In Search of Precedent in the Oil Patch: Louisiana's Market Value Cases

J. Michael Veron
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"If you are strong enough, there are no precedents."

F. Scott Fitzgerald**

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Lawyers have long been fascinated with how judicial decisions are made. Early studies dissected judges' written reasons for judgment and analyzed them for logical flaws. Later, the legal realists argued that a judge's stated reasons were not his actual reasons for deciding a case. Thus, their studies ventured beyond written opinions and probed the judge's mind in an attempt to identify his actual thought processes.

Despite their differences, adherents of both schools of thought have long acknowledged that precedent exerts some influence upon a judge deciding a case. The extent of that influence depends, of course, upon individual temperament and philosophy. Nonetheless, it is generally agreed that a judge's knowledge that earlier, like cases have been decided in a particular way makes him more inclined to reach a similar result in the case before him.

When that does not happen, i.e., when a trial judge "bucks the trend," the case usually is appealed and reversed. When an entire appellate panel disregards precedent, law review articles are written. When it happens in Louisiana, the event is especially noteworthy because of the state's historical struggle with the notion of precedent. Briefly, this struggle

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1. The legal realists later derisively labeled this approach as "mechanical jurisprudence." See generally, Pound, Mechanical Jurisprudence, 8 COLUM. L. REV. 605 (1908).


3. In 1937, a series of essays debated whether Louisiana could properly be characterized as a civil law or a common law jurisdiction. The common law advocates argued that, because Louisiana courts decided cases by reference to precedent, the state must be considered a common law jurisdiction. The civilians argued that the judicial method used by Louisiana courts was only a cosmetic common law influence and that the substantive roots of the system had always been, and always would be, civilian in nature. Compare Ireland, LOUISIANA'S LEGAL SYSTEM REAPPRAISED, 11 TUL. L. REV. 585 (1937) with Daggett, Dainow, Hebert
is largely the result of what might be called Louisiana's identity crisis. The state's substantive private law is largely derived from the civil law. However, its procedural law and its judicial system are functionally indistinguishable from the Anglo-American common law systems of the other states. As a result, Louisiana has been called a "mixed jurisdiction."\textsuperscript{4}

The state's civil law purists argue that theories of precedent are of common law origin and have no place in the civil law, which views judges as mandataries of the legislature whose function is limited to applying legislative commands.\textsuperscript{5} In short, civil law judges only apply law; unlike their common law brethren, they do not make it. According to civilian theory, a decision by a judge applying the law in a particular case is not itself authority to do the same in the future; other judges remain free to apply the legislative command in subsequent cases, based upon a reading of the statute, without reference to the first judge's decision. A group of judges' decisions applying statutes by analogy to disputes for which no statute specifically provides an answer may be regarded as an editorial "gloss" (called \textit{jurisprudence constante}) covering a lacuna in the statutory law, but no single decision is considered authoritative. It is the settled consensus, established only by the group, that is considered to be "custom" and is begrudgingly acknowledged to constitute a source of law.\textsuperscript{6}

The rejoinder, of course, is that the Cour de cassation sits in France, not Louisiana. Louisiana courts do not decide cases with the cryptic and syllogistic notes that constitute reasons for judgment in France. Instead,
Louisiana judicial opinions are stylistically indistinguishable from those of the other forty-nine states. Thus, it is argued, a Louisiana judge decides cases in a fashion that is virtually identical to his brethren in Texas, Nebraska, or California.

The two views are difficult to reconcile. Until recently, there seemed to be little need to do so, as the conflict appeared to be of only academic interest. However, two recent cases suggest that Louisiana's "split personality" may be of more practical significance than previously thought and occasion this re-examination of precedent in Louisiana.

In the last two years, the Louisiana Supreme Court has twice been called upon to decide what the words "market value" mean when used in the gas royalty clause of a mineral lease. That this same question had been decided forty years earlier in a series of four cases might lead the casual observer to assume that the result in the recent cases would be the same as that in the earlier cases. However, the court not only reached a contrary result, it did so with a novel approach.

This article will explore why the supreme court chose not to follow its precedents and what, if any, influence precedent played in the court's recent decisions. Briefly, the thesis here is that the court's rather ingenious (but perhaps not so ingenuous) approach to an identical issue it had confronted years earlier was the result of its attempt to escape precedent. That the court went to such lengths is, in an odd way, evidence that precedent does exert substantial force in Louisiana. At the same time, that the court did reach a different result indicates that the influence of precedent may well be more limited in Louisiana than elsewhere. The article concludes by suggesting a theory of precedent for Louisiana that reconciles its civil law substantive values with its institutional realities.

