"Jurisprudence Désorientée:" The Louisiana Supreme Court's Theory of Jurisprudential Valuation, Doerr v. Mobil Oil and Louisiana Electorate of Gays and Lesbians v. State

Jason Edwin Dunahoe

Repository Citation
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol64/iss3/11

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.
I. INTRODUCTION

"What is the law?" This question is undoubtedly straightforward and fundamental, but in a mixed jurisdiction such as Louisiana, the answer is anything but simple. Picture a scene that plays out hundreds of times a day throughout Louisiana as well as the rest of the United States. A new client walks into an attorney's office with a particular legal problem. Understandably, the client wants to know if he has a valid legal claim or defense. Provided the attorney is at least moderately acquainted with the area of the law in question, the client will expect that the attorney will, at least, have the capability to find the legal rule that governs his problem.

In a common law state, the attorney could look to the statutory authority, or more simply find a reported case from an appellate court, that answers the legal question posed by his client and closely approximates the given fact pattern. If the judge appointed to the case agrees that the material facts are sufficiently similar, the prior holding will control the legal conclusions of that judge. In Louisiana, however, relying on the words of the Louisiana Supreme Court, the attorney may or may not, depending upon the case from which the attorney quotes, be able to assure his client that the prior holding of a superior court will control the legal questions of his claim. The cause of this disorder is the confusion of the doctrines of stare decisis and jurisprudence constante. The doctrine of stare decisis generally states that once a legal question has been decided in a prior case the issue may not be reexamined by a subsequent tribunal absent extraordinary circumstances. On the other hand, with jurisprudence constante, judicial decisions are not controlling on issues of law. However, if there exists a consistent line of cases that arrive at the same legal conclusions using sound logical reasoning, then the previous rulings are highly persuasive and not controlling. The Louisiana Supreme Court has not been clear as to the exact weight accorded to prior cases. As a result, attorneys, and even

Copyright 2004, by LOUISIANA LAW REVIEW

1. This phrase translates from French to English to mean, "confused or bewildered jurisprudence."
judges, are confused as to whether the much touted civil law concept of jurisprudence constante truly controls.

On March 28, 2002, the Louisiana Supreme Court, in the case of Louisiana Electorate of Gays and Lesbians, Inc. v. State, handed down a decision that could have fundamentally changed the way legal practitioners viewed judicial decisions in Louisiana. But, in reality, the court simply stated what legal practitioners, both judges and attorneys, in the state have accepted for quite some time: "...the law is what this court has announced it to be..." In some sense courts necessarily make law; the judgments and rulings of the courts are binding rules for the parties to the actions. However, in the sense of prospective rules, or norms that will apply to future disputes, this level of precedential valuation may be unwarranted in Louisiana.

The opinion in Louisiana Electorate is particularly unusual when viewed in light of the same court's decision less than two years earlier in Doerr v. Mobil Oil, a case in which the court reiterated its well established support for the civilian approach to precedent - jurisprudence constante. Is it that decisions from this court constitute the "law," or are they merely secondary or persuasive sources of law not to be relied on as the "law," as is suggested in the comments to Civil Code Article 19? Or, is the court attempting to articulate a dual standard for precedent in which different areas of the law are subject to different precedential rules? This lack of clarity creates great confusion and frustration for practitioners, as well as legal professors, in their efforts to represent their clients or decide cases in the proper manner with justifiable confidence. Thus, the Louisiana Supreme Court should clarify its theory of judicial precedential valuation.

Part II of this comment examines the two cases of Doerr and Louisiana Electorate that have illustrated the confusion over the proper weight that should be given to judicial decisions. Subsequently, Part II (C) discusses the two theories of jurisprudential valuation, jurisprudence constante and stare decisis, with emphasis given to germane differences and similarities between the two. Part III analyzes the distinctions between jurisprudence constante and stare decisis. The

4. 812 So. 2d 626 (La. 2002).
7. 774 So. 2d 119 (La. 2000), reh'g granted, 782 So. 2d 573 (La. 2001).
8. La. Civ. Code Art. 1, comment b states, "According to civilian doctrine, legislation and custom are authoritative sources of law. They are contrasted with persuasive or secondary sources of law, such as jurisprudence, doctrine, conventional usages, and equity, that may guide the court in reaching a decision in the absence of legislation and custom. (2002) (emphasis added).
distinction between public law and private law in mixed jurisdictions is then examined, illuminating how jurisprudence constante is more appropriate for private law, while stare decisis is more appropriate for the public law. In the final section of Part III, the comment addresses the practical implications of determining precedential value for the practicing attorney or judge in Louisiana. Finally, Part IV of the paper suggests that the courts either adopt stare decisis, the "de facto precedential system" or, alternatively that the courts establish a clear and precise dual valuation system which applies different weight to judicial precedent in the private and public law arenas.

