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Walter V. Schaefer

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## FOREWORD: STARE DECISIS AND THE "LAW OF THE CIRCUIT"

Walter V. Schaefer\*

This issue of the DePaul Law Review discusses proposed solutions for a range of human problems so broad that a foreword in the ordinary sense of a description of scope and purpose is impossible. With the permission of the Editors, therefore, this "foreword" has been converted into comments prompted by only one of the many valuable articles the issue contains.

The subject of that article is the expanding independence of intermediate appellate courts.<sup>1</sup> Authors Mattis and Yalowitz discuss the developing disregard of stare decisis among the judges of the Illinois Appellate Court. While their Article focuses upon the problem as it affects the intermediate Illinois court, the same phenomenon exists in the federal courts of appeal where it has acquired respectability through the use of the euphemistic phrase, "the law of the circuit."

If the doctrine of stare decisis had not existed from the early days of the common law, it would have had to be invented. For if we assume only a single court and single judge, the principles underlying yesterday's judgment would inevitably shape the judgment rendered tomorrow. As Holmes put it, "Imitation of the past, until we have a clear reason for change no more needs justification than appetite. It is a form of the inevitable to be accepted until we have a clear vision of what different things we want."<sup>2</sup> And the need for adherence to stare decisis looms larger as the number of judges increases. A multi-judge system would be intolerable if each judge were free to determine for himself the principles upon which he decides the cases that come before him.

Trial courts, which are the backbone of any judicial system, have consistently been required to follow the decisions of the top court. They were not required to, and generally speaking, did not file written opinions, formal findings of fact, or conclusions of law. Until recently, reviewing courts operated upon the principle that a judgment which reached a result consistent with precedent would be affirmed even though it was based upon grounds which did not meet the approval of the reviewing court.

In recent years, however, there has been something of a reversal of roles in the federal system and in many states: trial judges are now required to make formal findings of fact and conclusions of law and file written judgments, while judges of intermediate appellate courts are increasingly authorized to dispose of cases without opinions.<sup>3</sup>

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\* Former Justice of the Illinois Supreme Court.

1. Mattis & Yalowitz, *Stare Decisis Among (Sic) The Appellate Court of Illinois*, 28 DEPAUL L. REV. 571 (1979).

2. O. HOLMES, COLLECTED LEGAL PAPERS 290 (1920).

3. This shift in function has been so pronounced that many federal courts of appeal have adopted rules which prohibit the citation of their own memorandum opinions. It is ironic that

It is hard to account for the increasing disregard of *stare decisis* among the judges of intermediate courts. Of course a judge feels responsible for the moral rightness and the legal soundness of each of his decisions. That responsibility is probably felt most deeply by our most conscientious judges. That same sense of responsibility, however, is felt just as strongly by trial judges, yet no one would suggest that a "law of the district" or "a law of the county" is thereby justified.

A possible, but certainly not satisfactory, explanation for this disregard may lie in the procedural rules of the two top courts, federal and state, which recognize the existence of a conflict among the intermediate courts as a ground for discretionary review. Those rules were designed to eliminate conflicts, not to stimulate them. Nevertheless, their existence may operate to blunt the sensitivity of an appellate judge to the damage that is done to the rights of litigants, as well as to the fabric of the law itself, by conflicting decisions. He may rationalize his refusal to follow the decision of a court of coordinate authority by mentally passing on to the top court the responsibility for resolving these conflicts.

The inability of the Supreme Court of the United States to deal adequately with all of the problems that are brought to it, and particularly its inability to deal adequately with conflicting decisions by the federal courts of appeal, has long been a matter of concern. There have been many proposed solutions, including the creation of a new court between the courts of appeal and the Supreme Court.<sup>4</sup> It is not unfair, I think, to observe that some of these proposals have tended to approach the problem from what the late Edmund Cahn would have called "the Institutional Perspective."<sup>5</sup> Their emphasis has centered on the impact of conflicting decisions upon the courts, rather than upon those whose lives are affected by the work of the court.

Two more recent approaches have looked at conflicting courts of appeals opinions from what Professor Cahn would have called "the Consumer

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judges who will not tolerate "prior restraints" upon verbal—or even physical—communication of ideas do not hesitate to suppress their own judgments. The requirement of a "compelling public interest" that is so rigorously insisted upon when restraints upon obscenity or Nazi marches are involved, somehow vanishes in the face of judicially imposed prohibitions of comment upon—or even reference to—their own determinations, which in fact are matters of public record.

4. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969). See also H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 154-68 (1973); Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. L. REV. 881 (1975); Nathanson, *Proposals for an Administrative Appellate Court*, 25 AD. L. REV. 85 (1972); Freund Committee Report: Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573 (1972); Hruska Commission Report: U.S. Commission of Revision of the Federal Court Appellate System, Structure and Internal Procedures (1975).

5. See, e.g., Cahn, *Consumers of Injustice*, 34 N.Y.U.L. REV. 1166 (1959); Cahn, *Fact-Skepticism: An Unexpected Chapter*, 38 N.Y.U.L. REV. 1025 (1963).

