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Gideon v. Wainwright: The Art of Overruling

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APPELLATE JUDICIAL OPINIONS

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[C]oncern over the Court's manner of overruling a past decision raises some basic questions concerning judicial craftsmanship in overruling opinions. What special functions, if any, should the Court seek to accomplish with an overruling opinion? What techniques of opinion writing have been used in the past to fulfill these functions? Did the majority opinion in *Gideon* (372 U.S. 335) fail to perform the proper function of an overruling opinion? Would it have done so by giving *Betts* (316 U.S. 455) a “more respectful burial”? These are, of course, questions concerning method, not result. Admittedly, as Dean Rostow recently pointed out in answering current criticisms of the Court's craftsmanship, “opinion writing is only one phase of the judicial craft . . . not the whole of it nor even its most important feature.” Yet, as even the Dean acknowledged, opinion writing remains a “vital phase” of the judicial process. It is, moreover, a phase which, if the frequency of separate opinions is any indication, causes great concern within the Court itself.

Although only occasional opinions by individual Justices have expressly recognized this special problem of the overruling case, an examination of the opinions for the Court in these cases suggests that it has not been overlooked. The Court over the years has employed certain “techniques” in overruling opinions that, as a general pattern, tend to preserve the impersonal qualities of the judicial process by emphasizing factors other than the vicissitudes of changing personnel.

1. *Changing conditions*.—Even those Justices most opposed to overruling constitutional decisions have acknowledged that the “law may grow to meet changing conditions” and that the doctrine of *stare*

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decisis should not require a "slavish adherence to authority where new conditions require new rules of conduct." It is not surprising therefore that overruling opinions in several cases have emphasized the changed circumstances brought about by the passage of time. Indeed, this technique was employed in one of the earliest overruling decisions, *The Genesee Chief* (12 How. 443) which rejected a unanimous holding of the Court decided only twenty-four years earlier in *The Thomas Jefferson*. (10 Wheat. 428) Chief Justice Taney's opinion for the Court in *The Genesee Chief* refused to follow the prior ruling that the national admiralty jurisdiction was limited, in accord with English common law, to waters that "ebbed and flowed." After stressing that the "great and growing commerce" on inland waters had made the extension of admiralty jurisdiction to non-tidewater areas a practical necessity, he noted that *The Thomas Jefferson* had been decided "when the great importance of the question as it now presents itself could not be foreseen." The earlier decision had been rendered in 1825, "when the commerce on the rivers of the west and on the lakes was in its infancy, and, of little importance, and but little regarded compared with that of the present day." Accordingly, while the Court was "sensible of the great weight" to which its prior decision was entitled, it nevertheless could rightfully overrule *The Thomas Jefferson*, since the reasoning there was clearly inapplicable to the contemporary situation.

Subsequent overruling opinions relying upon changed conditions have emphasized new developments in areas far less pragmatic than the commercial traffic involved in *The Genesee Chief*. In *Brown v. Board of Education*, (347 U.S. 483) for example, the Court cited the change in the status of public schools since *Plessy v. Ferguson*, as well as the present state of scientific knowledge about psychological developments of children. Indeed, the growth of knowledge concerning various aspects of economic and social development has been a fairly common point of emphasis in those opinions that have rejected prior precedent on the ground that "time and circumstances had drained [the overruled] case of vitality."

Reliance upon the "changed conditions" argument logically should permit an overruling opinion both to reject a precedent and at the same time acknowledge its correctness when originally decided. The Court has never gone quite this far, however, although at least one opinion intimated that the writer might have accepted the overruled case under the circumstances applying at the time of its decision. (370 U.S. 530, 543) More often, the Court simply has taken no position as to the validity of the rejected case. But even where the Court does suggest that the overruled decision was incorrect, an opinion emphasizing the changed circumstances naturally will contain the counter-suggestion that, in any event, the former Court might well have

decided differently if confronted with today's conditions. Thus, with the change-in-circumstances rationale, the Court may obtain the best of both worlds. Not only is the prior decision overruled, but the adverse emphasis upon differences in the Court's personnel that normally attends such action is eliminated, or at least diluted, by relying upon grounds consistent with that concept of impersonal decision-making ordinarily supported by *stare decisis*.

