

CASES TIME FORGOT: WHY JUDGES CAN SOMETIMES IGNORE CONTROLLING PRECEDENT

INTRODUCTION

Deep clashes in values often lead to deep clashes in the doctrines of the law.¹ The law is expressed partly by precedent, and thus clashes in values can affect the way in which courts use relevant precedent.² Traditional theories of precedent assert that precedent can be followed, distinguished, or overruled.³ More sophisticated theories suggest that precedent may also be treated as mistaken.⁴ This Comment argues that courts also use another technique: ignoring precedent. Understanding the phenomena of ignoring precedent will foster understanding of the general theory of precedent.

This Comment defines an ignored precedent as a precedent treated by later courts as having no controlling force without any indication that the original deciding court would reach a different result. In a case where the rule of the ignored precedent would control in favor of a particular result, a litigant who cites that precedent would not persuade a later court to change its ruling.⁵ From the perspective of the later-deciding court, such a precedent is as effective as speaking a language that the court does not understand.⁶ Yet the later-deciding court is acting in good faith, attempting to apply the law as best the law can be understood as a whole.⁷

This Comment argues that ignoring precedent is a normal, although uncommonly used, technique for dealing with particular precedent. In the

¹ Cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 194 (1977). The controversial question of the source of these values is beyond the scope of this Comment.

² Cf. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 63 (10th ed. 1996) (1960) (stating that if “the court in the future stands by the decision it has once made, that decision shapes not only the further growth of the law, but the further action of the community”).

³ See Fredrick Schauer, *Precedent*, 39 *STAN. L. REV.* 571, 594 (1987). Professor Schauer is not alone in his view that precedent must be followed, distinguished, or overruled. See, e.g., Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 *B.C. L. REV.* 81, 86 (2000).

⁴ DWORKIN, *supra* note 1, at 118.

⁵ Cf. LLEWELLYN, *supra* note 2, at 69 (asserting that the legal analysis of a dissenting opinion can be so groundbreaking that the analysis cannot be understood by the judges of the time).

⁶ Cf. *id.*

⁷ See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 134 (1960).

particular precedent, the result was reached because the deciding court perceived a particular value as controlling the outcome. But later courts did not see the particular value as relevant, and so the later courts ignored the rules of law—articulated or implicit—in the precedent. The precedent itself is not overruled because its underlying values are still relevant in the particular factual circumstances of the precedent itself. The precedent continues to exist, but without any influence on the law more generally.

Part I describes the way ignored precedent appears to the practicing lawyer and defines ignored precedent by comparison to other situations where precedent is treated as nonbinding. Part II of this Comment describes the basic theory of precedent and why precedent is ordinarily considered binding. Part III considers how deciding courts bound by precedent ordinarily applied and interpreted the precedent. Part IV describes the basic techniques available for a judge to avoid the binding effect of a precedent and reach a different result. Part V examines why precedents might be ignored. Specifically, this Comment argues that precedents are ignored when they fall into the cracks between competing values in society. Part VI provides specific examples of ignored precedent. Part VII argues that alternative explanations of the phenomena of ignored precedent are inadequate.

I. EXPERIENCING IGNORED PRECEDENT

Imagine an appellate litigator researching in preparation for writing a brief to an intermediate court of appeals. This litigator discovers a precedent from the court of last resort of the jurisdiction that decides an important legal question in favor of the litigator's client.⁸ To persuade the deciding court of the content of the law, the litigator cites the precedent extensively in the brief.⁹ Now imagine that the deciding court rules against the litigator on this legal question. In fact, the deciding court makes no effort to explain why the precedent does not control. Even given this nonconformance, the litigator is certain the superior court would decide the same way again if that court were faced with the facts of the precedent.¹⁰

⁸ Ignore the possibility that the hypothetical litigator is misinterpreting the precedent. This Comment treats the analysis of a case by a practicing lawyer identically to the analysis of a case by a deciding judge.

⁹ See Schauer, *supra* note 3, at 571 ("An appeal to precedent is a form of argument . . .").

¹⁰ Cf. LLEWELLYN, *supra* note 2, at 35–36 (stating that opinions will "go far to show what this court that speaks will do again *upon like facts to those assumed*").

The litigator would be confused by this result because litigants reasonably expect precedent will be followed if it is still good law.¹¹ In not giving effect to the precedent of the superior court, the deciding court has apparently rejected the binding nature of precedent.¹² The litigator might assert that the deciding court was acting in bad faith, forsaking the ideals of the rule of law in favor of particular outcomes.¹³

To defend the deciding court, some explanation of the court's behavior must be articulated. In the trivial case, ignoring precedent can be explained by the fact that the deciding court is unaware of the precedent that it ignores.¹⁴ One might easily say that the deciding court itself would admit that an error occurred in the process of deciding the case.¹⁵ But in the case of the imagined litigator, the case was directly cited to the deciding court, and that court gave the precedent no effect at all.

The litigator is aware of a type of precedent where citing the opinion is not expected to change the outcome: unpublished opinions. An unpublished opinion is a decision—usually of a court of appeals—that resolves a particular case but cannot be cited in any other case.¹⁶ Usually, the issues resolved are simple and straightforward.¹⁷ But because of the rules of the deciding court, that opinion may not be cited back to the court as precedent in deciding a later

¹¹ Cf. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (describing the law as predicting the material consequences of particular behavior).

¹² Cf. Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 22 (1989) (“Any departure from [the] rule [of a precedent] amounts to overruling it . . .”).

¹³ See Jack M. Balkin, *Brown v. Board of Education—A Critical Introduction*, in WHAT “BROWN V. BOARD OF EDUCATION” SHOULD HAVE SAID 46 (2001) (asserting that institutions ignore doctrines that lead to undesired results). But see Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 30 (1994) (arguing that judges are bound to follow the Constitution, not judicial interpretations of the Constitution).

¹⁴ See *Wansley v. First Nat'l Bank of Vicksburg*, 566 So. 2d 1218, 1221 (Miss. 1990) (en banc) (expressing confusion that *Lee v. Lee*, 109 So. 2d 870 (Miss. 1959), had failed to discuss relevant precedent); see also Andrew Kull, *The Simplification of Private Law*, 51 J. LEGAL EDUC. 284, 291 (2001) (arguing that legal doctrines fade away as they are no longer used or taught in law school).

¹⁵ If the reason the deciding court was unaware of the precedent is that the parties did not cite the precedent to the court, some judges suggest the decision should not be regretted. See Sarah M. R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251, 274–82 (2005) (discussing differing views held by various judges of the appropriateness of independent legal research by judges).

¹⁶ Frank I. Michelman, *Anastasoff and Remembrance*, 58 ARK. L. REV. 555, 557–58 (2005).

¹⁷ See Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995).

case.¹⁸ Effectively, the opinion does not persuade the court adjudicating a later decision because the unpublished opinion is treated as nonexistent.¹⁹

There have been many criticisms of the practice of unpublished opinions, including assertions that unpublished opinions are unconstitutional,²⁰ arrogant,²¹ or exceed the judicial role.²² Without stepping into that debate, the parallel between an unpublished opinion and an ignored one is very close.²³ In both cases, citation of something that arguably binds the deciding court is met, not with agreement and conformity, but with hostility. Rather than leading to the adoption of the result supported by the precedent, the citation carries no weight at all.

But the litigator can point out two differences between the two classifications. First, there is nothing unusual about a deciding court reaching the identical result as was reached in the unpublished opinion.²⁴ An essential part of the definition of an ignored precedent is that the deciding court reaches the opposite result.²⁵

The more important distinction between unpublished opinions and ignored precedent is the amount of advance notice given to lawyers. Unpublished opinions cannot be cited because of a rule of the court that wrote the opinion,²⁶ while no reason is given for the nonpersuasive character of an ignored precedent. As a practical matter, this means that lawyers will be able to predict when an unpublished opinion will not be given weight, but will not be able to predict when a precedent will simply be ignored.²⁷

¹⁸ See Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43.

¹⁹ Michelman, *supra* note 16, at 562–63.

²⁰ See Price, *supra* note 3, at 90–107 (discussing the views of the proper role of precedent during the founding era of the United States).

²¹ See Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 780–81 (1995); see also PHILIP SOPER, A THEORY OF LAW 111 (1984).

²² See Michelman, *supra* note 16, at 580–81 (arguing that judicial opinions must always strive to establish principles to constrain decisions by future judges).

²³ See Dragich, *supra* note 21, at 773–75 (noting the relationship of published opinions to the development of the modern use of precedent).

²⁴ See, e.g., *Anastassoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000) (reaching the same result as was reached in a factually identical unpublished opinion).

²⁵ Reaching the same result as an opinion not cited—perhaps even actually given no weight in the minds of the judges of the deciding court—renders that opinion superfluous, rather than ignored.

²⁶ See Michelman, *supra* note 16, at 561 (describing no-citation rules).

²⁷ Cf. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (holding unconstitutional a law so vague that people “of common intelligence must necessarily guess at its meaning and differ as to its application”).

This practical problem is a reflection of a lack of formal justification for the practice of ignoring precedent. The practice of unpublished opinions may be criticized, but the existence of a formal rule means that lawyers are not struggling to understand why unpublished opinions are treated as they are by courts.²⁸ In contrast, practicing lawyers can be expected to struggle with ignored precedent because they are not given a formal justification for ignoring precedent.

If a justification for ignoring precedent were articulated, it is not clear what precisely would be wrong with a deciding court choosing not to obey precedent.²⁹ Judges occasionally assert that other members of the court are ignoring precedent.³⁰ But this tends to be an accusation that the precedent has been misunderstood, not an accusation that the binding effect of the precedent has been ignored.³¹

II. PRECEDENT IN THEORY

To understand ignored precedent, one requires a foundational understanding of the theory of precedent, which this Part will provide. First, this Part will define precedent, distinguishing it from the broader category of authority. Second, it will briefly examine the reasons why precedent is binding.

Authority consists of all materials—including, but not limited to judicial opinions—that are “definitive or decisive” in deciding a case.³² There are three basic types of authority available for a court to examine in deciding the case before it. The first is *persuasive* authority. The touchstone of persuasive authority is that the deciding court is not required to follow result or reasoning of the referenced authority.³³ The deciding court must come to agree with the authority or the court will not follow that authority.³⁴

²⁸ The issue of unpublished opinions might be understood as a question of whether courts have the power to declare that their opinions are not precedent. See Michelman, *supra* note 16, at 570–71. It carries no weight to assert that courts are not treating unpublished opinions as precedent if unpublished opinions are excluded from being precedent by definition.