II. THE VALUE OF PRECEDENT IS UNCLEAR IN LOUISIANA SUPREME COURT CASELAW

A. Doerr v. Mobil Oil

In deciding the case of Doerr v. Mobil Oil, the Louisiana Supreme Court overruled its prior decision in Ducote v. Koch Pipeline. The substantive law of both of these cases can be briefly summarized as they have little bearing on the subject of this comment. In both Ducote and Doerr, the Supreme Court was called on to determine the meaning of the "pollution exclusion clause" in comprehensive general liability policies (CGLs). In Ducote, the court held that the pollution exclusion clause in the CGL should be interpreted broadly so as to exclude from coverage under the policy any pollution "regardless of whether the release was intentional or accidental, a one-time event or part of an on-going pattern of pollution." Significantly, this holding represented a departure from the rule announced by the court in South Cent. Bell Tel. Co. v. Ka-Jon Food Stores of Louisiana, Inc., which had been widely followed in the state appellate courts and the federal district courts. This fact was of great importance to the court in Doerr, particularly in its discussion of jurisprudence constante.

In Doerr, the court re-examined the interpretation of the pollution exclusion clause announced in Ducote. The court held that the exclusion should not be interpreted as broadly as indicated in Ducote, and that the CGLs should provide coverage only when the accidents

10. 730 So. 2d 432 (La. 1999).
11. Ducote, 730 So. 2d at 437 (emphasis omitted).
13. Kathryn M. Knight, The Total and Absolute Pollution Exclusions are Neither Total Nor Absolute, at Least for Now: Doerr v. Mobil Oil Corporation, 47 Loy. L. Rev. 1153, 1154 (Fall 2001).
15. Id.
incidentally involve pollutants and are not events of environmental pollution.\textsuperscript{16} In order to justify its departure from the rule announced in \textit{Ducote}, the Louisiana Supreme Court invoked the well established civilian principle of jurisprudence constante.\textsuperscript{17} On numerous occasions in the past and in no uncertain terms, the Louisana Supreme Court has made it clear that the common law doctrine of "stare decisis" is not recognized in Louisiana.\textsuperscript{18} The court was clear that \textit{Ducote} represented a departure from the "settled jurisprudence" of the state courts, and that the rule as established in a \textit{South Central Bell Telephone Co.},\textsuperscript{19} and followed in the appellate courts of the state, was accorded sufficient weight by those courts as to become custom. If the rule had attained the stature of "custom," it would qualify as a primary source of law under the Louisiana Civil Code.\textsuperscript{20} Therefore, in \textit{Doerr}, the court employed the doctrine of jurisprudence constante to justify its reversal of the prior holding in \textit{Ducote}.

Notably, the composition of the Louisiana Supreme Court at the time of the \textit{Doerr} decision was different from the composition at the time of \textit{Ducote}. Justice Marcus joined in the majority in \textit{Ducote}, but had retired at the time when the \textit{Doerr} case was heard. Justice Lemmon, who did not sit on the panel in \textit{Ducote}, was the deciding vote in \textit{Doerr} that arguably caused the transposition of the majority and minority between the two cases.

\textbf{B. Louisiana Electorate of Gays and Lesbians v. State}

Despite its pronouncement in \textit{Doerr}, in March 2002, the Louisiana Supreme Court sent a message to the legal community in Louisiana that was rather difficult to understand in light of its own "settled jurisprudence."\textsuperscript{21} In the case of \textit{Louisiana Electorate of Gays and Lesbians v. State}, the supreme court stated:

Despite the clarity of our holding to this effect, the district court chose to depart from \textit{Smith} and reached a contrary result on the law. This action involves, at least, a failure by

\textsuperscript{16} Id. at 136. For the purposes of this paper, the complexities of insurance contract interpretation are only coincidentally important.

\textsuperscript{17} Id.

\textsuperscript{18} See, \textit{e.g.}, Ardoin v. Hartford Acc't & Indem. Co., 360 So. 2d 1331, 1334 (La. 1978); Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 576, 578 (La. 1975); Carter v. Moore, 248 So. 2d 813, 829 (La. 1971).

\textsuperscript{19} \textit{South Cent. Bell Tel. Co.}, 644 So. 2d 357.


\textsuperscript{21} La. Electorate of Gays and Lesbians, Inc. v. State, 812 So. 2d 626 (La. 2002).
the lower court to recognize its obligation to follow the law of this State as pronounced by this court.\textsuperscript{22}

This statement presents the legal practitioner with a plethora of puzzles. What is this "obligation" the court spoke of in this excerpt? According to the civil law tradition, specifically the theory of jurisprudence constante, judges are not bound by prior decisions, even those announced by higher courts. Likewise, does the court really intend to mean that the law of Louisiana can be "pronounced by this court?" If so, then this calls into question the meaning of Article III of the Louisiana Constitution and its statement that the legislative power of the state will be vested solely in the legislature.\textsuperscript{23} However, this case does not represent the first instance in which the Louisiana Supreme Court has seemingly invoked the "stare decisis" type language. In the case of \textit{Johnson v. St. Paul Mercury Ins. Co.}, the supreme court explicitly stated that, in the absence of legislation, "the law is what this court has announced it to be."\textsuperscript{24} Interestingly, in \textit{Louisiana Electorate}, the supreme court made no mention of Doerr or the supposedly "well-established" principle of jurisprudence constante.

