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OVERRULING SUPREME COURT PRECEDENTS: ANTICIPATORY ACTION BY UNITED STATES COURTS OF APPEALS

MARGARET N. KNIFFIN*

INTRODUCTION

Supreme Court precedents, it is usually assumed, should always be followed by lower federal courts. On occasion, however, a United States court of appeals predicts that the Supreme Court will no longer follow one of its own precedents and anticipates the action of the Supreme Court by overturning¹ the precedent. This has occurred as recently as 1981.²

The device of anticipatory overruling has been used by courts of appeals for a number of stated reasons, among them: belief that the precedent has been eroded (but not overruled) by subsequent Supreme Court decisions;³ perception of a trend in Supreme Court decisions toward another rule;⁴ and awareness that the Supreme Court has indicated in other opinions that it is awaiting an appropriate case as a vehicle for overturning the precedent.⁵ Other reasons, employed in combination with these, include: the likelihood that changes in Supreme Court membership or in particular Justices' views will result in the overturning of the precedent;⁶ a sense that the Supreme Court may have erred or been misled in the earlier decision and therefore

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1. The terms "overturn" and "overrule" are used in this article in the sense that a court of appeals, in reaching its decision, has declared that a Supreme Court precedent is no longer good law and therefore will not be followed. Usually, of course, a court of appeals will overturn only its own precedents or those set by a lower court. The very question posed by this article is whether it is ever proper for a court to overrule a higher court's decision.

2. *United States v. City of Philadelphia*, 644 F.2d 187, 191-92 (3d Cir. 1981).

3. *See Hobbs v. Thompson*, 448 F.2d 456, 472-74 (5th Cir. 1971); *Rowe v. Peyton*, 383 F.2d 709, 714 (4th Cir. 1967), *aff'd*, 391 U.S. 54 (1968).

4. *See United States v. City of Philadelphia*, 644 F.2d 187, 192 (3d Cir. 1981); *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 813-14 (2d Cir.), *vacated sub nom. Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101 (1944); *Perkins v. Endicott Johnson Corp.*, 128 F.2d 208, 217-18 (2d Cir. 1942), *aff'd*, 317 U.S. 501 (1943).

5. *See Andrews v. Louisville & Nash. R.R.*, 441 F.2d 1222, 1224 (5th Cir. 1971), *aff'd*, 406 U.S. 320 (1972).

6. *See United States v. White*, 405 F.2d 838, 847-48 (7th Cir. 1969), *rev'd on other grounds*, 401 U.S. 745 (1971).

would decide differently now;⁷ and the experience of the Supreme Court and other courts in practical application of the precedent.⁸

This Article inquires whether the doctrine of stare decisis is flexible enough to permit anticipatory overruling by United States⁹ courts of appeals.¹⁰ The Latin term "stare decisis," literally, "to abide by the decision," is the name given to the Anglo-American common-law doctrine¹¹ which states that the holdings of previously decided cases should be followed.¹²

7. See *Hobbs v. Thompson*, 448 F.2d 456, 472-73 (5th Cir. 1971).

8. See *Perkins v. Endicott Johnson Corp.*, 128 F.2d 208, 217 (2d Cir. 1942), *aff'd*, 317 U.S. 501 (1943).

9. Discussion is limited to the federal court system because acceptability of anticipatory overruling can vary in the state court systems according to the views expressed by the highest court of each state, and because the precedential nature of appellate court decisions varies among the states.

10. This article focuses on the courts of appeals. United States district courts have anticipated and have made statements both in favor of and in opposition to the practice. See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 774 (E.D.N.Y. 1980) (anticipation held improper); *Fishkin v. United States Civil Serv. Comm'n*, 309 F. Supp. 40, 44-45 (N.D. Cal. 1969) (dictum) (anticipation approved in principle but deemed unwarranted), *appeal dismissed*, 396 U.S. 278 (1970); *Barnette v. West Va. State Bd. of Educ.*, 47 F. Supp. 251, 252-53 (S.D.W. Va. 1942) (anticipation occurred), *aff'd*, 319 U.S. 624 (1943). *Barnette* is somewhat analogous to a court of appeals decision in that it was appealable directly to the Supreme Court, in accordance with 28 U.S.C. § 1253 (1976), which permits an appeal to the Supreme Court of an order granting or denying an injunction in a suit required by Congress to be heard by a three-judge district court. Section 2281 of title 28 of the United States Code required that a request for an injunction to restrain enforcement of an allegedly unconstitutional state statute be heard by a three-judge district court. 28 U.S.C. § 2281 (1948) (repealed 1976).

The question of whether a district court should anticipate raises somewhat different issues from those involved when a court of appeals considers taking similar action. A district court must forecast not only what the Supreme Court will decide but also what the court of appeals will decide, including whether the latter court will anticipate.

A court of appeals judge, in urging anticipatory overruling in a particular case, saw a "duty to prophesy thrust upon" his court by its "position in the federal judicial system." *United States v. Girouard*, 149 F.2d 760, 765 (1st Cir. 1945) (Woodbury, J., dissenting), *rev'd*, 328 U.S. 61 (1946).

Anticipatory overruling has occurred in a Court of Claims case. *Mason v. United States*, 461 F.2d 1364, 1375-78 (Ct. Cl. 1972), *rev'd on other grounds*, 412 U.S. 391 (1973).

11. There is no federal statutory requirement of stare decisis. Sections 1254 and 1291 of title 28 of the United States Code, which concern review by the Supreme Court on appeal or writ of certiorari, imply only that the Supreme Court may reverse the lower court's decisions or remand with instructions. 28 U.S.C. § 1254 (1976); 28 U.S.C. § 1291 (1976). Note, *Stare Decisis and the Lower Courts: Two Recent Cases*, 59 Colum. L. Rev. 504, 507 (1959) [hereinafter cited as *Two Recent Cases*].

12. The importance of stare decisis in Anglo-American jurisprudence is undisputed. See Gray, *Judicial Precedents.—A Short Study in Comparative Jurisprudence*, 9 Harv. L. Rev. 27, 35-36 (1895) ("[I]t is law in England and in the United

In at least two common-law nations,¹³ the doctrine has been interpreted more strictly than in the United States. Until recently,¹⁴ the highest courts of those countries were considered bound by their own decisions, except in certain narrowly defined circumstances. In the United States federal court system, while *stare decisis* permits a court to overturn its own prior decision,¹⁵ there exists a range of opinion concerning how readily this should be done. Expressing his belief that adherence to precedent should predominate over the merits of a particular case, Justice Brandeis wrote: "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."¹⁶ Judge Wyzanski has commented: "What counts more than the rooting out of error is the establishment of affirmative norms of judicial behavior."¹⁷

In contrast, other jurists have emphasized the possibilities for change and growth in the law that are offered by overturning precedent in appropriate instances. In the words of Justice Field: "It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations."¹⁸ Justice Cardozo observed that "the whole subject matter of jurisprudence is more plastic, more malleable, the molds less definitively cast, the bounds of right and wrong less preordained and constant, than most of us . . . have been accustomed to believe."¹⁹

Regardless of how much importance a court may give to following its own precedent, there is strong authority for the view that some

States that, apart from its intrinsic merits, the decision of a court . . . is absolutely binding on all inferior courts."); Moore & Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 Tex. L. Rev. 514, 525 (1943) ("A decision of the United States Supreme Court is binding on federal matters on all other courts, federal or state."); Pound, *What of Stare Decisis?*, 10 Fordham L. Rev. 1, 6 (1941) ("The decision of the ultimate court of review in a common-law jurisdiction is held to bind all inferior courts of that jurisdiction . . ."); von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 Harv. L. Rev. 409, 413 (1924).

13. England and Israel.

14. [1966] 1 W.L.R. 1234, cited in Leach, *Revisionism in the House of Lords: The Bastion of Rigid Stare Decisis Falls*, 80 Harv. L. Rev. 797, 797-98 (1967) (England); Judicial Courts Law, Art. 33 (1957) (Israel).

15. See Gray, *supra* note 12, at 40. ("Naturally, considering the character of the people [in the United States] and of institutions, the weight attached to judicial precedent is somewhat less than in England . . .").

16. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), *overruled in part on other grounds*, *Commissioner v. Mountain Producers Corp.*, 303 U.S. 376, 387 (1938).

17. Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 Harv. L. Rev. 1281, 1282 (1952). Judge Charles E. Wyzanski, Jr. is a district court judge in the District of Massachusetts.

18. *Barden v. Northern Pac. R.R.*, 154 U.S. 288, 322 (1894), *quoted in* Re, *Stare Decisis and the Judicial Process*, 22 Cath. Law. 38, 42 (1976).

19. B. Cardozo, *The Nature of the Judicial Process* 161 (1921).

flexibility must exist.²⁰ The question remains, however, whether stare decisis is sufficiently flexible to accommodate anticipatory overruling.

The Supreme Court has not addressed the acceptability of anticipatory overruling. This Article analyzes the factors that have or theoretically can be considered by courts of appeals in overturning Supreme Court precedents and the contexts within which such overruling has

20. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring) (Stare decisis is "a useful rule, not an inexorable command."), quoted in Note, *The Attitude of Lower Courts to Changing Precedents*, 50 Yale L.J. 1448, 1448 (1941) [hereinafter cited as *Attitude of Lower Courts*]; *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 238 (1924) (Brandeis, J., dissenting) ("Stare decisis . . . is not a universal, inexorable command. The instances in which the court has disregarded its admonition are many."); *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 105 (D.C. Cir. 1972) (Bazelon, J.) ("It is the genius of the common law that it recognizes changes in our social, economic, and moral life. . . . The principle of stare decisis was not meant to keep a stranglehold on developments which are responsive to new values, experiences, and circumstances."), cert. denied, 412 U.S. 939 (1973); *Openheim v. Kridel*, 236 N.Y. 156, 164, 140 N.E. 227, 230 (1923) (Crane, J.) ("The common law is . . . a living organism which grows and moves in response to the larger and fuller development of the nation."); B. Cardozo, *supra* note 19, at 160 ("Somewhere between worship of the past and exaltation of the present the path of safety will be found."); Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 735 (1949) ("[S]ecurity can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness, and through the adapting of others to current facts."); Gellhorn, *Contracts and Public Policy*, 35 Colum. L. Rev. 679, 679 (1935) ("Neither precedent nor legislative insistence compels unintelligence."); Gray, *supra* note 12, at 39; Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."); Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A.J. 334, 334 (1944) ("I never have, and I think few lawyers ever have, regarded that rule [stare decisis] as an absolute. There is no infallibility about the makers of precedents."); Moore & Oglebay, *supra* note 12, at 515, 552 ("[Stare decisis] is a friendly and frequently persuasive link with what has gone before. . . . Precedent should be followed where it promotes substantial justice. It should not be followed blindly where present conditions or altered circumstances strongly suggest a different course"); Pound, *supra* note 12, at 6 ("Perhaps it is as well that the exact limits of this term 'binding authority' have never been rigidly defined. All definition, says Coke, quoting from the Digest of Justinian, is perilous."); von Moschzisker, *supra* note 12, at 411; *Attitude of Lower Courts*, *supra*, at 1456-57 ("The problem for 'inferior' judges is thus posed by the antithetical demands of society for a law that is stable and sure and for a law that is in sufficient flux to keep apace with current needs.").

The need for flexibility in law was referred to by Plato. Professor Milton Anastos has stated that Plato believed that "[s]cientifically trained rulers . . . may be likened to the captain of a ship who, out of solicitude for his vessel and its crew, saves the lives of his men, not by confining himself to fixed, unalterable regulations, but by application of his knowledge of navigation." Anastos, *Byzantine Political Theory: Its Classical Precedents and Legal Embodiment*, 1 Byzantina Kai Metabyzantina 13, 15 (1978).

occurred. It then advances and evaluates arguments for and against the validity of anticipatory overruling and, finally, offers recommendations concerning its future use.

I. SOME NECESSARY DISTINCTIONS

Examination of anticipatory overruling requires first that the topic be distinguished from subjects that may resemble it but that differ from it in significant respects.

Departure by a court of appeals from a precedent impliedly overruled by the Supreme Court should not be confused with anticipatory overruling. Implied overruling occurs when the Supreme Court, without mentioning that it is overturning its previous decision,²¹ determines that the rule of law that the precedent enunciated is no longer correct.²² The precedent therefore no longer exists as such, and a lower court should not follow it.²³ An example of implied overruling is the demise of the precedent declaring constitutional the "separate but equal" treatment of the black and white races with respect to public transportation.²⁴ When the Supreme Court held that segregation in public schools was unconstitutional,²⁵ most other courts concluded that the transportation precedent was thereby impliedly overruled.²⁶ Anticipatory overruling, by contrast, occurs when a lower court departs from a higher court's decision embodying a rule of law that the higher court has not repudiated either explicitly or by implication.