²⁹ Cf. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 821 (1994) (discussing the need to justify a requirement of obedience to precedent).

³⁰ See *Apprendi v. New Jersey*, 530 U.S. 466, 539 (2000) (O’Connor, J., dissenting).

³¹ See, e.g., *McConnell v. FEC*, 540 U.S. 93, 152 (2003) (criticizing dissenting opinion).

³² See BLACK’S LAW DICTIONARY 142–43 (8th ed. 2004).

³³ *Id.*

³⁴ See *id.*; see also *id.* at 1215 (defining persuasive precedent).

The next type of authority is *binding* authority. Binding authority requires the deciding court to reach a particular result.³⁵ For the highest court of a jurisdiction, binding authority might consist primarily of constitutions and statutes.³⁶ But for inferior courts, decisions of superior courts make up a significant portion of the binding authority to be followed.³⁷

The final type of authority derives its force from the principle of *stare decisis*. This principle requires a court to follow its own prior decisions even though the court has the power to overrule them.³⁸ Following a prior case under the principle of *stare decisis* does not imply that the previous decision was absolutely right, but only that the decision was previously decided.³⁹ A court is bound not to overrule the prior opinion absent extraordinary circumstances.⁴⁰

For the purposes of this Comment, precedent should be understood as judicial opinions that fall within either of the latter two categories, binding authority and *stare decisis* authority.⁴¹ To put it another way, the relevant precedents in a case are those judicial opinions that a deciding court is expected to address, either explicitly or in substance, in the course of resolving the particular case.⁴²

The standard judicial procedure is to follow on-point precedent.⁴³ Following precedent presents no difficulty when the “correct” result is the one reached by precedent.⁴⁴ But the presumption of following precedent exists even when the precedent reaches a result that the deciding court believes is

³⁵ A result is not necessarily a decision in favor of a particular party. Binding authority might instruct a court only as to the process it should follow in deciding a case. *See, e.g.*, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 139 (1997) (establishing abuse of discretion as the appropriate appellate standard of review in determining if scientific evidence is sufficiently reliable to be admitted); *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.* 467 U.S. 837, 842–43 (1984) (establishing a deferential process of reviewing agency interpretations of statutes).

³⁶ *See* BLACK’S LAW DICTIONARY, *supra* note 32, at 143.

³⁷ *See id.*

³⁸ *Id.* at 1443 (defining *stare decisis*).

³⁹ Schauer, *supra* note 3, at 576 (“A naked argument from precedent thus urges that a decisionmaker give weight to a particular result regardless of whether that decisionmaker believes it to be correct . . .”).

⁴⁰ *Cf. Hibbs v. Winn*, 542 U.S. 88, 113 (2004) (Stevens, J., concurring) (“In a contest between the dictionary [definition of words in a statute] and the doctrine of *stare decisis*, the latter clearly wins.”).

⁴¹ This definition is intended to closely track the definition adopted by Professor Schauer. *See* Schauer, *supra* note 3, at 576.

⁴² *See* Michelman, *supra* note 16, at 562–63.

⁴³ *See* Alexander, *supra* note 12, at 4.

⁴⁴ *Id.* Correctness is determined by reference to the particular values understood to define justice. *See id.*

incorrect.⁴⁵ These strong norms exist with regard to following both binding authority⁴⁶ and stare decisis.⁴⁷ However, the reason why courts feel constrained is open to question.⁴⁸

Some lawyers suggest that following precedent is a matter of fairness.⁴⁹ The goal is to treat a situation the way it has been treated in the past.⁵⁰ This maximizes fairness to the parties of the earlier and later disputes and creates predictability so that others may successfully avoid litigation through compliance with the law.⁵¹ Other lawyers propose that prudence dictates following precedent to preserve judicial legitimacy.⁵² A court's obedience to precedent shows "commitment to making decisions free from politics and personal whim."⁵³

Thus, avoiding precedent requires justification.⁵⁴ Further, the strength of the justification required varies based on how compulsory precedent is within a particular theory of precedent.⁵⁵ This Part described what precedent is and why it is constraining on the decisions of a court. The next Part will describe how courts use precedent to determine the content of the law.

III. PRECEDENT IN THE ORDINARY COURSE

Courts use precedent to determine the substance of the law to be applied.⁵⁶ Although a court must take precedent into account during the decision-making process, taking account of precedent does not imply mechanically applying

⁴⁵ See *id.* This Comment presumes that judges are acting in good faith and attempting to strictly obey relevant precedent.

⁴⁶ See, e.g., *Khan v. State Oil Co.*, 93 F.3d 1358, 1364 (1996) ("It is not our place to overrule [*Albrecht v. Herald Co.*, 390 U.S. 145 (1968)]; and *Albrecht* cannot fairly be distinguished from this case."), *rev'd*, 522 U.S. 3 (1997) (reversing *Albrecht*).

⁴⁷ See, e.g., Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295, 303 (2000) (explaining that, as a judge on the Ninth Circuit Court of Appeals, "[i]f I get another case identical to the one I [previously] decided incorrectly, I am bound by my earlier decision to repeat the error").

⁴⁸ Cf. Caminker, *supra* note 29.

⁴⁹ *Id.* at 850–52.

⁵⁰ See Alexander, *supra* note 12, at 11.

⁵¹ Caminker, *supra* note 29, at 850–52.

⁵² See LLEWELLYN, *supra* note 2, at 13.

⁵³ Caminker, *supra* note 29, at 853; see also Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 752 (1988).

⁵⁴ Cf. 5 U.S. (1 Cranch) iii–iv (preface by William Cranch) ("Every case decided is a check upon the judge. He can not [sic] decide a similar case differently, without strong reasons . . .").

⁵⁵ *Id.*

⁵⁶ See BLACK'S LAW DICTIONARY, *supra* note 32, at 1214–15.

previously established law to facts to find the correct outcome. Ignoring the difficulties in determining how to apply a rule to a set of facts, judges must determine what rule prior precedent established.⁵⁷ This Part will first discuss how a deciding court analyzes a single precedent. Then, it will discuss how a deciding court analyzes multiple interrelated precedents.

To analyze a particular precedent, Professor Llewellyn suggested that a judge must use legal reasoning to decide which parts of a prior opinion establish a rule and which parts are nonbinding rhetorical flourishes.⁵⁸ This is not a straightforward process. Professor Llewellyn asserted that it is always possible for a judge to reclassify language from a prior opinion and transform what had been thought of as rhetoric into the holding of the precedent and vice versa.⁵⁹

Professor Llewellyn basically described how a deciding court responds to a single precedent clearly on point. But seldom in the real world is the fit of the relevant precedent so clear. A deciding court, faced with multiple precedents arguably on point, cannot treat each prior case individually and then attempt to unify the various holdings because relevant precedents are likely to contain individual cases that contradict each other.⁶⁰ Instead, the deciding court must maneuver along the interconnections between precedents in order to determine the correct result of the present case.⁶¹

However, this does not tell the deciding court how to reconcile the various precedents. Professor Dworkin suggests that, in deciding hard cases, judges must look to two forces emanating from a precedent: the enacting force and the gravitational force.⁶² The enacting force consists primarily of the actual result of a particular case and does not necessarily include the reasoning that justifies the holding.⁶³ The gravitational force of a precedent measures how the precedent changes the legal landscape.⁶⁴ The gravitational force includes the reasoning supporting a decision but can also include implications of reasoning

⁵⁷ See LLEWELLYN, *supra* note 2, at 44–45.

⁵⁸ *Id.*

⁵⁹ *Id.* at 72–73.

⁶⁰ See DWORKIN, *supra* note 1, at 119.

⁶¹ *Id.* at 119–21.

⁶² *Id.* at 111.

⁶³ *Id.*

⁶⁴ See *id.*

that do not necessarily follow from the reasoning and holding of a particular decision.⁶⁵

To understand the interplay between enactment force and gravitational force, consider the case of *McCulloch v. Maryland*.⁶⁶ In that case, the Supreme Court held that the Constitution would not allow a state to impose a tax on the federal bank.⁶⁷ That holding should be considered the enactment force. The gravitational force might persuade a later Supreme Court to rule that an ambiguous statute grants federal courts the power to hear challenges to state taxation of a federal bank.⁶⁸

Of course, courts may struggle to determine the gravitational force of a precedent. Consider *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, where the Supreme Court addressed judicially created pleading requirements.⁶⁹ Although the Court strongly suggested that judicially created pleading requirements were never appropriate without Congressional action,⁷⁰ the Court reserved decision over whether there were any exceptions to that general rule.⁷¹ In response, inferior courts have continued to apply judicially created pleading requirements, effectively treating *Leatherman* as having very little gravitational force.⁷²

Essentially, a deciding court can determine how to apply precedent by measuring the pull of the gravitation force from each precedent and then holding for the result that leaves the various gravitational forces balanced.⁷³ Professor Dworkin explains that the gravitational force can be measured and conflicting precedent resolved by interpreting the web of law as creating a coherent and principled scheme.⁷⁴ Thus, when several precedents seem to be in conflict, the deciding court must rationalize—in a principled way—the

⁶⁵ See *id.*

⁶⁶ 17 U.S. (4 Wheat.) 316 (1819).

⁶⁷ *Id.* at 431–37.

⁶⁸ See *Osburn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 817–18 (1824).

⁶⁹ 507 U.S. 163, 168 (1993).

⁷⁰ See *id.* at 168–69 (“In the absence of [Congressional amendments to the Federal Rules of Civil Procedure], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.”).

⁷¹ See *id.* at 166–67.

⁷² See, e.g., *Schultea v. Wood*, 47 F.3d 1427, 1433–34 (5th Cir. 1995) (en banc).

⁷³ See DWORKIN, *supra* note 1, at 111.

⁷⁴ See *id.*; RONALD DWORKIN, *LAW’S EMPIRE* 52 (1986).

results of the various cases.⁷⁵ After this process, it will be apparent how each precedent should be applied, which is to say the strength of the gravitational force will be clear. From there, the deciding court reaches the result where the forces are balanced.⁷⁶ This Part described how judges ordinarily use precedent in reaching decisions. The next Part will describe the accepted categories of techniques a judge may use to avoid the result suggested by precedent.