The issue in \textit{Louisiana Electorate} was not one which was of great contention in the courts prior to this decision. Nothing in the opinion suggests that the court could not have used the traditional civilian method of jurisprudence constante in justifying its admonition of the trial court. To the contrary, it seems ill-advised for the court, if it wishes to adhere to the civil law theory of sources of law, to suggest that inferior courts are somehow obliged to decide cases according to the precedent of the supreme court absent an examination of the legal reasoning within that prior decision. Based on the discussion of jurisprudence constante in \textit{Doerr}, the absence of any discussion or recognition of that concept in \textit{Louisiana Electorate} is inexplicable. If the concept of jurisprudence constante is so "well-established," then surely a court in Louisiana that wished to bind lower courts to its holding would suggest that the holding met the standard for this level of valuation.

\textsuperscript{22} \textit{Id.} at 629 (emphasis added).
\textsuperscript{23} La. Const. art. III, § 1.
\textsuperscript{24} 236 So. 2d 216. Despite the language quoted above, the \textit{Johnson} court explicitly stated that Louisiana does not recognize the doctrine of stare decisis. In addition, the court did not discuss how it is that the judiciary in Louisiana can "announce" the law when all legislative power is constitutionally vested in the legislature alone. It is conceded, however, that the court made it clear that this statement applied when no written law existed.
C. The Two Theories of Precedent

The two cases of Doerr and Louisiana Electorate are significant to Louisiana law because both represent opposing views of the value of precedent in Louisiana law. In order to discuss possible solutions to this problem, one must fully understand both jurisprudence constante and stare decisis as they are known in Louisiana and the United States.

1. Jurisprudence Constante

The civil law places great importance on separating legislative and judicial functions, while clinging to the theoretical rule that judges do not make law in the prospective sense. The nature of the Louisiana Civil Code reflects this separation. Ideally, civilian methodology holds that civil codes are designed to be complete, coherent, and clear, thereby eliminating the necessity for judges to make law. A civilian code should be a logically harmonious body of law that comprehensively foresees many, if not most, of the future situations in need of a legal solution by establishing general principles from which specific legal rules can be deduced. The emphasis on logical harmony is clearly evident in the civilian theory of sources of law because judges are free to deviate from judicial precedent only when it is mandated by logical criticism of the prior decision.

Concerning the traditional civilian approach to the judicial function, the renowned French jurist Marcel Planiol noted:

Judicial interpretation is free in principle. Every tribunal may adopt the solution which it considers the most just and the best. It is bound neither by decisions which it may have rendered previously in analogous cases nor by those of a higher court.  

One of the fundamental precepts of the civilian tradition is the superiority of legislation to all other forms of law. Custom, which is defined in the civil code as a practice repeated for a long period of
time that acquires the acceptance of the general public as a
governing rule,\textsuperscript{30} is the only other source that rises to the level of a
primary source of law in the civilian tradition. Doctrine and
jurisprudence are recognized as only secondary or persuasive
sources in the civil law, such as in the Louisiana Civil Code.\textsuperscript{31}
Therefore, these two concepts are not to be accorded the status of
"law."

According to the civil law theory of precedent, "when a series
of decisions form a 'constant stream of uniform and homogenous
rulings having the same reasoning,' jurisprudence constante applies
and operates with 'considerable persuasive authority.'\textsuperscript{32} Stated
differently, when a rule of law, announced by a court, rather than in
legislation, is consistently followed by courts of Louisiana, the rule
will be given great weight by subsequent courts and may even
achieve a level of deference similar to that accorded to legislation.

Judicial decisions, inherently not the "solemn expression of
legislative will,"\textsuperscript{33} as they are not made by the legislature, must be
somehow transformed into "custom" in order to attain the status of
a primary source of law.\textsuperscript{34} This must be done in order to conform
to the legislative and doctrinal rule of all civilian jurisdictions that
legislation and custom are the only binding sources of law. The
Louisiana Civil Code gives a definition of custom that suggests how
judicial decisions attain this primary status: "[c]ustom results from
practice repeated for a long time and generally accepted as having
acquired the force of
law."\textsuperscript{35} In other words, the practice,
represented by the holding in a judicial decision, must be
recognized by other courts over a long period of time and must be
accompanied by a feeling that the holding is the "law," and
therefore binding.\textsuperscript{36} Speaking on the possibility of judges following
judicial precedent, a noted legal Louisiana legal scholar, Judge
Alvin Rubin, stated:

He [the judge] is not bound to do so, however, because the
doctrine of \textit{stare decisis} does not apply. Instead, each judge,
trial and appellate, may consult the civil code and draw

\begin{itemize}
\item \textsuperscript{30} La. Civ. Code art. 3 (2002).
\item \textsuperscript{31} La. Civ. Code art. 1, cmt. (b) (2002).
\item \textsuperscript{32} \textit{Doerr}, 774 So. 2d at 128 (quoting from James L. Dennis, \textit{Interpretation
\item \textsuperscript{33} La. Civ. Code art. 2 (2002).
\item \textsuperscript{34} Robert A. Pascal & W. Thomas Tete, \textit{The Work of the Louisiana Appellate
Courts for the 1969–1970 Term: Law in General: The Obligatory Force of
\item \textsuperscript{35} La. Civ. code art. 3 (2002).
\item \textsuperscript{36} \textit{Id.} at cmt. (b).
\end{itemize}
anew from its principles . . . The judge is guided much more by doctrine, as expounded in legal treatises by legal scholars, than by the decisions of colleagues . . . the rule is one of deference to a series of decisions, jurisprudence constante.\textsuperscript{37}

Jurisprudence constante provides the judge with the opportunity, regardless of the decisions of any other court, including courts with appellate jurisdiction, to decide a case based upon what he believes to be the most reasoned legal interpretation. The judge is under no obligation to defer to courts with supervisory jurisdiction. In his 1993 Tucker Lecture at the Louisiana State University Law Center, Judge James Dennis eloquently and succinctly explained that the basis for the deference given to prior judicial decisions in the civil law should be based not on simple recognition of similarity in fact patterns or legal questions.\textsuperscript{38} Rather, judges in the civil law should only defer to the holding in a prior decision if, after careful examination, they find that the legal reasoning of the judge in the prior case is sound and applicable to the case at hand.\textsuperscript{39} Therefore, jurisprudence constante posits its precedential weight in the veneration of prior legal reasoning by a judicial colleague and not by blind deference to prior holdings.

2. Stare Decisis

"It is a maxim among . . . lawyers," says Gulliver, "that whatever hath been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind."\textsuperscript{40}

\textit{Louisiana Electorate} suggests that the Louisiana Supreme Court is, at least in some sense, adopting or acquiescing to the common law doctrine of stare decisis.\textsuperscript{41} The phrase "stare decisis et non quieta movere" translates most accurately as "to stand by precedents and not

\begin{itemize}
\item 39. \textit{Id.}
\item 40. Bodenheimer, Oakley, \& Love, \textit{supra} note 3, at 89 (quoting from Jonathan Swift’s \textit{Gulliver’s Travels}).
\item 41. La. Electorate of Gays and Lesbians, Inc. v. State, 812 So. 2d 626 (La. 2002).
\end{itemize}
to disturb settled points." In effect, this doctrine mandates that courts abide by and decide cases in accordance with previous decisions of any supervisory court, but not those of inferior courts. As a justification for the use of stare decisis, Edgar Bodenheimer, late professor at the University of California, Davis and noted scholar on Anglo-American law, laid out five positive attributes of stare decisis that illuminate its nature. First, stare decisis provides private parties with certainty and calculability in their business interactions. If parties can predict the legal rules which will govern their business transactions, the risk inherent in any transaction will be necessarily decreased. Second, adherence to precedent enables attorneys to effectively and efficiently provide reliable advice to their clients. Attorneys would be required to expend vast amounts of time rearguing every legal point in the case if not for the controlling authority that can be found in prior cases. Third, stare decisis also ensures that judges will not act arbitrarily in their decision-making because it limits their ability to decide cases in discord with established precedent. Judges will not have the liberty of imposing their personal biases on the parties in a suit if they are bound by the holdings of prior cases.

The fourth benefit of this theory is that judicial business can be conducted much more efficiently since the answers to certain legal questions are, in theory, settled. As with attorneys, judges who were required to make judgements on every point of law each time they were at issue at any trial, would have enormous time pressures considering current court dockets. Finally, Bodenheimer asserts that all humans possess a similar sense of justice in which they believe that similarly situated individuals should be treated in a like manner. If two individuals subject to the same legal rule are treated unequally by different courts then one, if not both, of the judges in these cases will necessarily be viewed as acting unfairly by society.

Despite the adherence to precedent mandated by stare decisis, common law judges are adept at distinguishing the case at hand from

42. Id. at 88.
43. Id.
44. Bodenheimer, Oakley, & Love, supra note 3, at 89–90.
45. Id. at 89 (quoting Bodenheimer, Jurisprudence: The Philosophy and Method of the Law (Rev. ed. 1974)).
46. Id.
47. Id. at 90.
48. Id. Justice Cardozo expressed this idea when he stated, "[t]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." Benjamin N. Cardozo, The Nature of the Judicial Process 149 (1921).
49. Bodenheimer, Oakley, & Love, supra note 3, at 90.
a previous decision whose precedent he does not desire to follow. The art of distinguishment lies in the ability of a judge to outline the borders of the holding in a previous case. The more restrictive the interpretation of the previous holding, the more leeway a judge will have in deciding a case in a different manner. If the holding of a previous case is precise and limited, then the judge will have little trouble in formulating facts or considerations which justify a distinction between the case at hand and the previous decision. One renowned scholar on stare decisis has remarked that judges and lawyers have "carried the technique of distinguishing to a very high pitch of ingenuity."50