II

First, some definitions are in order. For the purposes of this article, precedent can be defined as the law's way of saying that the end does not justify the means. In other words, similar cases should be decided in a similar way, no matter whom the result favors. Of course, the scholarly definitions offer a bit more. According to Henry Campbell Black,
[a] judicial precedent is an adjudged case or decision of a court of justice, considered as furnishing an example or rule for the determination of an identical or similar case afterwards arising, between the same or other parties, in the same or another court, or [sic] a similar question of law.¹⁴

A more recent formulation of the doctrine of precedent as it is applied in this country offers the following:

The general American doctrine as applied to courts of last resort is that a court is not inexorably bound by its own precedents but will follow the rule of law which it has established in earlier cases, unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.¹⁵

When a case is decided in accordance with precedent, that the parties can point to an earlier dispute between other parties who received the same treatment certainly indicates that the resolution of their dispute was objective and impartial. Thus, the principal function of precedent is to preserve the impersonality of the law. If nothing else, precedent offers the loser at least some comfort in knowing that someone earlier suffered the same fate. By assuring that like cases produce like results, precedent serves an additional function: it eliminates the necessity of litigating every dispute. If lawyers can locate a similar case, both sides can predict the outcome of their own dispute if litigated. This, quite obviously, encourages the amicable settlement of differences without the costs and delays of litigation.

Given these functions, one can determine how well precedent works by measuring how often it produces like results in like cases and how reliably it predicts outcomes in subsequent like cases. Obviously, the trick is to determine whether one case is "like" another. This limitation aside, demonstrating that the results of subsequent "like" cases differ from precedent and could not be reliably predicted based upon precedent would suggest that precedent is not working well. If this were to happen frequently within a jurisdiction, it might well suggest that the courts of that jurisdiction did not adhere to a viable theory of precedent.

In both of the cases that prompted this article, Henry v. Ballard & Cordell Corp.¹⁶ and Shell Oil Co. v. Williams, Inc.,¹⁷ precedent failed. The remainder of this article undertakes the analysis suggested above to determine why.

¹⁴. H. BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW § 1, at 2 (1912).
¹⁶. 418 So. 2d 1334 (La. 1982).
¹⁷. 428 So. 2d 798 (La. 1983).
III

The "market value" question was first raised in 1934. In Wall v. United Gas Public Service Co.,18 landowners had granted a mineral lease in favor of several oil producers that required the lessees to pay to the lessors one-eighth of the value of any gas sold off the premises, calculated at its "market price." The lessees produced gas under the lease, ran it through a pipeline, and sold it elsewhere for a price greater than that prevailing in the field from which the gas was taken. In settling the royalty, the lessees paid one-eighth of the price prevailing within the field. The lessors sued for an accounting, demanding additional royalties calculated according to the difference between the actual sale price and the field-wide price.

The case reached the Louisiana Supreme Court, requiring the court to construe the term "market price" as used in the lease to determine how the royalties should be computed. In deciding the issue, the court reasoned as follows:

The term "market price" does not mean an arbitrary price fixed by the lessee. "Market price" means, according to Webster, "the price actually given in current market dealings." . . .

In Black's Law Dictionary, the term "market price" is thus defined:

"The actual price at which a given commodity is currently sold, or has recently been sold, in the open market, that is, not at forced sale, but in the usual and ordinary course of trade and competition, between sellers and buyers equally free to bargain, as established by records of late sales."

In Louisville & Nashville R.R. Company v. R. E. E. DeMontluzin Co., 166 La. 211, 116 So. 854, 855, it was said: "The market value means the fair value of the property between one who wants to purchase and one who wants to sell, under usual and ordinary circumstances."

The "market value" of a commodity is the "price at which the owner of the goods or the producer holds them for sale; the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade."

Ultimately, the court determined that the "market price" of the gas in the field from which it was taken was less than the price for which it

18. 178 La. 908, 152 So. 561 (1934).
19. 178 La. at 914-15, 152 So. at 563-64.
was later sold after being transported elsewhere. Accordingly, the court found that paying the lessors a royalty based on the market price in the field rather than the higher price for which it was sold elsewhere satisfied the royalty provision of the lease.

Nearly all who read the *Wall* opinion understand it to mean what it says, that is, that the "market value" of natural gas is the price someone would pay for it at the place and time it comes out of the ground. Any subsequent marketing efforts that affect the price are not to be considered. Thus, when transport of the gas by the producer through a pipeline increases the price, that increase is to be disregarded when computing the "market value" of the gas.

One year later, in *Sartor v. United Carbon Co.*, the supreme court again addressed the "market value" question. As in *Wall*, the plaintiffs charged that they had not been paid a royalty based upon the market price of the gas at the well. Because there were no sales at the well, the plaintiffs claimed to be entitled to the market price at points nearest to the well in the parish in which the well was located.

