a judiciary of enumerated power merely. The judicial power of the United States is extended to limited types of cases and controversies arising under the Constitution, laws of the United States, and treaties.[8] Federal review of State cases involving federal questions occurs generally when the case has been decided by the court of last resort in the State system, with the State court interpretations of federal questions being subject to federal appellate review by the Supreme Court of the United States. Conversely, when the case begins in the federal district court, where a basis for federal jurisdiction exists, the case then proceeds to the federal court of appeals serving the particular district court and the determination of the court of appeals is subject to review by the Supreme Court of the United States. The decision of a trial court is not binding precedent. The decision of a State appellate court is precedent within the state system for the state questions decided and, when the case begins in the federal district court, the decision of the federal court of appeals is precedent for the circuit. The precedent for the circuit in the federal system is, however, subject to being overruled by a contra decision of the Supreme Court of the United States, which establishes national precedent.

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[7] The Constitution of the United States provides for the judicial power of the United States in Article III and provides that the Congress shall have power to create courts inferior to the Supreme Court in Article I. The courts created by Congress pursuant to Article III enjoy the independence and terms of office as provided in that article. The pertinent portions of Article III, to recognize the limited nature of federal judiciary jurisdiction are as follows:

Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. [1] The judicial Power shall extend to all Cases, In law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Congress also has the power, under Article I of the United States Constitution, to establish specialized courts which do not have Article III court independence or constitutionally assured terms of office, e.g., the United States Tax Court. The authority to establish these Article I courts is as follows:

Section 8.[1] The Congress shall have power[:]

[9] To constitute Tribunals inferior to the Supreme Court;

....

The decision of the Supreme Court is binding on all courts, both state and federal, for the construction applicable to the federal Constitution, statutes enacted pursuant to the Constitution, or treaties. The United States Constitution contains a Supremacy Clause which provides that:

> *[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*[9]

Hence, federal law, as construed in a majority decision of the Supreme Court of the United States, constitutes precedent on the question decided and closely analogous questions. When the Supreme Court decides a question relating to construction of the Constitution, law enacted pursuant to the Constitution or treaty, that construction becomes "law" because it is an adjudication of what the federal law means and that adjudication is binding precedent. The same concept is true in the State systems when the State court of last resort decides a question of State law. Obviously, however, one can recognize the separate spheres of influence of the two systems of justice in the United States, with the national norms being decided by the Supreme Court of the United States, rendering decisions defining what the Constitution, laws, and treaties of the United States mean and thereby binding all persons and governmental entities within the jurisdiction of the United States to the construction established by the Supreme Court. The State court of last resort, deciding matters of state law, not inconsistent with federal law, thus constitutes precedent for analogous[10] cases in the state system.

b. Historical and constitutional basis for american federalism and the affect of binding precedent

Federalism, as a generic governmental concept, is properly deemed as "an expression of constitutional shorthand respecting the vertical distribution of legislative jurisdiction in the United States."[11] One may further define that vertical distribution of jurisdiction in American federalism as the "distribution of powers between the federal government and the States."[12]

The need for an American federalism began with the recognition that the American Colonies should establish a constructive relationship with the English Parliament and King during America's colonial period. Subsequent

[8] U.S. Const. art. VI, cl. 2.

[9] Analogous cases are those cases which have relevant facts for purposes of decision which are so similar to the relevant facts upon which the court based its decision in an earlier precedential case that the earlier precedent controls.

to gaining independence from England there was a need for an American federalism between the States and a central government. Consistent with that need, following the declaration of American independence from England, the States joined together under the Articles of Confederation, retaining much of their sovereignty, including the power to tax and regulate commerce, but giving the Confederation Congress both war and defense authority.[13]

The American Articles of Confederation, America's first attempt to create a central government, proved to be inadequate because there was no power in the central government to govern.[14] Hence, the delegates were sent to Philadelphia in 1787 to revise the Articles; however, they ultimately offered the States an opportunity to ratify a constitution which delegated powers to a central government, retaining the power to legislate for the general health, welfare and safety in the States.[15] The American government under the present Constitution became effective on March 4, 1789. The Constitution has been amended only twenty-seven times since its ratification by the requisite number of States and ten of those amendments occurred within two years after the ratification of the Constitution.