The true nature of American stare decisis is less obscure when viewed in the context of its dissimilarity with traditional English stare decisis. Prior to 1966, the English courts recognized a more rigid theory of stare decisis than the American courts did.51 Specifically, the British House of Lords, in London Street Tramways Co. v. London City Council,52 established the rule that only an "Act of Parliament" could modify a ruling on a question of law which had already been decided by the House of Lords in a previous case.53 This rigid adherence to precedent is in stark contrast to the more flexible version found in the United States. But in 1966, Lord Chancellor Gardiner of the House of Lords stated:

Their Lordships . . . recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.54

At least to some degree most common law courts now recognize that blind adherence to precedent is undesirable.55

According to the United States Supreme Court, the American version of stare decisis is not "an inexorable command."56 The court expounded in detail on the appropriateness of overruling past decisions when it decided not to overrule Roe v. Wade57 in its

---

52. Id.
53. Id.
55. See Bodenheimer, Oakley, & Love, supra note 3, at 91.
decision in Planned Parenthood v. Casey.\textsuperscript{58} As noted by Bodenheimer, "[i]n the United States... the duty to follow precedent is held to be qualified by the right to overrule prior decisions."\textsuperscript{59} American courts have recognized the right to overrule previous decisions particularly when they find those decisions to be "clearly erroneous." In his book, The Common Law Tradition, Karl Llewellyn reexamined the Latin phraseology, "[t]he only things we are told not to move are such as have truly 'come to rest—of which, in the law of a changing world, there are not too many."\textsuperscript{60}

One explanation for the distinction between the American and English theories of stare decisis may be the presence of a written constitution in the United States. As noted by several United States Supreme Court justices, the difficulty involved in changing the actual written law does not lend itself to rigid stare decisis.\textsuperscript{61} The nature of a constitution though, is permanence, without which a constitution would have no power and would be worthless as a basic law. The inherent power of a constitution is greatly diminished if the society it governs feels that it is alterable and flexible.\textsuperscript{62} The power of an easily amendable or voidable document is nothing more than illusory. If the court of ultimate authority over the interpretation of a permanent document is bound by its precedent, any erroneous or ill-advised interpretations could be inexorably embedded into the law. So not only could the litigants in a single case be affected by an erroneous or ill-advised prior holding, but the negative effect will be compounded by the continual application of the rule in all future cases.

In spite of the wealth of reasons to adhere to precedent as mandated by stare decisis, even the United States Supreme Court has articulated clear reasons why certain decisions should not be followed. The case of Moragne v. States Marine\textsuperscript{63} provides a glimpse of civilian-like reasoning in the overruling of a prior decision by a
common law court. There, the court justified, to some degree, its decision to overrule previous cases by stating, "a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy." This appeal to "reason" is quite similar to the civil law justification for diverging from precedent based upon a belief in the flawed nature of the legal reasoning in prior decisions.

III. ANALYSIS

A. Drawing Distinctions Between Jurisprudence Constante and Stare Decisis

After examining jurisprudence constante and both the English and American forms of stare decisis, with particular emphasis on the latter, the difference between the two common law and the civil law theories may still be obscure. If both notions of precedent allow for overruling of past decisions, little distinction seems to remain. Looking to the words of Planiol will give a clue to the true distinction. It is not the power of a court to overrule its own decisions that separates the two traditions. Rather, it is the power of a court to ignore the established precedent of supervisory courts. It is this notion of absolute and qualified deference to appellate court decisions that truly distinguishes jurisprudence constante and stare decisis. By this statement, the author takes issue with the simplified distinction that the court in Doerr, referring to Professor Yiannopoulos's treatise on the civil law, made between the two theories, referring to the number of cases decided in accord as the "chief distinction" between the two theories of precedent.

As plainly stated by Planiol, as well as others, the civilian concept of jurisprudence constante provides a judge with the opportunity to depart from the "rules of law" pronounced by appellate courts under certain circumstances. If a judge finds that the reasoning of the prior decision is flawed he may deviate from that precedent. Conversely, even under the American version of stare decisis, inferior courts are legally bound to decide cases in accord with the established precedent of a supervisory court. As stated by the U.S. Supreme Court, "[n]eedless to say, only this Court may overrule one of its
Additionally, federal appellate courts are in full accord that their decisions are binding precedent on trial courts within their respective circuits. Therefore, the practical distinction between the two valuation systems lies in the treatment of appellate decisions. The virtue of the civilian tradition lies in its granting discretion to the judge to determine for himself whether precedent should be followed or abandoned based on the legitimacy of the logical reasoning in the precedent. Conversely, the value of the common law tradition lies in its consistency of legal expression within certain jurisdictions. As noted by Oliver Wendell Holmes, "[the] prophecies of what courts will do in fact, and nothing pretentious, are what I mean by law." It is difficult to say which is the more virtuous of the two theories, but in the interest of practicality, this author suggests that stare decisis may be superior. Although dedication and deference to logic are worthy goals for the judiciary, they may not be appropriate guidelines for all judges. By utilizing a theory of stare decisis, the appellate courts and courts of last resort will retain their power to overrule illogical or undesirable decisions of lower courts or of themselves. Trial courts will no longer have this power; but by employing the appropriate channels of appeal, a party that feels he is being subjected to an irrational holding will have the opportunity to argue that point to the very court that established the holding. In addition, by mandating that lower courts abide by the holdings of higher courts, all of Bodenheimer's positive attributes will be infused into Louisiana's precedential theory. To the public at large, perhaps the most important of Bodenheimer's attributes is the duty of fairness exemplified by the equal treatment of similarly situated individuals.