The court again refused to consider any evidence of the value of the gas if affected by any marketing effort. Finding that transportation charges "would necessarily augment the market price in the parish above the market price at the well or field," the court rejected the plaintiffs' claims.

The court's reasoning in *Wall* and *Sartor* was (and is) consistent with Louisiana's view of minerals as insusceptible of ownership until reduced to possession. A surface owner does not own the minerals beneath his land. As an adjunct of land ownership, he simply has the exclusive right to explore for subsurface minerals and reduce them to possession and ownership. It is this right that he conveys to a lessee in a mineral lease.

Obviously, something that is not susceptible of ownership can be neither bought nor sold. Since every definition of "market value" refers to the trading price of property, it logically follows that minerals can have no "market value" until they are captured, reduced to possession, and owned. In the case of natural gas, this does not happen until the gas reaches the surface, at which point the landowner (or his lessee) becomes vested with title to the gas. At that instant, the gas also attains a value. If that value is defined according to the market, it must necessarily mean the price at which the gas would sell from that location and at that time to a willing buyer. Any alteration of that price by subsequent

20. 183 La. 287, 163 So. 103 (1935).
21. 183 La. at 290, 163 So. at 104.
22. This theory was first articulated in Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1922). When the Louisiana Mineral Code was enacted in 1974, the theory was enrolled at LA. R.S. 31:6.
events does not reflect the original "market value" of the gas in its pure sense.

In 1937, the Louisiana Supreme Court was called upon once again to address the meaning of "market value." In *Sartor v. United Gas Public Service Co.*, the plaintiffs again claimed that they had not been paid a royalty computed according to the "market value" of gas produced under their lease with the defendant.

The court began its opinion in *Sartor* with a simple statement of the rule settled by its two previous decisions: "Where there is no stipulation to the contrary in a lease contract of this kind, 'market value' is understood to mean the current market price paid for gas at the well or in the field where it is produced." In support of their claims, the plaintiffs had introduced contracts of sale between oil producers and pipeline companies involving gas produced in the same field as well as an adjoining field. The plaintiffs argued that the prices received by the producers from these pipeline companies should be accepted as the "market value" of the gas in the field. Noting the costs incurred by the producers to establish and maintain gathering systems to deliver gas from the wellhead to pipelines extending into the field, the court rejected the argument. The construction and maintenance of these gathering systems was an additional expense that added significantly to the value of the gas. Thus, the price at which the producer then sold the gas had been affected by subsequent marketing efforts and was not the original "market value" of the gas. Again, the court's language is clear:

> Under their contract [the plaintiffs] are entitled to payment for their royalty interest in the gas based upon the "market value" at the place where it is reduced to possession and ownership, where title vests, which is at the well, not at some distant point in the "field" or elsewhere, to which it is transported for sale and delivery to the pipe lines. This was made clear in the case of *Wall v. United Gas Public Service Company*. ... 

Since the plaintiffs offered no other evidence to show that the market value of the gas at the wells or in the fields where it was produced was different than the price from which their royalty was computed, they were denied further recovery.

The fourth and final "market value" case in the original group decided by the Louisiana Supreme Court was *Tyson v. Surf Oil Co.* In *Tyson*, the court for the first time was confronted with a claim that the pro-

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23. 186 La. 555, 173 So. 103 (1937).
24. 186 La. at 559, 173 So. at 105.
25. 186 La. at 566-67, 173 So. at 107.
ductor's subsequent marketing efforts resulted in the sale of gas produced under a lease at a price lower than the value of the gas at the well when reduced to possession. The evidence indicated that the producer had sold the gas to associated companies. Hence, in Tyson, the roles were reversed: the landowner argued that "market value" should be fixed at the wellhead at the moment of production and free of subsequent marketing efforts, while the producer argued that the value of the gas should be computed at its subsequent sale price.

An extensive review of the evidence indicated that the gas had indeed been sold at a price substantially below the value of the gas at the wellhead when produced. Thus, the court held that the market price of the gas was higher than its pipeline price. In the court's words:

We hold therefore that, insofar as the sale price of the gas to the Shoreline Oil Company at one cent per thousand cubic feet was without the consent of the plaintiffs, the price is not binding on plaintiffs and they are entitled to recover a fair market value for the gas at the well where produced.27

The court then reconstructed the value of the gas at the well and awarded a royalty computed accordingly.

Read together, the Wall and Tyson decisions established that a "market value" or "market price" gas royalty obligation was unaffected by the price at which the gas was subsequently sold by the lessee. If the lessee sold the gas for more than its value at the wellhead by transporting it elsewhere, he pocketed the difference as profit (Wall). If he sold the gas for less than its value at the wellhead, his profit was reduced (Tyson). In either event, the royalty obligation remained constant.