The amazing fact that the United States Constitution has been amended only twenty-seven times since 1789 and continues to constitute the fundamental law of the United States may be explained because it has been interpreted by the Supreme Court in a manner which renders it viable for contemporary America and the binding precedents interpreting the Constitution are law.[16] The dual sovereignty type of federalism which the Constitution created in the beginning of the American governmental experience was based upon the premise that the federal government created by the States was a government of enumerated powers and the inherent power of general sovereignty, the power to legislate for the general health, welfare and safety was reserved by the States.

This theory of reserved power in the States depended, for continued vitality, upon constitutional interpretation which construed the enumerated powers of the federal government narrowly. In *McCulloch v. Maryland*,[17] a case decided in 1819, the Supreme Court determined that the Congress had the power to establish a national bank even though no explicit power to do so

[10] Van Alstyne, *Federalism, Congress, The States And the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 Duke L.J. 769, 770 (1987).

[11] R. Berger, FEDERALISM: THE FOUNDER'S DESIGN (1987).

[12] *See* Lesser, *The Course of Federalism in America—An Historical Overview*, in FEDERALISM: THE SHIFTING BALANCE 2 (J. Griffith ed. 1989).

[13] *Id*.

[14] The retention of police power in the States does not, however, continue to limit the exercise of federal power in contemporary America. The broad construction of enumerated powers granted to the federal government in the Constitution has reduced the legal federalism concept of the Framer's Constitution to that which is now termed political federalism. *See* Lesser, *supra* note 13 at 1. Political federalism may be defined as that relationship between the States and federal government as determined by the representatives of the people within the States that elect them to serve in the political branches of government at the national level.

existed in the Constitution. The Court rejected the contention of the State of Maryland that federal power could not preempt state power by holding that the powers of the federal government were derived from the people, not from the states.[18] One should recognize that the Court had established the power of judicial review over executive and legislative actions in *Marbury v. Madison*[19] in 1803, and *McCulloch*, sixteen years later, both cases binding judicial precedent, established the basis for implementation of national policy, asserting:

> *Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.*[20]

Subsequent to the *McCulloch* precedent a federal legislative act would be determined to be valid by the Supreme Court if the act was found to bear a reasonable relationship to an enumerated federal power. In *McCulloch* the Court had found that the second Bank of the United States had a reasonable relationship to the federal congressional powers to "lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.[21]

This recognition of broad authority in the federal government, by binding precedential decisions of the Supreme Court, continued until following America's Civil War, 1861-65, when the Court began to become more reluctant to allow government interference with both economic matters and individual liberties. During the period 1888-1936, the Court limited government intrusion on the basis of the interpretation given to the word "liberty" in the due process clauses of the Fifth (applicable to the federal government) and Fourteenth Amendments (applicable to the States) which created substantive limitations on governmental regulation. The Court also used the Tenth Amendment, reserving power in the States if not granted to the federal government, and a narrow construction of the power of Congress to regulate under the interstate commerce

[15] The appropriate manner to construe the Constitution is a question which cannot be properly addressed in this short article; however, one should recognize that the United States Constitution is a document of concepts such as equal protection and due process of law. The Supreme Court's construction of those concepts changes with the evolution of the American government and the American people. Hence, continuing definition of evolving concepts, with the use of binding precedent, gives the Constitution a current interpretation.

[16] 17 U.S. (4 Wheat.) 316 (1819).

[17] *Id.* at 403-07.

[18] 5 U.S. (1 Cranch) 137 (1803).

[19] 17 U.S. (4 Wheat.) at 421.