Anticipatory overruling should also be differentiated from a lower court's failure to follow dictum of a higher court. Dictum does not

21. Higher courts rarely enumerate all the precedents overturned when a new principle is announced. See Kelman, *The Force of Precedent in the Lower Courts*, 14 Wayne L. Rev. 3, 17 (1967); *Attitude of Lower Courts*, *supra* note 20, at 1457.

22. Lower court judges have disagreed at times as to whether implied overruling has in fact occurred. See *Browder v. Gayle*, 142 F. Supp. 707, 719-20 (M.D. Ala.) (Lynne, J., dissenting) ("My study of Brown has convinced me that it left unimpaired the 'separate but equal' . . . doctrine in a local transportation case . . ." (citation omitted)), *aff'd per curiam*, 352 U.S. 903 (1956). Even an explicit overruling may be difficult to perceive. See Kelman, *supra* note 21, at 15.

23. For statements that a lower court should not adhere to an impliedly overruled precedent, see Kelman, *supra* note 21, at 28; Comment, *Anticipatory Stare Decisis*, 8 U. Kan. L. Rev. 165, 168 (1959).

24. *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (impliedly overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

25. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

26. See, e.g., *Flemming v. South Carolina Elec. & Gas Co.*, 224 F.2d 752, 752 (4th Cir. 1955), *appeal dismissed per curiam*, 351 U.S. 901 (1956); *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala.) ("[W]e think that *Plessy v. Ferguson* has been impliedly . . . overruled, and that, under the later decisions, there is now no rational basis upon which the separate but equal doctrine can be validly applied to public carrier transportation . . ."), *aff'd per curiam*, 352 U.S. 903 (1956).

have the force of precedent, and therefore deviation from it does not involve overruling.²⁷

If a higher court engages in prospective overruling²⁸ (stating that it will hold in a particular way, not in the current case, but in future instances), such a prediction is not necessarily binding. Some would suggest that it is mere dictum until it has been applied in an actual controversy.²⁹ To the extent that it is dictum, a lower court that disregards such a statement is not overruling a holding and therefore has not engaged in anticipatory overruling.

Some Supreme Court plurality opinions (in which Supreme Court Justices agree on a single result for different reasons) are of reduced precedential value.³⁰ Departure from such decisions does not involve overruling. Nor does overruling occur when a lower court deviates

27. See *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821), cited in *Hendricks County Rural Elec. Membership Corp. v. NLRB*, 627 F.2d 766, 771 n.4 (7th Cir. 1980) (Cudahy, J., dissenting) (Dicta "may be respected, but ought not to control the judgment in a subsequent suit . . ."), *rev'd on other grounds*, 102 S. Ct. 216 (1981); Moore & Oglebay, *supra* note 12, at 525 ("All will agree that statements in the court's opinion which were not germane to the matter before the court are not binding."); *id.* at 527 ("That time and repetition do not render a dictum impregnable should not, of course, be surprising when decisions, some hoary with respect, fall by the wayside."). *But see* *Hendricks County Rural Elec. Membership Corp. v. NLRB*, 627 F.2d 766, 768 n.1 (7th Cir. 1980) (Dictum "cannot be treated lightly by inferior federal courts until disavowed by the Supreme Court."), *rev'd on other grounds*, 102 S. Ct. 216 (1981). It should be noted that one method that a court can use to depart from its own precedent is to label it "dictum." See 1B J. Moore, *Moore's Federal Practice* ¶ 0.402, at 112 (2d ed. 1982).

28. Prospective overruling may be analogized to refusal to anticipate, in that in both situations a court decides one way at the present time, believing or knowing that in future instances the decision will be different. In prospective overruling, the same court probably will rule differently in subsequent cases; when there is a refusal to anticipate, the higher court probably will rule differently in subsequent cases and also in the same case.

29. Justice Cardozo wrote of a prospective overruling by a state court that it might be called "a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule." *Great N. Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366 (1932).

The requirement that federal courts decide only actual "cases and controversies," U.S. Const. art. III, § 2, may mean that a prospective overruling, which establishes a rule that is not applied to the controversy before the court, is dictum. This possibility was suggested by Dean Albert M. Sacks in his course, *The Legal Process*, at the Harvard Law School, 1970.

30. A few Supreme Court cases indicate that as to those plurality decisions in which the individual Justices' opinions differ in scope or breadth, the line of reasoning based on the "narrowest grounds" should govern in subsequent cases. Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756, 761 (1980). As is pointed out in that article, the Supreme Court's interpretation of "narrowest ground" as the ground that will govern in the smallest number of subsequent cases, can result in selection of a ground that "may reflect the views of only a minority of the Court, and thus should not be binding on lower courts." *Id.* at 764.

from the wording chosen by a higher court. Lower courts are not required to follow the precise language of precedents.³¹

Finally, anticipatory overruling should be distinguished from deviation by an inferior court from the instructions of a higher court that has remanded a case. This action does not amount to overruling because it concerns not a precedent but the same case.

In some instances, although a court of appeals has stated that it has distinguished a Supreme Court precedent or confined it to its facts, there are indications that in actuality the court may have overturned the precedent.³² This Article does not examine those cases because a more accurate analysis of anticipatory overruling can be made by limiting the field of inquiry to instances in which it clearly and definitely has occurred.

Departure from precedent by omission, *i.e.*, failure to mention the existence of the precedent, whether accidental or perhaps "conscious,"³³ will also not be considered. When a court does not acknowledge that it has anticipated, its consequent failure to state its reason for anticipating interferes with cogent analysis.

II. ANALYSIS OF FACTORS INVOLVED IN ANTICIPATORY OVERRULING

In examining the reasons advanced by courts of appeals that have engaged in anticipatory overruling, it should be remembered that the Supreme Court has not evaluated this device. It has, indeed, affirmed decisions in which a court of appeals stated that it had declined to follow a Supreme Court precedent.³⁴ In each such instance, however,

31. See Moore & Oglebay, *supra* note 12, at 526 n.40; Pound, *supra* note 12, at 8.

32. *E.g.*, United States v. Chase, 281 F.2d 225, 230 (7th Cir. 1960) ("It is extremely doubtful that the holding in Rogers would be followed by the present Supreme Court . . . We think the Rogers case can be distinguished . . . We have no desire to extend the rule of the Rogers case to include the situation at bar."); Columbia Gen. Inv. Corp. v. Securities & Exch. Comm'n, 265 F.2d 559, 562, 563 (5th Cir. 1959); Gardella v. Chandler, 172 F.2d 402, 408-09 (2d Cir. 1949) (Hand, J., concurring) (suggesting that Supreme Court decision declaring baseball not subject to federal antitrust legislation is limited to interstate travel aspects of the sport); *id.* at 409, 412 (Frank, J., concurring) (same); see Kelman, *supra* note 21, at 12, 14; *Anticipatory Stare Decisis*, *supra* note 23, at 167; Note, *Lower Court Disavowal of Supreme Court Precedent*, 60 Va. L. Rev. 494, 512-13 (1974) [hereinafter cited as *Lower Court Disavowal*]; *Attitude of Lower Courts*, *supra* note 20, at 1449, 1454, 1459. With respect to a court's preference for distinguishing its own precedents rather than overruling them, see Douglas, *supra* note 20, at 747, 754.

33. See *Attitude of Lower Courts*, *supra* note 20, at 1449, 1459.

34. See Andrews v. Louisville & Nash. R.R., 441 F.2d 1222, 1224 (5th Cir. 1971), *aff'd*, 406 U.S. 320 (1972); Rowe v. Peyton, 383 F.2d 709, 714 (4th Cir. 1967), *aff'd*, 391 U.S. 54 (1968); Perkins v. Endicott Johnson Corp., 128 F.2d 208, 217-18

the Supreme Court ruled on the merits, without voicing either approval or disapproval of the lower court's having anticipated. The High Court has also reversed, again on the merits, at least one decision in which a court of appeals had forecast the overturning of a Supreme Court precedent.³⁵ In this reversal the Court did not discuss the acceptability of anticipatory overruling. Rarely has the Supreme Court even acknowledged that anticipatory overruling has occurred.³⁶

(2d Cir. 1942), *aff'd*, 317 U.S. 501 (1943). The Supreme Court, in affirming on the merits, expressly overruled the precedents already overturned by the courts of appeals in *Andrews* and *Rowe*. 406 U.S. at 326; 391 U.S. at 67.

35. See *United States v. White*, 405 F.2d 838, 847-48 (7th Cir. 1969), *rev'd*, 401 U.S. 745 (1971).

36. For a case in which the Court did acknowledge the use of anticipation, see *Peyton v. Rowe*, 391 U.S. 54, 57-58 (1968) ("Chief Judge Haynsworth reasoned that this Court would no longer follow *McNally* We are in complete agreement with this conclusion and the considerations underlying it."). This statement may contain a hint of approval of the anticipation that had occurred, but all that it clearly indicates is that the Supreme Court itself would no longer follow its precedent. Also see *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 112-13 (1944) (Roberts, J., dissenting). Justice Roberts, in a dissent in which Justice Frankfurter joined, criticized the Supreme Court's "tendency" to overturn its own precedents. He warned that the lower courts would thereby become confused "unless indeed a modern instance grows into a custom of members of this court to make public announcement of a change of views and to indicate that they will change their votes on the same question when another case comes before the court." *Id.* at 113 (Roberts, J., dissenting). He added that "[t]his might, to some extent, obviate the predicament in which the lower courts, the bar, and the public find themselves." *Id.* (Roberts, J., dissenting). He then cited *Barnette v. West Va. State Bd. of Educ.*, 47 F. Supp. 251, 252-53, (S.D.W. Va. 1942), *aff'd*, 319 U.S. 624 (1943). In *Barnette*, the district court had declined to follow a Supreme Court precedent for the stated reason, among others, that four Justices had, in dissenting opinions in two cases, voiced disagreement with the precedent. *Id.* at 253. If it is assumed that Justice Roberts' reference to Justices' "public announcement of a change of views" was intended as criticism of one basis for the district court's decision in *Barnette*, his statement is an indication of disapproval by two Justices, four decades ago, of a particular instance of anticipatory overruling by a district court. It does not amount to a clear expression of the general attitude of the Supreme Court toward use of the device, particularly by courts of appeals. See also *Ashe v. Swenson*, 399 F.2d 40, 45 (8th Cir. 1968), *rev'd*, 397 U.S. 436 (1970). The majority opinion, written by then Circuit Judge and now Supreme Court Justice Blackmun, stated: "We . . . are not free to disregard an existing fiat and still live holding of the Supreme Court even though that holding is one by a sharply divided tribunal and even though only one of the Justices who participated in the majority decision remains active." *Id.* at 45. The opinion added: "[T]he overruling of an existing decision, if indicated at all, is for the Supreme Court and is not for us. Firmness of precedent otherwise could not exist." *Id.* The opinion stated further: "We feel . . . that our task is not to forecast but to follow those dictates, despite their closeness of decision, which at this moment in time are on the books and for us to read." *Id.* at 46. It is not known whether these remarks indicate dissatisfaction with anticipatory overruling when a factor other than a previously divided court or a change in Supreme Court membership suggests that the Supreme Court will overrule its precedent. Nor is it known whether Justice Blackmun, who now is in a position to view the question from a different perspective, maintains the view described.

One reason the Supreme Court has not taken a position concerning the acceptability of anticipatory overruling may be that the issue has never been directly presented for decision. The High Court may prefer, moreover, that the question not be posed, so that the device may, at least arguably, remain available to lower courts. The Court's silence may, at the same time, limit the frequency of employment of anticipatory overruling to circumstances that seem to lower courts particularly appropriate. Conversely, explicit approval might inspire widespread and less discriminate use of the device.

What factors could induce a court of appeals to take the extraordinary step of overruling a Supreme Court decision?

A. Appropriate Factors

1. Erosion of the Precedent

Anticipatory overruling has occurred when a precedent has been eroded by changes in related areas of the law.³⁷ Although the issue before the court of appeals has not been ruled on by the Supreme Court since establishment of the precedent, some of the High Court's subsequent decisions may have indicated so great a departure from its previous attitude that the court of appeals may perceive that a significant part of the underpinnings of the precedent has been worn away. It has not been impliedly overruled;³⁸ rather, it still exists, but it has been undermined.