Perspective,"<sup>6</sup> and have advanced suggestions for reducing or eliminating the fragmentation of national law by conflicting decisions of our courts of appeal. In one approach,<sup>7</sup> Professor Allan D. Vestal analyzed the tendency of federal agencies to relitigate issues. He pointed out that the federal agencies, "apparently without exception," engage in the practice of relitigating issues that have been decided against them, and he emphasized the undesirable aspects of a policy that permits a federal agency to persist in relitigation, hoping ultimately to find a court of appeals that agrees with its position.<sup>8</sup> To discourage the practice, he urged the use of issue preclusion, or collateral estoppel, to use the more familiar term. "When a government has litigated a matter at the court of appeals level," he says, "it would seem logical to say that it has had the incentive and opportunity to litigate the matter fully and that preclusion should apply."<sup>9</sup> A modest expansion of issue preclusion could also be used to bar forum shopping by other volume litigants.

Governmental agencies are subject to additional controls that are not available against all volume litigants. Executive determinations could bar relitigation by many of them, and Congress could control the relitigation policy of others.

To emphasize the unitary nature of the federal court system, Professor Vestal quoted from Judge Haynesworth's opinion in *Atkins v. Schmutz Manufacturing Co.*:<sup>10</sup>

The fact that the federal system is, in truth, a unitary one should have some effect upon the operation of that system. The judges, functioning in this close-knit relationship, are in a position to operate so that the output of the system is a consistent whole. \* \* \* The approach of the participants in the judicial system should reasonably be expected to be one of cooperation and understanding rather than conflict and confusion.<sup>11</sup>

Professor Vestal concludes that "This is a cry for the federal courts again to take a giant step in the interests of all people in the United States."<sup>12</sup>

The second approach emphasizes that regulatory law is more in need of uniformity than other areas of the law.<sup>13</sup> Many individuals affected by tax

6. A similar concept is expressed by Judge Clifford Wallace in *Judicial Administration in a System of Independents: A Tribe with Only Chiefs*, 1978 B.Y.U.L. REV. 39: "Both ideals of judicial independence and effective judicial administration are not ends in themselves but merely means of achieving a more fundamental goal, which may be called, for want of a better term, the doing of justice." *Id.* at 55.

7. Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N. CAR. L. REV. 123 (1977) [hereinafter cited as Vestal].

8. *Id.* at 126-27.

9. *Id.* at 167-69.

10. 435 F.2d 527 (4th Cir. 1970).

11. Vestal, *supra* note 7, at 174.

12. *Id.* at 179.

13. Note, *Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Court of Appeals*, 87 YALE L. J. 1219 (1978).

and labor law, for example, must engage "in complicated day-to-day management and planning based on fixed legal rules. The federal government has created the very complexity with which these planners must deal, and yet the complexity is not uniform throughout the federal system. An institution is needed to maintain uniformity in federal common law."<sup>14</sup> It is argued that "the courts of appeals, notwithstanding that there are at present eleven such courts sitting in different areas of the country, are best suited to the task."<sup>15</sup>

This analysis seems to regard "intercircuit conflict," a more accurate term than the more legal sounding "law of the circuit," as a concomitant of the scheme of intermediate appellate courts adopted by Congress, and by way of remedy it suggests that Congress "legislate the changes necessary to formalize the courts of appeal as panels of a national court of appeals."<sup>16</sup>

With considerable diffidence, I would venture to doubt that Congressional legislation is necessary. When Congress created the first courts of appeal in 1891, and when it subsequently created additional courts of appeal, it did not intend to establish independent sovereign units—each authorized to apply within its territorial limits its own interpretation of the federal constitution and statutes. And even if Congress had intended to do so, it could not have achieved that result constitutionally.<sup>17</sup>

A court can violate equal protection and other constitutional rights by its opinions, just as a legislative body can violate constitutional rights by its statutes. When a court deliberately refuses to follow the earlier ruling of a court of coordinate authority, it creates an unconstitutional discrimination. What is involved in the "law of the circuit" is akin to what was involved in *Erie v. Tompkins*.<sup>18</sup> In that case a rule, promulgated by judges, was held unconstitutional because it subjected citizens to different rules of law depending solely upon the court in which the action was brought. The "law of the circuit" operates in the same way: it subjects the citizens to different rules of law depending solely upon the court in which the action is brought.

The boundaries of intermediate appellate courts, both federal and state, are the result of past political compromises. They are totally unrelated to any consideration that might be thought to justify the application of different rules of substantive or procedural law from one district or circuit to another. Neither the Congress of the United States nor the General Assembly of Illinois could enact valid legislation that would bear differently upon their citizens depending upon the intermediate appellate court district or circuit in which they happen to sue or be sued.

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14. *Id.* at 1224.

15. *Id.*

16. *Id.* at 1246.

17. Such a legislative power, if it existed, could not be delegated to judges to be exercised in accordance with their personal preferences for one rule rather than another.

18. 304 U.S. 64 (1934).

The costs of the legal uncertainty caused by intercircuit conflicts are not measured by counting cases. Far more significant costs occur outside the immediate area of the judicial system. They are borne by those who must pay for the additional litigation expense and other legal costs engendered by the conflicts.

An increased awareness among judges of the impact of their work upon the consumers of their product might of itself help to diminish the number of conflicts. Many other suggestions, like those highlighted by Professors Mattis and Yalowitz, have been advanced. It might be well to implement them and measure their effect before moving toward more drastic structural changes.