IV. AVOIDING PRECEDENT

Judges attempt to avoid precedent when they believe the results suggested by the precedent do not correctly decide the case being adjudicated.⁷⁷ For example, judges may feel precedent is wrong when litigation is an expression of a large conflict over competing values in society.⁷⁸ When dissatisfied with the relevant precedent, judges can use different techniques—of varying legitimacy—to avoid the result dictated by the precedent.⁷⁹ This Comment argues that ignoring precedent is one legitimate technique judges use to avoid precedent.⁸⁰ But there are other techniques that various theories of precedent consider to be legitimate, and this Part will describe those alternative techniques.

There are three techniques that are considered acceptable for a court to use in avoiding the result suggested by a precedent: (1) overruling the precedent, (2) distinguishing the precedent, and (3) treating the precedent as mistaken. Understanding why a deciding court would want to avoid precedent requires an understanding of the purpose of precedent. The purpose of superior court precedent is to declare the content of the law.⁸¹

More specifically, superior court precedent exists to provide guidance for future decisions of inferior courts.⁸² This guidance can occur in two forms: the

⁷⁵ This process can be extremely difficult for a deciding court. *See* Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980) (criticizing the Rhode Island Supreme Court for relying on reasoning from Sixth Amendment jurisprudence to reach a result where the Fifth Amendment is controlling).

⁷⁶ *Cf.* DWORKIN, *supra* note 1, at 116–18.

⁷⁷ *See* LLEWELLYN, *supra* note 2.

⁷⁸ *See id.*

⁷⁹ *See* LLEWELLYN, *supra* note 7, at 77–91 (describing sixty-four techniques that courts have used to reach their goal of following or ignoring precedent).

⁸⁰ *See infra* Parts V–VII.

⁸¹ *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

⁸² *Cf.* Alexander, *supra* note 12, at 26.

superior court can either articulate a rule to be applied⁸³ or decide a case in a particular way so that inferior courts can make deductions by analogy.⁸⁴

Sometimes the superior court fails to provide guidance, creating confusion instead of clarity in the content of the law. Confusion can occur when a series of decisions are handed down with unresolved conflicts.⁸⁵ These unresolved conflicts make it difficult for a deciding court to determine what result the law dictates.⁸⁶ Another source of confusion is the inability of a superior court to decide firmly on the correct result.⁸⁷ Or, confusion can come from a single case, where the articulated rule or the procedural posture of the original case obscures the result the deciding court should reach based on the original opinion.⁸⁸ Problems in adjudication can also occur when the inferior court reasons incorrectly from the superior court, effectively misreading the meaning of the precedent.⁸⁹

These failures collectively show that the judicial system sometimes regrets the state of the law.⁹⁰ Courts recognize that they should avoid being dysfunctional by trying to establish the law so that people can comply.⁹¹ In contrast to the examples of confusion above, the techniques of overruling,

⁸³ *Id.* at 17–19.

⁸⁴ *Cf.* Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 741 (1979) (explaining that to decide cases, “reliance upon past precedent or upon reasonable analogy to the precedent affords the only possible approach”); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 1* (1990) (describing a categorization game played on Sesame Street as a metaphor of how lawyers think).

⁸⁵ *See* Richard M. Steuer, *Monsanto and the Mothball Fleet of Antitrust*, 30 ANTITRUST BULL. 1 (1985) (arguing that the Supreme Court antitrust jurisprudence is filled with conflicting cases).

⁸⁶ *See* Chad M. Oldfather, *Other Bad Acts and the Failure of Precedent*, 28 WM. MITCHELL L. REV. 151 (2001) (arguing that the jurisprudence of the Minnesota Supreme Court involving the admissibility of bad acts character evidence has developed two contradictory strands); Steuer, *supra* note 85.

⁸⁷ *See* *Chimel v. California*, 395 U.S. 752, 755–60 (1969) (detailing the fluctuating definitions of the area near a suspect that can be searched without a warrant during a lawful arrest).

⁸⁸ *See, e.g.,* *Harris v. Zion*, 927 F.2d 1401, 1423 (7th Cir. 1991) (Easterbrook, J., dissenting) (expressing frustration at *Allegheny County v. ACLU*, 492 U.S. 573 (1989), for failing to give effective guidance in adjudicating an Establishment Clause violation, in part because the narrowest rule came from a two-Justice plurality). *But see* Frederick Schauer, *Judicial Opinion Writing: Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995) (arguing that complexity in opinions does not necessarily mean the opinion is confusing or difficult to apply).

⁸⁹ *Cf. Marrese v. Am. Acad. of Orthopaedic Surgeons*, 628 F. Supp. 918, 919–20 (N.D. Ill. 1986) (expressing confusion as to how to decide a case on remand from the Supreme Court because the rule articulated seemed to require adjudicating a “nearly metaphysical question”).

⁹⁰ *See Harris*, 927 F.2d at 1423–24 (Easterbrook, J., dissenting).

⁹¹ *See* Holmes, *supra* note 11, at 457–58.

distinguishing, and treating as mistaken are legitimate ways of avoiding precedent.⁹²

A. *Overruling Precedent*

The first way courts can avoid precedent is overruling the precedent. When a precedent is overruled, it is no longer the law and does not bind or constrain deciding courts.⁹³ Overruling can occur for any number of reasons⁹⁴ and may be either explicit or implicit.⁹⁵ Ordinarily, the same court that originally decided the precedent overrules it.⁹⁶

However, there are situations in which an inferior court might perceive that its duty is to accurately decide a case as a superior court would, rather than as precedent appears to resolve the case.⁹⁷ Erosion of the precedent or new trends in the jurisprudence of the superior court might encourage an inferior court to anticipate the overruling of the precedent.⁹⁸ For example, consider *Andrews v. Louisville & Nashville Railroad Co.*, where the Fifth Circuit Court of Appeals was adjudicating the requirement of exhaustion of administrative remedies in the railroad employment context.⁹⁹ In the 1940s, the Supreme Court had not required exhaustion.¹⁰⁰ But in 1965, the Supreme Court strongly suggested that the 1940s ruling was eroded, but declined to overrule the earlier precedent.¹⁰¹ In dissent, Justice Black asserted that the Supreme Court “raised the overruling axe so high that its falling [was] just about as certain as the changing of the seasons.”¹⁰² The Fifth Circuit took up this invitation to go

⁹² See Schauer, *supra* note 3, at 577–79 (describing the concepts of overruling and distinguishing); DWORKIN, *supra* note 1, at 118–23 (describing the concept of treating precedent as mistaken).

⁹³ See BLACK’S LAW DICTIONARY, *supra* note 32, at 1136.

⁹⁴ Some Justices of the Supreme Court seem to view precedent as susceptible to overruling under a lower standard in Constitutional adjudication. See Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 74–75 (1991). However, Professor Gerhardt asserts that it is mistaken to have a lower standard for overturning precedent that is binding only through stare decisis. *Id.* at 73.

⁹⁵ See *id.* at 98 n.119 (discussing overruling sub silentio, also known as implicit overruling).

⁹⁶ See, e.g., *Travelers Fire Ins. Co. v. Wright*, 322 P.2d 417 (Okla. 1958) (overruling *Concordia Fire Ins. Co. v. Wise*, 246 P. 595 (Okla. 1926)); *Concordia*, 246 P. 595 (Okla. 1926) (overruling *Ray v. Henderson*, 144 P. 175 (Okla. 1914)).

⁹⁷ Margaret N. Kniffin, *Overruling Supreme Court Precedent: Anticipatory Action by United States Courts of Appeals*, 51 FORDHAM L. REV. 53, 61–70 (1982).

⁹⁸ *Id.* at 61–63.

⁹⁹ 441 F.2d 1222, 1222 (5th Cir. 1971).

¹⁰⁰ See *Moore v. Ill. Cent. R.R. Co.*, 312 U.S. 630 (1941).

¹⁰¹ See *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

¹⁰² *Id.* at 667 (Black, J., dissenting).

against precedent in anticipation of the Supreme Court's approval, and its decision was affirmed.¹⁰³ This suggests that attempting to predict a superior court's future ruling rather than following what that court has said in the past can be legitimate in certain circumstances.

While the Fifth Circuit successfully anticipated the Supreme Court in *Andrews*, the Court has not always approved of anticipation of its decisions.¹⁰⁴ The inferior court might be the final arbiter of a particular dispute,¹⁰⁵ particularly if the superior court has discretion whether to hear further judicial proceedings.¹⁰⁶ Taking advantage of the doubtfulness of review to predict, not follow, the decision of the superior court can be seen as an attempt by the inferior court to act as the superior court.¹⁰⁷ Moreover, predicting the law can significantly reduce clarity as to the content of the law.¹⁰⁸ Given the uncertain legitimacy of predicting the behavior of superior courts,¹⁰⁹ considerations of certainty of result, uniformity of law, perception of legitimacy, and maintaining the judicial hierarchy may weigh in favor of limiting overruling to the court that clearly has the power to overrule¹¹⁰—the original deciding court.¹¹¹

B. *Distinguishing Precedent*

When a deciding court is faced with a precedent that seems to compel an incorrect result, the deciding court is permitted to distinguish the precedent.¹¹²

¹⁰³ See *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972), *aff'g*, 441 F.2d 1222 (5th Cir. 1971).

¹⁰⁴ See, e.g., *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“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.”); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (“[O]nly this Court may overrule one of its precedents.”).

¹⁰⁵ Cf. *Caminker*, *supra* note 29, at 826 (noting that appellate review is limited at many points in the judicial hierarchy).

¹⁰⁶ See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 639, 654–57 (4th ed. 2003) (explaining that the Supreme Court has discretion in granting cert in order to control its workload).

¹⁰⁷ See *Khan v. State Oil Co.*, 93 F.3d 1358, 1364 (7th Cir. 1996) (stating that it is not the place of the Seventh Circuit to overrule a Supreme Court decision), *rev'd*, 522 U.S. 3 (1997); *Kniffin*, *supra* note 97, at 75.

¹⁰⁸ See David C. Bratz, *Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent*, 60 WASH. L. REV. 87, 100 (1984).

¹⁰⁹ See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 717–18 (9th Cir. 1997) (Hawkins, J., commenting on denial of rehearing en banc) (discussing the proper role of a deciding court faced with precedent that the court believes will be overruled or distinguished by a superior court).

¹¹⁰ See *Kniffin*, *supra* note 97, at 81–83.

¹¹¹ See *id.* at 55.