B. Mixed Jurisdictions and the Private Law/Public Law Distinction

With its unique mix of civil and common law traditions, Louisiana vehemently resists exclusive categorization into either the civilian or common law system. The concept of a "mixed

70. See supra notes 44-49 and accompanying text.
jurisdiction” is somewhat difficult to pin down. As noted by one comparative scholar, a “mixed jurisdiction” can be defined as “a legal system which, to an extensive degree, exhibits characteristics of both the civilian and English common law traditions.” This connection with the English common law may be unwarranted in Louisiana. Another description of “mixed jurisdictions” more applicable to Louisiana is that of F.P. Walton: “legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law.”

In mixed jurisdictions like Louisiana, the law is susceptible of a general division into two separate and distinct areas—those that are derived from the civil law and those that are derived from the common law. One of the clearest lines marking the separation of the two traditions in substantive law is the division between private law and public law. Marcel Planiol stated:

Public law regulates the acts of person who act in the general interest, in virtue of a direct or mediate delegation emanating from the sovereign. Private law regulates the acts which individuals do in their own names for their individual interests.

The legal subjects that private law encompasses are contracts, property, family law, and successions. In a highly controversial 1937 article on the state of the Louisiana legal system, Gordon Ireland provided a useful distinction between those areas practiced according to the common law technique and those areas practiced according to the civil law technique. Those areas listed under “the civil law technique” include many of the areas listed above: mandate, family law, prescription, security devices, obligations, and property. This private law of Louisiana is derived mainly from the French and Spanish civilian traditions, with the law of property containing of an

71. For a comprehensive assessment of “mixed jurisdictions” throughout the world, see William Tetley, Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified), 60 La. L. Rev. 677 (2000).
76. Id.
77. A.N. Yiannopoulos, Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913, 53 La. L. Rev. 5, 14 (1992); see also Dart, The Influence of
abundance of Greek, French, and German influences. In some cases, the articles of the Louisiana Civil Code are near verbatim copies of the source articles of other continental codes.

The subjects referred to as public law usually include criminal law, civil and criminal procedure, and evidence. Domat, another noted French jurist, asserted that public laws include "... laws which affect the government, the authority of its powers, the obedience due them, the forces necessary to maintain public tranquility, the control of finances, the judicial machinery, the punishment of crimes, the functions of the various semi-official bodies ..., [and] the general police." Thus, public laws are those laws that, when enforced, insure public order, or civilized conduct, within the context of a governmental state.

As a result of this distinction, it would be inappropriate to apply the doctrine of jurisprudence constante to public law as these areas are not governed by the Civil Code, and in some cases are specifically governed by federal law. The federal court system is governed by the common law and its concept of precedent, stare decisis, is naturally more appropriate than is jurisprudence constante — a purely civil law concept. It is essential to the functioning of a civilized society that laws which govern public order be uniform, at least in the sense that similarly situated individuals are treated in a similar manner with respect to their interaction with the sovereign. Two Louisiana district courts, following the rule of jurisprudence constante, could grant two citizens of the state, both subject to the same constitution, different protection from governmental intrusion because each judge would be free to interpret the Louisiana Constitution however he saw fit.

Alternatively, in matters of private law, jurisprudence constante is a more appropriate method for evaluating prior cases. Although the Civil Code may be limited in its application, by the fact that it is only a subpart of the whole of Louisiana law and not all-encompassing like the state constitution, it certainly applies to those areas of the law contained within its own pages. Therefore Articles 1–4 of the Louisiana Civil Code, which are general statements of traditional

the Ancient Laws of Spain on the Jurisprudence of Louisiana, 6 Tul. L. Rev. 83 (1931). Ireland's article also discusses the nature of the use of the Spanish law, specifically La Siete Partides, by Louisiana subsequent to Governor O'Reilly's assumption of authority in 1769, see Bodenheimer, supra note 40.


81. U.S. Const. art. VI, § 2, otherwise known as the Supremacy Clause, provides that when state and federal laws conflict, the federal law prevails.
civilian source hierarchy, should necessarily control. In addition, the nature of private law, the regulation of interactions between individuals, lends itself to a more fluid and individualistic interpretation of law.

To consider the appropriateness of flexible precedential valuation, one could consider the regulation and interpretation of private contracts. Factors surrounding the formation of a contract, such as consent and capacity, may necessitate conflicting holdings based upon equity. On the issue of consent, two identically situated individuals may react in different ways to the same external influence thereby affecting their consent to the contract in varying degrees. Some judgments as to capacity are based not on objective determinations such as age, but on the subjective determination of the judge as to whether the contracting party had the mental capacity to contract. This aspect of a person's capacity may be affected by drunkenness or imbecility which are by their nature case specific standards into which the judge must inquire.