During this time there was litigation on the issue in federal court as well, based upon diversity jurisdiction. The federal courts faithfully applied the rules laid down by the Louisiana Supreme Court without exception.28 Since this article explores the treatment of precedent by Louisiana courts, these decisions by federal courts applying what they perceived to be Louisiana law are not of great significance except to show that Wall and its progeny appeared to be clearly understood at the time. Additionally, that the "market value" rules settled by the Wall line of decisions were unquestioned for over forty years further indicates that they were clearly understood. If one accepts the earlier suggestion that one measure of how well precedent works is the extent to which it avoids relitigation of like disputes, the Wall quartet passed with flying colors for four decades.

27. 195 La. at 258, 196 So. at 339.
MARKET VALUE

IV

It is well known that, during the 1960's, this country's demand for natural gas began to exceed domestic supply in significant amounts. Thus, the United States began to import foreign oil and gas in increasing amounts. By the 1970's, foreign oil and gas accounted for more than one-third of the domestic consumption of petroleum. 29

When the Arabs imposed their oil embargo in the mid-1970's, the rapid constriction of the oil and gas supply naturally increased the market value of all available oil and gas. Under the "market value" formula of the Wall jurisprudence, this presented no unusual problems for the calculation of royalties. The "market value" of gas, although greater, was still susceptible of calculation at the wellhead.

However, in the interim between the Wall decisions and the Arab embargo, the federal government intervened to regulate the price of natural gas sold in interstate commerce. Its authority to do so was originally derived from enactment in 1938 of the Natural Gas Act. 30 Pursuant to that Act, the United States Supreme Court determined in 1954 that interstate gas sales contracts were subject to regulation. 31 As a result, Congress ultimately imposed an artificial restraint on the price of gas sold interstate by means of price controls. It was not until 1978 that Congress authorized the regulation of intrastate sales prices by enacting the Natural Gas Policy Act. 32

The regulatory process that developed for interstate gas sales is fairly typical of federal regulation. 33 A natural gas producer who wished to sell

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29. One news article reported that the United States' dependence on foreign oil was estimated to reach as high as 44% in 1976. U.S. Leaning Heavier Than Ever on Foreign Oil, 80 U.S. NEWS & WORLD REP., Apr. 5, 1976, at 36; see also Oil: The Import Bill Keeps Going Up and Up, Bus. Week, Aug. 23, 1976, at 24; Drilling More, Finding Less, 106 TIME, Aug. 11, 1975, at 54. For a contemporary discussion of the disparity between the controlled domestic prices and the fair market world prices, see OPEC's Price Doves Win a Big One, 106 TIME, Oct. 6, 1975, at 54.


33. Whenever Congress has determined that a particular business activity vitally affects the interests of the American people, it has invariably imposed its regulation of that activity. Typically, that response has been to impose a licensing scheme whereby entrepreneurs wishing to engage in the regulated activity must obtain governmental permission to do so. For certain especially critical endeavors, such as the furnishing of communications, electrical power, transportation, and the like, the government has also imposed tariffs or rates of permissible prices that can be charged the consumer by those engaged in the activity. In return, the furnisher of the critical public service or resource is assured that few, if any, competitors will be permitted and that the regulated price will provide a fair return on its investment. This response has not been without criticism. See, e.g., Breyer, Analyz-
the gas in the interstate market was required to obtain a certificate of
c convenience and necessity from the Federal Power Commission (now the
Federal Energy Regulatory Commission).\textsuperscript{34} Once the certificate issued, the
entire reserve of gas was dedicated to the interstate market, and the pro-
ducer was not allowed to withdraw the gas unless he obtained a certificate
of abandonment from the same federal agency.\textsuperscript{35} Once dedicated, the gas
could not be sold for a price above the ceiling rate fixed for the area
by the commission.\textsuperscript{36} This rate was established like utility rates, \textit{i.e.}, by
estimating costs and allowing an additional amount for "reasonable pro-
fit." If a producer were able to show extraordinary costs, he could peti-
tion for special relief from the applicable rate, which would allow him
to sell his gas for a higher price.\textsuperscript{37}

Before the Arab embargo, there was little difference between the
federally-regulated interstate price and the unregulated intrastate price.
After the embargo, however, the unregulated price rapidly escalated, and
the disparity between the two price structures became pronounced. Land-
owners who were owed "market value" royalties demanded that royalties
be computed according to the unregulated intrastate price. When producers
refused, litigation ensued.

