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DEATH OF A PRECEDENT: SHOULD JUSTICES RETHINK THEIR CONSENSUS NORMS?

*Michael H. LeRoy**

I. INTRODUCTION

A. Context for the Research Question

Justice Scalia: My tone is sometimes sharp. But I think sharpness is sometimes needed to demonstrate how much of a departure I believe the thing is. Especially in my dissents. Who do you think I write my dissents for?

Jennifer Senior (Interviewer): Law students.

Justice Scalia: Exactly. And they will read dissents that are breezy and have some thrust to them. That's who I write for.¹

Whether a Supreme Court Justice writes a dissenting opinion to impress law students, like Justice Scalia, or to clarify a legal argument in a majority opinion, as noted by Justice Ginsburg,² or to appeal to future Justices in the hope that they will correct or improve the law, as suggested by Chief Justice Hughes,³ each jurist has made a conscious decision to reveal disagreement with fellow Justices. Using statistics, my

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1. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 6, 2013, <http://nymag.com/news/features/antonin-scalia-2013-10>.

2. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010) ("On the utility of dissenting opinions, I will mention first their in-house impact. My experience teaches that there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation.").

3. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS* 68 (1928) ("A dissent in a court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.").

research relates to the birth and death of Supreme Court precedents.⁴ Since its inception, the Court has explicitly overruled 205 of its precedents.⁵ Some precedents were created in peaceful unanimity. Others emerged amid strife, a byproduct of polarized voting.

My research asks: Did the margin of votes in these precedents affect their longevity? What effect did the number of concurring and dissenting votes have on a precedent's life? Did the number of concurring and dissenting opinions shorten a precedent's duration? My results show that the Court's decisional behavior accelerates the demise of an overruled precedent. I cannot say which precedents will be overruled; but, overruled precedents that were decided with conflict died before those decided by consensus.

Later, I discuss my methods and statistical results.⁶ For now, let us visualize how fragmented voting occurs in an overruled precedent. *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*⁷ illustrates how dissensus relates to overruling. In this badly fractured case, Justices Frankfurter, Burton, and Minton signed the plurality opinion.⁸ They were joined by Justices Warren and Clark, who concurred together,⁹ and Justice Reed, who concurred separately.¹⁰ The plurality votes were opposed by Justice Douglas, whose dissenting opinion was joined by Justice Black.¹¹ Justice Harlan did not take part in the decision,¹² thus magnifying the significance of the eight votes in the case.

Seven years after this decision ruled that federal courts lacked jurisdiction to hear a lawsuit by unionized employees for unpaid wages,¹³ *Smith v. Evening News Ass'n*¹⁴ explicitly overruled it.¹⁵ Noting

4. My use of death as a metaphor is hardly novel or unique. For a discussion on morbid imagery, see *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting) ("In dispatching *Booth* [v. *Maryland*] and [*South Carolina v.*] *Gathers* to their graves, today's majority ominously suggests that an even more extensive upheaval of this Court's precedents may be in store."). See also *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963) ("I agree that *Betts v. Brady* should be overruled, but consider it entitled to a more respectful burial."); *United States v. Nichols*, No. 13-10106-JTM, 2013 WL 6000016, at *4 (D. Kan. Nov. 12, 2013) ("[T]he Supreme Court has never expressly overruled *Schechter Poultry* or *Panama Refining*; so the doctrine, even if dead, has never received a proper burial.").

5. See *infra* Part V app.

6. See *infra* Part III.

7. 348 U.S. 437 (1955).

8. *Id.* at 439.

9. *Id.* at 461 (Warren, J., concurring).

10. *Id.* (Reed, J., concurring).

11. *Id.* at 465 (Douglas, J., dissenting).

12. *Id.* at 461 (majority).

13. *Id.*

14. 371 U.S. 195 (1962).

that “*Westinghouse* and its holding is no longer authoritative as a precedent,”¹⁶ *Smith* called attention to that opinion’s fragmented support.¹⁷ Even before *Smith* overruled *Westinghouse Electric Corp.*, lower courts noticed the conflicted and confused approaches in this precedent.¹⁸ Similarly conflicted and short-lived precedents appear in this study,¹⁹ as well as long lasting precedents that were decided by overwhelming consensus.²⁰

15. *Id.* at 198-99.

16. *Id.* at 199.

17. *See id.* at 198 (observing that “a majority of the Court in three separate opinions concluded that § 301 did not give the federal courts jurisdiction over a suit brought by a union to enforce employee rights,” and singling out the different ways that these opinions “variously characterized” whether employee pay was a personal or collectively bargained right). *Smith* also made note of the fact that two Justices wrote a separate opinion to explain their view that a union could not sue to enforce an employee’s personal rights. *Id.* at 199 n.8.

18. *E.g.*, *Miss. Valley Elec. Co. v. Local 130 of the Int’l Bhd. of Elec. Workers*, 278 F.2d 764, 769 (5th Cir. 1960) (Brown, J., dissenting) (emphasizing the fractured basis for *Westinghouse Electric Corp.* by noting that “the Supreme Court in a 3-2-1-2 split held that § 301 does not of itself authorize a union to bring a direct action . . . to recover back wages for individual employees”); *United Steelworkers of Am., C.I.O. v. Galland-Henning Mfg. Co.*, 241 F.2d 323, 325 (7th Cir. 1957) (citing the “sharp division among members of the court, which perhaps is responsible for the contrariety of views as to the holding” in *Westinghouse Electric Corp.*); *United Steelworkers of Am. v. Pullman-Standard Car Mfg. Co.*, 241 F.2d 547, 549 (3d Cir. 1957) (“The contrariety of the three views expressed by the Justices who constituted the majority of the Court in the *Westinghouse* case makes it difficult for an inferior court to apply that decision to controversies about matters other than wage claims.”).

19. Numerous overruled precedents have been decided by a five-to-four vote. *See, e.g.*, *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227-31 (1995); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992); *Durham v. United States*, 401 U.S. 481 (1971), *overruled by* *Dove v. United States*, 423 U.S. 325, 325 (1976) (per curiam); *Labine v. Vincent*, 401 U.S. 532 (1971), *overruled by* *Trimble v. Gordon*, 430 U.S. 762, 769 (1977); *Cohen v. Hurley*, 366 U.S. 117 (1961), *overruled by* *Spevack v. Klein*, 385 U.S. 511, 514 (1967); *Brown v. United States*, 359 U.S. 41 (1959), *overruled by* *Harris v. United States*, 382 U.S. 162, 167 (1965); *Frank v. Maryland*, 359 U.S. 360 (1959), *overruled by* *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 528-34 (1967); *Crooker v. California*, 357 U.S. 433 (1958), *overruled by* *Escobedo v. Illinois*, 378 U.S. 478, 479-92 (1964); *Perez v. Brownell*, 356 U.S. 44 (1958), *overruled by* *Afroyim v. Rusk*, 387 U.S. 253, 256-68 (1967); *Trupiano v. United States*, 334 U.S. 699 (1948), *overruled by* *United States v. Rabinowitz*, 339 U.S. 56, 65-66 (1950). For a confusing arrangement of votes, see *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003), *overruled by* *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 481-82 (2007).

20. Numerous long-standing precedents, decided unanimously, have been overruled—albeit after a long period of time. *See, e.g.*, *Ex parte Bain*, 121 U.S. 1 (1887), *overruled by* *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (115 years later); *Coffey v. United States*, 116 U.S. 436 (1886), *overruled by* *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 357-61 (1984) (98 years later); *The Harrisburg*, 119 U.S. 199 (1886), *overruled by* *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 379-409 (1970) (84 years later); *Pace v. Alabama*, 106 U.S. 583 (1882), *overruled by* *McLaughlin v. Florida*, 379 U.S. 184, 188-90 (1964) (82 years later); *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1871), *overruled by* *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 281-302 (1976) (105 year later); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), *overruled by* *Puerto Rico v. Branstad*, 483 U.S. 219, 224-29 (1987) (126 years later); *Minturn v. Maynard*, 58 U.S. (17

A current case before the U.S. Supreme Court, *Harris v. Quinn*,²¹ updates the dissensus story. The Seventh Circuit Court of Appeals ruled that home-care nursing assistants, who work under a collective bargaining agreement between the state and a labor union, must pay union dues.²² Pamela Harris objected to this required payment, alleging that it violated her First Amendment rights of association and speech.²³ Supreme Court experts believe that she was prompted to challenge mandatory union dues for public employees by Justice Alito's opinion in *Knox v. Service Employees International Union, Local 1000*.²⁴ Harris persuaded the Supreme Court to hear her case.²⁵ She argued that the Court should explicitly overrule its 1977 decision, *Abood v. Detroit Board of Education*,²⁶ which ruled that public school teachers could not use the First Amendment to avoid paying compulsory union dues.²⁷ *Abood* has the decisional characteristics of an overruled precedent, with separate concurrences by Justice Rehnquist,²⁸ Justice Stevens,²⁹ and Justice Powell (joined by Chief Justice Burger and Justice Blackmun).³⁰ I believe that the fractured approaches in *Abood* have set the stage for overruling the case.³¹

How.) 477 (1855), *overruled by* *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608-12 (1991) (136 years later); *Schooner Catherine v. Dickinson*, 58 U.S. (17 How.) 170 (1855), *overruled by* *United States v. Reliable Transfer Co.*, 421 U.S. 397, 410-11 (1975) (120 years later).

21. 134 S. Ct. 48 (2013).

22. *Harris v. Quinn*, 656 F.3d 692, 693-94 (7th Cir. 2011), *cert. granted*, 132 S. Ct. 48 (2013).

23. *Id.*

24. 132 S. Ct. 2277, 2289 (2012) ("Our cases to date have tolerated this 'impingement,' and we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake." (emphasis added)); see also Michael S. Greve, *The Government Is Us. Let's Unionize!*, LIBR. L. & LIBERTY (Jan. 6, 2014), <http://www.libertylawsite.org/2014/01/06/the-government-is-us-lets-unionize>.