¹¹² BLACK'S LAW DICTIONARY, *supra* note 32, at 507; see also *id.* at 1443.

Distinguishing involves finding relevant factual differences between the precedent and the case to be decided.¹¹³ Based on those differences, the deciding court may be able to justify a different result.¹¹⁴ But if the earlier precedent cannot be distinguished in a principled way, the deciding court must reach the result compelled by the precedent.¹¹⁵ Nevertheless, because the deciding court itself is determining whether a relevant factual difference exists, it can effectively decide how constrained its own decision is by the precedent.¹¹⁶ All precedents are composed of the written word; therefore judges can take advantage of the flexibility of language to adopt the words of a precedent while avoiding the result.¹¹⁷ Distinguishing is a flexible tool for judges to reach particular results without being strongly constrained by prior precedent.¹¹⁸

C. *Precedent as Mistaken*

Treating a precedent as mistaken occurs when the judge is trying to determine the content of the law as a whole.¹¹⁹ Recall that Professor Dworkin suggests that courts determine the content of the law by conceptualizing the relationships between precedents.¹²⁰ This conceptualization may require courts to abandon the particular reasons articulated in the prior cases in favor of reasons that are consistent with the overall principles of the law.¹²¹ The deciding court must attempt to provide an alternative justification to explain the result reached in light of the difficult precedent.¹²² Professor Dworkin also acknowledges that a deciding court may not be able to provide a coherent and principled justification for the difficult precedent.¹²³ Rather than allow inconsistency into the law, he would allow precedent to be treated as

¹¹³ See Schauer, *supra* note 3, at 577–79; see also BLACK’S LAW DICTIONARY, *supra* note 32, at 507.

¹¹⁴ See BLACK’S LAW DICTIONARY, *supra* note 32, at 507; cf. LLEWELLYN, *supra* note 2, at 34–35 (noting that a judicial opinion explains and justifies the result reached).

¹¹⁵ Schauer, *supra* note 3, at 594–95.

¹¹⁶ *Id.* at 579–82.

¹¹⁷ See *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968) (“Words . . . do not have absolute and constant referents.”).

¹¹⁸ Cf. Alexander, *supra* note 12, at 22 (“Any departure from [the] rule [of a precedent] amounts to overruling it . . .”).

¹¹⁹ See DWORKIN, *supra* note 1, at 110–22.

¹²⁰ *Id.*; see *supra* notes 62–68 and accompanying text.

¹²¹ DWORKIN, *supra* note 1, at 118.

¹²² *Id.*

¹²³ *Id.*

mistaken.¹²⁴ He explains that if a precedent is mistaken, it must be treated as having no gravitational force at all.¹²⁵

When a precedent is treated as mistaken, Professor Dworkin explains that a strict theory of precedent implies that the ruling does not lose any of its enactment force.¹²⁶ A narrow range of application remains for the mistaken precedent.¹²⁷ Thus, citing a precedent that is both mistaken and directly on point will lead to the deciding court following the precedent.¹²⁸ For example, consider *Employment Division v. Smith*, where the Supreme Court held that a state does not need to assert a compelling government interest to deny unemployment benefits to a citizen who was fired for using peyote for religious reasons.¹²⁹ Although the law at issue, which prohibited the use of controlled substances not prescribed by a doctor, with no exception for the religious drug, peyote, made free religious exercise more difficult, the law was generally applicable in scope.¹³⁰ Because the law was generally applicable, the Court reasoned that the restrictions did not raise constitutional concerns requiring a compelling government interest.¹³¹

The Court acknowledged that some free exercise precedent involving claims against generally applicable laws had required a compelling government interest to justify denying a religious exemption, but asserted this test had been applied only to unemployment benefits denials.¹³² The Court explained that other precedents that had purported to require a compelling government interest had actually involved a free exercise claim brought “in conjunction with [claims based on] other constitutional protections.”¹³³ For example, in a previous free exercise case, *Wisconsin v. Yoder*, the Supreme Court ruled that the Free Exercise Clause required the State of Wisconsin to allow Old Amish parents to remove their children from school, notwithstanding state mandatory attendance requirements.¹³⁴ In *Smith*, the

¹²⁴ *Id.*

¹²⁵ *Id.* at 122.

¹²⁶ *Id.* at 121–22.

¹²⁷ *Id.* at 120–21.

¹²⁸ *See id.* (describing the continued application of a hypothetical statute after the reason for the statute is no longer relevant, thus causing the statute or cases based upon it to be mistaken).

¹²⁹ 494 U.S. 872, 878 (1990).

¹³⁰ *Id.* at 883–84.

¹³¹ *Id.*

¹³² *Id.* at 883.

¹³³ *Id.* at 881.

¹³⁴ 406 U.S. 205, 234–36 (1972).

Court explained that *Yoder* was still good law because it involved a “hybrid” claim of both free exercise and parental right to direct child education.¹³⁵

Thus, even as the legal doctrine was considerably changed, the Supreme Court made it clear that previous cases would have the same result under the new reasoning.¹³⁶ The reasoning of the precedent, which required the government to show a compelling interest, was discarded, although the result of each particular case has been preserved.¹³⁷

Note the confusion created when a court determines that a precedent is mistaken. After a precedent is interpreted as mistaken, the holdings of the relevant cases remain without any gravitational force.¹³⁸ Presumably, the holding must be interpreted narrowly because a broad understanding of the holding is functionally equivalent to a narrow holding that still retains a gravitational force.¹³⁹ A later court must struggle to continue to follow the precedent without giving it too much pull.¹⁴⁰ But because the precedent remains, a rationale is presumed to exist.¹⁴¹ Therefore, that rationale should still compel the same result in a sufficiently similar case.¹⁴²

In the aftermath of *Smith*, the Old Amish clearly can continue to avoid compulsory school attendance for their children.¹⁴³ But can other religious groups? Under what circumstances? Is a sincere religious belief necessary, or is the parental right to direct a child’s upbringing enough to require an exception? While *Smith* seems to legitimately ignore precedent, these issues suggest that prudence weighs heavily against declaring a precedent mistaken.

What unites the categories of overruling, distinguishing, and treating as mistaken is the ease with which a practicing lawyer can determine whether a

¹³⁵ *Smith*, 494 U.S. at 881–82.

¹³⁶ *See id.* at 878–79 (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law . . .”). This example is somewhat weak because it is clear that the Supreme Court did not lack the power to overrule the prior cases, but still chose not to admit that it was overruling precedent. One might prefer to interpret such a maneuver as an overruling, even if the Court does not label it so. *See LLEWELLYN*, *supra* note 2, at 72–73.

¹³⁷ *See Smith*, 494 U.S. at 878–79.

¹³⁸ DWORKIN, *supra* note 1, at 121–22.

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See id.* at 122.

¹⁴² *See id.*; *see also* Schauer, *supra* note 3, at 573 (“[A] previous decisionmaker’s . . . descriptions channel the way in which the present views those past decisions.”).

¹⁴³ *See Wisconsin v. Yoder*, 406 U.S. 205 (1972) (cited with approval in *Employment Division v. Smith*, 494 U.S. 872, 881 (1990)).

precedent is still useful in persuading a court. If the precedent has been overruled, it is not useful to cite it because it does not constrain the deciding court.¹⁴⁴ On the other hand, a precedent that has not been overruled and is suitably similar to the case being decided will constrain the deciding court.¹⁴⁵ Ignored precedent is different because while it is not overruled, it still does not constrain a deciding court.¹⁴⁶ The next Part will explain why ignored precedent might occur.

V. IGNORED PRECEDENT REVISITED

The previous Part detailed the ways traditional theories of precedent allowed judges to maneuver precedent to reach the result believed to be required by law. Judges desire this flexibility to react to the tensions in the competing and ever-changing values of society.¹⁴⁷ But allowing judges to shape the content of the law in this way can be expected to leave behind precedent that may clutter the law.¹⁴⁸ Thus, the cluttering precedents must be classified so that they can be understood.¹⁴⁹ As previously explained, the categorizations used by standard theories of precedent are overruling, distinguishing, and treating as mistaken.¹⁵⁰ This Comment suggests that ignoring precedent is another legitimate technique used by deciding courts, and this Part suggests why a deciding court might ignore instead of using a more familiar technique.

In reviewing the ordinary techniques to avoid precedent, one might get the impression that—despite the assertions of standard theories—precedent does not rigidly bind.¹⁵¹ If precedent does not rigidly bind, it seems reasonable to believe that judges decide cases by reference to the values of society.¹⁵² Thus,

¹⁴⁴ See BLACK'S LAW DICTIONARY, *supra* note 32, at 1136.

¹⁴⁵ See Schauer, *supra* note 3, at 594–95.

¹⁴⁶ See *supra* Introduction (establishing this Comment's definition of ignored precedent).

¹⁴⁷ See LLEWELLYN, *supra* note 2, at 72.

¹⁴⁸ Cf. DWORKIN, *supra* note 1, at 122 (describing certain cases as debris).

¹⁴⁹ Cf. Bratz, *supra* note 108, at 94 (discussing the importance of determining the current validity of Supreme Court precedent).

¹⁵⁰ See *supra* Part IV.

¹⁵¹ See Schauer, *supra* note 3, at 576–88 (asking whether precedent can constrain subsequent judicial decisions); see also *supra* Part IV (generally discussing the flexibility inherent in many standard techniques of avoiding precedent).

¹⁵² See DWORKIN, *supra* note 1, at 115–16. It is possible to subdivide normative judgments in many different categories, including *inter alia* values, ethics, norms, principles, ideals, or morals. This Comment is eliding these differences and using the label “value” to include all aspects of normative judgments.

if the values of society were different from the values underlying the precedent, then the judge's decision would also differ from the precedent.¹⁵³

There is no inconsistency between a theory that asserts that values strongly inform judicial decision making and a strong commitment to precedent that is observed. After all, one would expect that members of the same society will have similar values, broadly speaking.¹⁵⁴ A strong commitment to precedent needs no justification when it is functionally equivalent to a strong commitment to society's values.¹⁵⁵ As society changes the values that are supported and prioritized,¹⁵⁶ the correct results in particular cases will also change.¹⁵⁷ This can give rise to new doctrines, sometimes unexpectedly.¹⁵⁸

Looking backward, it is possible to identify the beginnings of new doctrines.¹⁵⁹ One reason to do this is to work forward from the origins of a doctrine to better understand what the doctrine means today.¹⁶⁰ Another reason is to trace a doctrine back to see what values underlie and justify the doctrine.¹⁶¹

Suppose Value A is dominant at a particular time.¹⁶² If we believe judges decide cases by applying values, then it will come as no surprise that precedents reach the result suggested by Value A.¹⁶³ Now imagine a factual

¹⁵³ *See id.*

¹⁵⁴ This is not to say that different members of society will not have some differences in values adopted or their relative priority. *See id.*

¹⁵⁵ Alexander, *supra* note 12, at 4.