Producers initially defended the suits by claiming that the jurisdic-
tion of federal regulation of the interstate gas market reached past the
sales contract to the lease and its royalty provisions. Thus, the producers
argued that royalty provisions were subject to federal regulation and were
modified automatically by federal regulation of the sales price of the gas.
However, this initial defense was rejected when the District of Columbia

\textit{Administrative Control of Oil and Gas Prices Might Be Said to Exemplify the Criticism.
As early as 1973, Congress took significant steps to decontrol the price of oil and gas when
the President to exempt any product from price controls upon specified findings, but sub-
ject to congressional veto. After unsuccessful attempts at phased decontrol by administrative
action, the Congress enacted in 1975 the Energy Policy and Conservation Act, \textit{id.}, which
settled the issue by legislative, rather than administrative, action. For a discussion, see Bruff
\& Gellhorn, \textit{Congressional Control of Administrative Regulation: A Study of Legislative
Vetoes}, 90 Harv. L. Rev. 1369, 1390-97 (1977); Pierce, \textit{Reconsidering The Roles of Regulation

\textsuperscript{34} 15 U.S.C. § 717f (1982); see Federal Power Comm’n v. Transcontinental Gas Pipe

\textsuperscript{35} 15 U.S.C. § 717f(b) (1982); \textit{e.g.}, California v. Southland Royalty Co., 436 U.S.
519 (1978).

\textsuperscript{36} 15 U.S.C. § 717d (1982); see Colorado Interstate Gas Co. v. Federal Power Comm’n,
324 U.S. 581 (1945).

\textsuperscript{37} 15 U.S.C. §§ 717c-717d (1982); see, \textit{e.g.}, Federal Energy Regulatory Comm’n v.
Circuit Court of Appeals ruled that the lease transaction between the landowner and producer did not constitute a "sale in interstate commerce of natural gas for resale" and, therefore, was not subject to the jurisdiction of the Natural Gas Act. Hence, the interpretation of royalty provisions in leases was regarded solely as a question of state law.

The producers next argued that since the only market for dedicated gas was the interstate market, the market value of interstate gas should be defined solely by reference to the price prevailing in the interstate market. Some courts were persuaded by this reasoning, but the majority of courts reasoned that landowners were not bound by producers' unilateral marketing decisions. Thus, the decision by a producer to dedicate a reserve of gas produced under a lease to the interstate market did not bind the landowner to accept a royalty computed according to the federally-regulated interstate price at which the gas sold. These decisions viewed the function of a "market value" royalty obligation as protecting the landowner against subsequent sale of the gas for less than its market value.

Although Louisiana can justifiably claim to be one of the nation's leaders in litigation as well as in oil and gas production, the "market value" question was slow to reach Louisiana courts. However, the first reported decision involving the issue, decided in 1978, demonstrated the ingenuity of Louisiana trial lawyers. In Harris v. Arkansas Louisiana Gas Co., attorneys for landowners holding "market value" leases sought injunctive relief prohibiting a producer from dedicating gas produced from their land to the interstate gas market on the ground that this would jeopardize their royalties. Like most states, Louisiana law conditions the granting of injunctive relief upon a showing that, without such relief, the petitioner will suffer irreparable damage. Louisiana's Second Circuit Court of Appeal refused relief for two reasons. First, the court noted that federal

41. 363 So. 2d 935 (La. App. 2d Cir. 1978).
preemption of natural gas sales in interstate commerce deprived it of any jurisdiction to enjoin a producer from dedicating gas to the interstate gas market. Second, the court reasoned that the plaintiffs had a remedy under state law to recover any royalties they were owed "if the term 'market value' in the lease should be determined to mean something more than the price received."  

*Henry v. Ballard & Cordell Corp.* was the first case to confront the "market value" question directly. As in other cases, the plaintiffs in *Henry* were landowners who complained that the calculation of their royalties based upon the interstate sales price of gas produced under their lands was a breach of the producer's obligation to pay royalties based upon the "market value" of the gas. The district court agreed that the subsequent sales price did not necessarily determine the "market value" of the gas. Instead, the court accepted evidence of intrastate sales made in the same field at the time the gas in question was sold as reflecting the true "market value" of the gas. Accordingly, the court rendered judgment in favor of the landowners and ordered the producer to provide an accounting so that damages could be calculated. 

On appeal, that judgment was reversed by the Louisiana Third Circuit Court of Appeal. Like many other cases, the case was decided by the way in which the court framed the issue. In order to escape the definitions of "market value" imposed by the *Wall* quartet, the court characterized the issue to be decided as whether the parties intended the royalty to be based upon the market value prevailing at the time a long-term gas sales contract was entered into between the lessee and the third party or the market value prevailing each day the gas was produced and delivered. Thus, the court reasoned that while *Wall* and its progeny established the measure of "market value," they did not determine when the measurement was to be taken. The court thus regarded the issue as *res nova*, leaving it free to decide the case without the constraints of precedent.