For example, in 1967 the Fourth Circuit found, in *Rowe v. Peyton*,³⁹ that since the establishment of a Supreme Court precedent in 1934,⁴⁰ "a more liberal, less technical concept"⁴¹ of the writ of habeas corpus had been adopted by the High Court. None of the cases that indicated this altered approach⁴² had dealt, however, with the issue before the Fourth Circuit: whether the writ was available to prisoners who had not yet commenced serving the particular sentences for the convictions that they sought to challenge. The court of appeals stated that in the precedent, the Supreme Court had "held that the writ was unavailable to question a sentence to be served in the future."⁴³ The court of appeals determined, however, that the Supreme Court's gen-

37. *Rowe v. Peyton*, 383 F.2d 709, 714 (4th Cir. 1967), *aff'd*, 391 U.S. 54 (1968).

38. Implied overruling, discussed in text in pt. I, *supra*, would occur if cases subsequent to the precedent dealt with the very issue involved in the precedent and the current case.

39. 383 F.2d 709 (4th Cir. 1967), *aff'd*, 391 U.S. 54 (1968).

40. *McNally v. Hill*, 293 U.S. 131 (1934).

41. 383 F.2d at 714.

42. Cases cited in *Rowe, id.*, are *Jones v. Cunningham*, 371 U.S. 236 (1963) and *Fay v. Noia*, 372 U.S. 391 (1963).

43. 383 F.2d at 713.

eral attitude in recent cases involving habeas corpus was "thoroughly inconsistent with" the precedent. Moreover, it found that the "doctrinaire approach" of the precedent and its emphasis on jurisdictional concerns had been "thoroughly rejected by the Supreme Court."⁴⁴ The court of appeals also noted the "currently proceeding reinterpretation of the due process and equal protection clauses of the Fourteenth Amendment . . ."⁴⁵ Consequently, the precedent was not followed, and habeas corpus was held to be available to the prisoners. The opinion stated:

This Court, of course, must follow the Supreme Court, but there are occasional situations in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court to a conclusion inconsistent with an older Supreme Court case.⁴⁶

44. *Id.* at 714.

45. *Id.* at 713. The Supreme Court, in affirming, observed that the precedent was "inconsistent with the purposes underlying the federal writ of habeas corpus." *Rowe v. Peyton*, 391 U.S. 54, 64 (1968).

46. 383 F.2d at 714. Erosion of the same precedent overturned in *Rowe* was the reason given for anticipatory overruling by the Fourth Circuit in two other cases: *Williams v. Peyton*, 372 F.2d 216, 219 (4th Cir. 1967); *Martin v. Virginia*, 349 F.2d 781, 783-84 (4th Cir. 1965). Other examples of erosion may be found in *Hobbs v. Thompson*, 448 F.2d 456, 472-73 (5th Cir. 1971), in *United States v. White*, 405 F.2d 838, 847-48 (7th Cir. 1969), *rev'd*, 401 U.S. 745 (1971) and in *Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598, 605 (2d Cir. 1968). In *Hobbs*, the court concluded that the precedent had become "inconsistent with other First Amendment cases." 448 F.2d at 472. In *White*, the court of appeals held that two Supreme Court cases presenting a view of the fourth amendment that formed the "conceptual basis" for the precedent had been overruled by the Supreme Court. 405 F.2d at 848. Although the Supreme Court majority opinion, reversing, stated that the precedent had not, after all, been eroded, *United States v. White*, 401 U.S. 745, 750 (1971), Justices Marshall, Harlan and Douglas, dissenting, all believed the contrary. Justice Marshall wrote that the precedent "[could not] be considered viable." *Id.* at 796 (Marshall, J., dissenting). Justice Harlan referred to the "erosion of its doctrinal foundations" and said that the case could "no longer be regarded as sound law." *Id.* at 769 (Harlan, J., dissenting). Justice Douglas wrote that the "idea, discredited by" a subsequent Supreme Court decision, "was the core of" the precedent. *Id.* at 759. (Douglas, J., dissenting). In *Sylvestri*, the court of appeals observed that the general approach to choice of law used in the precedent had been "modifi[ed] or at least . . . refine[d]" by a subsequent Supreme Court decision. 398 F.2d at 605. In addition, the dissenting opinion in a recent case stated that a Supreme Court precedent had been eroded "as authority that fourth amendment issues be raised according to state procedural rules." *United States ex rel. Gockley v. Myers*, 450 F.2d 232, 249 (3d Cir. 1971) (Adams, J., dissenting), *cert. denied*, 404 U.S. 1063 (1972).

The belief that erosion is not a ground for anticipatory overruling is expressed in *United States v. White*, 405 F.2d 838, (7th Cir. 1969) (Hastings, J., dissenting), *rev'd*, 401 U.S. 745 (1971). Judge Hastings referred to "the majority mistreatment of" the Supreme Court precedent, which he said consisted of "making a guess on what the Court may do at some future time." *Id.* at 852 (Hastings, J., dissenting). When

2. New Trends in Supreme Court Decisions

Anticipatory overruling has occurred also when a court of appeals has identified a new doctrinal trend away from the theory that underlies a Supreme Court precedent.⁴⁷ The situation is similar to one involving erosion, but here the precedent has not been undermined; rather, it has been left intact yet isolated from current thought as expressed in subsequent Supreme Court decisions.⁴⁸ The finding of a new doctrinal trend differs from implied overruling in that in none of the cases evidencing the trend has the Supreme Court ruled on the issue involved in the precedent. Furthermore, the word "trend" implies movement by the High Court toward a point not yet reached, while in implied overruling the Court has reached the issue concerned and ruled on it—though in some context other than the one involved in the precedent.

Supreme Court decisions were found by the Court of Appeals for the Second Circuit, in *Perkins v. Endicott Johnson Corp.*,⁴⁹ to show a trend away from the rules established in two Supreme Court precedents,⁵⁰ and the court therefore declined to follow those precedents.⁵¹ In determining whether the fourth amendment had been violated by subpoenas issued by the Secretary of Labor, which had required a manufacturer to produce employment and wage records, the Second Circuit perceived "a new judicial attitude" toward the relationship between administrative agencies and courts. This attitude had evolved, the court believed, because during the thirty years that had passed since the precedents were decided, the expansion of administrative agencies had caused the Supreme Court to evaluate more frequently their position in government. The court of appeals cited Supreme Court decisions "dealing more liberally with administrative

the Supreme Court, in reversing, held that the precedent had not been eroded, it expressed no view on the use of anticipatory overruling.

Cases in which a court of appeals has raised the question of overturning a Supreme Court precedent and found insufficient erosion to warrant doing so include: *In re Korman*, 449 F.2d 32, 39 (7th Cir. 1971) (dictum) ("We recognize that it is within our power to disregard a decision of the Supreme Court . . . if we are convinced that it has been undermined or repudiated by subsequent decisions of the Court."), *rev'd mem.*, 406 U.S. 952 (1972); *United States v. Bukowski*, 435 F.2d 1094, 1102 (7th Cir. 1970) (dictum), *cert. denied*, 401 U.S. 911 (1971).

47. *Perkins v. Endicott Johnson Corp.*, 128 F.2d 208, 216-18 (2d Cir. 1942), *aff'd*, 317 U.S. 501 (1943).

48. It can be argued that the result of the new trend is to erode the foundation of the precedent, and that these two reasons for anticipatory overruling can therefore be viewed as one.

49. 128 F.2d 208 (2d Cir. 1942), *aff'd*, 317 U.S. 501 (1943).

50. *Ellis v. Interstate Commerce Comm'n*, 237 U.S. 434 (1915); *Harriman v. Interstate Commerce Comm'n*, 211 U.S. 407 (1908).

51. 128 F.2d at 216-18.

agencies" and indicating that there was now less hesitance in allowing administrative agencies to obtain information from private enterprise, the administrative and judicial processes had come to be held "collaborative," increased emphasis had been placed on promptness in administrative inquiries that involved "remedial social legislation," and "administrative finality" had been recognized.⁵² It was therefore held that issuance of the subpoenas was not improper. The court of appeals concluded that "when a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it."⁵³ Judge Frank, author of the majority opinion, added in a footnote: "To use mouth-filling words, cautious extrapolation is in order."⁵⁴

52. *Id.* at 216-17.

53. *Id.* at 218. This statement was cited by Judge Learned Hand in *Picard v. United Aircraft Corp.*, 128 F.2d 632, 636 (2d Cir. 1942), *cert. denied*, 317 U.S. 651 (1942).

54. *Id.* at 218 n.30. Examples of trends that have formed bases for anticipatory overruling may be found in: *United States v. City of Philadelphia*, 644 F.2d 187, 192 (3d Cir. 1980) (In Supreme Court cases decided after the precedent, the High Court had shown itself to be "far more reluctant to infer rights of action for silent statutes."); *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 813 (2d Cir. 1944) (Supreme Court cases had increasingly permitted state taxation of interstate commerce and had moved "away from the automatic condemnation of taxes by formal, preconceived, and antiquated rules."); *vacated sub nom. Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101 (1944); *Picard v. United Aircraft Corp.*, 128 F.2d 632, 636 (2d Cir. 1942) ("[T]he Supreme Court . . . ha[d] for a decade or more shown an increasing disposition to raise the standard of originality necessary for a patent."), *cert. denied*, 317 U.S. 651 (1942). Two cases in which trends were perceived as reasons for anticipating but in which erosion was emphasized are *Williams v. Peyton*, 372 F.2d 216, 219-20 (4th Cir. 1967), and *Martin v. Virginia*, 349 F.2d 781, 783 (4th Cir. 1965) ("progressively developing notions as to the scope of the writ of habeas corpus" were perceived). In this latter case, the court overturned the same precedent from which it later departed in *Rowe v. Peyton*, 383 F.2d 709 (4th Cir. 1967), *aff'd*, 391 U.S. 54 (1968). In support of anticipatory overruling to follow a Supreme Court trend, in addition to the cases cited in this note and in note 47, *supra*, see *Lower Court Disavowal*, *supra* note 32, at 494 n.1.

A decision in which the use of a new trend as a ground for anticipatory overruling was opposed is *Northern Va. Regional Park Auth. v. United States Civil Serv. Comm'n*, 437 F.2d 1346 (4th Cir.), *cert. denied*, 403 U.S. 936 (1971). Although the court "acknowledge[d] the considerable weight of" an argument that "standards for reviewing statutes abridging the exercise of First Amendment freedoms have changed dramatically since 1947," *id.* at 1349, it felt a "duty to give effect to an existing Supreme Court ruling . . ." *Id.* at 1351. As the Fourth Circuit had shown willingness to use anticipatory overruling in 1965 and 1967, in *Martin*, *Williams* and *Rowe*, its hesitance here may have been attributable to its being less certain than in those cases as to the eventual overturning of the precedent in question by the Supreme Court. The court stated that were the Supreme Court to decide now the issue ruled on in the precedent, it "might" reach a different result. *Id.* See the discussion of certainty as to eventual outcome in text in pt. III(B), *infra*.

3. Awareness that the Supreme Court is Awaiting an Appropriate Case in which to Overrule the Precedent

Another reason for anticipatory overruling of a Supreme Court precedent was illustrated in *Andrews v. Louisville & Nashville Railroad*,⁵⁵ when the Fifth Circuit concluded that the High Court had been waiting for an appropriate case in which to overturn a precedent. The court of appeals believed that the case before it was "precisely the case for which the Supreme Court [had] been waiting. . . ."⁵⁶ Under the precedent,⁵⁷ a former railroad employee who brought a private action for damages for wrongful discharge by the railroad did not need to show exhaustion of his administrative remedies under the Railway Labor Act.⁵⁸ In a subsequent decision, *Republic Steel Corp. v. Maddox*,⁵⁹ the Supreme Court itself indicated that it was eroding the foundation of its precedent. It added, however, that it did "not mean to overrule it" at that time, and that "[c]onsideration of such action should properly await a case" which would afford an opportunity to examine "in context" the administrative remedies set forth in the Act.⁶⁰

In concluding that the Supreme Court would, after such consideration, overrule the precedent, the court of appeals stated that it found itself in agreement with Justice Black's dissenting opinion in *Maddox*.⁶¹ The Justice had declared that the Supreme Court, "while declining expressly to overrule," had "raised the overruling axe so high that its falling [was] just about as certain as the changing of the seasons."⁶²

In two cases, courts of appeals have indicated that, had they found new doctrinal trends, they might have deviated from Supreme Court precedents. *Bass v. Mississippi*, 381 F.2d 692, 694 (5th Cir. 1967) (dictum); *Blalock v. United States*, 247 F.2d 615, 620 (4th Cir. 1957) (dictum).