¹⁵⁶ *See* LLEWELLYN, *supra* note 2, at 72.

¹⁵⁷ *Compare* *Lochner v. New York*, 198 U.S. 45 (1905) (applying substantive due process to strike down economic regulation), *with* *United States v. Carolene Prods., Co.*, 304 U.S. 144, 152 n.4 (1938) (noting a change in doctrine to reduce scrutiny of economic regulation and increase scrutiny of restrictions on political and social rights).

¹⁵⁸ *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 164 (1999) (asserting that First Amendment protections for commercial speech arose out of Supreme Court decisions protecting abortion rights); *see also* Thomas A. Smith, *The Web of Law* 26 (San Diego Legal Studies, Research Paper No. 06-11, 2005), *available at* <http://ssrn.com/abstract=642863> (noting judges might be concerned about the doctrines that might arise from their decisions).

¹⁵⁹ *See, e.g.*, PETER HAY ET AL., *CONFLICT OF LAWS* 177 (12th ed. 2004) (noting the first recognition of the doctrine of *forum non conveniens* in nineteenth century Scotland).

¹⁶⁰ *See* SULLIVAN & GUNTHER, *supra* note 158, at 164-91 (examining the origin and development of the First Amendment protections for commercial speech).

¹⁶¹ *See* Cravens, *supra* note 15, at 258-63 (attempting to evaluate the values underlying independent judicial research by investigating the original judicial assertions on the acceptability of the practice).

¹⁶² It is not necessarily the case that one value will dominate other values within a particular sphere. For example, it is possible that two or more values are in constant competition over a period of cases. *Cf.* Oldfather, *supra* note 86.

¹⁶³ *See* DWORKIN, *supra* note 1, at 112.

situation in litigation where Value *B*, although normally subordinate to Value *A*, strongly compels a different result than Value *A* would indicate.¹⁶⁴ Because Value *A* is dominant, we would reasonably predict that the result suggested by Value *A* will be chosen.¹⁶⁵

Suppose the unexpected occurs, and the result suggested by Value *B* is chosen. Knowing about the possibility of shifting values in society, we might predict that this unexpected decision represents the beginning of the erosion of Value *A*'s dominance.¹⁶⁶ In the future, the opinion written in this case might be seen as the foundational precedent of a new doctrine.¹⁶⁷

But if, as time passes, Value *A* does not lose its position of dominance, then the result in this case makes very little sense in the grand scheme of legal doctrine.¹⁶⁸ In the future, deciding courts faced with this precedent may struggle to understand it in terms of Value *A*, which continues to be dominant. At some point, the later courts may give up and decide that the precedent does not make any sense within the framework of Value *A*. Eventually, we might expect the precedent to be overruled and treated simply as an aberration.¹⁶⁹

But Value *B* may continue to provide a good reason not to regret the precedent, and therefore the precedent might not be overruled. Still, while adjudicating cases where Value *B* does not apply, a deciding court would give the precedent no persuasive force—regardless of how on point the precedent appeared to be. In short, the deciding court would ignore the precedent because the precedent could not be comfortably situated within a coherent understanding of the law based on Value *A*.

Thus, ignored precedent is a case where a dominant value *almost* changed. But in the end, that value kept its place instead of losing it. And this left a

¹⁶⁴ In practice, reaching a result when multiple values suggest different answers is likely to be very difficult, especially if it is not clear how to compare the values directly. See Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 838–42 (1994).

¹⁶⁵ Cf. *id.* at 826–27 (discussing the balancing of public values in the adjudication of litigation).

¹⁶⁶ Cf. *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 105 (D.C. Cir. 1972) (“It is the genius of the common law that it recognizes changes in our . . . moral life.”).

¹⁶⁷ See Kozinski, *supra* note 47, at 305–06 (describing the origins of a broad understanding of transfers for discovery purposes, which were later ruled unauthorized by the Supreme Court); Smith, *supra* note 158. In deciding a case, a judge may worry not only that the wrong result will be reached, but that the judicial opinion created will become the foundation of an entire erroneous doctrine. See *id.*

¹⁶⁸ Cf. LLEWELLYN, *supra* note 2, at 69 (asserting that the legal analysis of a dissenting opinion can be so groundbreaking that the analysis cannot be understood by the judges of the time).

¹⁶⁹ See SULLIVAN & GUNTHER, *supra* note 158, at 283–84 (describing the rise and fall, over an eight year period, of *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968)).

conundrum. On the one hand, the inferior courts could not effectively apply the precedent because it was inconsistent with the dominant principles of the society, but they lacked the authority to overrule the precedent. On the other hand, the precedent-creating court was unwilling to overrule the precedent. Ignoring the precedent functioned as a compromise.

This compromise is difficult to fit into a generic theory of precedent because Value *B* is inconsistent with Value *A*. If the two values were more consistent, inferior courts would have less difficulty applying cases where Value *B* defeated Value *A*. Thus, the precedents where Value *B* was the deciding principle would not be ignored and would be capable of persuading the courts in the limited circumstances delineated by the spheres of relevance of the two values at issue. At root, ignored precedent can be seen as a concrete expression of inconsistent values competing to be the deciding principles of society.¹⁷⁰ In other words, ignored precedents are another type of debris left behind when values clash in the legal forum.¹⁷¹

VI. EXAMPLES OF IGNORED PRECEDENT

Even if we are able to imagine another kind of debris in the law, there is no reason to pay attention to the hypothetical possibility unless actual examples can be provided. This Part offers two cases where precedent appears to have been ignored. Each example will go through four steps of analysis: (1) a description of the dominant value expressed in the legal background and the new value that points to a different result in the particular precedent being examined; (2) a close examination of the facts and reasoning of the ignored precedent; (3) an examination of a later case decided by an inferior court and an attempt to explain both why the precedent is relevant to the later case and how the treatment of that precedent by the later deciding court amounts to ignoring the precedent; and (4) a discussion of later legal developments to show that the decision to ignore the precedent is prevalent and not an anomalous choice of a particular inferior court.

In reaction to these examples, one might suggest that the inferior court is engaged in behavior like predicting the overruling of the ignored precedent, distinguishing the ignored precedent, or treating the ignored precedent as

¹⁷⁰ Cf. Gottlieb, *supra* note 164 (discussing the difficulty of ranking the priority of values).

¹⁷¹ Cf. DWORKIN, *supra* note 1, at 122.

mistaken.¹⁷² This possibility cannot be definitively ruled out. While discussion of alternative ways the inferior court might have ruled will be discussed to clarify the argument that the inferior court is ignoring the precedent, the major argument for why ignoring should be considered distinct from overruling, distinguishing, and treating as mistaken will be covered in the next Part.¹⁷³

A. *Ignoring Precedent in the Definition of Property*

The first dominant value discussed is a particular conception of property rights. Property rights give exclusive control of some object to the owner.¹⁷⁴ But how property rights are obtained can be very controversial.¹⁷⁵ In the example that follows, Value *A* is the understanding that property rights put the right holder in a superior position over others, including the public.¹⁷⁶ Value *B* is the importance of a well-informed body politic.¹⁷⁷

In one case where those two values came in conflict, the Supreme Court allowed Value *B* to trump Value *A*, declaring that “although . . . neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves.”¹⁷⁸

Followed to its logical conclusion, such a broad declaration could have meant the end of private property when informing the public, or any public interest, was at stake.¹⁷⁹ But when Value *B* was not at stake, one appeals court avoided the Supreme Court case by saying, “While it is of course true that law ordinarily speaks in general terms, there are cases where the occasion is at once the justification for, and the limit of, what is decided.”¹⁸⁰

No reference was made to the value of informing the public. In fact, no justification for the treatment of the Supreme Court case was articulated at all.

¹⁷² Cf. LLEWELLYN, *supra* note 2, at 72–73 (noting that courts may decide to continually distinguish a precedent rather than declare the precedent overruled).

¹⁷³ See *infra* Part VII.

¹⁷⁴ See, e.g., *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823) (“An absolute title to lands cannot exist, at the same time, in different persons . . .”).

¹⁷⁵ JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 3–41 (5th ed. 2002).

¹⁷⁶ See, e.g., *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

¹⁷⁷ See U.S. CONST. amend. I (guaranteeing freedom of the press).

¹⁷⁸ *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 236 (1918) (citations omitted).

¹⁷⁹ See *id.* at 263 (Brandeis, J., dissenting).

¹⁸⁰ *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279, 280 (2d Cir. 1929) (Hand, J.).

Thus, this Comment argues that the inferior court ignored the Supreme Court precedent.

1. *Creating a New Definition of Property*

During World War I, various organizations gathered news in Europe and distributed the information to their clients—newspapers and other news providers.¹⁸¹ These organizations were in tight competition with each other to provide the news to their clients.¹⁸² The major value of the news, as provided, was its freshness and relevance.¹⁸³ One organization, International News Service (INS), decided to reduce its costs by copying the publicly available text of another organization, the Associated Press (AP), and distributing this text to the clients of INS, thus saving INS the expense of going to Europe.¹⁸⁴ The AP responded by suing to enjoin INS from copying the text, and the case reached the Supreme Court.¹⁸⁵

In its decision, the Court explained that there was no question that the public, and not any particular person, owned the facts that make up the news.¹⁸⁶ Since the AP had unquestionably made public the information that INS had taken, one might expect that the Court would find that the AP had no theory of recovery. But the Court held that

[t]he question here is not so much the rights of either party as against the public but their rights as between themselves. And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves.¹⁸⁷

From this basis, the Court went on to explain that abandonment to the public was based on intent and that the clear intent of the AP, as shown by the manner

¹⁸¹ See *Int'l News Serv.*, 248 U.S. at 238.

¹⁸² See *id.* at 230.

¹⁸³ See *id.* at 238 (“[N]ovelty and freshness form so important an element in the success of the business . . .”).

¹⁸⁴ *Id.* at 231.