Undoubtedly people adjust their conduct in reliance on the law. But it is more fundamental to ensure consistent public order, such as in cases of criminal punishment, than to decide the interpretation of a contract in exactly the same manner each time the contract comes before a court. The criminal system not only subjects one to financial and proprietary sanctions, but also to forfeiture of personal liberty in the form of imprisonment, and in the case of capital punishment, the forfeiture of life itself. Contractual interpretation by a court might result in the loss of one's property or wealth, but is not likely to affect the very basic societal existence of the contractors, (i.e. whether or not they are imprisoned) nor will it result in the death of either party at the hands of the sovereign. The nature of contracts themselves suggest that it is more important to evaluate the will of the parties involved than the exact wording of the document attesting to the contractual relationship. If the will of the parties is the most important consideration, then absolute predictability as to the interpretation of contractual clauses is not necessary to effectuate a just solution to a private dispute.

This example of contract interpretation illustrates why it is appropriate to apply jurisprudence constante, a theory that provides relatively more flexibility to judges, to the private law. Generally speaking, the feeling of unfair or unequal treatment will be more pronounced in cases involving citizens' interaction with the sovereign.

82. La. Civ. Code art. 2045 (2002): "Interpretation of a contract is the determination of the common intent of the parties." It is conceded that Civil Code Article 2046 states that "no further interpretation" is necessary if the contract is unambiguous, but Civil Code Articles 2046–2057 all address situations in which contracts are unclear.
Therefore, stare decisis, a theory that mandates relatively strict adherence to precedent, is a more appropriate method of evaluating precedent in public law matters.

C. The Reality of Practicing Law and Deciding Cases in Louisiana

Despite the situation described in the introduction, most attorneys practicing in Louisiana today feel confident knowing they have advised their clients with a fair degree of certainty with regard to the law governing their particular problem. This assurance results from the reality of the legal practice in Louisiana. It is not unlike that of its common law brethren states. Attorneys rely, almost exclusively, on the interpretations of the law, including the civil code articles, found in reported opinions. Mindful of the traditional civilian understanding of precedent, Planiol even went so far as to state in his civil law treatise, "[i]t is quite true that the courts are not bound to follow decisions previously made by them: but in fact they usually do so." 83 With respect to Louisiana in particular, "[i]t is simply no longer the case in Louisiana's private-law system that a court may rely on the appropriate code articles without conducting an exhaustive study of the accompanying case law." 84

One would be hard pressed to find an attorney, much less a legal malpractice insurer, in Louisiana that would argue a case based solely on the text of the written law. The logic supporting this type of behavior is simple. Judges express their opinions about the correct interpretation of a given law or legal question. Absent some change in the membership of a given court, 85 an attorney would be more than justified in presuming that the court will rule similarly in subsequent cases. In addition, although the civil law recognizes the right of lower courts to deviate from the precedent of superior courts in certain circumstances, this rarely occurs. Once again, this behavior is completely understandable. As no judge desires to be overruled, he will normally conform his decisions to the interpretations of law propounded by his superiors in the appellate courts. For these, as well as other reasons, the courts of Louisiana are predisposed to decide cases based on the holdings of previous cases. 86

85. See discussion of Doerr in Section II (A).
86. As noted by Justice Victory in a recent dissent to an overruling of a previous holding of the La. Supreme Court, "[J]udicial flip-flops do nothing for the
In addition to the practical considerations of judges, educational methods have some influence on the writing and reasoning of Louisiana judges. As Professor Ireland pointed out, the law classes in Louisiana are taught by the case law or common law method. Therefore, the common law method of reasoning from precedent tends to dominate the thinking of practicing attorneys as well as judges in Louisiana. Unlike their European civilian counterparts, who never work as attorneys, Louisiana judges are chosen from among the general population of attorneys. This fact tends to encourage Louisiana judges to consider issues of practicality based upon their prior legal experience as practicing attorneys. Judges will therefore be more receptive to arguments based upon the practical considerations of attorneys who must, in the interest of efficiency and certainty, rely on previous decisions of the courts. Additionally, as one of fifty states, forty-nine of which are common-law states, Louisiana attorneys are often exposed in their dealings with lawyers and legal issues outside Louisiana to heavy doses of the common-law methodology, including profuse reliance on case law. Louisiana attorneys have also come to utilize the same tools of legal research as the rest of the United States, which provide comprehensive compilations of case law by all of the state’s courts.

