of the law.[15] The United States Supreme Court, moreover, has left the door open for the consideration of charges of discrimination that fall without the race and color category.[16] These considerations would appear to be grounds for an argument that, with the rule of exclusion now the law, it should be extended to cover other social groups subject to possible discrimination. Pointing in the same direction are the indications given by the federal courts in their construction of the federal naturalization statutes that a Mexican is in a different racial classification from that of the white man.[17] If such is the case, then the position of the defendant in the principal case and that of the Negro in *Norris v. Alabama* are closely analogous.

These factors are grounds for questioning the court's refusal in the principal case to extend the rule of the *Norris* case beyond its precise facts. There seems to be little reason why that rule should not be available to members of races, nationalities, or other social groups whose standing in a particular case is very similar to that of the Negro.

COURTS — OPERATION OF OVERRULING DECISIONS

Plaintiff purchased a truck at a stated cash price of $1,750, giving in payment a note for $1,439.14, cash in the amount of $100, and his car in trade valued at $500. The increase of $289.14 above the stated cash price was to be for insurance, interest and service charges. The seller assigned the conditional sales contract, made upon the forms of the defendant, to the defendant for $1,150. The insurance was $148.24, leaving $140.90 as interest and service charges. The plaintiff filed suit alleging usury

15. Mamaux v. United States, 264 Fed. 816 (6th Cir. 1920) (wage-earners); State v. Walters, 61 Idaho 341, 102 P.2d 284 (1940) (one-quarter blood Indian); State v. Guirlando, 152 La. 570, 93 So. 796 (1922) (Italian); Sanchez v. State, 147 Tex. Crim. 436, 181 S.W.2d 87 (1944) (Mexican); Carrasco v. State, 130 Tex. Crim. 659, 95 S.W.2d 433 (1936) (Mexican); Ramirez v. State, 119 Tex. Crim. 362, 40 S.W.2d 138, *cert. denied*, 284 U.S. 659 (1931) (Mexican). The same indication was given in the principal case.

16. In Fay v. New York, 332 U.S. 261, 283, *rehearing denied*, 332 U.S. 784 (1947), the Court said:

> We do not mean that no case of discrimination in jury drawing except those involving race or color can carry such unjust consequences as to amount to a denial of equal protection or due process of law.

17. *Ex parte* Shahid, 205 Fed. 812 (E.D.S.C. 1913); *In re* Rodriguez, 81 Fed. 337 (N.D. Tex. 1897).

under the constitution[1] and statutes[2] of the state, which allowed a return of 10 per cent on the use of money. The trial court found for the defendant. On appeal, held: affirmed. Although the $149.90 was in effect interest at the rate of 11½ per cent, the contract could not be upset because a long line of decisions had allowed such rates in similar fact situations. The court, however, recognized that the decisions erroneously interpreted the provisions against usury and issued a *caveat* overruling the old line of decisions and giving notice that under the new interpretation such contracts would be illegal.[3]

The problem raised in this case is how a court, finding that its past decisions have established an erroneous interpretation of the law, and that contract rights have been based on that interpretation, can overrule the old cases without upsetting established contract rights.[4] Our present legal system is primarily based upon the "declaratory theory" of jurisprudence,[5] which states that court decisions are merely evidence of the law and are not law themselves.[6] This necessarily means that when a prior decision is overruled, it never was true evidence of the law and that the rule presently declared is the true rule and always has been.[7]

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1. ARK. CONST. ART. 19, § 13 (1874).
2. ARK. STAT. ANN. § 68-609 (1947).
3. Hare v. General Contract Purchase Corp., 249 S.W.2d 973 (Ark. 1952).
4. See Snyder, *Retrospective Operation of Overruling Decisions*, 35 ILL. L. REV. 121 (1940); Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409 (1924).
5. HALE, HISTORY OF THE COMMON LAW 64 (4th ed. 1713); Holdsworth, *Case Law*, 50 L. Q. REV. 180, 184 (1934). For an excellent case discussion of this theory, see People *ex rel.* Rice v. Graves, 242 App. Div. 128, 273 N. Y. Supp. 582 (3rd Dep't 1934), *aff'd*, 270 N.Y. 498, 200 N.E. 288 (1936), *cert. denied*, 298 U.S. 683 (1936).

The doctrine of stare decisis, which calls for a court of equal or lower jurisdiction to follow the decision of a court of equal or higher jurisdiction, is another factor that works against the overruling of a particular case. The doctrine has not, however, been slavishly applied, and courts, through the exercise of their own discretion have deviated from past decisions and established new precedents when they have felt that the situation demanded it. Von Moschzisker, *supra* note 4, at 412.

Other factors that have influenced the courts in this class of cases are whether the interpretation has been based on common law, statute, or constitutional provision, whether the old rule has been supported by a long line of decisions or only one or two decisions, whether the rights involved have been property or contracts or whether they have been of some other type, and whether or not the party has actually relied upon the past decisions.