25. See generally *Harris*, 132 S. Ct. 2277.

26. 431 U.S. 209 (1977).

27. *Id.* at 221-23; *Harris*, 656 F.3d at 698. *Abood* limited the use of compulsory dues to collective bargaining and closely-related functions. *Abood*, 431 U.S. at 222.

28. *Abood*, 431 U.S. at 242 (Rehnquist, J., concurring).

29. *Id.* at 244 (Stevens, J., concurring).

30. *Id.* (Powell, J., concurring).

31. The decision in *Abood* has generated a long stream of criticism. See *Ellis v. Bhd. Ry. & S.S. Clerks*, 466 U.S. 435, 443-44 (1984) (criticizing *Abood*); *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856, 870-71 (W.D. Wis. 2012) (calling *Abood* into doubt). Additionally, cases have declined to extend *Abood*. See *Knox v. Serv. Emp. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288-89 (2012); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 226-28 (2000); *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 917-18 (9th Cir. 2005); *Monahan v. N.Y.C. Dep't of Corr.*, 214 F.3d 275, 286 (2d Cir. 2000); *Charter v. U.S. Dep't of Agric.*, 230 F. Supp. 2d 1121, 1126-27 (D. Mont. 2002); *Gallo Cattle Co. v. Kawamura*, 72 Cal. Rptr. 3d 1, 5-8 (Ct. App. 2008). Moreover, numerous opinions have distinguished *Abood*. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557-59 (2005); *Lyng v. Int'l Union*, 485 U.S. 360, 369 (1988); *Jerry Beeman and Pharmacy Servs., Inc. v. Anthem Prescription Mgmt., LLC*, 652 F.3d 1085, 1104 (9th Cir. 2011); *Kidwell v. City of Union*, 462 F.3d 620, 624-25 (6th Cir. 2006); *Pelts & Skins, LLC v. Landreneau*,

B. Organization of this Research Article

This Article explores how the Supreme Court's decisional behaviors can shorten the life of an overruled precedent. Part II organizes the Court's own explanations for overruling precedents.³² One theme, "Changing Times" in Part II.A,³³ explains why Justices overrule precedents. This category includes environmental factors,³⁴ piecemeal overruling,³⁵ and extinguishing obsolete precedents.³⁶ New members of the Court are another factor in overruling cases.³⁷ In Part II.B, "Correcting Mistakes,"³⁸ Justices overrule an unworkable or impractical precedent,³⁹ find a better approach in a new precedent,⁴⁰ and state that a "do over" is needed.⁴¹ Finally, "Conflicting Approaches"⁴² explains that precedents are overruled due to a variety in judicial viewpoints⁴³ and close vote margins.⁴⁴

Part III discusses my research methods and results,⁴⁵ including a detailed explanation in Part III.A of the sample of overruled and overruling precedents,⁴⁶ and data from these cases.⁴⁷ Variables include: the number of majority, concurring, and dissenting votes; the voting margin for a precedent; number of published opinions in a case; and years from the overruled to overruling precedent. Part III.B reports the data analysis.⁴⁸ Table 1.1 displays the passage of years for all cases involving an overruled precedent and its overruling opinion.⁴⁹ Tables 2.1 through 2.3 show voting characteristics of overruled precedents,⁵⁰ while

365 F.3d 423, 432-33 (5th Cir. 2004); *Wang v. Blue Cross Blue Shield Ass'n*, 55 F. App'x 802, 803 (9th Cir. 2003); *Troster v. Pa. State Dep't of Corr.*, 65 F.3d 1086, 1090-91 (3d Cir. 1995); *Pasillas v. Agric. Labor Relations Bd.*, 202 Cal. Rptr. 739, 754-55 (Ct. App. 1984); *Falk v. State Bar of Mich.*, 305 N.W.2d 201, 209-12 (Mich. 1981); *Columbus Educ. Ass'n v. Archuleta*, 505 N.E.2d 279, 283-84 (Ohio Ct. App. 1986).

32. *See infra* Part II.

33. *See infra* Part II.A.

34. *See infra* text accompanying notes 74-76.

35. *See infra* text accompanying notes 77-78.

36. *See infra* text accompanying notes 79-84.

37. *See infra* text accompanying notes 85-90.

38. *See infra* Part II.B.

39. *See infra* text accompanying notes 94-97.

40. *See infra* text accompanying notes 98-101.

41. *See infra* text accompanying notes 102-07.

42. *See infra* Part II.C.

43. *See infra* text accompanying notes 108-12.

44. *See infra* text accompanying notes 113-17.

45. *See infra* Part III.

46. *See infra* Part III.A.1.

47. *See infra* Part III.A.2.

48. *See infra* Part III.B.

49. *See infra* Table 1.1.

50. *See infra* Tables 2.1-.3.

Tables 3.1 and 3.2 report regression results for the effect of voting characteristics on an overruled precedent's longevity.⁵¹

This Article concludes in Part IV, where I ask whether Justices should reconsider their consensus norms.⁵² Noting that half of the Court's overruled precedents survive no more than twenty years⁵³—and that the margin of votes and number of concurring opinions in an overruled precedent are statistically correlated with the early demise of these cases⁵⁴—I conclude that the Court should strengthen its consensus norms. Part V is a roster of every overruled precedent, and its overruling case.⁵⁵

II. WHY THE SUPREME COURT OVERRULES ITS PRECEDENTS: A SPECTRUM OF REASONS

A judicial system requires uniformity and continuity in its rulings.⁵⁶ Given the primacy of *stare decisis*,⁵⁷ direct appeals to overrule a Supreme Court precedent should rarely succeed. The Court's overruling of its own precedents has attracted much scholarly attention. Studies have linked an overruled precedent to the ideological preferences of Justices,⁵⁸ and to intrinsic factors of the precedent such as its legal reasoning,⁵⁹ pattern of votes and separate opinions,⁶⁰ and treatment of prior cases.⁶¹ New Justices who bring a change in philosophy may cause

51. See *infra* Tables 3.1–2.

52. See *infra* Part IV.

53. SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946-1992*, at 29 (1995).

54. See *infra* Tables 2.1–3.

55. See *infra* Part V app.

56. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 735-36 (1949).

57. “*Stare decisis* is the doctrine of precedent, and means ‘to stand by things decided.’” Michael H. LeRoy, *Overruling Precedent: “A Derelict in the Stream of the Law,”* 66 SMU L. REV. 711, 713 n.2 (2011) (quoting BLACK’S LAW DICTIONARY 1537 (9th ed. 2009)). The Supreme Court has said that *stare decisis* “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (“[N]o judicial system could do society’s work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.” (citation omitted)).

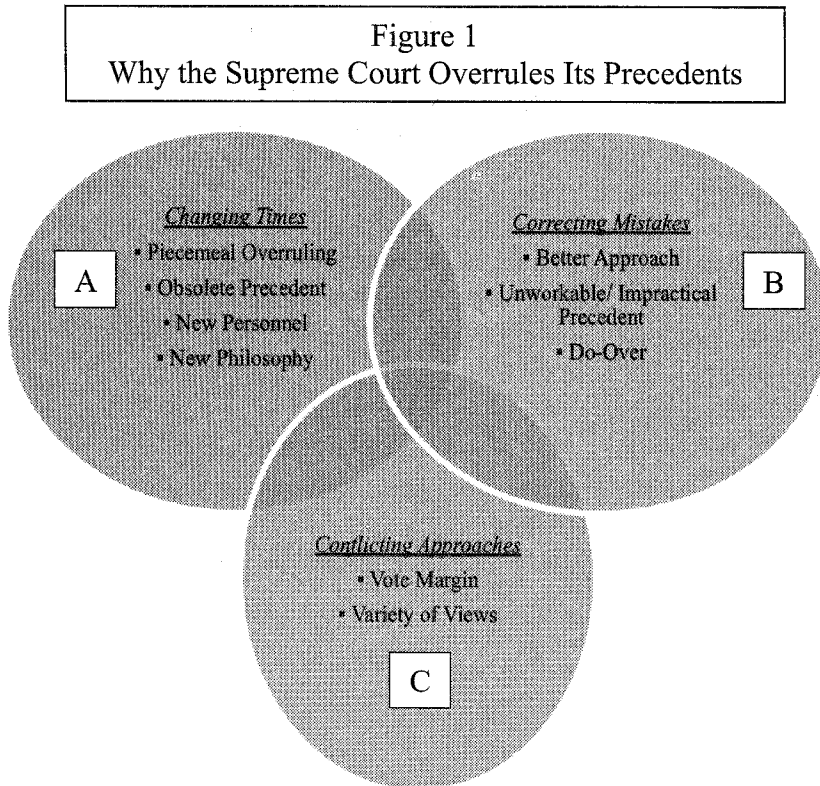
58. See generally Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262 (1992).

59. BRENNER & SPAETH, *supra* note 53, at 35.

60. John R. Schmidhauser, *Stare Decisis, Dissent, and the Background of the Justices of the Supreme Court of the United States*, 14 U. TORONTO L.J. 194, 196-98, 202-03 (1962).

61. See David J. Danelski, *Causes and Consequences of Conflict and Its Resolution in the Supreme Court*, in JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS 21, 22-30, 38 (Sheldon Goldman & Charles M. Lamb eds., 1986).

a precedent to be overruled.⁶² The age of a precedent may also affect its survival.⁶³ The following discussion explains why Justices overrule precedents.



62. For a discussion on this theme, see Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1725-29 (2013); see also Banks, *supra* note 58, at 262-68 (discussing how key membership changes in the Hughes, Warren, and Burger Courts led to new majorities that increasingly questioned precedents).