55. 441 F.2d 1222 (5th Cir. 1971), *aff'd*, 406 U.S. 320 (1972).

56. *Id.* at 1224. In fact, the Supreme Court, in affirming the decision of the court of appeals, expressly overruled the precedent. *Andrews v. Louisville & Nash. R.R.*, 406 U.S. 320, 326 (1972).

57. *Moore v. Illinois Cent. R.R.*, 312 U.S. 630 (1941).

58. 45 U.S.C. §§ 151-164, 181-188 (1976).

59. 379 U.S. 650, 655 (1965), *cited in Andrews v. Louisville & Nash. R.R.*, 441 F.2d 1222, 1223 (5th Cir. 1971), *aff'd*, 406 U.S. 320 (1972).

60. 379 U.S. at 657 n.14, *cited in Andrews v. Louisville & Nash. R.R.*, 441 F.2d 1222, 1224 (5th Cir. 1971) *aff'd*, 406 U.S. 320 (1972).

61. 441 F.2d at 1224 (quoting *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 667 (1965) (Black, J., dissenting)).

62. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 667 (1965) (Black, J., dissenting). Cases in which courts of appeals have suggested that they approve of using the likelihood of the Supreme Court's overruling its precedent as a ground for anticipatory overruling, but have not found such likelihood, include: *Booster Lodge No. 405, Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 459 F.2d 1143, 1150 n.7 (D.C. Cir. 1972) (dictum), *aff'd per curiam*, 412 U.S. 84 (1973); *Salerno v. American*

Here, the belief of the court of appeals in the certainty of the Supreme Court's eventual overturning of the precedent was the sole reason given for anticipatory overruling. In some instances, however, the likelihood of a particular Supreme Court action is used as a supporting factor after another reason for anticipatory overruling, such as a new doctrinal trend, has been identified.⁶³ In a sense, it can be said that whatever reason a court of appeals gives for predicting that, were the issue now before the High Court, the precedent would be overturned, the probable accuracy of this prediction is always a factor that the court of appeals considers.⁶⁴

4. Changes in Supreme Court Membership or in Individual Justices' Views

A factor that has been present in combination with other reasons given for anticipatory overruling is the belief of a court of appeals that because of changed Supreme Court membership or the altered views of one or more of the Justices, the Supreme Court would no longer adhere to its precedent.⁶⁵ The Justices' thinking on an issue may be known through their statements in cases or pronouncements outside the Court.

Although ours is a government of laws and not of men, reasonable persons may differ in interpreting the law. It is therefore not to be denied, nor is it a ground for criticism, that a change in membership on the High Court may result in a different outcome. That an individual Justice may upon further reflection revise his or her thinking on an issue is not cause for concern, as it may indicate refinement of analysis in the light of continued learning and experience. The Supreme Court appears, however, to attempt to limit the effect of changes in membership, by its tradition of prohibiting newly appointed Justices from voting on rehearing petitions.⁶⁶

League of Professional Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970) (dictum) ("[T]he Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom."), *cert. denied*, 400 U.S. 1001 (1971).

63. *E.g.*, *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 814 (2d Cir.) ("We must determine . . . that law which in all probability will be applied If this means the discovering and applying of a 'new doctrinal trend' in the Court . . . this is our task"), *vacated sub nom.* *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101 (1944).

64. The degree of certainty as to how the Supreme Court would currently decide an issue is discussed in pt. III(B), *infra*.

65. *United States v. White*, 405 F.2d 838, 847 (7th Cir. 1969), *rev'd*, 401 U.S. 745 (1971).

66. This practice is referred to in B. Woodward & S. Armstrong, *The Brethren* 80 (1979).

In discounting the likelihood that the Supreme Court would adhere to one of its precedents,⁶⁷ the Court of Appeals for the Seventh Circuit, in *United States v. White*,⁶⁸ in addition to finding erosion of the precedent,⁶⁹ noted that four Justices had declined to agree with the decision when it was made.⁷⁰ The court of appeals pointed out, further, that in a subsequent case⁷¹ four Justices had criticized the precedent,⁷² the Chief Justice having stated that it was “wrongly decided and should not be revitalized,”⁷³ and three other Justices having said that it “should be considered a dead letter.”⁷⁴ The court of appeals appeared not to have questioned the precedential force of a divided opinion;⁷⁵ rather, it probably believed that subsequent erosion of the precedent by other Supreme Court opinions presaged a sufficient change in the views of the already sharply divided Court to produce a different outcome.⁷⁶

67. On *Lee v. United States*, 343 U.S. 747 (1952).

68. 405 F.2d 838 (7th Cir. 1969), *rev'd*, 401 U.S. 745 (1971).

69. *Id.* at 847.

70. *Id.*

71. *Lopez v. United States*, 373 U.S. 427 (1963).

72. The four included one Justice from among the four who had dissented in the precedent and three Justices who had since been named to the High Court. Another of the original four dissenters, though still a member of the Supreme Court, was not among those who subsequently criticized the precedent, and the two others of the original four were no longer on the Court when the subsequent case was decided.

73. *Lopez v. United States*, 373 U.S. 427, 441 (1963) (Warren, C.J., concurring in the result).

74. *Id.* at 447 (Brennan, J., dissenting) (joined by Douglas, and Goldberg, JJ.)

75. See discussion of divided opinions as precedents in pt. II(C), *infra*.

76. Judge Hastings, dissenting, believed that “only the Supreme Court could set aside its holdings.” 405 F.2d at 852 (Hastings, J., dissenting). He thought that the precedent was being overturned “[b]y the process of taking a head count and making a guess on what the Court may do at some future time . . .” *Id.* (Hastings, J., dissenting). The Supreme Court, in reversing, held that its precedent had not, after all, been eroded. It did not refer to the question of changes in individual Justices’ views. *United States v. White*, 401 U.S. 745, 750 (1971).

Change in the views of Supreme Court Justices was a factor in the decision to anticipate in *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 815 (2d Cir.) (“at least a minority, and possibly more, of the present Court is committed to” an attitude different from that expressed in the precedent), *vacated sub nom.* *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101 (1944). An often cited district court case in which one reason given for anticipatory overruling was a change in Supreme Court Justices’ views is *Barnette v. West Va. State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D.W. Va. 1942) (“Of the seven [J]ustices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound . . .”), *aff'd*, 319 U.S. 624 (1943). Justice Frankfurter dissented on the merits from the holding of the Supreme Court majority affirming the decision. He added: “That which three years ago had seemed . . . to lie within permissible areas of legislation is now outlawed by the deciding shift of opinion of two Justices. What reason is there to believe that they or their successors may not have another view a

5. Inconsistency in Supreme Court Decisions

A second reason given in combination with others for anticipatory overruling is that because a precedent is inconsistent with previous Supreme Court decisions, the High Court will, when afforded an opportunity, overturn that precedent.⁷⁷ This factor was present in *Hobbs v. Thompson*,⁷⁸ when the Court of Appeals for the Fifth Circuit considered the constitutionality of a municipal law prohibiting city firemen from electioneering.⁷⁹

A Supreme Court precedent⁸⁰ was interpreted by the court of appeals to permit a "broad prophylactic rule against political activity" by public employees if there was a rational basis for such legislation.⁸¹ In addition to holding that the precedent had been eroded by subsequent Supreme Court decisions,⁸² the court of appeals found that it was "inconsistent" with and "out of harmony with" Supreme Court cases that predated it by as many as seven years.⁸³ These earlier cases required that any statute limiting first amendment rights be as specifically drawn as possible.⁸⁴ The court of appeals predicted that the

few years hence?" *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 665 (1943) (Frankfurter, J., dissenting).

For the view that it is "inevitable" that a lower court take into account "substantial" changes in membership on the Supreme Court, see *Lower Court Disavowal*, *supra* note 32, at 531. That changes in Justices' views should not be the sole reason for anticipatory overruling, see *id.* at 538.

Cases in which courts of appeals stated that changes in Supreme Court membership or in the attitudes of Justices do not justify anticipatory overruling include *NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1330 (3d Cir. 1981) ("Although there is ample ground for argument that the Supreme Court has doubts about *Lau's* continued viability, a requiem may be premature and, in any event, should not be sung by this choir."). The court of appeals also declared: "It is true . . . that five [J]ustices expressed reservations in *Bakke* about the holding in *Lau*. . . . The issue did not have to be resolved, however" *Id.* at 1329. Also see *United States ex rel. Gockley v. Myers*, 450 F.2d 232, 238-39 (3d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972); *Ashe v. Swenson*, 399 F.2d 40, 45-46 (8th Cir. 1968), *rev'd*, 397 U.S. 436 (1970); *Ferina v. United States*, 340 F.2d 837, 839 (8th Cir.) (The argument that "subsequent changes in personnel on the bench of the Supreme Court [had] resulted in a realignment of majority opinion" did not persuade the court to "forecast the law of the Supreme Court."), *cert. denied*, 381 U.S. 902 (1965).

For the suggestion that the strength of the commitment to a decision of each Justice who supported it affects the strength of a precedent, see Jackson, *supra* note 20, at 335.

77. *Hobbs v. Thompson*, 448 F.2d 456, 472-73 (5th Cir. 1971).

78. 448 F.2d 456 (5th Cir. 1971).

79. This law had been applied to forbid firemen to place bumper stickers on their automobiles in support of a candidate for the state legislature. *Id.* at 471-75.

80. *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

81. 448 F.2d at 472.

82. *Id.* at 472-74.

83. *Id.* at 472-73.

84. *Id.* at 473 (quoting *United States v. Robel*, 389 U.S. 258, 268 n.20 (1967)).

Supreme Court would no longer follow the precedent, and held the limitation on employees' political activities to be unconstitutional.⁸⁵

6. Failure of the Precedent to Have the Intended Effect

A related reason for forecasting Supreme Court overruling, which has been mentioned in a court of appeals opinion⁸⁶ in conjunction with other factors, is the assessment that a Supreme Court precedent has been shown, in practical application, not to have had the effect that the Court originally intended. When the Second Circuit, in *Perkins v. Endicott Johnson Corp.*,⁸⁷ concluded that a Supreme Court precedent concerning judicial limitation of administrative inquiries had been eroded, it suggested also that "[l]egal doctrines, as first enunciated, often prove to be inadequate under the impact of ensuing experience in their practical application" on a case-by-case basis.⁸⁸

7. Potential Factors

There has been speculation as to whether a lower court should overrule a Supreme Court precedent which is relatively obscure, in that it deals with an issue that has not been considered for quite some time and would probably be decided differently if it now came before the Supreme Court.⁸⁹ In such a situation, anticipatory overruling could even occur unintentionally, if the lower court were unaware of the precedent. This factor has not been specifically mentioned in

85. 448 F.2d at 473, 475. For a statement that even if the Supreme Court had erred this would not be a ground for anticipatory overruling, see *Hendricks County Rural Elec. Membership Corp. v. NLRB*, 627 F.2d 766, 769 (7th Cir. 1980), *rev'd on other grounds*, 102 S. Ct. 216 (1981). In reversing, the Supreme Court labeled as dictum the portion of its previously decided case that the court of appeals had considered a precedent. 102 S. Ct. at 227.

For the suggestion that error in a precedent should not be the sole reason for disregarding the precedent, but that in rare instances anticipatory overruling is proper, see Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970) (Friendly, J.) (dictum) ("We freely acknowledge our belief that *Federal Baseball* [a precedent] was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* [another precedent] is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.'"), *cert. denied*, 400 U.S. 1001 (1971). Yet the court believed that it should not overturn the Supreme Court precedents, "save perhaps" when there was "near certainty" that the Supreme Court was itself waiting for the occasion to do just that. *Id.*; see also Kelman, *supra* note 21, at 7.

86. *Perkins v. Endicott Johnson Corp.*, 128 F.2d 208, 217 (2d Cir. 1942), *aff'd*, 317 U.S. 501 (1943).

87. 128 F.2d 208 (2d Cir. 1942), *aff'd*, 317 U.S. 501 (1943).

88. *Id.* at 217.

89. See *Lower Court Disavowal*, *supra* note 32, at 524.

instances of anticipatory overruling, yet it may play a role when a new doctrinal trend in a related area is identified.