2. *The lessons of experience.*—Closely related to the change-in-circumstances rationale is the argument that a prior precedent may be rejected when it has failed to pass the "test of experience." The Court has frequently acknowledged that "the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." This willingness to make adjustments in the light of the "lesson of experience" has been cited as at least a partial ground for overruling precedent on several occasions. In most cases, the overruling opinion based the rejection of the earlier decision upon the administrative difficulties and uneven results revealed by its application. In other instances, however, experience in the application of a rule has been used to show the erroneous nature of the factual or policy assumption upon which it was based. In *Mapp v. Ohio*, (367 U.S. 643, 651-52) for example, the Court noted that the experience of various states had revealed the error in the supposition that remedies other than the exclusionary rule could effectively deter unreasonable searches and seizures.

In relying upon the "lesson of experience," the Court has once again tended to depreciate changes in its personnel as the cause of the change in the law by either the outright suggestion or, at least, the insinuation that the present result was one that its predecessors might well have reached if they had had the same information, derived from experience under the rule first promulgated. This role of the "experience" rationale may be accentuated by the reminder that "courts are not omniscient" and that "judicial opinions must yield to facts unforeseen." On occasion, it may be further implemented by the conclusion that the result of applying a particular doctrine has been exactly the opposite of that intended by the earlier Court and that the achievement of this original objective can in fact be accomplished only through reversal of the original decision itself. Of course, reliance upon difficulties experienced in the application of the overruled case will lose much of its effectiveness in deemphasizing shifts in the Court's composition when such difficulties were readily foreseeable at the time the problem was first decided. Yet, even here, there remains the remote possibility that problems that may not have seemed very serious when contemplated in the abstract might well have caused a reversal of position when faced as a matter of practical reality.

3. *The requirements of later precedent.*—In the majority of overrulings, the opinions have been based upon neither changing conditions nor the lessons of experience. They have relied simply upon the “error” of the earlier decision. Only a small number of these opinions, however, have relied solely upon the force of reasoning now considered superior to the rationale of the overruled case. The Court generally has attempted to buttress its position by showing that the rejection of the overruled case was required, or at least suggested, by other, later decisions basically inconsistent with its earlier ruling. Examples of the use of this technique in overruling opinions are extremely varied. While most of the “inconsistent precedent” has been found in cases dealing with the same problem as the overruled decision, the Court occasionally has relied upon rulings in related areas that, while not directly questioning the overruled case, could be treated as having “impaired its authority.” In *Mapp v. Ohio*, for example, the majority opinion pointed to the basic inconsistency between the Court’s refusal to exclude unconstitutionally seized evidence and the required exclusion of all coerced confessions, irrespective of their reliability. Similarly, in *Smith v. Allwright* (321 U.S. 649) the Court found that its decision in *United States v. Classic* (313 U.S. 299) holding that a party primary could be an integral part of the election machinery subject to congressional regulation under Article I, § 4 “call[ed] for a re-examination” of its holding in *Grovey v. Townsend* (295 U.S. 45) that the action of a political party convention in excluding Negroes from a primary election did not constitute state action.

Overruling opinions also have differed in their treatment of the inconsistency between the earlier ruling and the later precedent. In some cases the Court has acknowledged that the decisions could be reconciled, but found it necessary to overrule the earlier decision because the basis of distinction between the cases was not justifiable in terms of the function of the legal principle involved. More often, the Court has maintained, sometimes in the face of obvious distinctions, that it has no choice but to overrule the earlier decision, since that ruling is totally irreconcilable with subsequent cases. A variation of this approach has been employed in those opinions overruling a principle that had been sharply limited by a long series of cases creating numerous exceptions to its application. In such instances, the overruling opinions, after noting that the later decisions already had “stricken the foundation” from the original case, have asserted the result as merely “a logical culmination of a gradual process of erosion.” On occasion, the Court has even gone so far as to declare that its previous decision already had been overruled *sub silentio* by the “tide” of later cases.