63. See S. Sidney Ulmer, *An Empirical Analysis of Selected Aspects of Lawmaking of the United States Supreme Court*, 8 J. PUB. L. 414, 416-17, 424-26 (1959) (conducting a similar study). Sidney Ulmer reported that the Court had decided about 55,000 appellate cases and overruled only 81 of its precedents at the time of his study. *Id.* at 417. He found that 29% of cases were overruled within 10 years; 35% lasted between 11 to 20 years; 14% lasted 21 to 30 years; 12% lasted 31 to 40 years; 12% lasted more than 40 years (with three cases lasting more than 75 years). *Id.* at 418-23 tbl.1. Ulmer also found that in 32 of 81 cases (40%), the margin of votes was 8 or 9, while in 14 cases (17%) the margin was 1 or 2 votes; and in 35 cases (43%), the margin was 3 to 7 votes. *Id.* For a more general study of the effect of age on precedent appears, see Williams M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 252-62 (1976) (sampling 658 appellate court decisions).

Figure 1 depicts the main reasons that the Supreme Court overrules precedents. A primary cause is “Changing Times” (Ring A).⁶⁴ These factors include environmental change,⁶⁵ piecemeal overruling,⁶⁶ and overruling obsolete cases.⁶⁷ This category also includes changes to the Court’s personnel and philosophy.⁶⁸ “Correcting Mistakes” (Ring B) is another change agent.⁶⁹ There are times when the Court is more openly critical of itself. It may declare a precedent is no longer workable or practical.⁷⁰ The Court occasionally favors a better alternative to a precedent.⁷¹ Sometimes, the Court opposes a precedent so vehemently that it overrules it in a “do-over” case.⁷² Overruling may coincide with new personnel and a change in philosophy. Thus, Figure 1 shows an intersection between “Changing Times” and “Correcting Mistakes.” The third domain (Ring C) posits that structural conflict can hasten the end of a precedent.⁷³ This ring intersects with the others because a fragmented precedent may result from changes in the Court’s membership, as well as the Justices’ conflicting ideas.

A. *Changing Times*

Environmental Change: Fundamental changes in the conditions that create a precedent may cause the Court to discard its ruling.⁷⁴ Justices

64. See *supra* Figure 1; *infra* Part II.A.

65. See *infra* text accompanying notes 74-76.

66. See *infra* text accompanying notes 77-78.

67. See *infra* text accompanying notes 79-84.

68. See *infra* text accompanying notes 85-90.

69. See *supra* Figure 1; *infra* Part II.B.

70. See *infra* text accompanying notes 94-97.

71. See *infra* text accompanying notes 98-101.

72. See *supra* Figure 1; *infra* text accompanying notes 102-07.

73. See *infra* Part II.C. This ring represents my theoretical perspective. It has no precise or single origin, but has been stated by others in similar terms. See *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting). Justice Marshall stated:

Power, not reason, is the new currency of this Court’s decisionmaking. Four Terms ago, a five-Justice majority of this Court held that “victim impact” evidence of the type at issue in this case could not constitutionally be introduced during the penalty phase of a capital trial. By another 5–4 vote, a majority of this Court rebuffed an attack upon this ruling just two Terms ago. . . . [T]oday’s majority overrules *Booth* and *Gathers* and credits the dissenting views expressed in those cases. Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did.

Id. (citations omitted).

74. See *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 497 (1973), *overruling* *Ahrens v. Clark*, 335 U.S. 188 (1948) (“[D]evelopments [in criminal procedure] since *Ahrens* have had a profound impact on the continuing vitality of that decision.”); see also *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 238 (1970), *overruling* *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962) (“Having concluded that *Sinclair* was erroneously decided and that subsequent

may be prompted by broad societal change.⁷⁵ Enactment of a law that conflicts with the precedent may cause the Court to overrule itself.⁷⁶

Piecemeal and Implicit Change: Sometimes the Court uses “piecemeal” or “implicit” approaches to overrule a precedent.⁷⁷ A new line of authority may undermine a precedent so much that the Court feels compelled to overrule it.⁷⁸

Obsolescence: An accumulation of later decisions that limit the reach of a precedent may render the case obsolete.⁷⁹ The Court may be

events have undermined its continuing validity, we overrule that decision and reverse the judgment of the Court of Appeals.”).

75. See *Taylor v. Louisiana*, 419 U.S. 522, 534-35 (1975), *overruling* *Hoyt v. Florida*, 368 U.S. 57 (1961) (involving a state law that precluded women from compulsory jury duty because women played a distinctive role in society. Rejecting this argument, and *overruling Hoyt*, the *Taylor* Court reasoned: “A system excluding all women, however, is a wholly different matter. It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare any women from their present duties.”).

76. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517-18 (1917), *overruling* *Henry v. A.B. Dick Co.*, 224 U.S. 1 (1912) (explaining that “it must be accepted by us as a most persuasive expression of the public policy of our country with respect to the question before us. . . . [T]he decision in *Henry v. A. B. Dick Co.*, 224 U.S. 1 must be regarded as overruled.”).

77. Some Justices, when irritated by this approach, state displeasure with their brethren. See *Darr v. Burford*, 339 U.S. 200, 221 (1950) (Frankfurter, J., dissenting) (“The real question before us in this case is whether *Wade v. Mayo* should be overruled. Whether this overruling is to be done forthrightly by two words saying the case ‘is overruled’ or the overruling is euphemistically done by fifteen words hardly changes the fact.” (citation omitted)); see also William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1392-93 (1988) (noting that in the previous fifteen years “fewer statutory precedents [were] openly overruled, and then only after a lengthy battle over procedural and historical arcana, but more of them are overruled implicitly or piecemeal”). In some cases, Justices do not expressly overrule a precedent, but leave the impression that they have done exactly this. This injects an element of subjectivity in determining if a precedent has been overruled. Professor William N. Eskridge confirms that this is a problem when he notes that “the Court does not actually state that it is overruling the precedent,” but “there is evidence within the Court’s opinion, and/or concurring or dissenting opinions, for the proposition that the precedent is overruled, and when subsequent citations of the ‘overruled’ precedent support the categorization.” *Id.* at 1430.

78. *State Tax Comm’n v. Aldrich*, 316 U.S. 174, 181 (1942), *overruling* *First Nat’l Bank of Bos. v. Maine*, 284 U.S. 312 (1932) (“[W]e do not think that *First National Bank v. Maine* should survive. We overrule it. In line with our recent decisions in *Curry v. McCannless*, *Graves v. Elliott* and *Graves v. Schmidlapp*, we repeat that there is no constitutional rule of immunity from taxation of intangibles . . .); see also *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976), *overruling* *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). The *Hudgens* Court stated:

It matters not that some Members of the Court may continue to believe that the *Logan Valley* case was rightly decided. Our institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be. And in the performance of that duty we make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court’s decision in the *Lloyd* case.

Hudgens, 424 U.S. at 518 (footnote omitted).

79. See *infra* text accompanying notes 129-32 (discussing *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895)).

unsure about whether a current decision overrules a prior case.⁸⁰ Some Justices consider a precedent as impliedly overruled because other courts disrespect it.⁸¹ In a related process called “anticipatory overruling,” lower courts occasionally predict a precedent’s demise.⁸² Although the Court can disapprove of a precedent without overruling it,⁸³ it can also overrule cases that are outside the mainstream of law.⁸⁴

Change in the Court’s Personnel and Philosophy: Trial judges consider whether changes in the Court’s membership reliably forecast an end to a precedent.⁸⁵ When enough Justices bring a new philosophy to

80. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 126-39 (1984) (Stevens, J., dissenting) (revealing, in a lengthy dissent, the intense disagreement as to whether cases cited by the majority opinion were already overruled). Justice Stevens asserted:

None of these cases contain only “implicit” or *sub silentio* holdings; all of them explicitly consider and reject the claim that the Eleventh Amendment prohibits federal courts from issuing injunctive relief based on state law. There is therefore no basis for the majority’s assertion that the issue presented by this case is an open one.

Id. at 137 (citation omitted). Stevens further expounded on this view, noting: “The majority incredibly claims that *Greene* contains only an implicit holding on the Eleventh Amendment question the Court decides today. In plain words, the *Greene* Court held that the Eleventh Amendment did not bar consideration of the pendent state-law claims advanced in that case.” *Id.* at 137 n.14 (citation omitted).

81. E.g., *City of Morgantown v. Royal Ins. Co.*, 337 U.S. 254, 261 (1949) (Black, J., dissenting) (“I think it an undesirable practice for this Court to overrule past cases without saying so. The effect of the Court’s holding here is to overrule *Ettelson v. Metropolitan Ins. Co.*, 317 U.S. 188, decided by a unanimous Court in 1942.”).

82. See C. Steven Bradford, *Following Dead Precedent: The Supreme Court’s Ill-Advised Rejection of Anticipatory Overruling*, 59 *FORDHAM L. REV.* 39, 41 (1990) (“According to this view, lower courts should disregard Supreme Court decisions when they are reasonably sure that the Supreme Court would overrule them given the opportunity. This rejection of doubtful precedent by lower courts has been termed anticipatory overruling.” (footnote omitted)). For examples of anticipatory ruling, see *United States v. City of Phila.*, 644 F.2d 187, 192 (3d Cir. 1980); *Andrews v. Louisville & Nashville R.R. Co.*, 441 F.2d 1222, 1224 (5th Cir. 1971); *Hobbs v. Thompson*, 448 F.2d 456, 472-74 (5th Cir. 1971).

83. E.g., *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984) (declaring that “[t]o the extent that *Coffey v. United States* suggests [that collateral estoppel or double jeopardy automatically bars a civil, remedial forfeiture proceeding following an acquittal on related criminal charges], it is disapproved”).

84. E.g., *United States v. Dixon*, 509 U.S. 688, 712 (1993) (“We would mock *stare decisis* and only add chaos to our double jeopardy jurisprudence by pretending that *Grady* survives when it does not.”).