6. Swift v. Tyson, 16 Pet. 1, 18 (U.S. 1842); People *ex rel.* Rice v. Graves, 242 App. Div. 128, 131, 273 N.Y. Supp. 582, 587 (3rd Dep't 1934), *aff'd*, 270 N.Y. 498, 200 N.E. 288 (1936), *cert. denied*, 298 U.S. 683 (1935); Ray v. West Penna. Natural Gas Co., 138 Pa. 576, 590, 28 Atl. 1065, 1066 (1891).
7. *Ibid.*

Thus an overruling decision relates back to the time of the overruled case, and rights arising between the decisions and based upon the old one become questionable.

Some authorities have attacked this theory as archaic and unrealistic.[8] These writers suggest that it should be recognized that the courts do, in fact, make law just as much as the legislature does and that therefore court decisions, like legislation, should have only a prospective effect.

This theory has never been generally recognized, as it is fundamentally repugnant to the doctrine of separation of powers. Nevertheless, several United States Supreme Court decisions, in factual situations analogous to that of the principle case, have achieved the same result indirectly. Ordinarily the Court follows the latest interpretation of a state constitution by the highest court of the state, but to this rule there are several exceptions,[9] one of which is the so-called contract exception to retroactive overruling.[10] Under the contract exception, when a state court has put two different interpretations on a statutory or constitutional clause, the latest of which has impaired contracts based on the old interpretation, and the case has come on appeal from a federal court, the Supreme Court has applied the line of decisions upon which the contracts had been based and has treated the

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8. GRAY, THE NATURE AND SOURCES OF THE LAW 218-240 (2d ed. 1921); HOLLAND, JURISPRUDENCE 66 (12th ed. 1917); Note, 24 CORNELL L. Q. 611, 612 (1939).

9. For a discussion of these exceptions, see SIMKINS, FEDERAL PRACTICE §§ 1134, 1137 (3rd ed. 1938). The principal case speaks of the prior decisions on such sales contracts as setting up a rule of property, but in a stricter sense the "rule of property" exception is exemplified where a court, on realizing that its earlier decisions interpreting land titles have been erroneous, refuses, in order to avoid upsetting titles based on those past rulings, to overturn them retrospectively. See Hanks v. McDonell, 307 Ky. 243, 210 S.W.2d 784 (1948).

10. That there might be such an exception was first suggested by the Supreme Court in Rowan v. Runnels, 5 How. 134, 139 (U.S. 1847). The exception was greatly clarified in Ohio Life Insurance and Trust Company v. Debolt, 16 How. 416, 432 (U.S. 1853), and the language there used became the rule in Gelpcke v. City of Dubuque, 1 Wall. 175, 206 (U.S.1863) as follows:

> . . . The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.

See Snyder, *supra* note 4 at 130.

latest view as prospective only.[11] This result was originally based on the "impairment of contracts" clause,[12] but it was later stated that the true purpose behind the exception was to avoid gross injustice.[13] It should be noted, however, that the contract exception has not been applied when the case has come up on a writ of error to the state supreme court rather than on appeal from a lower federal court.[14] Furthermore, it is arguable that at the present the contract exception can no longer be invoked by the Court because under *Erie R.R. v. Tompkins*[15] it no longer has a choice of state interpretations. Under that case, no matter what the effect of the latest interpretation is on contracts prior to it, if

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11. Taylor v. Ypsilanti, 105 U.S. 60 (1881); Douglass v. County of Pike, 101 U.S. 677 (1879); Gelpcke v. City of Dubuque, *supra* note 10; Rowan v. Runnels, *supra* note 10.

12. See language from Gelpcke v. City of Dubuque, 1 Wall. 175 (U.S. 1863) quoted in note 10 *supra*. See also Snyder, *supra* note 4, at 133.

13. *See* Tidal Oil Co. v. Flanagan, 263 U.S. 444, 452 (1923); Olcott v. The Supervisors, 16 Wall. 678, 690 (U.S. 1872). See also Snyder, *supra* note 4, at 140.

14. When the case has come up on appeal from a lower federal court, federal jurisdiction has been based on diversity of citizenship, and in such cases the Supreme Court has said that the federal courts are free to decide what the state law is and to enforce it as set forth by the state supreme court before the contracts were made rather than as set forth in the later decisions of the same state supreme court. *Ibid.* But when the case has come up on writ of error to a state supreme court on the ground that the state court's retroactive overruling is in violation of the "impairment of contracts" clause or of the due process clause of the Fourteenth Amendment, the Court has consistently denied that it had jurisdiction on those grounds. Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924); Turner v. Wilkes County Commissioners, 173 U.S. 461 (1899); Bacon v. Texas, 163 U.S. 207 (1895); Central Land Co. v. Laidley, 159 U.S. 103 (1895); Railroad Company v. McClure, 10 Wall. 511 (U.S. 1870); *see* Commercial Bank v. Buckingham, 5 How. 317, 343 (U.S. 1847). The disposition of these constitutional contentions is well expressed in the following quotations from Central Land Co. v. Laidley, 159 U.S. 103 (1895). With reference to the argument based on impairment of contracts clause, the Court said:

> In order to come within the provision of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the State, and not by a decision of its judicial department only.