In theory, a lower court might predict that the Supreme Court will overturn a precedent because of changes in society other than as reflected in subsequent Supreme Court opinions. For example, a change in patterns of public investment, which may have rendered outmoded a case interpreting bankruptcy legislation, was alluded to by a court which felt itself bound, nevertheless, to adhere to that precedent.⁹⁰

B. *Evaluation of Appropriate Factors*

All of these factors have been or may potentially be considered by courts in deciding whether to anticipate. On first examination, it might appear that when the Supreme Court has already reached the point of declaring that it is awaiting an appropriate case in which to overturn a precedent, or when Justices have publicly announced disapproval of a precedent, the court of appeals has a more reliable source of information concerning the Supreme Court's views than in any of the other situations. Closer analysis reveals, however, that in instances of erosion of a precedent or development of a new trend in Supreme Court decisions, the very opinions that cause the erosion or constitute the new trend are a direct source of information as to the Supreme Court's ideas concerning the issue at hand. So, too, is the thinking of the Supreme Court discoverable when a precedent is inconsistent with certain of its prior decisions and when its prior rulings have indicated an intended effect that the precedent has failed to achieve. If a court of appeals sees changes in society as a basis for

90. *Wallace v. Securities & Exchange Comm'n (In re Continental Inv. Corp.)*, 586 F.2d 241, 248 (1st Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). On the use of changed conditions as a reason for anticipatory overruling, see *Lower Court Disavowal*, *supra* note 32, at 528, 533; *Attitude of Lower Courts*, *supra* note 20, at 1452.

A Supreme Court case in which, although circumstances were found to have changed, the precedent was left standing as an "aberration" is *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) (since 1922, when the precedent declared baseball not to be interstate commerce, the nature of the sport and of participation in it had changed and had come to involve interstate commerce).

For the belief that a court should overturn its own precedent when conditions have altered, see *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943) ("[C]hanged conditions," consisting of "closer integration of society and . . . expanded and strengthened governmental controls . . . often deprive precedents of reliability and cast us more than we would choose upon our own judgment . . ."); *Klein v. Maravelas*, 219 N.Y. 383, 386, 114 N.E. 809, 810-11 (1916) (Cardozo, J.) ("The needs of successive generations may make restrictions imperative to-day which were vain and capricious to the vision of times past."); B. Cardozo, *supra* note 19, at 150-53; *Holmes*, *supra* note 20, at 466 ("We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind."); *Moore & Oglebay*, *supra* note 12, at 515, 523; *Pound*, *supra* note 12, at 11.

anticipatory overruling because the precedent is thereby rendered anachronistic, such conditions would presumably be so widely recognized that although the High Court had not spoken on the issue, its views could reasonably be assumed.

C. Inappropriate Factors and Evaluation Thereof

Reasons that have been suggested for anticipatory overruling and that are not justifiable include an attempt to compel the Supreme Court to consider the viability of a precedent.⁹¹ Such an action would not amount to anticipatory overruling, as it would not involve predicting what the Supreme Court would do. Instead, the lower court would be overturning the precedent regardless of the likely outcome, simply to bring about review.

Another ground that should not be considered valid is a claim that a Supreme Court precedent is less binding than it otherwise might be because it was decided by a divided court (provided the Court was not equally divided, which would indeed negate its precedential value).⁹² This situation should be distinguished from one in which changes in Supreme Court membership or in the views of Justices combine with the fact that the precedent was decided by a divided court to indicate that the High Court will itself probably overturn its precedent. To refuse to follow a Supreme Court precedent simply because it was decided by a divided Court would not be "anticipating," because such refusal would not entail a prediction of Supreme Court action but would, rather, amount to questioning whether a decision by a divided court is actually a precedent—which it undoubtedly is.⁹³

Another inappropriate reason for anticipatory overruling is the desire to avoid reversal when the Supreme Court eventually reaches the expected decision. No criticism is implied in a reversal that occurs

91. The Court of Appeals for the District of Columbia refused to accept this as a ground for overruling a Supreme Court precedent in *Booster Lodge No. 405, Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 459 F.2d 1143, 1150 n.7 (D.C. Cir. 1972) (although one party had "asked [the] court to overrule [a Supreme Court precedent] in order to force reconsideration of the union discipline area by the Supreme Court," the court ruled that this was not its "function"), *aff'd per curiam*, 412 U.S. 84 (1973); see also *Lower Court Disavowal*, *supra* note 32, at 532.

92. Most authorities agree that an opinion by an equally divided Supreme Court has no precedential value and thus binds only the parties to the case. See *United States v. Pink*, 315 U.S. 203, 216 (1942); *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1910); *United States v. Friedman*, 528 F.2d 784, 788 (10th Cir. 1976), *vacated mem.*, 430 U.S. 925 (1977); 1B J. Moore, *supra* note 27, ¶ 0.402[2], at 119 (2d ed. 1982); Gray, *supra* note 12, at 41.

93. Opposition to use of a divided court as a ground for anticipatory overruling is expressed in: *United States v. Girouard*, 149 F.2d 760, 763 (1st Cir. 1945) ("It is true that these decisions were by a divided court but . . . we are bound to accept the law as promulgated by these decisions."), *rev'd on other grounds*, 328 U.S. 61 (1946); *Lower Court Disavowal*, *supra* note 32, at 510.

simply because a lower court followed a precedent set by a superior court.⁹⁴ Fear of reversal should play no role, therefore, in a decision to anticipate.

In assessing whether the Supreme Court will follow its precedent, a lower court should not give weight to its own views on the merits. This is because the question of what the Supreme Court would now decide if given the opportunity has no direct relation to what the court of appeals believes is a wise outcome on the merits. It may be argued that if a court of appeals is convinced that a particular outcome is the wiser one, it would expect that the Supreme Court would agree. The answer to this point is that reasonable judges can and often do differ, and the Supreme Court might well disagree on the merits with the conclusion of the court of appeals.⁹⁵

The Supreme Court might be influenced by the knowledge that a court of appeals believed a certain outcome so likely that it was willing to anticipate. Although a court of appeals might view as desirable a possible opportunity to influence the High Court's decision, the Supreme Court should act of its own volition. A lower court, though it may consider one result to be better law than another, should not seek to influence the High Court's decision.

A highly questionable criterion for anticipation is awareness that another court has or has not anticipated when presented with the same issue. Another court's evaluation of the viability of a precedent may be helpful and, indeed, persuasive to a court ruling on the same issue.⁹⁶ A court should guide itself, however, by its own best assess-

94. See Kelman, *supra* note 21, at 9; Wyzanski, *supra* note 17, at 1299.

95. For a statement that a lower court's beliefs on the merits should not affect its decision whether to anticipate, see *Mason v. United States*, 461 F.2d 1364, 1375 (Ct. Cl. 1972), *rev'd on other grounds*, 412 U.S. 391 (1973). A hint that the lower court's views on the merits might be one ingredient in anticipatory overruling is found in *United States v. Girouard*, 149 F.2d 760, 765 (1st Cir. 1945) (Woodbury, J., dissenting) ("[O]n rare occasions . . . we must conclude that dissenting opinions of the past express the law of today. When this situation arises *and we do not agree with decisions of the Supreme Court* I think it our duty to decline to follow such decisions." (emphasis added)), *rev'd*, 328 U.S. 61 (1946). The italicized passage may mean, without so stating, that the court of appeals might not agree that the precedents would still be followed. Also see *Barnette v. West Va. State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D.W. Va. 1942) (in declining to follow a Supreme Court precedent, the court gave various reasons. It then added: "[A]nd believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs . . . we would be recreant to our duty as judges, if . . . we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties."), *aff'd*, 319 U.S. 624 (1943).

96. See *Northern Va. Regional Park Auth. v. United States Civil Serv. Comm'n*, 437 F.2d 1346, 1351 (4th Cir.) (Anticipation did not occur; the court saw as "highly relevant" the fact that "other federal courts have in recent adjudications felt similarly

ment of the case before it. If it believes that anticipation is otherwise called for, it should not allow the fact that another tribunal in another jurisdiction reached a different conclusion to dissuade it. Nor should a court of appeals anticipate because a court in another jurisdiction has already done so.

These, then, are the factors that have been or can be considered when a federal court of appeals anticipates and the contexts within which anticipation has occurred. It remains to assess the arguments for and against anticipatory overruling.

III. EVALUATION OF ARGUMENTS FOR AND AGAINST ANTICIPATORY OVERRULING

In examining whether *stare decisis* permits anticipatory overruling, a preliminary and oft-debated question arises concerning the nature of law. Do courts, in deciding cases, "discover" the law, which has existed all along, or do they "create" law?⁹⁷ If courts discover law, a court of appeals, in predicting an action of the Supreme Court and taking that action without waiting for the High Court to do so, arrives, before the Supreme Court does, at an already existing point. If, on the other hand, the Supreme Court creates law when it overturns a precedent, a court of appeals, in anticipating, fashions what it believes the High Court would itself wish to create.

Attempting to choose between these two concepts may generate unnecessary confusion. Each can be considered a different optical device for viewing a single entity. Regardless of whether the High Court discovers law or creates law, its decision becomes enforceable only when made and has no legal effect prior to that moment. After the Court has ruled, its holding is law until overturned, regardless also of whether the holding discovered or created law. The question remains, whichever conceptual tool is used: May a court of appeals do first whatever it believes the Supreme Court would itself do, whether

constrained."), *cert. denied*, 403 U.S. 936 (1971). It is unclear whether the court was "constrained" by the other courts' views on the merits or by their decision not to anticipate.

97. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . ."); Douglas, *supra* note 20, at 736; Gray, *supra* note 12, at 41; Holmes, *supra* note 20, at 460-61; von Moschzisker, *supra* note 12, at 422; *Two Recent Cases*, *supra* note 11, at 504, 512; Comment, *Federal Courts*, 31 *Geo. L.J.* 85, 86 (1942-43); Judge James D. Hopkins, New York State Supreme Court, Appellate Division, Second Department, Address at the Appellate Judges' Conference, *Legislative and Judicial Functions—Their Relative Place in Changing a Rule of Law* 1 (August 9, 1970) (available at The Institute of Judicial Administration, Inc., in New York City); Judge Thomas E. Fairchild, United States Court of Appeals for the Seventh Circuit, *id.* at 19.

this consists of finding the law that already existed or fashioning the law that should exist?

A. *Duty to Anticipate versus Duty to Follow
Supreme Court Precedent*

Several court of appeals judges have used the term "duty" with respect to anticipatory overruling, implying that once the determination is made that the Supreme Court would almost certainly overturn a precedent, the lower court has no choice but to act in concert. Judge Woodbury, in a dissenting opinion, wrote that when his court, in fulfilling the "duty to prophesy thrust upon" it, identified Supreme Court precedents that the High Court would no longer follow, it had a "duty to decline to follow such decisions."⁹⁸ Judge Learned Hand, dissenting in another case, said of the court of appeals that "the measure of its duty is to divine, as best it can, what would be the event of an appeal in the case before it."⁹⁹

Courts are expected to invoke, in deciding each case, the most applicable, most recently established rule of law. If a court of appeals knows that the Supreme Court will most likely adopt a new rule by overturning a precedent, perhaps there is an obligation to follow that rule, which is, in one respect, the most current law.¹⁰⁰

In addition, there is a duty of obedience to the High Court, which might be violated by giving effect to a law that the Supreme Court would itself no longer apply. There may also be a duty of "active assistance,"¹⁰¹ requiring a court of appeals to help bring about the result, on the merits, that the Supreme Court would wish.¹⁰² There is, of course, a counterargument, that obedience to the Supreme Court requires following its precedents, however outmoded.¹⁰³ It may also

98. *United States v. Girouard*, 149 F.2d 760, 765 (1st Cir. 1945) (Woodbury, J., dissenting), *rev'd*, 328 U.S. 61 (1946).

99. *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 823 (2d Cir.) (Hand, J., dissenting), *vacated sub nom. Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101 (1944); *see Bass v. Mississippi*, 381 F.2d 692, 696 (5th Cir. 1967) (dictum); *Two Recent Cases*, *supra* note 11, at 508.

100. *See United States v. City of Philadelphia*, 644 F.2d 187, 192 n.3 (3d Cir. 1981) (In justifying its departure from a Supreme Court precedent in order to follow a trend shown by subsequent Supreme Court cases, the court stated: "As an inferior court in the federal hierarchy, we are, of course, compelled to apply the law announced by the Supreme Court as we find it on the date of our decision.")

101. *Attitude of Lower Courts*, *supra* note 20 at 1458; *see id.* at 1450.

102. For the belief that a higher court would not wish a forecast of its action, but would desire the views of the lower court on the merits, *see Comment, Decisions*, 44 *Colum. L. Rev.* 565, 570 (1944).