[20] 17 U.S. (4 Wheat.) at 407. Chief Justice Marshall's opinion established that the Congress had both implied powers and the Necessary and Proper Clause to use for purposes of implementing its enumerated powers by reasonable means. It is noteworthy that the Court held that the word "necessary" of the clause was not to be construed to mean laws "absolutely necessary." Id. at 413-16. McCulloch established by binding precedent the definition of "necessary" as reasonably necessary and thus created a broad base for implementation of federal power.

clause, to limit governmental regulation during this same time-frame.

The judicial doctrine described above, providing for a narrow construction of governmental power and thus limited governmental influence, prevailed until 1937 when the conservative judicial philosophy, limiting economic regulation, favoring a free-market economy, lost favor with the Court. The Court thereafter deferred to the Congress and the State legislatures to establish the economic regulatory norms and the Court returned to the principles of *McCulloch v. Maryland*. Even the casual observer can recognize that the role of the judicial branch of government in America is greatly affected by the role it perceives for itself in the judicial review process. Also, as is evident from recognizing how Supreme Court binding precedent constitutes "law", the Court's new precedent, *West Coast Hotel Co. v. Parrish,*[22] overruled prior precedent and repudiated economic substantive due process, the theory which had limited government power in matters involving economic regulation.[23]

One should, therefore, recognize that the Court, with majority opinions construing the Constitution, is making "law," and the precedent created by the judicial interpretation of the Constitution is what the United States Constitution means until the Court overrules the precedent or confines its operational affect by later construction.

c. How a court determines what precedent is applicable to the case

Judges, lawyers, and academics are blessed with very accurate and effective methods of legal research in the United States. The party seeking to research a prior precedent which will control the case for adjudication must first determine the relevant facts of the case and, therefore, the legal issue which must be decided by the court. The legal issue to be researched is the question to be decided, in the context of the relevant facts of the case which are important to the court in making its decision, i.e., what principle of law should the court apply to the question which it must decide to adjudicate the case.

In America the researcher, judge, judicial clerk, or lawyer, can utilize either a manual subject-matter research methodology to locate cases which treat similar issues or use electronic legal research methods such as WESTLAW or LEXIS. The available legal research methodologies allow researchers to find cases treating similar issues and, in some instances, to discover cases directly on point.[24] When the researcher finds a case which is treating the same legal issues and those issues are based upon essentially the same relevant fact situation, such is said to be an analogous case. When the analogous case has been decided by the court of last resort in the jurisdiction in which the researcher is seeking a precedent, that case, *if such is a majority opinion*, is a precedent. In such a situation the precedent in question is said to be a binding precedent when decided by

[21] 300 U.S. 379 (1937).
[22] *See* Adkins v. Children's Hospital, 261 U.S. 525 (1923).

an appellate court of the State or the federal judicial system. If the case found is not a majority opinion it is said to be *persuasive authority*. Such a case would also be persuasive authority if it was not decided in the forum, i.e., within the State in question or the federal circuit in question.

One must recognize that lawyers in the United States= legal culture are generally highly trained and have offered in their trial memoranda during the motion practice preceding the trial, and trial of the case, much of the legal authority applicable for the case to the trial judge. The lawyers also play a very important role in offering arguments for and against precedents which they assert to be binding to the appellate courts on appeal.

The court, both the trial and appellate court, must determine the authority of the precedent offered to it, determining whether such is binding or merely persuasive. The precedent case will be determined to be binding when the relevant facts in the precedent case are sufficiently similar to justify the application of the same rule of law as was used in the precedent case to the case before the court for adjudication. When the relevant facts for decision used by the court in the precedent case in rendering its decision are sufficiently similar to those facts in the case which are before the court, then the court is justified as treating the precedent case as binding upon it, *if* the rule of law applied in that case has not been changed by the law-maker, i.e., the state legislature or Congress. Thus, when a prior case is determined to be a binding precedent, the principle established in the prior case must be applied, and determines the disposition of the subsequent case, the case before the court for adjudication. When, however, the prior decision is merely persuasive, the court uses its discretion to determine what, if any, weight will be given to the prior opinion.