Id. at 109. To the contention that the state court's action violated the due process clause of the Fourteenth Amendment, the court answered:

> When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States. . . .

Id. at 112.

15. 304 U.S. 64 (1938).

the statute interpreted is constitutional as interpreted, the Supreme Court will be obliged to follow it.[16]

A court faced with decisions establishing an erroneous interpretation of a statutory or constitutional clause upon which contracts have developed has at least four possible alternatives: (1) It may refuse to overrule altogether; (2) It may overrule, giving the decision a retroactive effect; (3) It may overrule in that particular case but refuse to give the decision a retroactive effect; and (4) It may hold to the old decisions for determining the case at bar but in the same decision reverse itself prospectively. The objection to the first is that it perpetuates bad law, and the objection to the second has been discussed above. The third is better but fails to do substantial justice in the case being decided. The fourth alternative is that which was used in the principal case, and it appears to be the most desirable since it avoids surprise in the instant case but corrects the error of past decisions. This last alternative has been used before,[17] has been thought to raise no constitutional issue,[18] and has been specifically endorsed by one United States Supreme Court Justice.[19] Its only drawback is that the prospective statement is only dictum in the particular case, but this defect is cured when the court later follows its warning.[20]

16. In Sunray Oil Co. v. Commissioner of Internal Revenue, 147 F.2d 962 (10th Cir. 1945), the petitioner sought to invoke the principle of such cases as *Gelpcke v. City of Dubuque* and *Rowan v. Runnels.* The court commented on the present pertinency of those cases as follows:

> The taxpayer relies on certain earlier decisions where federal courts chose to follow earlier rather than later decisions of state courts as correct expositions of state law. In those cases the federal courts exercising jurisdiction in diversity of citizenship cases held themselves free to decide what the state law was, and to enforce it as laid down by state court decisions handed down before the contracts involved were made. But that freedom of choice between earlier and later decisions of state courts no longer obtains since Erie R.R. Co. v. Tompkins. . . .

Id. at 964.

17. Payne v. City of Covington, 276 Ky. 380, 123 S.W.2d 1045 (1938); Robinson v. Means, 192 Ark. 816, 95 S.W.2d 98 (1936).

18. Great Northern Ry. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 364 (1932). There the Court, in reference to the fact that the Supreme Court of Montana gave its decision a prospective effect, said:

> We think the federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principal of forward operation and that of relation backward. . . .

19. *See* Mosser v. Darrow, 341 US.. 267, 276 (1951) (Mr. Justice Black's dissent).

20. In Anheuser-Busch, Inc. v. Manion, 193 Ark. 405, 100 S.W.2d 672 (1937), the court followed a *caveat* laid down in Robinson v. Means, 192 Ark. 816, 95 S.W.2d 672 (1937).

On the basis of this evaluation it is submitted that the court in the principal case rendered a decision which was consistent with the demands of substantial justice, while keeping the development of the law in step with modern economy.

FEDERAL JURISDICTION—DIVERSITY OF CITIZENSHIP—MULTI-STATE CORPORATION

Plaintiff, a citizen of Massachusetts, sued a multi-state corporation, incorporated under the laws of Massachusetts, New York, and New Hampshire, in the Massachusetts Federal District Court, alleging that defendant was a corporation of New York.[1] Defendant pleaded incorporation in Massachusetts, and the court dismissed the case for want of diversity jurisdiction. On appeal, held: affirmed. A citizen of one state cannot sue a corporation, incorporated in that state and another, in the federal courts of that state on the ground of diversity of citizenship.[2]

The citizenship[3] of multi-state corporations, for purposes of determining diversity jurisdiction, is based on three conclusive fictitious presumptions applied by the courts:

1) All shareholders of the company are citizens of the state of incorporation.[4]
2) There is a separate and distinct corporation in each state of incorporation.[5]
3) The corporation involved in the suit is the separate corporation of the state where suit is brought.[6]

Applying these presumptions, the courts find diversity jurisdiction where suit is brought in a state other than that of the individual party[7] (as distinguished from the multi-state corpora-

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1. The $3,000 minimum, required for diversity jurisdiction pursuant to 28 U.S.C. 1332 (1946), was met.

2. Seavey v. Boston & Maine R.R., 197 F.2d 485 (1st Cir. 1952).

3. Although corporations are not technically citizens under 28 U.S.C. 1332 (1946), the courts refer to the stockholders jointly as the corporation and speak of the citizenship of the corporation. See McGovney, *A Supreme Court Fiction*, 56 HARV. L. REV. 853, 862 (1943).

4. Muller v. Dows, 94 U.S. 444 (1876).

5. Missouri Pacific Ry. v. Meeh, 69 Fed. 753 (8th Cir. 1895).

6. Town of Bethel v. Atlantic Coast Line R.R., 81 F.2d 60 (4th Cir. 1936), *cert. denied*, 298 U.S. 682 (1936).

7. *E.g.*, Railway Co. v. Whitton's Administrator, 13 Wall. 270 (1871).