85. At times, judges and commentators have correctly predicted that the replacement of Justices who voted for a precedent by new Justices who seem opposed to the precedent would lead to the overruling of an opinion. For example, a U.S. Circuit Judge thought that the U.S. Supreme Court would overrule *Minersville School District v. Gobitis*, 310 U.S. 586, 591-95 (1940) (denying a First Amendment challenge by a Jehovah’s Witness to a school requirement that children salute the flag). *Gobitis* was nearly identical to *Barnette v. West Virginia State Board of Education*, 47 F. Supp. 251 (S.D. W. Va. 1942). Due to rapid turnover on the Court, Judge Parker counted the likely votes to reaffirm *Gobitis*, and therefore ruled in anticipation of this outcome, reasoning that:

Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not. . . . The developments with

the Court, this may cause a precedent to be overruled.⁸⁶ Justices tend to avoid a public conversation about this root cause for change. Instead, they overrule cases because of “repugnant reasoning,”⁸⁷ or because a legal principle is no longer “authoritative.”⁸⁸ Similarly, Justices overrule cases with an “aberrational doctrine,”⁸⁹ or flawed understanding of the Constitution.⁹⁰

B. Correcting Mistakes

The Court is not immune from serious mistakes. Sometimes lower courts discredit a bad precedent, though this does not necessarily cause the Court to overrule itself.⁹¹ Similarly, state courts signal problems with a Supreme Court precedent when they “underrule” the Court— a term that connotes the overruling of precedent by an inferior court.⁹² While

respect to the *Gobitis* case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered therein and three other justices in a special dissenting opinion in *Jones v. City of Opelika*.

Id. at 252-53 (citation omitted).

86. This theme is explored in *Banks*, *supra* note 58, at 263-68; *Barrett*, *supra* note 62, at 1725-29.

87. *Madden v. Kentucky*, 309 U.S. 83, 93 (1940), *overruling* *Colgate v. Harvey*, 296 U.S. 404 (1935) (“Appellant relies upon *Colgate v. Harvey* . . . to support his argument that the present statute . . . violates the privileges and immunities clause. . . . [W]e look upon the decision in that case as repugnant to the line of reasoning adopted here. . . . *Colgate v. Harvey* . . . is overruled.”).

88. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 854 (1976), *overruling* *Maryland v. Wirtz*, 392 U.S. 183 (1968) (“[W]e do not believe the reasoning in *Wirtz* may any longer be regarded as authoritative.”). Later, *National League of Cities* was overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985).

89. *E.g.*, *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971), *overruling* *Kesler v. Dep’t of Pub. Safety*, 369 U.S. 153 (1962) (“We can no longer adhere to the aberrational doctrine of *Kesler* and *Reitz* that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration.”). The opinion explained that *Kesler*’s approach “is at odds with the approach taken in nearly all our Supremacy Clause cases.” *Id.* at 652.

90. *Afroyim v. Rusk*, 387 U.S. 253, 256-68 (1967), *overruling* *Perez v. Brownell*, 356 U.S. 44 (1958) (“Our holding . . . is the only one that can stand in view of the language and the purpose of the Fourteenth Amendment, and our construction of that Amendment . . . comports more nearly than *Perez* with the principles . . . that the entire Fourteenth Amendment was adopted to guarantee.”). In *Afroyim*, the Court concluded: “Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship. *Perez v. Brownell* is overruled.” *Id.* at 268.

91. This process is revealed in Judge Jerome Frank’s insulting reference to *Federal Baseball Club, Inc. v. National League*, 259 U.S. 200 (1922) as an “impotent zombi.” *Gardella v. Chandler*, 172 F.2d 402, 409 (2d Cir. 1949).

92. Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 503-04 (2008) (“Every so often . . . state courts actively disregard binding Supreme Court precedent—sometimes

the Court hesitates to overrule its own precedent, it is less beholden to *stare decisis* when it decides a constitutional issue.⁹³

The Precedent Is Unworkable or Impractical: The Court may justify overruling a precedent because a rule or doctrine becomes unworkable⁹⁴ or impractical.⁹⁵ When a precedent is impractical or harmful in its application, the Court may overrule it.⁹⁶ Judicial experience with a precedent may cause the Court to overrule it.⁹⁷

A Precedent Is Overruled in Favor of a Better Approach: A case may be overruled because it outlives its usefulness⁹⁸ or other precedents intervene to limit its vitality.⁹⁹ If the Court believes that a new rule or principle is better than one embodied in a precedent, this may be grounds for overruling.¹⁰⁰ On rare occasions, this process works in

through clever bits of judicial ‘subterfuge’ and sometimes in a far less timid fashion.” (footnote omitted)).

93. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (“Since we deal with a constitutional question, we are less constrained by the principle of *stare decisis* than we are in other areas of the law.”).

94. *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965), *overruling* *Kesler v. Dep’t of Pub. Safety*, 369 U.S. 153 (1962) (citing the “unworkability” principle: “[A] procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice *Kesler* should be pro tanto overruled.”). There are times, however, when the Court rejects the “unworkability” argument. *See* *Evans v. Michigan*, 133 S. Ct. 1069, 1080 (2013) (rejecting an argument to overrule *Payne v. Tennessee*: “[W]e have no reason to believe the existing rules have become so ‘unworkable’ as to justify overruling precedent.”). More generally, *see* Eskridge, *supra* note 77, at 1362-63 (criticizing the “super-strong presumption of correctness” for statutory precedents); Lawrence C. Marshall, “Let Congress Do It”: *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989).

95. *See* *Jackson v. Denno*, 378 U.S. 368, 376-91 (1964), *overruling* *Stein v. New York*, 346 U.S. 156 (1953) (noting that the overruling was due to “difficulties inherent in the New York procedure”).

96. *See* *United States v. Scott*, 437 U.S. 82, 86-87 (1978), *overruling* *United States v. Jenkins*, 420 U.S. 358 (1975) (“[T]hrough our assessment of the history and meaning of the Double Jeopardy Clause in . . . *Jenkins* . . . occurred only three Terms ago, our vastly increased exposure to the various facets of the Double Jeopardy Clause has now convinced us that *Jenkins* was wrongly decided.”).

97. *See* *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting) (“The Court bows to the lessons of experience . . . recognizing that the process of trial and error . . . is appropriate also in the judicial function.” (footnote omitted)); *see also* *Edelman v. Jordan*, 415 U.S. 651, 671 n.14 (1974) (quoting *id.*), *overruling* *Shapiro v. Thompson*, 394 U.S. 618 (1969).

98. *United States v. Salvucci*, 448 U.S. 83, 88, 95 (1980), *overruling* *Jones v. United States*, 362 U.S. 257 (1960) (observing that “[i]n the 20 years which have lapsed since the Court’s decision in *Jones*, the two reasons which led the Court to the rule of automatic standing have likewise been affected by time. . . . We are convinced that the automatic standing rule of *Jones* has outlived its usefulness . . .”).

99. *See* Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 425-26 (1924).

100. *Illinois v. Gates*, 462 U.S. 213, 238 (1983), *overruling* *Aguilar v. Texas*, 378 U.S. 108 (1964) (“[I]t is wiser to abandon the ‘two-pronged test’ established by our decisions in *Aguilar* and

reverse: the Court realizes that the overruled precedent is better than the new one.¹⁰¹

A Precedent Is Overruled Because a “Do Over” Is Necessary: Sometimes, the Court believes it is more important to get the law right than to limit a faulty principle.¹⁰² These “do-over” cases occur when Justices believe that a case was wrongly decided.¹⁰³ The Court may overrule a decision that “lacks constitutional roots,”¹⁰⁴ causes “confusion” by overturning a long line of precedents,¹⁰⁵ signifies “an

Spinelli. In its place we reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable cause determinations.”).

101. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (stating that “if the precedent under consideration itself departed from the Court’s jurisprudence, returning to the ‘intrinsically sounder doctrine established in prior cases’ may ‘better serv[e] the values of *stare decisis* than would following [the] more recently decided case inconsistent with the decisions that came before it” (internal quotation marks omitted)); *see also* *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977), *overruling* *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (reasoning that: “In sum, we conclude that the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to *Schwinn*.”).

102. *See* *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 240-55 (1970), *partially overruling* *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962) (stating the most apologetic version of this rationale); *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 209 (1930), *overruling* *Blackstone v. Miller*, 188 U.S. 189 (1903) (“*Blackstone v. Miller* no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled.”); *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844), *overruling* *Commercial & R.R. Bank v. Slocomb*, 39 U.S. (14 Pet.) 60 (1840) (“After mature deliberation, we feel free to say that the cases of *Strawbridge and Curtiss* and that of the *Bank and Deveaux* were carried too far, and that consequences and inferences have been argumentatively drawn from the reasoning employed in the latter which ought not to be followed.”). Justice Stewart’s confessional concurrence in *Boys Market* is especially revealing:

When *Sinclair Refining Co. v. Atkinson* was decided in 1962, I subscribed to the opinion of the Court. . . . Today I join the Court in concluding “that *Sinclair* was erroneously decided and that subsequent events have undermined its continuing validity. . . .” In these circumstances the temptation is strong to embark upon a lengthy personal *apologia*. . . . An aphorism of Mr. Justice Frankfurter provides me refuge: “Wisdom too often never comes, and so one ought not to reject it merely because it comes late.”

Boys Markets, 398 U.S. at 255 (Stewart, J., concurring) (quoting *Henslee v. Union Planters Bank*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting)).

103. *Fed. Election Comm’n v. Wis. Right to Life*, 551 U.S. 449, 501 (2007) (“Overruling a constitutional case decided just a few years earlier is far from unprecedented.”); *Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 382 (1977), *overruling* *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) (“Since one system of resolution of property disputes has been adhered to from 1845 until 1973, and the other only for the past three years, a return to the former would more closely conform to the expectations of property owners than would adherence to the latter.”).