This approach doomed the landowners who, relying on the *Wall* jurisprudence, thought it unnecessary to introduce any evidence of the parties' intent regarding the "market value" royalty provisions. However, the producer went to great lengths to show that it intended something quite different than one might have supposed from reading *Wall*. In the absence of evidence to the contrary, the court accepted the producer's

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42. *Id.* at 940.
44. 401 So. 2d at 608-10.
evidence as reflecting the intent of the parties that "market value" be fixed at the price at which the producer contracted to sell the gas to a third party subsequent to the lease.  

The Louisiana Supreme Court accepted the case for further review. Ultimately, it accepted the issue as framed by the court of appeal, which predetermined its affirming that court’s judgment. In rejecting the landowners’ reliance on the Wall cases, the court reasoned that the royalty provisions were ambiguous in failing to state expressly that "market value" meant current market value. Having found an ambiguity, the court resorted to parol evidence regarding the intent of the parties in employing the term “market value” to define the royalty obligations of the lease. Again, only the producer had introduced evidence regarding intent; based upon this, the court found that “the parties to the mineral leases at issue intended that royalties based on the 'market value' of the gas be computed on the basis of the price received for the gas under the 1961 sales contract [between the producer and the third party].”

In so holding, the court reasoned that when a producer contemplated that the “market value” of gas produced from the leased premises would be fixed by a subsequent gas purchase agreement between it and a third party, the price fixed for the gas in the contract would be the “market value” of the gas, unless the contract was not made in good faith “or was unreasonable in any respect, whether as to price, contract term or otherwise.” Thus, by an evidentiary default, the court found that the landowners intended what no landowner in his right mind would intend—that a producer could unilaterally fix its royalty obligation in subsequent dealings with third parties.

At the same time, the Henry court recognized that parties to a mineral lease might intend something different even while using the same “market value” language. More specifically, the court candidly declared that “[h]ad plaintiffs shown that the purpose of the market value royalty clause was to provide them with protection as to price, regardless of what disposition is made of the gas by lessee and regardless of what price was received, then we would arrive at a different conclusion.” Previously, landowners had been insulated from subsequent marketing efforts as a matter of law; Henry now required that they prove that they intended that result.

This was a new approach to the issue. As the supreme court

45. Id.
48. Id. at 1340.
49. Id.
50. Id.
acknowledged, the majority of jurisdictions had interpreted "market value" to mean the value of the gas when produced, regardless of its actual sales price. Other jurisdictions, which the court admitted were a minority, had ruled that the term "market value" referred only to the gas in the market in which it had been dedicated by contract, which usually meant the federally-regulated interstate gas market. Under either approach, the term "market value" was regarded as unambiguous. What "market value" meant was regarded as a question of law, not fact. Essentially, these decisions interpreted "market value" based upon each court's perception of public policy.

In effect, Henry announced that there was no policy choice to be made. The sole inquiry of the court in determining "market value" was the intent of the parties. This, quite obviously, was a significant and radical departure in method and result from the Wall cases as well as the jurisprudence of other states.

The decision was noted by student writers in all three of Louisiana's major law reviews. All three students approved the court's result. In each case, the approval reflected the writer's agreement with the policy underlying the result. None of the writers questioned the court's characterization of the issue, and none seriously considered the precedents on the issue and the binding effect, if any, they should have had.

After the Henry case was decided in the third circuit, but before the supreme court affirmed that holding, the "market value" question was considered by the Louisiana Fourth Circuit Court of Appeal in Shell Oil Co. v. Williams, Inc. In that case, the producer sued for a declaratory judgment that payment of "market value" royalties based upon the interstate sales price of gas satisfied the royalty obligations of its lease with

51. Id. at 1339.
53. At least one of the student writers appeared to be unaware that there was precedent for the court to consider: "In the noted case, the Louisiana Supreme Court made its first definitive statement on the state of the law in Louisiana in regard to the determination of market value in an oil and gas royalty clause." Note, supra note 52, at 28 LOY. L. REV. at 1248 (emphasis added). Another student writer made a single reference to precedent in a footnote and casually distinguished it for the reasons given by the Henry majority. Note, supra note 52, at 57 TUL. L. REV. at 1052 n.16. The writer then analyzed the case as simply one of contractual interpretation of a term that was res nova—a rather uncritical acceptance of the majority's characterization of the issue. The third student writer's approach was much the same; his note contained not a single reference to precedent on the meaning of "market value." Note, supra note 52, at 43 LA. L. REV. 1257.
54. 411 So. 2d 634 (La. App. 4th Cir. 1982), rev'd, 428 So. 2d 798 (La. 1983).
the defendants. The defendants reconvened to cancel the lease because the producer had made royalty payments based upon its contract sales price rather than the higher prices prevailing at the time the gas was produced and sold.