103. *See, e.g., Hendricks County Rural Elec. Membership Corp., v. NLRB*, 627 F.2d 766, 769 (7th Cir. 1980), *rev'd*, 102 S. Ct. 216 (1982); *Ferina v. United States*, 340 F.2d 837, 839 (8th Cir.) ("This court does not forecast the law of the Supreme

be contended that anticipatory overruling does not involve assistance to the High Court, but rather an appropriation of its role.

The duty and the desire of every court of appeals to be forthright in reaching a decision and in describing its reasoning requires the court to indicate, when this is so, that it believes that a precedent would no longer be followed by the Supreme Court. Honesty may oblige the court also to depart from that precedent and anticipate the action the Supreme Court would take. In one such instance, the Second Circuit, in finding a trend and declining to follow a Supreme Court precedent, believed that it was fulfilling its "task," which was "to be performed directly and straightforwardly, rather than 'artfully' dodged."¹⁰⁴ Whether that court meant by "artful dodging," adhering to the precedent or finding a way to distinguish it, is not known.

Public perception of the forthrightness of a court is aided by anticipatory overruling; a statement that the court believes that a precedent would no longer be followed, but will apply it anyway, may be regarded as hypocritical. On the other hand, the duty of honesty may be performed by acknowledging that although the Supreme Court would probably overrule the precedent, the court of appeals has the obligation to follow the last decided case on the issue.

B. *Duty to do Justice versus Lack of Certainty*

One of the most compelling arguments in support of anticipatory overruling is that greater justice and fairness to the litigants are accomplished thereby.¹⁰⁵ It may be unjust for a court of appeals to apply a rule of law which it believes the Supreme Court would not now approve and which it believes will not be allowed to stand when and if the Supreme Court considers the case. If no further appeal is taken, for the possible reason, among others, that a party cannot afford this further step, or if the appeal is not entertained or certiorari not granted, whatever decision the court of appeals reaches will endure for an indefinitely long time.¹⁰⁶ The question must be asked whether

Court when and if it should decide to reverse itself We are obliged to rigorously apply the prevailing, majority precedent."), *cert. denied*, 381 U.S. 902 (1965).

104. *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 814 (2d Cir.), *vacated sub nom. Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101 (1944).

105. See Touchy, *The New Legality*, 53 A.B.A.J. 544, 546 (1976); *Two Recent Cases*, *supra* note 11, at 506, 515.

For the view that anticipatory overruling is an "irrelevant gesture" because the law will not be definite until the Supreme Court has ruled on the issue, see *Lower Court Disavowal*, *supra* note 32, at 533. This attitude omits to consider the question of justice to the parties who are before the lower court.

106. *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 823 (2d Cir.) (Hand. J., dissenting) ("I agree [with the majority] that one should not wait for formal retraction in the face of changes plainly foreshadowed; the higher court may not entertain

the losing party has in such an event received justice. Even should the case be heard by the Supreme Court, is it not unfair for the losing party to be governed even temporarily by a rule that the court of appeals knows is most probably, in a sense, no longer good law? Whether or not the case is heard by the High Court, it is indisputable that a court of appeals would wish to render a decision that is as fair and just to the litigants as possible.

It can be said that whenever an appellate court reverses the holding of a lower court, the party who had lost below is declared to have been temporarily in an unfair position, bound by a rule of law found ultimately to be incorrect. Arguably, this situation is analogous to one in which a court of appeals adheres to a Supreme Court precedent which it believes will be overruled, and therefore no unfairness results when anticipatory overruling is refused. Yet the situations differ, for in the former, the appellate court applies the rule that, to the best of its knowledge, it believes is correct and would be applied by a higher court. In the latter context, the court of appeals believes that the Supreme Court will not adhere to a precedent and is therefore confronted with a much more difficult choice in terms of fairness to the litigants.

Justice for the other party, the individual who asks the court of appeals to follow a Supreme Court precedent, must also be considered. This party can, of course, argue that until the Supreme Court has overturned the precedent, it is law and must be applied in his case. He can attempt to show reliance on the precedent, claiming that unfair surprise will result if the court of appeals departs from it.

Reliance is usually taken into account when a court considers overturning its own precedent and is one reason for the use of prospective overruling.¹⁰⁷ Reliance on remedial law is generally treated as less significant than an expectation as to the primary law that will be applied.¹⁰⁸ When anticipation is a possibility, reliance may have particular weight because of the expectation that lower courts will follow precedents established by higher courts; surprise would therefore be greater here than otherwise. The question of whether the litigant is

an appeal . . . or the parties may not choose to appeal.”), *vacated sub nom.* Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944); C. Allen, *Law in the Making* 298 (6th ed. 1958) (“An erroneous judgement may stand, and acquire an undeserved authority, merely because the losing party does not appeal against it”), *cited in* Re, *supra* note 18, at 41; Douglas, *supra* note 20, at 747 (As to whether a court should overturn its own precedent, Shakespeare’s *Merchant of Venice* is quoted: “ ‘ ‘Twil be recorded for a precedent; And many an error, by the same example Will rush into the state.’ ”); *Two Recent Cases*, *supra* note 11, at 506.

107. See, e.g., *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-09 (1971); *Great N. Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932); *Ramey v. Harber*, 589 F.2d 753, 757-60 (4th Cir. 1978), *cert. denied*, 442 U.S. 910 (1979).

108. See B. Cardozo, *supra* note 19, at 156.

indeed surprised can be partially answered by inquiring how reasonable it was for him to foresee the approaching change. The degree of unfairness of surprise depends to some extent upon the purpose pursued by the litigant. A city government, for example, might be surprised at the overturning of a precedent that permitted restrictions on political electioneering by its firemen.¹⁰⁹ The surprise would probably not be unfair, however, as no real interference with city government should result from removal of the prohibition.

Apart from the issue of reliance on a Supreme Court precedent, an answer to the broader question of whether justice requires anticipatory overruling must turn partially upon the nature of the interests that are at stake in a particular case. If failure to overturn a Supreme Court precedent would result in imprisonment of an individual, that person may have an exceptionally strong claim. In *Rowe v. Peyton*,¹¹⁰ for example, if the court of appeals had refused to overturn a Supreme Court precedent, a prisoner would have been delayed for years in challenging a conviction until "all responsible officials who participated in the trial, judge, prosecutor, lawyer, clerk and reporter, [might] have died, or the case have become so dim in their memories that they could contribute nothing as witnesses."¹¹¹ Although individuals who may suffer monetary loss have as great an entitlement to justice as have any others, there is in our legal system a particularly strong aversion to wrongful imprisonment.

Just as the desire to prevent irremediable damage may impel a court to anticipate, so may it require a court to refrain from employing the device. If irreversible harm would result from anticipating, a court should be less willing to anticipate.¹¹²

In arguing against anticipation, it may be objected that even if injustice is done to an individual when a court refuses to anticipate, justice is best assured to the greatest number of persons by adhering invariably to precedent.¹¹³ But interpreting *stare decisis* as sufficiently flexible to permit anticipatory overruling would permit justice to be attained when an exception to the general rule of following precedent

109. Such a precedent was overturned in *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971).

110. 383 F.2d 709 (4th Cir. 1967), *aff'd*, 391 U.S. 54 (1968).

111. *Id.* at 715; *accord Williams v. Peyton*, 372 F.2d 216, 219-21 (4th Cir. 1967); *Martin v. Virginia*, 349 F.2d 781, 783-84 (4th Cir. 1965) (application of precedent would have prevented prisoner's challenge of convictions which, if successful, would enable him to be considered for parole with respect to other conviction).

112. See *United States ex rel. Gockley v. Myers*, 450 F.2d 232, 240 (3d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972); von Moschzisker, *supra* note 12, at 423-24; *Two Recent Cases*, *supra* note 11, at 515-16.

113. Concerning the necessity of doing justice in the greatest number of cases, see von Moschzisker, *supra* note 12, at 429.

is warranted, without diminishing fairness in the larger class of cases in which there is no reason to consider overturning a precedent.

All considerations of dispensing justice by anticipating must be weighed against the inescapable lack of certainty concerning how the Supreme Court would decide the particular case. This lack of certainty is one of the most troubling issues to be addressed. No court of appeals can ever predict with absolute certainty how the Supreme Court will rule. Since federal courts decide only actual cases and controversies,¹¹⁴ the Supreme Court cannot resolve a dispute until that case comes before it. No one can foresee with assurance the effect upon the individual Justices of the presentation of a particular case. The unpredictability of human nature and the fact that reasonable persons can disagree concerning interpretation of the law contribute to the lack of certainty.

An additional element of uncertainty results from the inevitable interval between the rendering of a decision by a court of appeals and a ruling by the Supreme Court.¹¹⁵ If the case never reaches the Supreme Court because an appeal was not taken or for any other reason, an indefinitely long period of time will elapse before the same issue comes before the High Court in some other case. During this interlude, the factors that led the court of appeals to anticipate may become unrecognizable or disappear. For example, what was previously a new doctrinal trend may be reversed, an eroded precedent may be reconstructed by subsequent Supreme Court opinions, or the membership of the Supreme Court may change. (Nevertheless, at least at the time when the court of appeals anticipated, it ruled as the Supreme Court would then most likely have ruled, even though the change was temporary because the High Court later maintained its original stance.) Should the court of appeals have erred in its forecast, concerning either what the High Court would do then or in the future, this holding would remain a part of the law until the Supreme Court had an opportunity to examine the issue, however distant that time might be.

Given that absolute certainty is impossible, how strong a likelihood must there be that the Supreme Court will overturn a precedent before a court of appeals should even consider anticipating such an action? Judge Learned Hand cautioned against losing sight of the distinction between "changes plainly foreshadowed" and "the exhilarating opportunity of anticipating a doctrine which may be in the

114. U.S. Const. art. III, § 2, cl. 1.

115. Suggested by Alan S. Kramer, a former editor of the Columbia Law Review and member of the New York State Bar.

womb of time, but whose birth is distant.”¹¹⁶ He advocated anticipatory overruling in the former instance, but not in the latter.¹¹⁷

When anticipatory overruling has occurred, the degree of certitude entertained by courts of appeals has varied. On the one hand, the Fifth Circuit quoted Justice Black in finding that the Supreme Court’s eventual overturning of its precedent was “‘just about as certain as the changing of the seasons,’”¹¹⁸ and the Second Circuit applied the rule that “in all probability” the Supreme Court would choose.¹¹⁹ On the other hand, the Second Circuit stated, in another case: “We recognize that the matter is far from certain.”¹²⁰ A middle ground is suggested by the conclusion of the Fourth Circuit: “[T]here is reasonable ground for thinking that were the Supreme Court faced with the issue today, it might well reconsider [the precedent] and hold [in the opposite way].”¹²¹

Every court must experience a degree of uncertainty as to whether any of its decisions is a wise one. As Justice Holmes stated: “[C]ertainty generally is illusion, and repose is not the destiny of man.”¹²² Yet in the special situation of anticipatory overruling, a second layer of uncertainty is superimposed upon the first.¹²³ To the extent that a

116. *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 823 (2d Cir.) (Hand, J., dissenting), *vacated sub nom.* *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101 (1944).

117. *Id.* (Hand, J., dissenting).

118. *Andrews v. Louisville & Nash. R.R.*, 441 F.2d 1222, 1224 (5th Cir. 1971) (quoting *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 667 (1965) (Black, J., dissenting)), *aff'd*, 406 U.S. 320 (1972). That the Supreme Court affirmed a decision in which a court of appeals predicted the demise of a precedent does not provide any indication of the certainty, beforehand, of this outcome.

119. *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 814 (2d Cir.), *vacated sub nom.* *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101 (1944).

120. *Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598, 605 (2d Cir. 1968).

121. *Martin v. Virginia*, 349 F.2d 781, 783-84 (4th Cir. 1965).

122. Holmes, *supra* note 20, at 466.

123. *See United States v. Girouard*, 149 F.2d 760, 767 (1st Cir. 1945) (Woodbury, J., dissenting) (believing that the standard of certainty suggested by Judge Learned Hand, see text in pt. III(B), *supra*, had been met), *rev'd*, 328 U.S. 61 (1946).