¹⁸⁵ *Id.* Independently, the AP alleged that INS bribed AP employees and induced AP clients to violate their contracts so that INS could obtain information before it was published by AP clients. *Id.*

¹⁸⁶ *Id.* at 234.

¹⁸⁷ *Id.* at 236 (citations omitted).

in which the AP conducted business, was to keep the material private.¹⁸⁸ Given that reasoning, the AP could recover for the acts of INS.¹⁸⁹

The justification for holding in favor of the AP is strongly utilitarian. Quite simply, the Court seemed concerned that without this type of protection, the news gathering activities of these types of organizations would simply halt.¹⁹⁰ The Court was unwilling to accept this result.¹⁹¹ The end result is a relational theory of ownership in which the public is not simply the aggregate of those who are not included in the controversy, but is instead a unified entity.¹⁹²

2. *Ignoring a Definition of Property*

In the next case, the value of informing the public is not relevant. But the issue of protecting rights to a perishable intangible presents itself again. In the previous case, that right was protected against interlopers. In the next case, no protection of the rights to a perishable intangible is provided.

In the fashion trade, various companies design unique silk patterns to sell during each fashion season.¹⁹³ Although many new designs are conceived and produced each year, relatively few “catch the public fancy” and become commercially successful.¹⁹⁴ Further, even a successful pattern will interest the public for only one fashion season.¹⁹⁵

In response to these economic pressures, Doris Silk Corporation copied silk designs conceived by Cheney Brothers and sold them for profit.¹⁹⁶ Taking advantage of the expenses saved by copying only the successful silk pattern,

¹⁸⁸ See *id.* at 240.

¹⁸⁹ *Id.* at 245.

¹⁹⁰ See *id.* at 240 (“The cost of the service would be prohibitive if the reward were to be so limited.”).

¹⁹¹ See *id.* at 235 (“The service [of providing timely news] for newspaper readers is . . . extremely useful in itself.”). In other words, the Court believed that informing the public about World War I was a socially valuable course of conduct that needed to be encouraged and protected.

¹⁹² The relational ownership theory has been applied by other courts. See, e.g., *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490 (W.D. Pa. 1938) (holding that viewing a baseball game from outside the stadium and broadcasting the results violated the property rights of the owner of the stadium). But this case has been interpreted as enforcing a right to privacy. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 572 (1977).

¹⁹³ *Cheney Bros. v. Doris Silk Co.*, 35 F.2d 279, 279 (2d Cir. 1929) (Hand, J.).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* A fashion season lasts eight or nine months. *Id.*

¹⁹⁶ *Id.*

Doris sold the silk patterns at a price below Cheney's price.¹⁹⁷ Naturally, Cheney responded by suing Doris.¹⁹⁸

Cheney recognized that it was impossible to copyright the patterns.¹⁹⁹ Therefore, Cheney requested protection only during any particular season.²⁰⁰ The court explained that this would create a difference of degree, but not of kind, with a copyright, which Cheney had acknowledged was not available.²⁰¹ Therefore, the court rejected this scheme, leaving Cheney without any remedy.²⁰²

Judge Learned Hand acknowledged that *International News Service* held that one party could have a right over another without having a right over the public.²⁰³ But he declined to apply the rule to the case before him, explaining,

[a]lthough that concerned another subject-matter—printed news dispatches—we agree that, if it meant to lay down a general doctrine, it would cover this case; at least, the language of the majority opinion goes so far. We do not believe that it did. While it is of course true that law ordinarily speaks in general terms, there are cases where the occasion is at once the justification for, and the limit of, what is decided. This appears to us such an instance; we think that no more was covered than situations substantially similar to those then at bar.²⁰⁴

One could take the result of the case two ways. Judge Hand might have thought that *International News Service* either was wrongly decided or would no longer be followed by the Supreme Court. But if this were so, one would expect the deciding court to follow the superior court, rather than effectively overrule it.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Judge Hand stated:

It is in practice impossible, and it would be very onerous if it were not, to secure design patents upon all of these; it would also be impossible to know in advance which would sell well, and patent only those. Besides, it is probable that for the most part they have no such originality as would support a design patent. Again, it is impossible to copyright them under the Copyright Act, or at least so the authorities of the Copyright Office hold.

Id. (internal citations omitted).

²⁰⁰ *Id.* at 279–80.

²⁰¹ *Id.* at 280.

²⁰² *See id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

Alternatively, one might look at what was said by the deciding court as distinguishing *International News Service* in some way. But the way the two cases are different is difficult to articulate. Further, the difference was not articulated. Judge Hand does say that *International News Service* involves “printed news dispatch” and not silk patterns.²⁰⁵ But, as previously discussed, those two products are very alike. To say that news is more important than silk patterns may affect the amount of damages, but it does not justify finding that no cognizable harm had been caused. In fact, Judge Hand seems to require affirmative proof of similarity. One could wonder what other similarities Judge Hand would have required before he would have been willing to apply the rule articulated by the Supreme Court.²⁰⁶

3. *Later Legal Developments*

The Supreme Court has continued to develop doctrines that support Value B by economically protecting the continued existence of news organizations.²⁰⁷ But Value A continues its general dominance, as *International News Service* continues to be ignored by courts when determining rights to intellectual property.²⁰⁸ If something is perishable and unable to be copyrighted, the law continues to provide no protected property interest.

B. *Ignoring Precedent in the Definition of State Action*

The second value being discussed is the distinction between acts of the government and acts of private citizens. Based on this distinction, government action and private action are judged by different standards.²⁰⁹ The distinction between public and private is an important part of the modern American legal landscape.²¹⁰ Value A is the principle that private actions can be judged by a

²⁰⁵ *Id.*

²⁰⁶ For example, was it required that the particular perishable product be news matter? Only news matter about compelling events?

²⁰⁷ See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (requiring malice on the part of a news organization before imposing liability for errors in factual reporting about public figures).

²⁰⁸ See Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411 (1983); Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994). Cf. ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 394–97 (2d ed. 2000).

²⁰⁹ See *The Civil Rights Cases*, 109 U.S. 3 (1883).

²¹⁰ See Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1014 (1985).

different, lower standard than actions of the public government.²¹¹ Value *B* is opposition to racism.²¹²

In one case where those two values came in conflict, the Supreme Court declared, “the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment.”²¹³ Given that the litigation at issue was essentially a contract dispute, the logical consequence of this analysis would be the end of a separate category of private action.²¹⁴ A contract is meaningless if breach cannot be punished, performance cannot be enforced, and the major mechanism for enforcement is litigation.²¹⁵

In a later case, where Value *B* was not at stake, a district judge, affirmed on appeal, avoided the precedent and ruled based on the dominance of Value *A*. The district court summarized the law in favor of Value *A* by stating that “to succeed on either claim, however, Plaintiffs must establish that the Defendants were state actors Moreover, the fact that the claims were adjudicated by a state court judge does not provide the requisite state action for purposes of . . . the Fourteenth Amendment.”²¹⁶ No reference was made to the value of opposing racism. No justification for the treatment of the Supreme Court case was articulated. In fact, the Supreme Court case was not even cited in that opinion or the appeals court opinion at all. Thus, this Comment argues that the inferior court ignored the Supreme Court precedent.

1. Creating a New Definition of State Action

From the 1930s to the 1950s, the Supreme Court was incrementally stepping toward the end of state-recognized racial division.²¹⁷ Although the Court was clearly unwilling to continue tolerating government endorsement of

²¹¹ See 28 U.S.C. § 1983 (2000) (allowing suit of public actors, but not private actors, for violations of federal rights).

²¹² See, e.g., 42 U.S.C. § 3605 (2000) (banning housing discrimination based on race or other illicit factors).

²¹³ *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948).

²¹⁴ See *id.* at 11.

²¹⁵ See Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933) (“Enforcement, in fact, puts the machinery of the law in the service of one party against the other.”).

²¹⁶ *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1388 (M.D. Fla. 2005), *aff’d*, 403 F.3d 1223 (11th Cir. 2005), *cert. denied*, 545 U.S. 945 (2005).

²¹⁷ See James M. Nabrit, Jr., *Introduction* to LEGAL ASPECTS OF THE CIVIL RIGHTS MOVEMENT 3 (Donald B. King & Charles W. Quick eds., 1965). This process reached a culmination in *Brown v. Board of Education*, 347 U.S. 483 (1954).

racial discrimination, the Court was not yet ready to take the final step and declare racism affirmatively improper and unjust.²¹⁸ Already the Court had decided that government could not mandate a blatantly unequal segregation scheme on a railroad,²¹⁹ zone property based on race,²²⁰ or deny black state citizens access to a state program available to white citizens.²²¹ While racism was on the retreat, the Court did not yet have the requisite will to strike a final blow to constitutionally tolerated government racism.²²²

In *Shelley v. Kraemer*, the Court was faced with private individuals creating conditions that could not be imposed by the government.²²³ The properties in question were encumbered by restrictive covenants that prohibited ownership or occupancy by non-Caucasians.²²⁴ The net effect of these covenants was to create segregated neighborhoods where Caucasians could live with the understanding that non-Caucasians would not move in. Precedent was clear that a government could not use zoning to achieve this effect.²²⁵ But in the case before the Court, there was no statutory scheme to prevent whites and blacks from living in the same neighborhood.²²⁶ On the other hand, allowing a scheme of easements to achieve the same effect would clearly have been a retreat from the progress made by the Court toward achieving racial justice.²²⁷

Normally, easements are considered private agreements.²²⁸ A party makes a contract with a neighboring landowner that burdens one parcel to benefit another.²²⁹ The contract then “runs with the land,” allowing subsequent purchasers of either parcel to reap the benefits of the original agreement.²³⁰

²¹⁸ See Donald B. King & Charles W. Quick, *Overall View*, in LEGAL ASPECTS OF THE CIVIL RIGHTS MOVEMENT, *supra* note 217, at 22.

²¹⁹ *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U.S. 151, 160–61 (1914). However, the case was dismissed because the statutory scheme had not yet gone into operation, effectively leaving the plaintiffs with an unripe claim. *See id.* at 164.

²²⁰ *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

²²¹ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (requiring Missouri to operate a law school that accepted black students rather than subsidize enrollment for black Missourians in a Kansas law school).

²²² *See King & Quick, supra* note 218.

²²³ 334 U.S. 1 (1948).

²²⁴ *Id.* at 5–6.