The court explicitly rejected the reasoning of the third circuit in *Henry* that "market value" was intended to mean regulated interstate prices. Instead, the court held "that the market value of the gas is its value at the moment it leaves the well and before the producer places it into the interstate pipeline and under the umbrella of federal regulations." In so doing, it relied specifically upon the *Wall* holding as precedent. Accordingly, the fourth circuit reversed the trial court's judgment for the producer, entered judgment on the reconventional demand for the landlord, and remanded the case to the trial court for an accounting of royalty payments based upon market prices prevailing in both the interstate and intrastate markets at the time gas under the lease was produced and sold.

As with *Henry*, the Louisiana Supreme Court accepted the *Williams* case for review. Unlike *Henry*, all parties agreed that the royalty obligation was to be based upon the current market value of the gas. Further, there was no dispute that the "market value" of the gas would be determined by reference to comparable sales of other gas. The question was whether sales within the open, unregulated intrastate market could be considered "comparable" to sales of dedicated interstate gas. The court ruled that they were not comparable, and therefore the current "market value" of the gas produced under the lease and sold in the interstate market would be determined by contemporaneous interstate sales without reference to the price the gas would have obtained if sold at that time in the open intrastate market.

The court's only reference to *Wall* was in a footnote. It casually distinguished that decision on the ground that "*Wall* was not concerned with the market value of federally regulated gas and is not determinative of the issue presently before this court." Thus, the court reversed the judgment of the fourth circuit and reinstated the judgment of the district court in favor of the producer.

The supreme court's decisions in *Henry* and *Williams* were not unanimous and, in fact, provoked vigorous dissents. *Henry* was a 4-3 decision; in *Williams*, one of the *Henry* dissenters simply concurred.

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55. 411 So. 2d at 639 (footnote omitted).
56. Shell Oil Co. v. Williams, Inc., 421 So. 2d 904 (La. 1982).
57. Shell Oil Co. v. Williams, Inc., 428 So. 2d 798, 801 n.6 (La. 1983).
58. 418 So. 2d at 1334. Justices Dennis, Watson, and Lemmon dissented. Id. at 1341. The fourth member of the majority, Justice Calogero, assigned additional concurring reasons. Id.
without assigning reasons. In both cases, the dissenters all protested that the majority was fashioning a new definition of "market value" that conflicted with the definition settled by earlier jurisprudence. Justice Dennis' dissents in both cases were particularly sensitive to the majority's abandonment of precedent. He began his dissent in Henry with the observation that "[t]he majority's decision is not based upon existing rules of law and the evidence in this case." In his dissent in Williams he noted:

[The parties' use of a "market rate" basis for royalties presumably reflects an awareness of our decision in Wall v. United Gas Public Service Co., . . . decided nine months prior to execution of the lease, in which we defined "market price" and "market value" as current prices received for goods sold in a free exchange. The record provides no convincing evidence that the mineral lessors subsequently assented to a modification of the original agreement that the royalties would constitute a portion of the value received for gas in a free market. He concluded: "I am disturbed by the majority's departure from this long-standing principle of free enterprise in this case."]

VI

Justice Dennis is not alone. What makes the majority's abandonment of its earlier well-litigated position on "market value" gas royalties so disturbing is that it was done without even an acknowledgment that precedent was being overruled. Any abandonment of precedent should be accomplished more directly; judicial muttering that a precedent is distinguishable because "times have changed" does not suffice.

Confronting the issue, of course, is not enough. A forthright declaration that "Smith v. Jones is hereby overruled" is direct enough, but, without more, is no better than the most mechanical adherence to precedent. One rightly expects detailed reasons to accompany such a declaration, and one expects these reasons to make sense. More specifically, the decision to overrule any precedent should be marked by a conscious evaluation of the competing policies underlying the precedent and the new rule and a deliberate choice of that which is perceived to be wiser.