For cases in which anticipatory overruling did not occur but in which the various degrees of certainty required for anticipation were discussed, see *Booster Lodge No. 405, Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 459 F.2d 1143, 1150 n.7 (D.C. Cir. 1972) (dictum) (“near certainty” is needed), *aff'd*, 412 U.S. 84 (1973); *Breakefield v. District of Columbia*, 442 F.2d 1227, 1230 (D.C. Cir. 1970) (dictum) (“the proper decisional result” must be “very clear”), *cert. denied*, 401 U.S. 909 (1971); *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970) (dictum) (“[N]ear certainty” is needed. “While we should not fall out of our chairs with surprise” if the precedents are overruled, “we are not at all certain the Court is ready to give them a happy despatch”), *cert. denied*, 400 U.S. 1001 (1971); *Ashe v. Swenson*, 399 F.2d 40, 46 (8th Cir. 1968) (prediction “with assurance” may be more difficult than otherwise in the “rapidly developing and sensitive area of the criminal law and the Fourteenth Amendment Bill of Rights

court of appeals is unsure how the Supreme Court will treat one of its own precedents, each argument in favor of anticipatory overruling is weakened, and every argument against its use is reinforced. At the point at which any significant uncertainty exists, anticipatory overruling ought not even to be considered.

C. *The Need for Growth in Law versus the Need
for Uniformity, Predictability, and Stability*

If a court of appeals is accurate in its prediction, anticipatory overruling facilitates growth in the law.¹²⁴ The new rule that the lower court believes the Supreme Court will eventually apply is made immediately available to the parties and becomes a part of the fabric of the law. Failure to anticipate when the court of appeals believes that the Supreme Court would reach a new result delays this growth and may postpone it indefinitely because of the possibility that neither the same case nor another concerning the same issue may ever come before the High Court. Paradoxically, however, growth in the law often depends upon adherence to precedent, which provides a mechanism for transmission to lower courts of changes made by the highest court.¹²⁵

The possibility of fostering growth in the law by anticipating must not become confused with what has been described as a "creative opportunity" for a judge.¹²⁶ Creativity relates to producing something entirely new, and a court of appeals should never venture beyond assisting in the realization of what it believes the Supreme Court itself will find if given the opportunity.

Although the need for a system of law to change and grow as society evolves is not usually debated,¹²⁷ there is no unanimity as to how great

relationship"), *rev'd*, 397 U.S. 436 (1970); *Bass v. Mississippi*, 381 F.2d 692, 696 (5th Cir. 1967) (dictum) (an "arguendo assumption" that the Supreme Court would override the precedent is sufficient); *New Eng. Mut. Life Ins. Co. v. Welch*, 153 F.2d 260, 262 (1st Cir. 1946) (dictum) ("the clearest indications" of eventual overturn by the Supreme Court are required). On the subject of certainty in anticipatory overruling, see also Wyzanski, *supra* note 17, at 1298-99; *Two Recent Cases*, *supra* note 11, at 506, 515.

124. See *Attitude of Lower Courts*, *supra* note 20, at 1457-58.

125. See *Kelman*, *supra* note 21, at 5-6.

126. See *Attitude of Lower Courts*, *supra* note 20, at 1458.

127. Concerning the general need for growth in the law, see Hand, *Sources of Tolerance*, 79 U. Pa. L. Rev. 1, 13 (1930); Holmes, *supra* note 20, at 468 ("The development of our law has gone on for nearly a thousand years, like the development of a plant, each generation taking the inevitable next step, mind, like matter, simply obeying a law of spontaneous growth. It is perfectly natural and right that it should have been so."); Jackson, *supra* note 20, at 335 ("[W]e are all under trusteeship responsibility for the precious but never finished body of the law."); Moore & Oglebay, *supra* note 12, at 515 ("No court can effectively command, over an extensive period of time, obedience to a rule of law that departs too far from the norms of

a consequent sacrifice in uniformity, predictability and stability is warranted. One strong argument against anticipatory overruling consists simply of the notion that stare decisis precludes overturning, for any reason, a precedent set by a higher court.¹²⁸ The traditional interpretation of stare decisis in the American common-law system has been that although a court may depart from its own precedent, it is absolutely bound by the holding of a superior court.¹²⁹ Many of the arguments, and the most persuasive ones, against acting on a prediction of what the Supreme Court will do are based on the considerations of uniformity, predictability and stability, which underlie the doctrine of stare decisis.

The need for uniformity of law is one reason why stare decisis is assigned great value in our legal system.¹³⁰ Because lower courts are required to follow the precedents of higher courts, a pyramidal effect is obtained, in which the rules set by the highest court will, theoretic-

the times. No case is forever impregnable.”). That the need for growth in the law may compel the Supreme Court to limit the application of one of its own precedents, see *Washington v. Dawson & Co.*, 264 U.S. 219, 236 (1924) (Brandeis, J., dissenting) (“Modification implies growth. It is the life of the law.”).

128. The separate situation of implied overruling, which stare decisis does not prohibit, is discussed in pt. I, *supra*.

129. See, e.g., *Hendricks County Rural Elec. Membership Corp., v. NLRB*, 627 F.2d 766, 769 (7th Cir. 1980), *rev'd*, 102 S. Ct. 216 (1982); *Northern Va. Regional Park Auth. v. United States Civil Serv. Comm'n*, 437 F.2d 1346, 1351 (4th Cir.) (“Conceivably, if the Supreme Court were to make a fresh evaluation of the constitutionality of the Hatch Act today, it might depart from the result it reached in 1947. Our holding is dictated, however, by our duty to give effect to an existing Supreme Court ruling . . .”), *cert. denied*, 403 U.S. 936 (1971); *United States v. White*, 405 F.2d 838, 852 (7th Cir. 1969) (Hastings, J., dissenting) (“I have long held the rather old fashioned view that only the Supreme Court could set aside its holdings. . . . I make no prophecy on the future of [the precedent]. Until it is set aside by the Supreme Court, I regard it as controlling . . .”), *rev'd*, 401 U.S. 745 (1971); *Ashe v. Swenson*, 399 F.2d 40, 46 (8th Cir. 1968), *rev'd*, 397 U.S. 436 (1970); *Ferina v. United States*, 340 F.2d 837, 839 (8th Cir.), *cert. denied*, 381 U.S. 902 (1965); *Gardella v. Chandler*, 172 F.2d 402, 405 (2d Cir. 1949) (Chase, J., dissenting); *Douglas v. City of Jeannette*, 130 F.2d 652, 659 (3d Cir. 1942), *aff'd*, 319 U.S. 157 (1943); *Kelman*, *supra* note 21, at 4; *Re*, *supra* note 18, at 46-47; *Anticipatory Stare Decisis*, *supra* note 23, at 167; sources cited *supra* note 12.

In some instances, courts of appeals appear to have invoked the duty of adherence to Supreme Court precedent as a “makeweight” argument when these courts have not found the precedent impaired. See *Hockenbury v. Sowders*, 633 F.2d 443, 445 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981); *United States v. Decoster*, 624 F.2d 196, 216 (D.C. Cir. 1979). Courts that refuse to anticipate often do not go beyond stating that they are bound by precedent. They usually do not consider whether anticipatory overruling can ever be a sound action (which discussion would, of course, be dictum); therefore, it is known only that in a particular instance use of the device was impermissible.

130. See *United States v. Girouard*, 149 F.2d 760, 765 (1st Cir. 1945) (Woodbury, J., dissenting), *rev'd*, 328 U.S. 61 (1946); *B. Cardozo*, *supra* note 19, at 160; *Kelman*, *supra* note 21, at 4; *Two Recent Cases*, *supra* note 11, at 508.

cally, permeate the entire system. (This dissemination depends, of course, on enough appeals being heard to bring cases to the higher levels of the hierarchy.)

When a court of appeals departs from a Supreme Court precedent, disparity is created between the new decision and the precedent. This situation will persist until the High Court overturns or reaffirms its precedent, provided this case or another concerning the same issue eventually reaches the Court. If other circuits do not anticipate in cases involving the same precedent, further disparity will result. In addition, district courts in the jurisdiction of the anticipating court of appeals may decline to follow its lead and adhere instead to the Supreme Court precedent, and district courts in other circuits that have not anticipated are likely also to apply the precedent. If, however, a court of appeals believes that the precedent will be overturned by the Supreme Court, it can contend that by aligning its decision with what will become the law and, in instances of perceived erosion or new trends, with what has in related fields already become the law, it is furthering uniformity.

Another argument against anticipation relates to equality in treatment of litigants, a desirable result of uniformity of law. To the extent that a court of appeals may anticipate, while another circuit or a district court may not do so in a case involving the same issue, different law will be applied according to the accident of which court hears a case.

A related goal of *stare decisis* is predictability of judicial decisions. The fair and efficient functioning of our legal system depends heavily on the ability of individuals to forecast the results of particular acts.¹³¹ Aside from instances in which it is arguable whether a precedent is applicable, there are numerous planning situations in which the parties can be fairly certain that a particular rule of law is applicable and can guide their behavior accordingly. Individuals may have a stronger entitlement to being able to predict the law in some areas, such as commercial transactions, than in others, such as criminal sentencing. Although a person may fairly expect the law to be clear as to whether an act is a crime before he commits it, he is usually not thought to have a right to predict the punishment.

Predictability of law rests on the assumption that lower courts will follow the precedents established by the higher courts in their respec-

131. See *Ashe v. Swenson*, 399 F.2d 40, 45 (8th Cir. 1968), *rev'd*, 397 U.S. 436 (1970); Holmes, *supra* note 20, at 457 ("People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves . . ."); von Moschzisker, *supra* note 12, at 414; *Two Recent Cases*, *supra* note 11, at 515. For the criticism that lack of predictability results when a Supreme Court precedent is overturned by the Supreme Court itself, see *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 112-13 (1944) (Roberts, J., dissenting).

tive jurisdictions. There is no assurance, however, that the higher courts will adhere to their own precedents, as *stare decisis* does not require this. Predictability thus becomes a function of attempting to foresee what the higher courts will do. If it is reasonably clear that the Supreme Court will depart from one of its precedents and the court of appeals anticipates this action, it can be said that the lower court's action was in fact predictable. An individual's entitlement to predictability does not extend, it can be argued, to being able to forecast that a court of appeals will not anticipate and will instead apply a rule that the Supreme Court would not endorse.

Stability of law, an end sought by means of *stare decisis*,¹³² may decrease when a lower court anticipates. To the degree that stability results from deliberate and orderly change,¹³³ the leap-frogging effect of acting in advance of the highest court lessens stability. The value of stability as a goal in itself must be assessed, however, in relation to other desirable factors, such as growth. A tension can arise between these two elements if the desire for deliberate and orderly change impedes growth of the law when the latter is called for by the current needs of society.

D. *Greater Efficiency in Judicial Administration in the Supreme Court versus More Cases to be Heard by the Courts of Appeals*

Efficiency in judicial administration, resulting from fewer appeals from court of appeals decisions, is a probable result of anticipatory overruling. Provided that each litigant shares the court's view that a precedent is unlikely to be followed by the Supreme Court, the party who loses when anticipatory overruling occurs is less apt to appeal than is the losing party when the precedent is followed. This conclusion is based on the assumption that, as the likelihood of success on appeal diminishes, so does willingness to incur the various attendant expenses.

When a court of appeals rules as the Supreme Court would in a particular case, the need for the Supreme Court to grant certiorari or agree to hear an appeal for the purpose of establishing the correct rule of law is lessened. The Supreme Court may wish, however, to announce to other courts its agreement, on the merits, with the decision of a lower court that has anticipated, particularly if there is discord among the circuits. In such an instance, the High Court presumably would have decided to hear the case had anticipation not occurred,

132. Douglas, *supra* note 20, at 736 ("*Stare decisis* serves to take the capricious element out of law and to give stability to a society.>").

133. See *Barnette v. West Va. State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D.W. Va.), *aff'd*, 319 U.S. 624 (1943).

and so its burden, although not lessened, is at least not increased by the lower court's action.

Though the need for the Supreme Court to hear appeals and to grant certiorari may be diminished when anticipatory overruling occurs, litigation in the district courts and appeals to the courts of appeals may increase and efficiency of judicial administration decrease correspondingly, if individuals are encouraged to believe that courts of appeals may depart from Supreme Court precedents.¹³⁴ Whereas a party adversely affected by a Supreme Court precedent may not expect to be able to pursue an appeal all the way to the High Court, he may venture a suit if there is hope that the precedent will be overturned in a lower court. If, however, anticipatory overruling is otherwise thought acceptable, its use should not be curbed because the number of suits may increase. If more people come into court because they may thereby have the advantage of a change in the law which the Supreme Court quite probably will make itself, this is not an event to be discouraged.

E. *Increased Respect for the Judicial System versus Diminished Respect for the Supreme Court*

Respect for the Supreme Court, it can be argued, may be diminished when lower courts depart from its precedents. The damage to the prestige of the High Court may occur not only throughout the judiciary system but in public opinion as well. None will quarrel with the importance to the functioning of our society of a public perception that the courts, particularly the Supreme Court, are deserving of respect.¹³⁵ If the High Court is seen as having been treated with less than due regard by a lower court, or if indeed a lower court is viewed as having usurped some attribute of the Supreme Court's authority, respect for the High Court and the legal system cannot but decline in the public eye.