104. *United States v. Dixon*, 509 U.S. 688, 704 (1993), *overruling* *Grady v. Corbin*, 495 U.S. 508 (1990) (explaining “*Grady* lack[ed] constitutional roots” and was “wholly inconsistent with earlier Supreme Court precedent”). The Court bluntly stated: “[W]e think it time to acknowledge what is now, three years after *Grady*, compellingly clear: The case was a mistake.” *Id.* at 711.

105. *Solorio v. United States*, 483 U.S. 435, 450 (1987), *overruling* *O’Callahan v. Parker*, 395 U.S. 258 (1969) (stating that the *Solorio* decision was reached due to “confusion wrought by”

abrupt and largely unexplained departure" from precedent,¹⁰⁶ or ignores the original intent of a law.¹⁰⁷

C. Conflicting Approaches

Variety of Views: The Court does not overrule insignificant precedents. It uses this power sparingly for precedents of higher authority.¹⁰⁸ Because these are important cases, they lend themselves to conflicting views. The Court's consensual norms have been shown to vary over time,¹⁰⁹ which implies that overruling occurs when Justices are less bound by *stare decisis*. Bloc voting characterizes some eras in the Court's history.¹¹⁰ In constitutional issues, the Court's diversity tends to create incoherent results.¹¹¹ Network maps of precedents show how some precedents are cited more often than others.¹¹²

Vote Margin: A Justice acting as a swing vote, or a coalition of Justices, can influence the Court's decisional behavior.¹¹³ Sometimes,

O'Callahan). *Solorio* also said that *O'Callahan* had rejected "an unbroken line of decisions from 1866 to 1960." *Id.* at 439-40.

106. *Cont'l T.V., Inc.*, 433 U.S. at 47, overruling *Arnold, Schwinn & Co.*, 388 U.S. 365 (explaining the latter was "an abrupt and largely unexplained departure" from precedent).

107. See *Daniels v. Williams*, 474 U.S. 327, 330-32 (1986), overruling *Parratt v. Taylor*, 451 U.S. 527 (1981) (stating that *Parratt* was overruled "to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment" when prison custodians "leav[e] a pillow on the prison stairs, or mislay[] an inmate's property . . ."); *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 532 (1967), overruling *Frank v. Maryland*, 359 U.S. 360 (1959) (disagreeing with the reasoning of the *Frank* majority: "In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment.").

108. THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* 91 (2006).

109. See generally Thomas G. Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361 (1988).

110. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 348-49 (1990); Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 404-07 (1988) (noting the Warren Court's lack of respect for precedent due to ideological expedience); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1344, 1359-61 (1990) (noting that certain Justices on the Rehnquist Court departed from the use of precedents in abortion cases).

111. Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 823-24, 826-31 (1982) (applying Arrow's Theorem and concluding that when multiple Justices apply *stare decisis*, they tend to produce incoherent results).

112. James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 SOC. NETWORKS 16, 17-20 (2008) (using the complete network of citations in all 30,288 majority opinions contained in the U.S. Reports from its inception to 2002).

113. Saul Brenner, *Fluidity on the United States Supreme Court: A Reexamination*, 24 AM. J. POL. SCI. 526, 528-32 (1980); Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decision Making*, 29 J. LEGAL STUD. 721, 724, 737-39, 745, 747 (2000); Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1280-81, 1300-04 (2005) (analyzing Supreme Court voting patterns to determine median Justices from 1937 to 2002);

courts are influenced by the voting margin for a precedent. A case decided by a five-to-four vote is more susceptible to questioning or distinguishing by lower courts.¹¹⁴ When Justices act boldly, as in the case of overruling their own precedents, they vote as a bloc.¹¹⁵ Certain Justices are not only prone to dissent,¹¹⁶ but their contrarian ways forecast future overruling of a precedent.¹¹⁷

III. RESEARCH METHODS AND RESULTS

A. Empirical Research Methods

1. Sample

I created a comprehensive database of U.S. Supreme Court decisions that overruled another Court case. My sample is similar to others,¹¹⁸ but covers the entire life of the Court.¹¹⁹ I began with keyword searches in Westlaw's Supreme Court database.¹²⁰ When a search seemed to identify an overruled case, I checked by consulting the "Full

David M. O'Brien, *Charting the Rehnquist Court's Course: How the Center Folds, Holds, and Shifts*, 40 N.Y.L. SCH. L. REV. 981, 982-92 (1996); Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1181, 1184-86, 1188-90 (2004) (using a model to predict the important votes of moderate Justices).

114. Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standard State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1204 (1999) ("In *United States v. White*, however, the circuit court declined to follow a Supreme Court precedent because it was a five-to-four decision, its authority had been eroded by recent cases, and many of the current justices had explicitly criticized it." (footnote omitted)).

115. See J. Woodford Howard Jr., *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43, 48 (1968); David W. Rohde, *Policy Goals, Strategic Choice and Majority Opinion Assignments in the U.S. Supreme Court*, 16 MIDWEST J. POL. SCI. 652, 653, 661-63 (1972); Lee Epstein et al., *Rating the Justices: Lessons from Another Court* 20 (April 1992) (draft presented at the annual meeting of the Midwest Political Sci. Ass'n (on file with the *Hofstra Law Review*)).

116. Epstein et al., *supra* note 115, at 16, 22 & tbl.9.

117. *Id.* at 22 & tbl.9 (rating the top ten Justices who dissented in cases that were overruled: Hugo Black (30); William O. Douglas (27); Louis Brandeis (16); Oliver Wendell Holmes (13); Earl Warren (11); Harlan Fiske Stone (10); John Marshall Harlan I (10); William Brennan (8); Wiley Rutledge (8); Potter Stewart (7); and Frank Murphy (7)).

118. Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 756 (2000) (examining all Supreme Court decisions from 1985 to 1997 that used the word "federalism," yielding 85 Supreme Court opinions and 738 votes of Justices); Martin et al., *supra* note 113, at 1300-04 (analyzing Supreme Court voting patterns to determine median Justices from 1937 to 2002). For a study closest to mine, see Ulmer, *supra* note 63, at 417-23.

119. My purpose is to publish the most comprehensive roster of explicitly overruled cases.

120. I used basic combinations such as "overruled by," "we overrule," "overruling," and "is overruled."

History” and “Citation References” features in Westlaw. I also asked Westlaw if an advanced method to discover all overruled Supreme Court cases existed.¹²¹ Over time, I generated a roster of Supreme Court precedents that were overruled and the overruling cases.¹²²

I also researched law review articles for lists of overruled Supreme Court cases.¹²³ I added unduplicated cases to my roster. During this time, I found a study like mine.¹²⁴ Given the similarity of this study, published more than fifty years ago, I expanded my data analysis to compare my results to this analysis.¹²⁵ Two other sources provided unduplicated cases to my database. One is a curious publication from the U.S. Government Printing Office.¹²⁶ It does not explain how or why these cases were compiled. Also, while reading two Supreme Court opinions that overruled a precedent, I found new cases.¹²⁷

Borderline cases were not included, for example, precedents that are implicitly overruled.¹²⁸ Many precedents are abrogated, criticized,

121. After some investigation, Westlaw reported that it has no such search feature.

122. See *infra* Part V app. The Appendix lists them as matched pairs. See *infra* Part V app.

123. See generally Albert P. Blaustein & Andrew H. Field, “Overruling” *Opinions in the Supreme Court*, 57 MICH. L. REV. 151 (1958); Eskridge, *supra* note 77; Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467 (1980); Emmet E. Wilson, *Stare Decisis, Quo Vadis? The Orphaned Doctrine in the Supreme Court*, 33 GEO. L.J. 251 (1945); Amy L. Padden, Note, *Overruling Decisions in the Supreme Court: The Role of a Decision’s Vote, Age, and Subject Matter in the Application of Stare Decisis After Payne v. Tennessee*, 82 GEO. L.J. 1689 (1994).

124. Ulmer, *supra* note 63, at 417-23.

125. See *infra* Tables 1.2, 2.3. His sample included sixty-four cases that the Court overruled from 1880 to 1957. Ulmer, *supra* note 63, at 433. S. Sidney Ulmer used a more flexible standard for including a case. *Id.* at 416. In Ulmer’s study, a case did not necessarily have to be expressly overruled to be included in the sample. *Id.* at 416. He defined four different ways to count a case as overruled: (1) expressly overruled by a later case; (2) one or more Justices say a precedent has been overruled; (3) a Court reporter’s headnote states the case is overruled; and (4) a Shepherd’s report lists the case as overruled. *Id.* Like my study, however, Ulmer measured duration for overruled precedents. *Id.* at 418-23 tbl.I (noting that the far-right column of counting “terms,” equates to years). Ulmer’s study also related this longevity metric to the voting pattern in the overruled case. *Id.* at 426 tbl.II (describing margin of votes as “Excess of Majority”).

126. See generally U.S. GOV’T PRINTING OFFICE, SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISIONS (2012), available at <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-12.pdf>.

127. *Payne v. Tennessee*, 501 U.S. 808, 828 n.1 (1991) (listing thirty-three overruling opinions); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 383, 406 n.1, 407 n.2 (1932) (Brandeis, J., dissenting).