The judge or lawyer attempting to ascertain the precedent from a prior case must know the relevant facts which the court used for purposes of decision in the prior case and the principle of law which the court applied to the relevant facts. The precedent of a case is, therefore, simply the principle of law or rule of law that was applied to the relevant facts necessary for decision on the basis of the legal issue or issues actually presented to that court for decision. All statements of the court which are not necessary for the decision in that case are *dicta* (if plural) and *dictum* (if singular).

d. How a court will decide a case in the United States legal culture when precedent does not control

[23] A case "directly on point" is a prior case, within the forum, which is so similar to the case before the court for decision that it clearly controls the decision of the court, i.e., the relevant facts and law which were applicable in the prior case are so similar that the precedent case cannot be distinguished on either the law or the relevant facts which the court must consider to determine what rule of law it will apply to decide the case.

As previously mentioned, a trial court does not establish precedent. Precedent is established by an appellate court in the respective judicial system, federal or state. As noted, there is recognition of a "precedent of the circuit" in the United States when the federal court of appeals decides an appeal from the federal district court. Even so, binding precedent, the precedent to be given the most deference, in the federal system must come from the Supreme Court of the United States, in a similar manner to the treatment of precedent created by an intermediate state courts of appeal. Ultimately, the state court of last resort within the state court system renders the precedential decision which is given the most deference as binding precedent.

When a trial court is faced with a situation where there is no precedent or controlling statute, it then uses either persuasive authority available to it or exercises discretion in determining what law should be applied to the case before it. Such a situation is said to be a "case of first impression" which allows the trial judge to determine what the general law should be in such a fact situation. The appellate court is then faced with essentially the same method of judicial resolution, i.e., it must decide what general law should be applied to the case of first impression before it and, in doing so, establishes the precedent which will be followed by the courts subordinate to it (either state or federal courts within their respective spheres of influence). The trial and appellate courts, in determining the rule of law to apply in creating "new precedent," will look to analogous cases in the forum, persuasive authority from cases previously decided treating the issue before it in other States or the federal system, legal treatises and law review articles.

III. The effect of binding precedent, as used in the United States, on decision-making by judges and justices

Trial judges are bound by any precedent established which is determined to be applicable to the case before it for resolution by the appropriate appellate court in the jurisdiction in which the trial judge sits. In essence, the trial judge does not have the general authority to overrule prior precedent. When, however, the trial judge is faced with the application of a prior precedent which has been so significantly eroded by the passage of time or other precedent cases that it is clear the precedent would be overruled if the case was submitted to the appropriate appellate court, some trial judges refuse to follow the Aout-dated@ precedent. Obviously, however, in such a case the losing party has the opportunity on appeal to assert the failure to follow the precedent as trial court error.

As an example of how both trial and appellate judges review the effect of binding precedent which has been diminished in strength by time or other analogous cases which have been decided differently, one should consider the manner in which the Supreme Court of the United States changed its majority

view regarding the construction to be given to the Establishment Clause in the First Amendment to the United States Constitution, which provides that "Congress shall make no law respecting an establishment of religion[.]"[25] The constitutional admonition that government shall make no law respecting an establishment of religion clearly means that government cannot establish a religion. The problem thus requires that the court determine what "laws" respect an establishment of religion.[26] The Establishment Clause has, in the past, been construed by the Supreme Court to prohibit government programs which aid a particular religion directly. The contemporary view of the clause also prohibits government from showing a preference from one religion over another or for religion over non-religion. The Supreme Court, for many years, used the test established in a Supreme Court precedent styled *Lemon v. Kurtzman*,[27] which utilized a three-part inquiry to determine if the government regulation in question was permissible under the Establishment Clause. The *Lemon* precedent looked to the purpose of the legislation, i.e.: (1) was such secular - if such was secular the statute was constitutional; (2) does the regulatory statute in question have a primary affect which is to aid or inhibit religion, i.e., if the regulatory legislation would either aid or inhibit religion it was an Establishment Clause violation; and, (3) does the regulatory legislation cause an excessive entanglement between government and religion, i.e., where it is necessary for the government to become excessively entangled with religion to assure that the aid in question was not directly aiding the religious purpose the regulation was unconstitutional.