IV. CONCLUSION

The cases of Doerr and Louisiana Electorate illustrate the difficulty in maintaining the civil law concept of jurisprudence constante in a mixed jurisdiction like Louisiana. Some cases decided by Louisiana courts will, by way of the Supremacy Clause of the United States Constitution, have to be decided in accordance with the doctrine of stare decisis. That is the law of the federal courts. However, modern American stare decisis is of such a nature as to provide for similar if not the same outcomes. Doerr was decided based upon a traditional understanding of the theory of jurisprudence constante as some sort of prerequisite for overturning Ducote. If, as the Louisiana Supreme Court held, Ducote truly were a departure from the settled jurisprudence of this state, the court could

88. Few, if any, classes taught at Louisiana law schools today are taught without the heavy use of judicial opinions as explanations and clarifications of the law as pronounced in the Civil Code or in statutes.
89. Supra note 87.
doubtlessly have arrived at a similar conclusion using the commonly understood American form of stare decisis.

After examining both jurisprudence constante and stare decisis, as it is practiced in the United States, the practical similarity in the application of the two theories becomes apparent. Both theories provide for at least some level of deference to prior judicial decisions, especially those of courts with supervisory jurisdiction. In addition, both provide a mechanism by which a subsequent court may decide a case at hand in a manner inconsistent with that of a previous court. The civil law court will more readily overrule and thereafter justify its action based upon a reassessment of the legal reasoning of the previous court. The common law court, on the other hand, will likely use the tool of distinction so as to theoretically comply with the precedent while avoiding the perceived injustice.

At the heart of the problem presented by the conflicting opinions of Doerr and Louisiana Electorate is a confusion of doctrines by the Supreme Court of Louisiana, exemplified by careless language in its opinions. It is unlikely that the outcome in either case would be substantially different had the court chosen to rely solely on jurisprudence constante or stare decisis. What is significant, however, is that the court has not made it clear which doctrine it intends to support in future cases. First, if the court wishes to bind the lower courts only in cases similar to Louisiana Electorate, at its core a public law issue, it needs to make that clear. This determination seems unwarranted considering that the court in that case wanted to bind the trial court not to its interpretation of a criminal law, but to a constitutional issue, which by nature is not as receptive to strict precedential adherence.

Second, if the Supreme Court is earnest in its desire to retain Louisiana's civilian traditions, including the theory of jurisprudence constante, then it should be more careful when it informs trial courts of their obligation to follow the decisions it renders. The Court should qualify that statement with the caveat that a Louisiana judge should not feel obliged to follow the decisions of any Louisiana court if the judge truly believes that the legal reasoning in the prior decision is flawed.

However, the best choice would be for the Louisiana courts to decline to adopt either of these alternatives, but rather adhere to a system of precedential valuation more akin to stare decisis. The

---

90. Albert Tate, Jr., Civilian Methodology in Louisiana, 44 Tul. L. Rev. 673 (1970). Judge Tate recognized that observers of both Louisiana courts and American common-law courts will likely see little difference in the way cases are argued and decided.

91. See supra notes 20 and 40.

92. See supra note 51 and accompanying text.

93. Supra note 24.
similarities between the American form of stare decisis and the practical application of jurisprudence constante in Louisiana courts indicate no need for theoretical distinction.94 The Louisiana Supreme Court should refrain from suggestions, despite their basis in civilian tradition, that each district court in Louisiana has the right to announce a different rule of law for its own district despite the holdings of the appellate courts or even the state supreme court. This is not conducive to consistent application of the law throughout Louisiana, and it should be avoided. Despite Gulliver's warning,95 courts following the rule of stare decisis do not necessarily perpetuate bad law, they merely rely on the appellate courts to correct their past mistakes without clear usurpation of authority.

In the alternative, the Louisiana Supreme Court might, based upon its apparent willingness to accept either the civil law or common law theory of precedent, establish a dual system of precedent in Louisiana. This system would provide that in cases in which the legal issues are confined to the subjects of the civil code, or even in cases of constitutional interpretation, the traditional civilian theory of jurisprudence constante would apply. However, in the cases in which public laws are at issue, such as criminal law or procedure, the court could be more strict in its requirement that lower courts accept its rulings as "law." The relative and personal nature of private law lends itself toward the civilian concept of jurisprudence constante with its slightly less rigid attitude toward precedent. Public laws, on the other hand, in order to provide for the orderly governance of society in relation to the sovereign, are logically more susceptible of valuation in accordance with the American understanding of stare decisis. Finally, Louisiana should give deference to the traditions from which the state derives its law and their necessarily more extensive understanding of the proper interpretation of the legal subjects derived therefrom. In other words, Louisiana courts should apply civilian precedent theory to those areas primarily based on the civil law and common law precedent theory to those areas based on the American common law.

Jason Edwin Dunahoe*

94. See, e.g., State v. Jackson, 764 So. 2d 64 (La. 2000). This case is a notable example of how the Louisiana Supreme Court is acting like other American courts. In this case, the court "expressly overruled" the prior decision of the court in State v. Church, 538 So. 2d 993 (1989). Nowhere in the overruling decision does the court justify its action of overturning the decision. The court, just as most American appellate courts do, assumes that it has the right to overrule its own prior decisions.

95. See infra note 40.

* J.D./B.C.L. Candidate, May, 2004, Paul M. Hebert Law Center, Louisiana State University.