128. See *Angel v. Bullington*, 330 U.S. 183, 192 (1947) (“Cases like *David Lupton’s Sons v. Automobile Club of America*, 225 U.S. 489, are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with *Erie Railroad Co. v. Tompkins*, 304 U.S. 64.”); Eskridge, *supra* note 77, at 1392-93. In his dissenting opinion in *Angel*, however, Justice Rutledge noted the ambiguity of this form of overruling: “From the Court’s opinion I cannot say whether the question has been resolved. Its discussion of North Carolina’s ‘policy’ and its overruling of the *Lupton’s Sons* case . . . would seem to indicate that it is applying *York*, though without saying so frankly.” *Angel*, 330 U.S. at 211 (Rutledge, J., dissenting) (emphasis added).

disagreed with, and called into doubt—terms that KeyCite uses. An example is *United States v. E.C. Knight Co.*¹²⁹ No Supreme Court decision expressly overruled *E.C. Knight*. However, the precedent is no longer valid. At various times, the Supreme Court has criticized it,¹³⁰ or disagreed with it.¹³¹ According to KeyCite, the Eleventh Circuit Court of Appeals treats *E.C. Knight* as an abrogated case.¹³²

Like earlier studies, I catalogued cases in pairs.¹³³ I did not assume, however, that paired cases in earlier studies met my criteria. Occasionally, a published study treated a Supreme Court opinion as an overruled precedent, but my reading did not confirm this conclusion.¹³⁴ I also excluded Supreme Court precedents that were overruled by statute, such as *Dred Scott v. Sandford*.¹³⁵

2. Data Collection

I counted votes in the majority, concurring, and dissenting opinions.¹³⁶ The number of Justices who did not participate in a decision was also recorded. In addition, I counted the number of opinions as a separate measure of fragmentation. A per curiam ruling was counted as a majority opinion. Because the Court has not always had nine Justices, I checked an authority to calculate the voting pattern in accordance

129. 156 U.S. 1 (1895).

130. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 121-22 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 38-39 (1937).

131. *United States v. Lopez*, 514 U.S. 549, 554 (1995).

132. See *United States v. Ballinger*, 312 F.3d 1264, 1269 (11th Cir. 2002).

133. Padden, *supra* note 123, app. (utilizing a similar approach).

134. For example, *Cage v. Louisiana*, 498 U.S. 39 (1990), overruled by *Estelle v. McGuire*, 502 U.S. 62 (1991), is a borderline case that was excluded from the sample. The case was reported as overruled in Padden, *supra* note 123, app. A KeyCite check of *Cage* shows a red flag, indicating overruling. But, a close reading of *Estelle* shows that the Court did not expressly overrule *Cage*. Instead, the *Estelle* Court said:

We acknowledge that language in the later cases of *Cage v. Louisiana* . . . might be read as endorsing a different standard of review for jury instructions. . . . So that we may once again speak with one voice on this issue, we now *disapprove* the standard of review language in *Cage* and *Yates*, and reaffirm the standard set out in *Boyd*.

502 U.S. at 72 n.4. Similarly, it appears that *Robbins v. California*, 453 U.S. 420 (1981) was overruled by *United States v. Ross*, 456 U.S. 798 (1982). But, the majority opinion in *Ross* never used the term “overrule,” and the dissenting opinion of Justice Marshall stated: “[T]he Court unambiguously overrules ‘the disposition’ of *Robbins* . . . though it gingerly avoids stating that it is overruling the case itself.” *Ross*, 456 U.S. at 841 (Marshall, J., dissenting).

135. 60 U.S. (9 How.) 393 (1857), superseded by constitutional amendment, U.S. CONST. amend. XIV.

136. A majority and concurring vote was each counted as one unit. Research that replicates this study might give less weight to a concurring vote, counting it as a mild form of support for a ruling. However, I gave the same weight to concurring and majority votes because both contributed equally to the outcome in the precedent.

with the Court's membership in the year that the overruled precedent was decided.¹³⁷

To understand this counting process, consider the earliest pair of *Wilson v. Daniel*¹³⁸ and its overruling decision, *Gordon v. Ogden*.¹³⁹ In establishing a Supreme Court, the Judiciary Act of 1789 provided one Chief Justice and five Associate Justices.¹⁴⁰ *Wilson* was decided by six Justices.¹⁴¹ Justice Iredell was a lone dissenter.¹⁴² Thus, *Wilson* was scored as a five to one decision.¹⁴³ This meant that the *Wilson-Gordon* pair scored "4" for the variable labeled "VOTEMARG." The second variable was "YEARPASS," indicating the number of calendar years that separated the first opinion and overruling case. The *Wilson-Gordon* pair was scored "32" for years passed.

B. Empirical Results and Findings

My database used seven variables: (1) YEARPASS (number of years from first precedent to overruling case); (2) MAJVOTE (number of majority votes); (3) DISSVOTE (number of dissenting votes); (4) CONVOTE (number of concurring votes); (5) VOTEMARG (majority votes and concurring votes minus dissenting votes); (6) DISOPINS (number of dissenting opinions); and (7) CONOPINS (number of concurring opinions). Using IBM SPSS Statistics, a software program that enables creation of a database spreadsheet and also provides for various statistical analyses, I found the means and dispersion for these variables. Next, I used a linear regression model to estimate the effect of the voting variables, and the number of opinions, on a precedent's longevity.

1. Descriptive Statistics

Passage of Years to Overrule a Precedent: How long do overruled precedents last? My sample contained 205 pairs of overruled and overruling precedents. Table 1.1 shows the longevity of overruled precedents in years.¹⁴⁴

137. *The Supreme Court of the United States and the Federal Judiciary*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/courts_supreme.html (last visited Feb. 15, 2015) [hereinafter *The Supreme Court*].

138. 3 U.S. (3 Dallas) 401 (1798).

139. 28 U.S. (3 Pet.) 33 (1830).

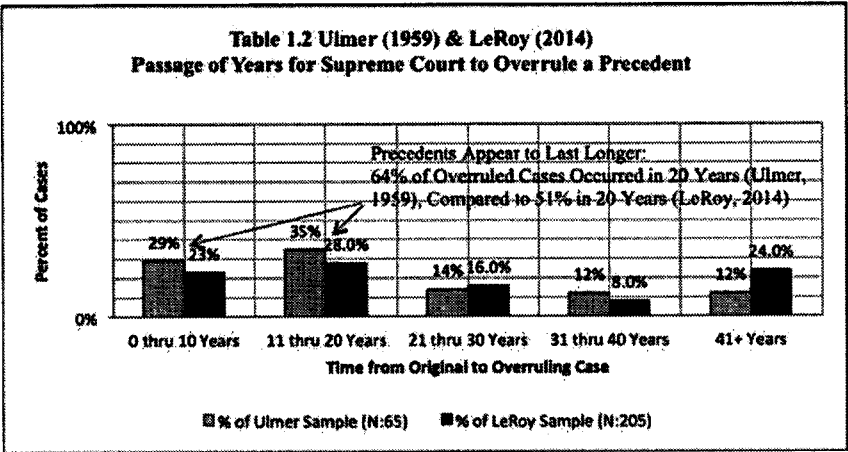
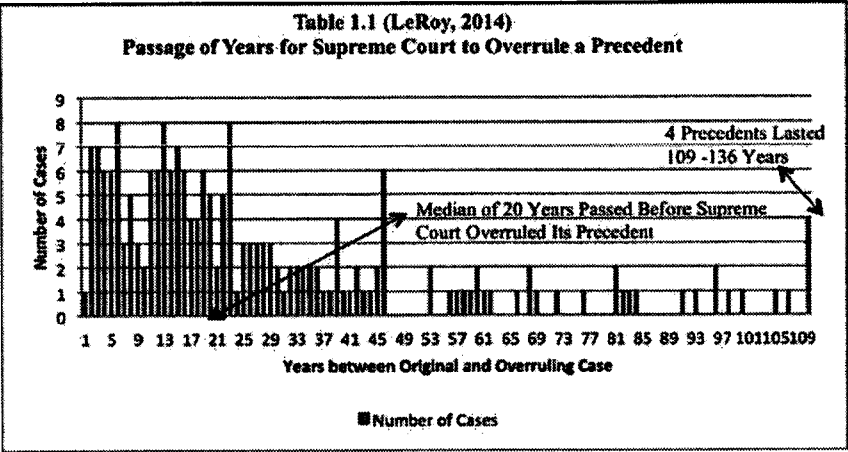
140. *The Supreme Court*, *supra* note 137.

141. *Wilson*, 3 U.S. (3 Dallas) at 404.

142. *Id.* at 405.

143. *Id.* at 404.

144. A similar table was published in my first study. LeRoy, *supra* note 57, at 740 tbl.2.1.



The range in Table 1.1 was 1 to 138 years. Overruled precedents lasted a mean of 29.11 years and median of twenty years. Table 1.2 compares the longevity of overruled precedents in Sidney Ulmer’s 1959 study and my analysis. The main finding is that more precedents had a shorter duration in Ulmer’s study, with 64% of overruled cases occurring within twenty years compared to 51% in my study. Some caveats must be noted in this comparison. My sample contained overruled cases that were decided before Ulmer’s study. The fact that I

That table was composed of 154 cases, while the table here shows results for 205 cases. *Id.* at 740; see *infra* Tables 1.2.

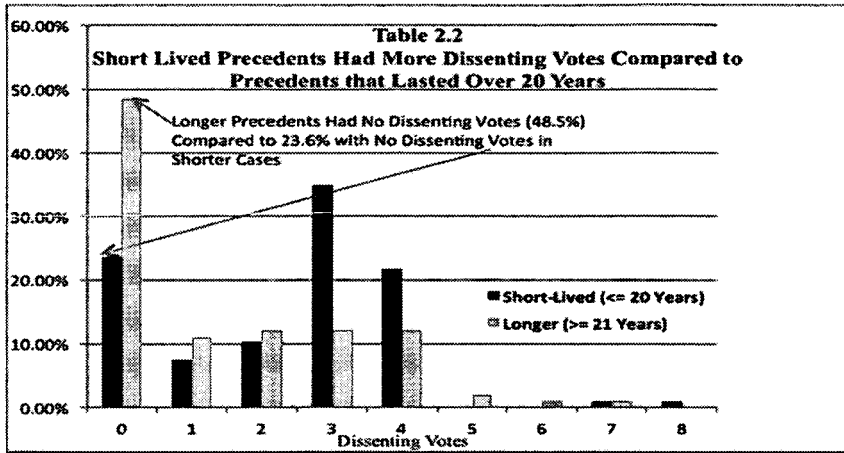
had the benefit of a powerful online research tool may explain why Ulmer missed some cases. Also, the differences in our data could be due to sampling bias by Ulmer, or both of us. One or both of us could improperly include or exclude overruled cases. It is important to note that Ulmer did his research in the late 1950s. This was only twenty years or so after the Supreme Court experienced a major upheaval in commerce clause cases. Thus, the longer-lasting precedents that I report in 2014 could be due to period effects stemming from the different times we collected data.