²²⁵ *See Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (holding racially based zoning laws, designed to keep white and black neighborhoods distinct, were not a legitimate exercise of government power).

²²⁶ *See Shelley*, 334 U.S. at 11.

²²⁷ *See King & Quick, supra* note 218.

²²⁸ *DUKEMINIER & KRIER, supra* note 175, at 781.

²²⁹ *Id.*

²³⁰ Technically, we are speaking now of a type of easement called a negative covenant. *See id.* at 861–63.

One prime example is a negative covenant that restricts the land so that only single family houses will be built on a parcel.²³¹ Like any contract, breach of an easement creates a cause of action, enforceable in court.²³²

Negative covenants are a type of contract.²³³ Traditionally, contract law focuses on enforcing the promises of parties so they may reap the benefits of their bargains.²³⁴ Although public policy may change the terms of a transaction or prevent certain types of transactions from occurring,²³⁵ in general the law of contracts enforces on a party only those obligations that the party assumes.²³⁶ Contract law is thus perceived as within the domain of private law as opposed to public law, in which the government imposes obligations on the private individual regardless of whether the individual sought out the obligations.²³⁷ Nonetheless, the remedies for a breach of contract are enforced primarily through litigation and subsequent judicial enforcement.²³⁸

Under this rubric, racially discriminatory covenants were only private contracts. Established precedent held that the Constitution imposed no obligation on private citizens to shun racist behavior.²³⁹ Instead of confronting or rejecting this precedent, the Supreme Court in *Shelley* accepted the necessity of finding state action.²⁴⁰ The Court explained:

That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment[] is a proposition which has long been established by decisions of this Court.²⁴¹

Once state action had been found, it followed easily that the state action violated the Constitution.²⁴²

²³¹ See, e.g., *Sanborn v. McLean*, 206 N.W. 496 (Mich. 1925).

²³² See, e.g., *id.*

²³³ *DUKEMINIER & KRIER*, *supra* note 175, at 861–63.

²³⁴ *Dalton*, *supra* note 210.

²³⁵ *RESTATEMENT (SECOND) OF CONTRACTS* § 178 (1981).

²³⁶ See *id.* §§ 1–2.

²³⁷ See *Dalton*, *supra* note 210 (“[O]ur principle vision of contract law is still one of a neutral facilitator of private volition.”).

²³⁸ See, e.g., *Sanborn v. McLean*, 206 N.W. 496 (Mich. 1925).

²³⁹ See *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the Fourteenth Amendment did not give Congress the power to outlaw whites-only facilities run by private citizens).

²⁴⁰ *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (“[T]he restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed . . . by the 14th Amendment.”).

²⁴¹ *Id.* at 14.

²⁴² See *id.* at 20.

Under the theory of this ruling, parties remain free to enter into any agreement they would like.²⁴³ However, when “the purposes of the agreement [can be] secured only by judicial enforcement by state courts of the . . . terms of the agreement[,],” then the enforceability of the agreement turns on whether the government could bind citizens to do what the agreement requires.²⁴⁴ In other words, judicial action invokes constitutional scrutiny.²⁴⁵ Private parties are thus limited to nonlegal sanctions to enforce those agreements that could not be enforced at law.

2. *Ignoring a Definition of State Action*

In the next case, the value of opposing racism is not relevant. But the issue of judges as state actors presents itself again. In the previous case, judges adjudicating cases were declared to be state actors. In the next case, a state judge adjudicated whether an unconscious woman would have wanted to continue an intensive life-saving procedure.²⁴⁶ Notwithstanding the magnitude of the judge’s involvement in the decision, the judge was not categorized as a state actor.

On March 21, 2005, the parents of Terri Schiavo filed suit in federal court, seeking to obtain a judicial decision that their daughter—at that time in a persistent vegetative state—would have made the choice to continue medical care.²⁴⁷ This issue had been intensely litigated in the courts of the State of Florida,²⁴⁸ with an ultimate conclusion that Terri Schiavo’s choice would have been “to forego further [extraordinary life-preserving measures].”²⁴⁹ This result was against the legal position of Schiavo’s parents and in favor of her husband’s legal position.²⁵⁰ The end result of this finding in the state court

²⁴³ See *id.* at 13.

²⁴⁴ *Id.* at 13–14.

²⁴⁵ Regardless of one’s opinion of the legal persuasiveness, there is no question that justice was on the side of those who opposed enforcement of the racial covenants. Quite simply, the only morally acceptable result was reached in *Shelley*. Now, the same effect is reached by operation of the Fair Housing Act. See 42 U.S.C. § 3605 (2000).

²⁴⁶ *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 780 So. 2d 176, 178–79 (Fla. Dist. Ct. App. 2001) (describing Florida law and procedure).

²⁴⁷ See Gayle White, *Schiavo Judge Begins Review*, ATLANTA J. CONST., Mar. 22, 2005 at A1.

²⁴⁸ See *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 916 So. 2d 814, 814 n.1 (Fla. Dist. Ct. App. 2005).

²⁴⁹ *Id.* at 815.

²⁵⁰ See White, *supra* note 247.

litigation was an order to disconnect the feeding tube that was keeping Terri Schiavo alive.²⁵¹

In an attempt to change this result, Congress passed a law granting federal jurisdiction to Schiavo's parents to bring new litigation in federal court.²⁵² Because of Schiavo's medical situation, her parents sought a preliminary injunction preventing the removal of a feeding tube that was providing nutrition to keep her alive.²⁵³

As the federal trial judge explained, to receive a preliminary injunction the moving party must show

- (1) it has a substantial likelihood of success on the merits;
- (2) irreparable injury will be suffered unless the injunction issues;
- (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and
- (4) if issued, the injunction would not be adverse to the public interest.²⁵⁴

The trial judge also explained that, although the first point was generally most important, the "necessary level or degree of possibility of success on the merits will vary according to the court's assessment of the other factors."²⁵⁵

The trial judge found the irreparable injury factor strongly weighed in favor of an injunction.²⁵⁶ Additionally, the judge found the third and fourth factors weighed toward granting the injunction.²⁵⁷ However, the judge denied the preliminary injunction because Schiavo's parents had not established a "substantial likelihood of success on the merits"²⁵⁸

²⁵¹ *Schindler*, 916 So. 2d at 815.

²⁵² A Bill to Provide for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005).

²⁵³ See White, *supra* note 247.

²⁵⁴ *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1383 (M.D. Fla. 2005) (citing *Klay v. United Health Group, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004)).

²⁵⁵ *Id.*

²⁵⁶ *Id.* ("It is apparent that Theresa Schiavo will die unless temporary injunctive relief is granted.")

²⁵⁷ *Id.*

²⁵⁸ *Id.* Given the statutory authorization for the federal court jurisdiction, there was no deference to state court judicial fact finding. See Pub. L. No. 109-3, 119 Stat. 15, § 2 (2005) ("[T]he District Court shall determine *de novo* any claim . . . notwithstanding any prior State court determination . . ." (emphasis added)). However, the trial judge determined that this language did not change the standards for granting temporary injunctive relief. See *Schiavo*, 357 F. Supp. 2d at 1383 n.2.

Among the many legal theories articulated was an assertion that Schiavo's rights protecting her from illegitimate government behavior were violated.²⁵⁹ The trial judge explained that these claims could only succeed if it was established that state action had occurred. On this point, the court held that

[i]n order to succeed on either claim, however, Plaintiffs must establish that the Defendants were state actors Moreover, the fact that the claims were adjudicated by a state court judge does not provide the requisite state action for purposes of . . . the Fourteenth Amendment.²⁶⁰

There was no citation to *Shelley v. Kraemer*. The appellate court affirmed the trial court's ruling.²⁶¹ No citation to *Shelley v. Kraemer* occurs in the appellate opinion.

One could try to distinguish *Shelley* by articulating two separate conceptions of state action. Consider some alternative ways the trial judge could have reached the legal conclusion that Terri Schiavo's parents had no substantial likelihood of success. The judge could have held that the state court proceedings were state action but were not the action asserted to be objectionable. This argument stalls on the fact that the state court proceedings had resulted in an order that Terri Schiavo's feeding tube be removed,²⁶² which was obviously the action that Terri Schiavo's parents found objectionable. Alternatively, the judge could have accepted that the action in dispute was state action, but concluded that the action did not violate any restriction on the government. But in practical terms, this argument is cold-blooded because it endorses the view that causing a woman to die (by starvation)²⁶³ does not constitute illegal action by a state government.

²⁵⁹ See *Schiavo*, 357 F. Supp. 2d at 1387 (discussing the fourth and fifth counts of the complaint). The relevant rights were established by the Religious Land Use and Institutionalized Persons Act and the First Amendment. *Id.*

²⁶⁰ *Id.* at 1388. Given that legal arguments being discussed were not based on the Fourteenth Amendment, it is unclear why the judge made reference to the Fourteenth Amendment. This confusion is moot because Terri Schiavo's parents filed an amendment complaint that did assert violations of the Fourteenth Amendment and an injunction was denied on the amended complaint. See *Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161, 1163 (M.D. Fla. 2005) (discussing the amended complaint and denying a renewed motion for a temporary injunction).

²⁶¹ *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005). However, the standard of review was only for abuse of discretion. See *id.*

²⁶² *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 916 So. 2d 814, 815 (Fla. Dist. Ct. App. 2005).

²⁶³ See White, *supra* note 247.

Procedurally, Terri Schiavo's parents needed only a "likely or probable" chance of success, not a win on the merits.²⁶⁴ In such circumstances, a fine legal distinction might be beyond the scope of a determination of mere likelihood of success.²⁶⁵ In any case, there is no evidence that any federal court examining the matter drew any such distinction. In related proceedings on the case, the Eleventh Circuit Court of Appeals examined the issue of state action and explained that "[p]roviding a neutral forum for adjudication is an essentially neutral act."²⁶⁶ The court explained further that a private citizen who invokes the judicial process does not create state action.²⁶⁷ But if we take this latter point seriously, then *Shelley* itself—where a private citizen sought a court order²⁶⁸—is washed away.

3. *Later Legal Developments*

It is unquestionably the case that the Supreme Court remains committed to ending racism in the United States.²⁶⁹ Therefore, it is extremely unlikely that *Shelley* would be overturned if a similar case came before the Court.²⁷⁰ Nonetheless, inferior courts continue to ignore the possibility that a judge is a state actor.²⁷¹ Occasionally, courts will note that the understanding of state action articulated in *Shelley* has only been applied in the context of racial discrimination.²⁷² This resolves whether a judge, adjudicating a claim, is a state actor based on the type of claim being adjudicated. The relevance of the type of claim to the character of the judge's conduct is left murky, and such a distinction is nowhere to be found in the absolutist language of *Shelley*.²⁷³ In

²⁶⁴ *Schiavo*, 357 F. Supp. 2d at 1383 (emphasis omitted).