A 1997 decision of the Supreme Court, *Agostini v. Felton*,[28] provides us with a basis to view what occurs in the American legal culture as the majority of the Supreme Court changes its judicial philosophy. The *Agostini* court reviewed an earlier decision, *Aguilar v. Felton*,,[29] which had established the precedent that the Establishment Clause prohibited the City of New York from sending public school teachers into church-related schools to provide remedial education to disadvantaged children pursuant to funding for such from a congressionally mandated program to offer dis al trial court entered a permanent injunction enjoining the application of the funds in question for parochial schools unless the academic services were made available to the parochial school children as after-school instruction on public school campuses.

[24] U.S. Const. amend. I, cl. 1. The author recognizes that Brasil does not follow the same view of the separation of Church and State that is followed in the United States; however, this example of how the strength of precedent may be diminished and subsequently overruled is offered as an example of how the process of overruling precedent occurs, not to suggest an appropriate relationship between church and state.

[25] Materials concerning the Establishment Clause and the changing view of the Court concerning such are based upon comments provided during a Constitutional Law Symposium presented for the Tribunal Regionale Federal DA 3ª Regi~o and the Instituto Dos Advogados de Sao Paulo, October 13-15, 1997, by this author during the course of lectures relating to other topics.

[26] 403 U.S. 602 (1971).

The *Agostini* case questioned the continuing viability of *Aguilar,* asserting that it was

no longer "good law" in that it was not consistent with the Court's Establishment Clause decisions following *Aguilar.* Hence, the *Agostini* plaintiffs sought review from the permanent injunction which had been granted in *Aguilar,* attempting to reverse that decision and authorize the on-campus parochial school tutorial aid.

The Supreme Court's *Agostini* opinion noted that *Aguilar* was not consistent with its subsequent Establishment Clause decisions and overruled *Aguilar,* a case which had utilized the *Lemon* test as a basis for the decision. The *Agostini* opinion looked to the cases which intervened between the *Aguilar* injunction and *Agostini,* finding that the changing majority of the Court had departed from the *Aguilar* Establishment Clause judicial philosophy. The Court found that it had abandoned the test established by the *Lemon* case and established a new test, overruling the *Aguilar* precedent. The Supreme Court looked to other cases which it had decided in the intervening period between *Aguilar* and *Agostini* and departed from the precedent relied upon in *Aguilar.*

The intervening cases which the Supreme Court reviewed indicated that the Court had changed its view of an Establishment Clause violation and, therefore, found that the tutorial program did not result in governmental indoctrination. The Court then summarized recent precedential cases, asserting that the governmental academic tutorial program in question did not conflict with any of the primary criteria which it currently used to evaluate whether government aid had the effect of advancing religion. The *Agostini* Court majority established a new test to determine whether government aid has the affect of advancing religion, i.e., "[whether] it [the aid] does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.[30] The *Agostini* Court then held that "a federally funded program providing supplemental remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here.@[31]

The foregoing material should adequately indicate that a precedent in the United States legal culture is not etched in stone. The basic law may change relating to the precedent by the law-maker, the passage of time and evolving culture may render the precedent obsolete, or the majority of the Court may change its judicial philosophy in such a manner to overrule prior precedent and establish new precedent. The *Agostini* Court indicated the manner in which the United States constitutional culture utilizes precedent with the following

[27] 521 U.S. 203, 117 S. Ct. 1997 (1997).
[28] 473 U.S. 402 (1985).

language:

> *[T]he doctrine of* stare decisis *does not preclude us from recognizing the change in our law and overruling* Aguilar *and those portions of law inconsistent with our more recent decisions. As we have often noted,* stare
>
> decisis *is not an inexorable command, but instead reflects a policy judgment that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.*
>
> ....
>
> *We therefore conclude that our Establishment Clause law has "significantly changed" since we decided* Aguilar. *We are only left to decide whether this change in law entitles petitioners to relief[.] We conclude that it does.*
>
> ....
>
> *We do not acknowledge, and we do not hold that other Courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.*
>
> ....
>
> *The trial court acted within its discretion in entertaining the motion [to give relief in the outstanding injunction in* Aguilar*] with supporting allegations, but it was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.*[32]