Voting Characteristics of Overruled Precedents: Table 2.1 (*infra*) shows a data analysis for the margin of votes in my cases. The mean margin for an overruled precedent was 5.13 votes (VOTEMARG). On average, these cases had 6.80 majority votes (MAJVOTE), 1.90 dissenting votes (DISSVOTE), and .60 concurring votes.¹⁴⁵ These means sum to 9.3 votes because some Justices split their vote, being part of a majority and a dissent in the same case.

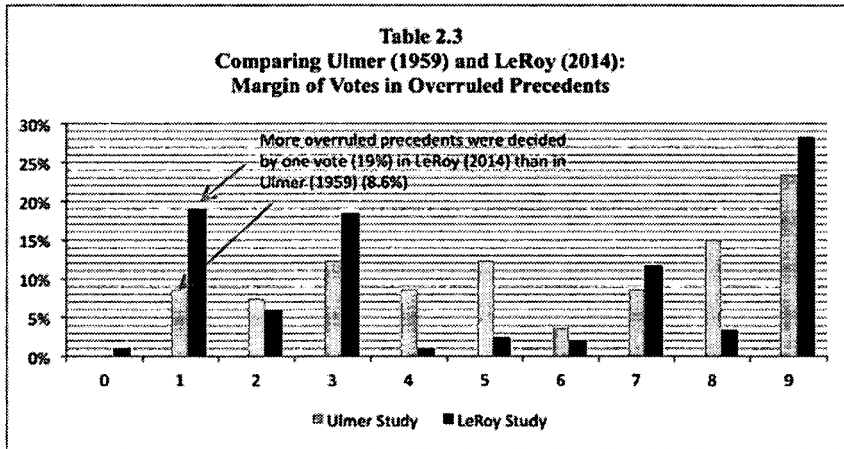
Table 2.1: Votes In Overruled Precedents				
	MAJVOTE (Majority Votes in Precedent)	CONVOTE (Concurring Votes in Precedent)	DISSVOTE (Dissenting Votes in Precedent)	VOTEMARG (Majority & Concurring Votes Minus Dissenting Votes)
Mean	6.80	.60	1.90	5.13
Median	7.00	.00	2.00	5.00
N=205				

Table 2.2 (*infra*) compares the voting patterns for short- and long-duration precedents. I split the sample along its median, with half of the precedents overruled in 20 years or less. Table 2.2 shows that shorter precedents had more dissenting votes than longer-lasting cases. For short-lived precedents, only 23.6% had no dissenting vote. In contrast, 48.5% of longer-lasting opinions had no dissenting vote.

145. See *infra* Table 2.1. A small number of cases had one or no Justices who did not vote, and an even fewer number of cases were decided when the Court had less than nine Justices.



In Table 2.3 (*infra*) I compared voting patterns in Ulmer's and my analyses.¹⁴⁶ There were more overruled precedents decided by one vote in my study (19%) than in Ulmer's (8.6%).



2. Regression Results

Equations and Results: For an overruled precedent, what effect do votes have on its longevity? To answer this question, I specified the following equation in the form of a linear regression model:

146. See *infra* Table 2.3.

Years Elapsed = Constant + Majority Votes + Concurring Votes + Dissenting Votes + Margin of Votes + Error.

Consistent with other empirical legal studies, I tested the independent variables for multicollinearity. Several variables were highly inter-correlated. Given the fixed number of votes in a typical opinion—nine—the number of majority votes will tend to correlate inversely with dissenting votes.¹⁴⁷ Because multicollinearity biases the coefficient estimates for these variables, I could not use a multiple regression analysis with these voting measures as independent variables.

As an alternate approach, I regressed two proxy variables for dissensus—the number of dissenting and concurring opinions. While these variables do not fully capture the degree of dissensus in an overruled precedent, it is the best alternative measure of decisional fragmentation. I ran another test for multicollinearity and concluded that this problem no longer existed. Thus, I re-specified the equation:

Years Elapsed = Constant + Concurring Opinions + Dissenting Opinions + Margin of Votes + Error.

Table 3.1 (*infra*) shows that a strong correlation was found between two variables and a precedent's longevity: margin of votes ($t, 4.031$; $p < .000$) and concurring opinions ($t, -2.793$; $p < .006$). The effect of the number of dissenting opinions was not statistically significant ($t, 1.430$; $p < .154$).

147. DR. BUNTY ETHINGTON, MULTICOLLINEARITY 1-2, available at <http://umdrive.memphis.edu/yxu/public/Multicollinearity.pdf> ("Prior to estimating the regression equations, if you notice that any of the bivariate correlations among the independent variables are greater than .70, you may be facing the problem of multicollinearity. But even that rule of thumb is subject to debate."). Using that guideline, I found that VOTEMARG and MAJVOTE had a .716 correlation [significant at the 0.01 level (2-tailed)]; and DISSVOTE and VOTEMARG had a -.899 correlation [significant at the 0.01 level (2-tailed)].

Table 3.1

Multiple Regression: Dissensus Affects a Precedent's Longevity^a

Model	Unstandardized Coefficients		Standardized Coefficients	t	Sig.
	B	Std. Error	Beta		
(Constant)	7.688	5.503		1.397	.164
VOTEMARG	4.031	.732	.463	5.504	.000
CONOPINS	-4.655	1.667	-.185	-2.793	.006
DISOPINS	3.225	2.256	.125	1.430	.154

a. Dependent Variable: YEARPASS

In Table 3.2 (*infra*), the p value (Sig. F) shows that the voting variables significantly correlated with the number of years that the precedents lasted. The model explained 18% of the variance in the longevity of overruled precedents (Adjusted R-square).

Table 3.2

Multiple Regression: A Precedent's Fragmentation Is Related to Longevity^a

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate	Change Statistics				
					R Square Change	F Change	df1	df2	Sig. F Change
1	.438 ^a	.192	.180	24.828	.192	15.886	3	201	.000

a. Predictors: (Constant), DISOPINS, CONOPINS, VOTEMARG

Interpreting Results: To understand the meaning of these results, consider a pair of cases in the database, *Westinghouse Electric Corp.*, overruled by *Smith*. *Westinghouse Electric Corp.*, decided by a

six-to-two vote,¹⁴⁸ had two concurring opinions (three concurring Justices) and one dissenting opinion.¹⁴⁹

The following equation plugs-in *Westinghouse Electric Corp.*'s decisional characteristics: Years Elapsed = 7.788 (Constant) plus 4 times 4.031 (Margin of Votes) + 3 times -4.655 (Concurring Opinions) + 1 times 3.225 (Dissenting Opinions). The italicized numbers show the margin of votes, concurring opinions, and dissenting opinions in *Westinghouse Electric Corp.* multiplied by their regression coefficients in Table 3.1. Combining the terms in this equation, the model predicts that *Westinghouse Electric Corp.* would last 13.17 years.¹⁵⁰ In reality, this precedent lasted seven years before *Smith* overruled it. This regression model is about six years off in predicting how long *Westinghouse Electric Corp.* would last.

It is Important to emphasize that, the model does not predict that this particular case would be overruled.¹⁵¹ However, the model correlates *Westinghouse Electric Corp.*'s early demise with that opinion's decisional characteristics. Put another way, the model's goodness of fit is significant; but, as the *Westinghouse Electric Corp.-Smith* pair shows, the fit is not precise, nor is it close.

Finally, I wondered why there was a statistically significant result for the number of concurring opinions but not for the number of dissenting opinions. After running a frequencies analysis for these variables, I found that 26.3% of the overruled cases had one or more concurring opinions, while 59.5% of these cases had one or more dissenting opinions. A plausible interpretation is that a dissent alone does not shorten the life of a precedent, but when the majority is unable to unite in its reasoning for a ruling, this double-layered fragmentation hastens the overruling of a precedent. In other words, the most fragile overruled precedents are those where the majority itself is in disarray.

148. 348 U.S. at 439, 461, 465. Justice Harlan did not participate in the consideration or decision of the case. *Id.* at 461.

149. *Id.* at 461 (Warren, C.J., concurring); *Id.* at 461 (Reed, J., concurring); *Id.* at 465 (Douglas, J., dissenting).

150. The t-statistic for Vote Margin is -1.765 (significance at $p < .08$); for Majority Votes, 1.838 (significance at $p < .068$); Margin of Votes, -1.765 (significance at $p < .08$); Majority Votes, 1.838 (significance at $p < .068$); Margin of Votes, 3.499 (significance at $p < .001$); Dissenting Votes, 2.029 (significance at $p < .044$); and Concurring Votes, -2.879 (significance at $p < .005$).

151. See generally James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091 (2001) (applying a multivariate approach to explaining the factors that contribute to a precedent being overruled).

IV. CONCLUSION: SHOULD JUSTICES RETHINK THEIR CONSENSUS NORMS?

What are the implications for this research? Hopefully, Justice Scalia was glib when he said that he writes dissents for the benefit of law students.¹⁵² And, hopefully, Justice Alito's apparent invitation to overrule *Abod* was motivated by a compelling legal concern and not an ideological agenda.¹⁵³ Controversial declarations by Justices help to frame my research question: What do the voting characteristics in a Supreme Court case mean for a precedent's longevity? The answer is that, while the Court rarely overrules its precedents,¹⁵⁴ these actions are pivotal because they conflict with the guiding principle of *stare decisis*.