Arguably, however, the public will admire and respect a lower court for taking what may be thought a brave step, in "directly and

134. See *Two Recent Cases*, *supra* note 11, at 515; *Anticipatory Stare Decisis*, *supra* note 23, at 168; *Lower Court Disavowal*, *supra* note 32, at 524. With respect to the increased litigation that may result when the Supreme Court overrules its own precedents, see *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 112-13 (1944) (Roberts, J., dissenting).

135. Justices Frankfurter and Roberts, in dissenting opinions in separate cases, have warned that diminished public respect or confidence may result when the Supreme Court overturns its own precedents. See *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 113 (1944) (Roberts, J., dissenting) ("Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy."); *Helvering v. Hallock*, 309 U.S. 106, 129 (1940) (Roberts, J., dissenting).

straightforwardly" making whatever decision it believes the Supreme Court would make, rather than indulging in a "blind following" of a precedent.¹³⁶ There is a strong possibility that public respect for the judiciary system as a whole, as dispenser of justice, will be increased when a court shows itself determined to bring about, without delay, whatever result the Supreme Court would now reach.

F. *Other Arguments To Be Considered*

It may be argued that courts of appeals should not anticipate because confusion among district courts may result. Unless the Supreme Court has subsequently ruled in that case or another case involving the same issue, the district court will face a dilemma when it encounters a case that concerns this issue; it owes obedience to two higher courts that ostensibly are in disagreement with one another. If the district court chooses to follow the court of appeals, according respect to that court's assessment of the likelihood of change, the district court is, nevertheless, deviating from a Supreme Court precedent. The situation for a district court is thus not a comfortable one.¹³⁷

Additionally, there may be difficulty in limiting the use of anticipatory overruling. The more frequent the employment of this device, the more visible it will become and, perhaps, the more readily it will be used by courts. To date, however, this possibility has not been realized. The use of anticipatory overruling by courts of appeals has been infrequent and, though it has occurred as recently as 1981,¹³⁸ its use has not shown an increase since 1942, when the first full discussions of it in court of appeals opinions appeared.¹³⁹ If district courts begin to employ the device more often, some of the problems associated with its use will increase. For example, there will be less certainty of the eventual result, because the actions of both the court of appeals and the Supreme Court will have to be forecast and the case might be heard by the court of appeals and never reach the Supreme Court.

The unique position of the Supreme Court in our legal system provides bases for further arguments against anticipation. The legal system confers upon the Supreme Court, and only upon that Court,

136. *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 814 (2d Cir.) (quoting *Barnette v. West Va. Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D.W. Va.), *aff'd*, 319 U.S. 624 (1943), *vacated sub nom. Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101 (1944)).

137. Concerning the difficulty that may arise for lower courts when the Supreme Court overturns its own precedents, see *Helvering v. Hallock*, 309 U.S. 106, 129 (1940) (Roberts, J., dissenting).

138. See *United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir. 1981).

139. See *Picard v. United Aircraft Corp.*, 128 F.2d 632 (2d Cir.), *cert. denied*, 317 U.S. 651 (1942); *Perkins v. Endicott Johnson Corp.*, 128 F.2d 208 (2d Cir. 1942), *aff'd*, 317 U.S. 501 (1943).

the right to be the final arbiter of change in interpretation of the law. Supreme Court Justices are appointed, and their appointments confirmed, with awareness that theirs is the highest responsibility in the federal judiciary system. Courts of appeals judges are chosen with consciousness that their decisions, though often undisturbed by the Supreme Court, do not represent the ultimate judicial authority.

It is the prerogative of the Supreme Court to decide not only whether, but when, it will overturn a precedent.¹⁴⁰ Although the High Court must await a suitable case as a vehicle for instituting change in the law, it may also choose to decline the opportunity to make the change until what it deems a more appropriate time. In *Republic Steel Corp. v. Maddox*,¹⁴¹ for example, the Supreme Court stated that in order to consider whether to overrule a precedent it would wait for a case which would provide a context for examining the administrative remedies specified in particular legislation.¹⁴²

The Supreme Court is empowered to consider the intangible factors in the development of case law and in the state of society that may cause a particular case, such as *Brown v. Board of Education*,¹⁴³ to be selected to provide the occasion for announcing that a doctrine (there, the "separate but equal" rule) is no longer acceptable in a particular context (for example, public education of blacks and whites).¹⁴⁴ The Supreme Court can be said to have a broader view of the legal system than any one court of appeals, which hears cases from only one circuit. It can be contended, however, that when a change in the law is appropriate and is almost certainly imminent, the Supreme Court should not delay announcement of it for any reason and would, furthermore, wish to have it promulgated as soon as possible.

It has been suggested in favor of anticipation that the device may serve the Supreme Court in obviating the need for that Court to make certain decisions that are politically controversial. Provided a court of appeals accomplishes the result desired by the Supreme Court, the latter may never have to make a pronouncement on the subject. If this is indeed a benefit to the Supreme Court, it is one that should be only a byproduct of anticipatory overruling, and should never be a motive for it. Political concerns should not in any manner affect the decision of a court of appeals.

140. See *Gardella v. Chandler*, 172 F.2d 402, 405 (2d Cir. 1949) (Chase, J., dissenting) (to anticipate would be "an unwarranted attempt to usurp the authority of" the Supreme Court); *Lower Court Disavowal*, *supra* note 32, at 536.

141. 379 U.S. 650 (1965).

142. *Id.* at 657 n.14. The Fifth Circuit, deciding that it had before it "the case for which the Supreme Court [had been] waiting," anticipated and overturned the precedent. *Andrews v. Louisville & Nash. R.R.*, 441 F.2d 1222, 1224 (5th Cir. 1971), *aff'd*, 406 U.S. 320 (1972).

143. 347 U.S. 483 (1954).

144. See *Kelman*, *supra* note 21, at 8.

It may be argued that anticipatory overruling is unnecessary because the Supreme Court will itself eventually announce whatever change in the law it deems necessary. In addition, a court of appeals may, if it wishes, lay before the High Court, in its decision, its assessment of the fragility of the precedent, thereby helping to ensure that the problem will come to the attention of the Supreme Court.¹⁴⁵ This argument does not, however, take account of the possibility that the issue may never reach the High Court if an appeal is not taken or is not heard. It also disregards the matter of fairness to parties who will, temporarily or indefinitely, be affected by imposition of the precedent, some of whom may thereby suffer irreversible harm.

A further argument against anticipation is that, in matters other than constitutional interpretation, courts of appeals should await legislative action.¹⁴⁶ There is, however, no assurance that a legislature will act swiftly enough to give relief in the near future, and legislation, because of its prospective nature, will not, in any event, affect the parties currently before the court. Legislatures may have before them other matters assigned higher priorities and, above all, they are not bound to consider any particular question of law that may arise. Courts do, in contrast, have an obligation to decide every controversy that is properly before them. If the issue before the court is one that is appropriate of judicial resolution, the court would be shirking its duty if it declined to anticipate on the ground that the legislature should decide whether to institute the change.

CONCLUSION

A court of appeals, in deciding whether to utilize anticipatory overruling, must make a threshold determination as to whether *stare decisis* ever permits such anticipation. The court must consider whether growth in the law can, in at least some instances, be sufficiently important to warrant an action that will necessarily diminish the uniformity, predictability and stability which result from following Supreme Court precedent. It is here suggested that growth in the law and flexibility can, in theory and in limited circumstances, be sufficiently valuable to justify such diminution.¹⁴⁷

145. See Wyzanski, *supra* note 17, at 1299 (with respect to trial courts); *Lower Court Disavowal*, *supra* note 32, at 536.

146. Concerning the advisability of legislation when a court is asked to overturn its own precedent, see Pound, *supra* note 12, at 10, 12-13.

147. See Pound, *supra* note 12, at 11 ("It is impossible to have at the same time a perfect stability, a complete certainty and predictability in the judicial process, and a perfect flexibility. . . . The best that can be done is to maintain a balance between them which will give as much effect as we can to each consistently with not impairing the other.").

A related preliminary decision must be made with respect to whether the court of appeals perceives itself as having a duty to bring about the result that the Supreme Court would reach in the same case, or whether the court believes, all other factors aside, that its sole and absolute obligation is to adhere to the precedent set by the High Court. This Article contends that the responsibility to follow Supreme Court precedent is not absolute and therefore does not preclude anticipatory overruling.

The court should examine whether its criteria for believing that the precedent will be overturned by the Supreme Court are appropriate. If, for example, the underpinnings of the precedent have been eroded by subsequent Supreme Court decisions or if the Supreme Court has stated that it is awaiting the opportunity to overrule the precedent, anticipation may be justifiable. Other situations in which anticipatory overruling can be reasonable have been described in Part II of this Article. On the other hand, some potential reasons for anticipation are not appropriate. These include, for example, the claim that a precedent decided by a divided Supreme Court is inherently weak and the wish of a court of appeals to overturn a precedent because of its own views on the merits.

If a court of appeals has answered the foregoing questions in a manner that does not prohibit anticipation, it should examine the circumstances of the particular case before it with reference to the arguments for and against anticipation described in Part III.

The court of appeals must, if it is to anticipate, satisfy itself that the Supreme Court is highly likely to depart from a precedent and almost certain to reach a particular result. As has been pointed out earlier, absolute certainty can never be attained. The court must nevertheless perceive that there is virtual certainty as to what the action of the Supreme Court would be. If such near certitude does not exist, the court should abandon any thought of anticipating in that case, for to anticipate would be to indulge in mere guesswork rather than in prediction.

Anticipatory overruling should occur only when a court of appeals is sure that greater justice to both parties will be accomplished thereby. The circumstances of the case should be scrutinized to ascertain whether the party seeking the overturning of the Supreme Court precedent will be treated more fairly if overruling occurs. The court must satisfy itself that the other party would not suffer any unfairness in that event. The possibility of irremediable harm to either party if anticipation does or does not occur, such as, for example, the chance that imprisonment will result, must be assessed.

The court must ponder also the likely effect of anticipatory overruling in the particular case upon public respect for the Supreme Court and the judicial system. A related concern is that of whether the Supreme Court should be the only body to announce the demise of the precedent, in view of that Court's position in the public mind as the

ultimate tribunal and because of its unique opportunity to see the legal system as an integrated whole. Further, the court of appeals may sense that, despite its certainty of the eventual overturning of the precedent, only the Supreme Court should determine whether the precedent should be overruled at this particular time.

A court of appeals should consider also whether anticipatory overruling in the instant case will engender confusion in district courts of that circuit, which in turn must decide in future cases whether to follow the precedent set by the court of appeals or that established earlier by the Supreme Court.

In addition, the court of appeals should question whether the particular Supreme Court precedent involved might more appropriately be overturned by a legislative body. The court should be mindful that, whereas a legislature has no duty to act in such a situation, a court does have an obligation to adjudicate the case before it, and the court's holding will necessarily cause one rule of law or another to prevail.

Finally, anticipatory overruling must remain a discretionary device. Courts should not feel constrained to apply it because they have done so in similar circumstances.¹⁴⁸

How can a court of appeals adequately balance all of these elements to reach a decision in a matter so serious as possible departure from a Supreme Court precedent? It must be realized that there can be no easy solution, nor even any "correct" solution, to the problem. A court which attempts this task seeks, as Justice Frankfurter said in another context, a "balance of imponderables."¹⁴⁹ Yet lack of a clear path should not deter a court of appeals from grappling with the problem and from arriving at a decision which, if not a solution, is at least a means of achieving as many as possible of its goals without violating its obligations. When a court of appeals, after having weighed all the relevant factors, concludes that overturning of the precedent appears to be warranted, it should, provided its intellect, its discretion and its good sense permit, act as it believes the Supreme Court would act—and anticipate.

148. Anticipatory overruling has not had the effect of a precedent, as courts of appeals have, within the same circuit, utilized it in some instances and criticized it in others. Compare *Rowe v. Peyton*, 383 F.2d 709 (4th Cir. 1967) (anticipation occurred), *aff'd*, 391 U.S. 54 (1968) with *Northern Va. Regional Park Auth. v. United States Civil Serv. Comm'n*, 437 F.2d 1346 (4th Cir.) (court refused to anticipate), *cert. denied*, 403 U.S. 936 (1971). It would be a contradiction in terms to allow stare decisis to require that a precedent be overruled.

149. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 652 (1943) (Frankfurter, J., dissenting).