²⁶⁵ *See Sunbeam Prods., Inc., v. West Bend Co.*, 123 F.3d 246, 254, 254 n.13 (5th Cir. 1997), *overruled on other grounds by* 532 U.S. 23 (2001).

²⁶⁶ *Schiavo*, 403 F.3d at 1293 n.2 (citing *Paisey v. Vitale*, 807 F.2d 889, 893–894 (11th Cir. 1986)).

²⁶⁷ *See id.* ("[He] who has obtained a state court order . . . is not engaged in state action merely because [he] used the state court legal process." (citing *Cobb v. Ga. Power Co.*, 757 F.2d 1248, 1251 (11th Cir. 1985))).

²⁶⁸ *Shelley v. Kraemer*, 334 U.S. 1, 6 (1948).

²⁶⁹ *See Grutter v. Bollinger*, 539 U.S. 306, 331–32 (2003).

²⁷⁰ *See supra* Part VI.B.1.

²⁷¹ For example, federal courts of appeals continue to decline to treat adjudication by state court judges as state action. *See, e.g.*, *Taylor v. Gilmartin*, 686 F.2d 1346 (10th Cir. 1982); *Dahl v. Akin*, 630 F.2d 277 (5th Cir. 1980); *Louisville Area Inter-Faith Comm. for United Farm Workers v. Nottingham Liquors, Ltd.*, 542 F.2d 652 (6th Cir. 1976). *See generally Cobb*, 757 F.2d at 1251 (collecting cases).

²⁷² *See, e.g.*, *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191–92 (11th Cir. 1995).

²⁷³ *Shelley*, 334 U.S. at 14.

short, when a judicial process is invoked to adjudicate a private dispute, the judge making the decisions will not be treated as a state actor.²⁷⁴

VII. TRYING TO REVIVE TRADITIONAL CONCEPTIONS OF PRECEDENT

This Comment argues that *International News Service v. Associated Press*²⁷⁵ and *Shelley v. Kraemer*²⁷⁶ are ignored precedents. There is every reason to think that the Supreme Court would treat the facts of those cases identically if it were faced with those facts again. Yet the widely tolerated practice of inferior courts is to ignore the rules of law articulated by those cases. Because ignoring precedent is not predicted by any theory of precedent, the theory should be modified to include a category—in parallel to the categories of overruling, distinguishing, and treating as mistaken—of ignoring precedent.

One could try and fit the manipulations of *Shelley* and *International News Service* into one of the accepted categories. In *Cheney Bros.*, the court might have been trying to distinguish the case from the *International News Service* precedent.²⁷⁷ However, that part of the opinion is a declaration of a different result, not a justification of the different treatment. In *Schiavo*, the deciding court might have been treating *Shelley* as mistaken and limiting the gravitational force of that precedent. Aside from the discomfort of declaring a pivotal civil rights case to be mistaken, the next step of a deciding court should be to determine if the mistaken precedent is sufficiently similar to still provide the rule for decision.²⁷⁸ By providing no justification for why *Shelley* was not

²⁷⁴ To resolve this disparity, one law dictionary has explicitly defined state action in the alternative, with one part defining the dominant view and the other part defining state action as used in *Shelley*. See BLACK'S LAW DICTIONARY, *supra* note 32, at 1444. Presumably, if the two definitions were coextensive, only the general definition would be included to avoid redundancy.

²⁷⁵ 248 U.S. 215 (1918).

²⁷⁶ 334 U.S. 1 (1948).

²⁷⁷ See *Cheney Bros. v. Doris Silk Co.*, 35 F.2d 279, 280 (2d Cir. 1929) (“[W]e think that no more was covered than situations substantially similar to [*International News Service*].”).

²⁷⁸ DWORKIN, *supra* note 1, at 120–21.

followed, the *Schiavo* courts ignored the legal rule articulated in *Shelley*.²⁷⁹ This is implicitly an overruling of *Shelley*.²⁸⁰

In an attempt to preserve the legitimacy of the later courts, one could attempt to characterize the inferior court adjudications as attempts to predict the result that the Supreme Court would reach.²⁸¹ However, no prediction of the Supreme Court's likely disposition of either case was suggested by either inferior court to justify their respective decisions.²⁸² Instead, the inferior courts seemed to treat the precedents as having no impact on the content of the law.²⁸³

If a precedent has very little impact on the law, Professor Dworkin would say that deciding courts are treating the precedent as mistaken.²⁸⁴ But mistaken precedent still binds deciding courts in certain circumstances.²⁸⁵ The later-deciding courts described in Part V suggested that there could be no circumstances where the earlier precedent would be applied.²⁸⁶ The later courts did not treat the precedent as mistaken, instead choosing to simply ignore the precedent.

Perhaps one could accommodate the treatment of *International News Service* and *Shelley* by later courts within the traditional legitimate categories of overruling, distinguishing, and treating as mistaken.²⁸⁷ But there once was a time in common law adjudication when overruling was forbidden and

²⁷⁹ Compare *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1388 (“[T]he fact that the claims were adjudicated by a state court judge does not provide the requisite state action for purposes of . . . the Fourteenth Amendment.”), with *Shelley v. Kraemer*, 334 U.S. 1, 14 (“[T]he actions of state courts . . . in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment . . .”).

²⁸⁰ See Alexander, *supra* note 12, at 22 (“Any departure from [the] rule [of a precedent] amounts to overruling it.”).

²⁸¹ See Kniffin, *supra* note 97, at 74–76. Interestingly, the judge who wrote the opinion in *Cheney Bros.*, Judge Hand, appeared to believe that an inferior court had the duty to predict, not necessarily follow, a superior court. See *Specter Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1943) (Hand, J., dissenting) (“I conceive that the measure of [a court’s] duty is to divine, as best it can, what would be the event of an appeal in the case before it.”).

²⁸² Further, it is clear that the Supreme Court wanted nothing to do with the politically charged *Schiavo* litigation. See *Schiavo ex rel. Schindler v. Schiavo*, 125 S. Ct. 1692 (2005) (denying stay of inferior court adjudication pending a certiorari petition); *Schiavo ex rel. Schindler v. Schiavo*, 545 U.S. 945 (2005) (same).

²⁸³ Cf. Dragich, *supra* note 21, at 785–87 (discussing the effect of unpublished opinions on the content of the law).

²⁸⁴ DWORKIN, *supra* note 1, at 118–22.

²⁸⁵ *Id.* at 121.

²⁸⁶ See, e.g., *Cheney Bros. v. Doris Silk Co.*, 35 F.2d 279, 280 (2d Cir. 1929) (“[T]here are cases where the occasion is at once the justification for, and the limit of, what is decided. This appears to us such an instance . . .”).

²⁸⁷ Or one could discard this Comment’s presumption of judicial good faith.

distinguishing was the only legitimate technique to avoid a precedent.²⁸⁸ When overruling and distinguishing proved inadequate, Professor Dworkin articulated a theory of treating precedent as mistaken.²⁸⁹ This Comment brings into the open another way that judges can legitimately avoid a precedent. To repress the idea of ignored precedent is to deliberately restrict our understanding of the legal content of ignored precedent.²⁹⁰ Improved understanding is reached if we recognize that judges can legitimately ignore cases that time has passed by.

CONCLUSION

The first principle of precedent is that courts are bound to follow it.²⁹¹ The second principle is that courts have tools to avoid it.²⁹² To understand what particular precedents mean, lawyers have identified categories of ways that judges treat precedent.²⁹³ Adding the category of ignored precedent is another way of understanding what judges actually do as they try to apply the law in good faith.²⁹⁴ To find it acceptable to say that time has passed by a precedent is to accept how little a precedent can stand for, while still being good law.

As a practical matter, describing a case as ignored precedent is only a post hoc description of how that precedent is actually used by the judiciary without explaining why that particular precedent became ignored.²⁹⁵ Nonetheless, capable practitioners will be forced to develop a sense of what precedents—while still good law—are not worth the effort to use in persuading a court.²⁹⁶ Furthermore, judges themselves must frequently make decisions based on the content of law from another jurisdiction.²⁹⁷ To make that judgment accurately,

²⁸⁸ See Kniffin, *supra* note 97, at 55 (noting that some common law countries continue to heavily restrict a court's power to overrule itself).

²⁸⁹ DWORKIN, *supra* note 1, at 118–22.

²⁹⁰ See LLEWELLYN, *supra* note 2, at 53 (arguing that one cannot understand the content of a case unless one examines “what it will be made to stand for by another later court” (emphasis omitted)).

²⁹¹ See Alexander, *supra* note 12, at 4.

²⁹² See Schauer, *supra* note 3, at 576–89.

²⁹³ *Cf. id.* at 583–89.

²⁹⁴ *Cf. LLEWELLYN, supra* note 2, at 3 (“What [judges] do about disputes is . . . the law itself.” (emphasis omitted)).

²⁹⁵ See Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1557 (1997).

²⁹⁶ *Cf. Lawson, supra* note 13, at 33 (noting that litigants would be sanctioned for continuing to argue against longstanding precedent that is nonetheless inconsistent with a clear original understanding of the Constitution).

²⁹⁷ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that federal courts sitting in diversity should follow state law, including state judicial opinions); see also *Allstate Ins. Co. v. Hague*, 449 U.S. 302,

familiarity with the way that other jurisdiction uses its precedents is essential.²⁹⁸ This is not a call for action and reform on the part of judges. But in creating and interpreting precedents, judges could be more accurate if they recognize that assertions made in an opinion are not necessarily propositions that the opinion can be cited to support.²⁹⁹

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326 (1981) (Stevens, J., concurring) (“[J]udges are presumably familiar with their own state law and may find it difficult . . . to discover and apply correctly the law of another State.”).

²⁹⁸ Cf. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004) (deferring “to the interpretation of [state law made by] the Court of Appeals for the Circuit in which the state is located” because those judges possess “greater familiarity” with the state law at issue).

²⁹⁹ See Schauer, *supra* note 3, at 574 n.8 (noting that the meaning of cases can change over time).

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