The *Agostini* case clearly indicates the effect that a changing majority of the Court and evolving judicial philosophy of that majority has in the adjudication of cases involving constitutional concepts. Such is the nature of the use of precedent in the United States constitutional culture. The precedent in *Agostini* also indicates that the current majority of the Court is taking more of an accommodationist view of the relationship between Church and State than, as in the past, a separationist view.

[29] 117 S. Ct. at 2016.
[30] *Id.*

IV. The effect of binding precedent, as used in the United States, on the practice of law

The use of binding precedent in the federal and state systems of the United States allows a practitioner to determine the relevant facts regarding a particular case from a client, research those facts and ascertain precedent cases. The precedent cases allow the practitioner to project the decision of the appropriate trial court, based upon the analogous case which serves as a precedent, for that trial court's decision. This projection of how a client's case will be decided by the appropriate trial and appellate courts is called "forecasting." Forecasting would not be possible without the use of binding precedent.

In essence, the use of precedent in the American legal culture creates a stability in the law for decision-making purposes and, further, provides a basis for the legal practitioner to forecast the decision which a court should make regarding cases which that practitioner brings to the court for decision. Further, in some instances a new precedent will indicate that the facts presented to the lawyer for review do not serve as a basis for a valid cause of action in the jurisdiction in question. Hence, the ability to forecast the action which the trial and appellate courts should take regarding a particular fact situation can avoid the necessity to litigate repetitive fact situations which do not constitute a basis for judicial relief.

V. The effect of binding precedent, as used in the United States, on the reality of legal education

The legal culture of the United States requires that students of the law be taught to analyze cases to determine relevant facts, issues which the court must decide, and the rationales which are appropriate to respond to the legal issues. Hence, the case method of teaching is a necessary aspect of proper application of binding precedent. It may be helpful to think of this process as a mechanic with his tools in constructing a machine. AThe completed product is like the rule; its components are legal vocabulary, concepts, definitions and principles; the worker=s tools and knowledge of their use are analogous to method. The tools can be used to construct or to dismantle, to add on, or to downsize.@[33]

American legal education seeks to familiarize students with the basic substantive law through constitutions, statutes and case decisions. When one recognizes that binding precedent serves as the basis for determining what these "laws" mean it becomes apparent that students must learn why the court held as it did, i.e., determine what the rationale is for specific cases and how the court developed the rationale.

This second objective, recognizing what the rationale of the court is

[31] *Id.* at 2016-17.

and how it is developed is generally called "legal method." One author in America has asserted that "legal method" does not concern itself with the principles, doctrines, and rules comprising a jurisdiction's substantive law in a specific field or *in toto*. It does concern itself with the methodology employed, principally by courts, to create, elaborate, and apply that substance.[34] Thus, much American legal education concentrates on analyzing legal opinions in light of formerly published opinions to recognize issues, rationales, and precedents. This approach stresses the reason or rationale of a court's opinion, as well as requiring that the legal issue or issues of a legal case be articulated in the context of the facts of the case.

Unfortunately, due to the use of a teaching approach that can focus on rules rather than rationales, law students often struggle to enunciate why a court should apply a given rule of law to a particular case. Using teaching materials composed of both treatise materials and edited opinions of the appellate courts teaches students to recognize and formulate the legal issues of the cases through analysis of the facts and rationale used by the Court and, very importantly, to determine the precedent of the case and how the case is, or is not, controlled by prior precedent.

When a student of the law is faced with a "case" for analysis and projection of how the appropriate court should decide the legal issues presented, the legal method of analysis is used. The difficulty is analyzing the facts and determining which facts are relevant for purposes of the court's decision. Determining the relevant facts for decision determines the issue or issues the court must ultimately decide. The trial court will apply the precedent of the appropriate precedential decision which is the most analytically similar to the legal issues in the case for decision before it.