59. Justice Watson, who had dissented in the Henry decision, concurred in the Williams decision without assigning reasons. 428 So. 2d at 803.
60. See Henry, 418 So. 2d at 1342 (Dennis, J., dissenting); id. at 1344 (Watson, J., dissenting); Williams, 428 So. 2d at 803 (Lemmon, J., dissenting); id. at 803 (Dennis, J., dissenting).
61. 418 So. 2d at 1342.
62. 428 So. 2d at 804-05.
63. id. at 805.
The civil law elements of the Louisiana legal community can be expected to be especially sensitive about this. In their view, it is bad enough that judges decide cases by referring to other cases, rather than to sources of positive law, such as the Civil Code or the Louisiana Revised Statutes. If judges must invoke a common law theory of precedent, these critics presumably would at least require that the judge be faithful to it. To be sure, that fidelity does not necessarily command that precedent be followed in every case. However, even the act of overruling precedent can be an effective acknowledgement of its restraining force: Were it not for exceptional circumstances found by the court to exist, precedent would govern its decision. In short, the rare occasion in which precedent is overruled is the exception that proves the rule.

A court must submit to certain institutional restraints in order to be impersonal and, therefore, legitimate. A court that rejects the classic restraints imposed by the civil law tradition of state positivism necessarily must, in the alternative, embrace the restraints imposed by precedent under the rival common law judicial tradition. Louisiana's courts, like those of the other states of the Union, decide cases in the common law tradition. In so doing, they implicitly submit to the restraints of precedent.

The definitions and descriptions of precedent offered earlier admit to exceptional circumstances in which precedent does not furnish the rule of decision in a particular case. However, those exceptional circumstances must be approached and evaluated carefully. If it is determined that exceptional circumstances do exist that justify a departure from precedent, the court should at a minimum offer an institutional acknowledgement that precedent ordinarily would control "but for" these circumstances.

The introduction to this article declared that it would suggest a theory of precedent for Louisiana that reconciles its civil law substantive values with its institutional realities. That promise may be difficult to keep. However, assuming that Louisiana courts will continue to decide cases like their common law brethren, it is suggested that prior cases be viewed as a source of positive law, but only in a subsidiary sense. Simply put, legislation should be regarded as a preferred source of positive law, and judicial decisions interpreting statutes should not be invoked as rules of decision in subsequent cases. In such cases, there would be no judicial precedent to follow, only the statutory command.

However, in cases presenting issues to which no statute applies, prior opinions deciding similar disputes should, in the absence of legislation, be properly regarded as a positive source of law upon which courts can subsequently rely. A theory of judicial precedent has its place in such cases.  

64. This approach is not entirely original. See Tête, The Code, Custom, and the Courts: Notes Toward a Louisiana Theory of Precedent, 48 Tul. L. Rev. 1 (1973). When there
The issue of "market value" gas royalties is one to which no legislation is specifically directed. Thus, the Louisiana Supreme Court should properly have regarded its earlier cases on the issue to be a positive source of law furnishing the rule of decision in the *Henry* and *Williams* cases. Quite simply, the issue in the recent cases should have been whether to follow precedent or to change it. This, of course, requires at the outset an acknowledgement that precedent exists.

The puzzle, then, is this: If the court did not like its precedent, why did it not simply say so and announce a new rule? Surely, the court's redefinition of the issue to distinguish precedent was hardly persuasive, and it was especially ill-advised when one considers the institutional cost incurred.65

No explanation can be offered with any certainty. Perhaps the real answer is that the court, faced with a burdensome docket, had little time to ponder these considerations when deciding the case with dispatch and moving to the next one. At bottom, the two cases may show nothing more than that judges, like lawyers, don't always "do law well."66 If "doing law well" means formulating a viable theory of precedent, the recent "market value" cases are telling reminders that Louisiana's split personality is a condition that remains symptomatic.

is a statute governing the issue to be decided, Louisiana courts have demonstrated a willingness to overturn long-standing judicial interpretations of the statute upon the discovery of new evidence of legislative intent. See, e.g., Louisiana Bank & Trust Co. v. Boutte, 309 So. 2d 274 (La. 1975); Turner v. Bucher, 308 So. 2d 270 (La. 1975); Holland v. Buckley, 305 So. 2d 113 (La. 1974); Creech v. Capitol Mack, Inc., 287 So. 2d 497 (La. 1973). At least one author has argued that the frequency with which the Louisiana Supreme Court has overruled prior jurisprudence is an indication that Louisiana courts employ civil law methodology rather than a theory of precedent. Barham, supra note 3, at 373-74, 373 n.35.

65. Serious questions can be raised about the court's "market value" decisions from the standpoint of policy. However, it is beyond the scope of this essay to raise policy arguments rejected by the court in the *Henry* and *Williams* cases. Instead, the intent here is to analyze the court's evasion of precedent on the "market value" question, and the wisdom of the policy inherent in the court's decisions is considered only insofar as it relates to that.

66. Credit for this simple but vividly descriptive phrase must go to Professor Morton Horwitz of Harvard Law School, who once employed it in a classroom lecture in criticizing a decision of the Supreme Court.