No matter which of these variations is utilized, the mere presence of these previous decisions indicates that the Court's ruling is not the result of a sudden shift. On the contrary, particularly where the authority of the overruled case was gradually undermined by a series of decisions, the Court may properly emphasize that the downfall of the overruled case was not the product of a "little coterie of like minded justices" recently appointed to the bench, but of a long line of judges who, over the years, participated in the various undermining decisions. This quality of borrowing support from the past also provides what is probably the primary value of the "inconsistent precedent" rationale: a court can overrule a decision while purporting to follow the principles of *stare decisis*. In pointing to subsequent decisions basically at odds with the case to be overruled, the Court places itself in a position where it must choose between two lines of authority. It must either overrule a precedent or "disregard a contrary philosophy expressed in a later case." Moreover, where the inconsistent precedent consists of a group of later cases showing a continuous trend away from the original decision, the Court has suggested that it really has no choice but to follow the path of subsequent decisions and overrule the original case. As one opinion put it: "No interest which could be served by . . . rigid adherence to *stare decisis* is superior to the demands of a system based on a consistent application of the Constitution." In fact, carried to its limits, the argument based upon the force of subsequent decisions has permitted the Court to disclaim the responsibility for anything more than the formalistic burial of a case already dead.

4. *The place of the overruling art.*—Changing conditions, lessons of experience, and inconsistent later cases clearly have been the basic grounds of overruling decisions. There are very few such cases in which the Court has not employed one or the other. A description of the rationale of overruling opinions would not be complete, however, without mentioning certain other factors commonly emphasized by the Court. Overruling opinions, particularly those relying upon the inconsistency of later decisions, frequently have attempted to depreciate the precedent value of the overruled case even as of the time it was decided. Thus, the opinions often have noted, and sometimes stressed, that the overruled case was decided by a divided Court. Similarly, attention has been focused on the fact that the particular context in which an issue was originally presented had prevented the Court from giving to it the "deliberate consideration" normally afforded significant constitutional issues. Still another point emphasized in overruling opinions . . . has been the unavailability of a lesser ground that would permit the Court to reach the correct result without overruling its prior decision. Although these factors do not themselves furnish an independent ground for reversing prior de-

cisions, they may effectively supplement the primary arguments based upon changed conditions, experience, or the effect of later cases. The image of the overruling process presented in the Court's opinion still rests, however, essentially upon the use of these basic rationales.

In this regard it should be emphasized that while these arguments obviously improve that image by minimizing the importance of alterations in the Court's composition, they are not mere facades put forth as a matter of good public relations. Differences in viewpoints between present and past members of the Court obviously are important, but changed conditions, the lesson of experience, and the course of later decisions are relevant factors that do and should have considerable bearing upon the Court's determination to overrule a prior decision. As the Court has frequently recognized, the principles of *stare decisis* still have some applicability in the area of constitutional law. There remains, at the least, a presumption of validity that attaches to the conclusions expressed in prior opinions. Of course, this may be overcome by a finding that the opposite result is clearly the correct one, but the assumption that the later Court thus has obtained "a knowledge and wisdom . . . denied to its predecessors" naturally carries with it a certain uneasiness. Any doubts of this sort, however, may be substantially lessened if, in addition to the arguments supporting its position, the Court can depreciate the views of its predecessor by showing either that they concerned conditions far different from those of today, that they were made without the information gained through experience in their application, or even that they stand against the tide of the views expressed by other courts over the years. Thus, in relying upon these factors, the Court has merely followed the standard policy of attempting to present the strongest case for the result it has reached, which, in this instance, involves showing not only the reasonableness of its own views but also the inappropriateness of following the contrary views expressed by its predecessor.

The basic patterns of reasoning traditionally employed in overruling cases, therefore, are consistent in all respects with the proper objectives of the judicial opinion. Of course, this is not to suggest that these rationales are suited to every case. There have been overruling decisions, like *The Legal Tender Cases* (12 Wall. 457) and *Rabinowitz v. United States* (339 U.S. 56) so patently based on the changes in personnel that no explanation for the overruling other than the difference in the views of the Justices originally in the majority and their successors could reasonably be offered. (It might be noted in passing that neither of these sudden shifts in position did much to enhance the Court's reputation among the bar, and *The Legal Tender Cases* actually "shook popular respect for the Court.") But where

these justifications for disregarding precedent are applicable, they should be employed in the interests of both the logical persuasiveness of the Court's position and the maintenance of the profession's confidence—and through it the public's confidence—in the impersonal and principled qualities of the judicial process.