Law teaching by a lecture method does not provide a satisfactory basis for law students to understand fact situations which are presented to them for purposes of analysis, research, or forecasting. Law teaching in the United States requires active participation of the law student in the learning process. The students are called upon to participate in class through class recitations and general questions concerning the material presented, thus learning how to use the tools. It is extremely important that the student be prepared for each class and participate during the course of the class to gain re-enforcement of the conclusions reached during the preparation for class.

Extensive research and writing occurs during the course of study for the first degree in law in the United States, with a substantial amount of time during the first year of the law school experience dedicated to requiring the student to learn to analyze cases, identify relevant facts and issues, and understand how to properly phrase and utilize the precedents of the cases studied.

[32] *See* Cappalli, *The Disappearance of Legal Method*, 70 Temp. L. Rev. 393, 398 (1997).
[33] *Id.*

VI. The support system necessary for a binding precedent legal culture such as that which is used in the United States

The most obvious need, as such relates to a support system for a binding precedent legal culture, is for a system of legal research to be readily available, easy to use, and rendered current by legal publishers. Law students, law professors, lawyers, judges and justices must have available access to up-to-date cases which constitute a basis for ascertaining precedent and researching such. The record of the case must be sufficiently detailed to indicate the relevant facts which the court found it necessary to utilize for purposes of decision, the issue decided, and the rationale which the court utilized to determine the case. A decision of the Supreme Court is currently available in the United States within hours after the decision of the Court is rendered on either WESTLAW or LEXIS. Supplements to written reports are available within weeks after the electronic material is available from the Court.

One should recognize that the reporting and research system available to a legal precedent culture must be available in a prompt and accurate manner. The system must also be designed in such a way that it is both reasonably available and easy to utilize. Additionally, the legal researchers must be in a position to determine the current validity of any case relied upon as precedent. In the United States one may determine the current status of any case, state or federal, by a method called "shepardizing." The Shepard's citations are published books which contain citations of all published legal opinions, with references to all published cases which have affected the prior cases in any way, i.e., affirming or overruling a portion or all of the prior precedent. This up-date methodology is also available electronically on either WESTLAW or LEXIS. When a court publishes a written opinion, following, rejecting or modifying a prior precedent, Shepard's editors read the opinion and compile a list of all prior cases the court has utilized for purposes of its decision. Any use of prior cases as a basis for the subsequent decision, modifying, affirming or over-ruling the prior case is indicated by adding notations of that action to the published citation for the prior case. Hence, when one checks the prior citation (the issue of the reporter in which the opinion is found, e.g., *Smith v. Jones*, 10 U.S. 1 (18xx)), it is possible to obtain the citation for any subsequent cases that have referenced *Smith v. Jones* and by researching those citations one can determine how, if at all, subsequent cases have affected the original precedent as established in the precedential opinion.

The use of binding precedent requires a reporting system that makes appellate opinions available to all interested parties. There must also be a method readily available to track all precedential cases to provide a basis to determine their current viability in a prompt manner.

VII. Conclusion

The use of binding precedent in the United States legal culture, both in the State and Federal justice systems, is one of the most outstanding characteristics of American law. Binding precedent, as used in the United States, provides a basis for law students, lawyers, law professors, judges and law-makers to forecast what the Court should decide in a case subject to established precedent.

Binding precedent in the United States does not, however, mean that the precedent of a case is written in stone. Precedent will change prospectively when the law-maker changes the law upon which the precedent is based, or a Court, with authority to change the applicable precedent, modifies or overrules the prior precedent.

One should recognize that the transplantation of the binding precedent concept as used in the United States to other legal cultures could require the re-evaluation of the manner in which legal education occurs. Teaching methodology must be compatible with binding precedent use and student participation in the learning process must be assured. Further, while the practice of law and judicial decision-making would obtain great benefit from the predictability of decision which binding precedent offers, the bar and bench must be properly acclimated to the use of binding precedent for the practice to work properly.