My findings show that the more an overruled precedent is fragmented, the shorter it lives. In addition to reporting decision-making metrics for overruled precedents, this study provides context about the voting patterns in these cases. Justices should not avoid dissensus or seek unanimity as an end to itself. But, Justices exploit split votes in vulnerable precedents and seize upon the Court's earlier discord to end a precedent. No one recognizes this institutional threat more than Justices, who worry that the votes for a treasured precedent are eroding.¹⁵⁵ Their brethren bluntly question the vitality of a precedent decided by a five-to-four vote.¹⁵⁶ The "fifth vote" in a precedent is singled out to indicate a

152. Senior, *supra* note 1.

153. Supreme Court blogs reported on Justice Alito's hint in *Knox v. Service Emporium International Union*, 132 S. Ct. 2277 (2012). Greve, *supra* note 24 ("[Writing] [p]redictably, the petitioners' merits brief in Harris picks up those hints [from Justice Alito]."); see *Knox*, 132 S. Ct. at 2289 (quoting Justice Alito: "Our cases to date have tolerated this 'impingement,' and we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake.").

154. BRENNER & SPAETH, *supra* note 53, at 10-11; see also Ulmer, *supra* note 63, at 417 (stating that the Court had decided about 55,000 appellate cases by the late 1950s).

155. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 912 & n.1 (1992). A plurality overruled the Court's "strict scrutiny" approach to reviewing abortion restrictions in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986). *Planned Parenthood*, 505 U.S. at 836. Worried that the *Planned Parenthood* opinion was a milestone, in a broader overruling of *Roe v. Wade*, 410 U.S. 113 (1973), Justice Stevens counted votes to take stock of the future:

It is sometimes useful to view the issue of *stare decisis* from a historical perspective. In the last 19 years, 15 Justices have confronted the basic issue presented in *Roe v. Wade* . . . Of those, 11 have voted as the majority does today: Chief Justice Burger, Justices Douglas, Brennan, Stewart, Marshall, and Powell, and Justices Blackmun, O'Connor, Kennedy, Souter, and myself. Only four—all of whom happen to be on the Court today—have reached the opposite conclusion.

505 U.S. at 912 n.1. Aware of the vanishing support for *Roe*, Justice Stevens concluded: "And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light." *Id.* at 923.

156. See, e.g., *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 66-67 (1977) (White, J.,

flaw.¹⁵⁷ When a concurring opinion is part of a precedent, this fragmented support is portrayed as a defect.¹⁵⁸ The fact that precedents “were decided by the narrowest of margins, over spirited dissents” galvanizes Justices to overrule earlier opinions.¹⁵⁹

Strong consensus does not immunize a precedent forever;¹⁶⁰ however, it tends to extend a precedent’s life.¹⁶¹ When Justices overrule a recent precedent decided by a large majority, they admit that they carry a heavy burden to justify their action.¹⁶² These explanations do not necessarily mollify or persuade Justices who disagree with the overruling majority.¹⁶³ Other times, a dissenting opinion from an early

concurring) (disagreeing with the majority’s overruling of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1977) by citing the dissenting opinion of Justice Holmes in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)). It is interesting to note that, Justice Holmes’ dissenting vote appears to have been vindicated nearly a century later when *Miles Medical Co.* was overruled by *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). See also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), overruling *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976). For a provocative perspective on this institutional problem, see generally Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692 (2014).

157. *E.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57-63 (1996), overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). In *Seminole Tribe of Florida*, Justice Rehnquist pointed out the fragility of the overruled case when he said: “Justice White added the fifth vote necessary to the result in that case, but wrote separately in order to express that he ‘[did] not agree with much of [the plurality’s] reasoning (citations omitted).’” *Id.* at 59-60.

158. *E.g.*, *Garcia*, 469 U.S. at 556 (referring to “the separate concurrence providing the fifth vote in *National League of Cities*”).

159. *Payne v. Tennessee*, 501 U.S. 808, 828-30 (1991).

160. On a nine-to-zero vote, *Pace v. Alabama* upheld a state law that criminalized fornication between “any white person and any negro.” 106 U.S. 583, 583 (1882); ABRAHAM L. DAVIS & BARBARA LUCK GRAHAM, *THE SUPREME COURT, RACE, AND CIVIL RIGHTS* 15 (1995). *Pace* reasoned that there was no Equal Protection violation because the black man and white woman who were convicted received equal sentences of two years in prison. 106 U.S. at 585. The opinion also shows that a long-lasting precedent is not necessarily good. Eighty-two years passed before *McLaughlin v. Florida*, 379 U.S. 184 (1964) overruled this disreputable precedent. See also *Puerto Rico v. Branstad*, 483 U.S. 219, 230 (1987), overruling *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860) (explaining 126 years later that “*Kentucky v. Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development.”).

161. See *supra* note 19.

162. See *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965), overruling *Kesler v. Dep’t of Pub. Safety*, 369 U.S. 153 (1962) (conceding “that candor compels us to say that we find the application of the *Kesler* rule as elusive as did the District Court, and that we would fall short in our responsibilities if we did not accept this opportunity to take a fresh look at the problem”). The opinion directly confronted the Court’s vote in creating a new jurisdictional rule in *Kesler*, and stated: “The overruling of a six-to-two decision of such recent vintage, which was concurred in by two members of the majority in the present case, and the opinion in support of which was written by an acknowledged expert in the field of federal jurisdiction, demands full explication of our reasons.” *Id.* (footnotes omitted).

163. *E.g.*, *Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 382-83 (1977) (Marshall, J., dissenting), overruling *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).

case is cited to explain why a precedent should not be overruled.¹⁶⁴ Additionally, there are cases where the votes for a precedent have such a muddled meaning that Justices do not even agree whether they are overruling a precedent.¹⁶⁵

Dissonance and confusion do nothing to inspire confidence in the law. There is something fundamentally wrong when—as I report here—half of the Court’s overruled precedents survive twenty years or less. To the extent that a concurring opinion or dissenting vote perpetuates a Justice’s reputation or public persona, or signals a think tank or interest group, or indulges a personal fancy, or reserves an issue for a future case, or cements the Justice’s place in history as a swing voter or great dissenter, these judicial vanities infect precedents with dysfunction. The better approach is to reinvigorate the Court’s consensual norms.¹⁶⁶

Justice Marshall remarked:

The Court today overrules a three-year-old decision, *Bonelli Cattle Co. v. Arizona*, in which seven of the eight participating Justices joined. In addition, as the Court is certain to announce when the occasion arises, today’s holding also overrules *Hughes v. Washington*, a nine-year-old decision also joined by all but one of the participating Justices. It is surprising, to say the least, to find these nearly unanimous recent decisions swept away in the name of *stare decisis*.

Id. (footnote omitted) (citations omitted); see also *United States v. Rabinowitz*, 339 U.S. 56, 85 (1950) (Frankfurter, J., dissenting), *overruling* *McDonald v. United States*, 335 U.S. 451 (1948) (“We are asked to overrule decisions based on a long course of prior unanimous decisions, drawn from history and legislative experience. . . . [W]e overrule the underlying principle of a whole series of recent cases [including] *McDonald v. United States*, 335 U.S. 451.”).

164. See *supra* note 158.

165. See *Hudgens v. NLRB.*, 424 U.S. 507, 523 (1976) (Powell, J., concurring) (“Although I agree with Mr. Justice White’s view concurring in the result that *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) did not overrule *Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968), and that the present case can be distinguished narrowly from *Logan Valley*, I nevertheless have joined the opinion of the Court today.” (emphasis added)). Yet, Justice Marshall’s dissent said: “The Court today holds that the First Amendment poses no bar to a shopping center owner’s prohibiting speech within his shopping center. After deciding this far-reaching constitutional question, and overruling [*Logan Valley*], in the process, the Court proceeds to remand for consideration of the statutory question . . .” *Id.* at 525-26 (Marshall, J., dissenting) (emphasis added) (citation omitted).

166. See Jeffrey Rosen, *Roberts’s Rules*, ATLANTIC (Jan. 1, 2007, 12:00 PM), <http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559> (reporting that the Chief Justice, in a lengthy interview, stated his belief that “the most successful chief justices help their colleagues speak with one voice” and help to foster unanimous or nearly unanimous rulings). And, during his first year as Chief Justice, Roberts said his goal was to build consensus on the Court while deciding cases on narrow grounds. See *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES, May 22, 2006, at A16. It is interesting to note, however, that early data on Chief Roberts’ tenure indicates a fractured Court. See William D. Blake & Hans J. Hacker, “*The Brooding Spirit of the Law*”: *Supreme Court Justices Reading Dissents from the Bench*, 31 JUST. SYS. J. 1, 7 tbl.2 (2010) (indicating that Chief Justice Berger, who served the 1969 to 1985 terms, read 51 dissents, an average of 3.2 per year; Chief Justice Rehnquist, who served the 1986 to 2004 terms, read 53 dissents, an average of 2.9 per year; and Chief Justice Roberts, who served the 2005 to 2007 terms, read 12 dissents, an average of 4.0 per year).

V. APPENDIX: SUPREME COURT DATABASE OF
OVERRULED PRECEDENTS

(* INDICATES NEW ADDITION TO ROSTER)¹⁶⁷

Adams v. Tanner, 244 U.S. 590 (1917), *overruled by* Ferguson v. Skrupa, 372 U.S. 726 (1963).

Adkins v. Children's Hosp. of D.C., 261 U.S. 525 (1923), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

Adler v. Bd. of Educ. of City of N.Y., 342 U.S. 485 (1952), *overruled by* Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

Aguilar v. Texas, 378 U.S. 108 (1964), *overruled by* Illinois v. Gates, 462 U.S. 213 (1983).

Ahrens v. Clark, 335 U.S. 188 (1948), *abrogated by* Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 (1973).

City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).*

Albrecht v. Herald Co., 390 U.S. 145 (1968), *overruled by* State Oil Co. v. Khan, 522 U.S. 3 (1997).

Allen v. Newberry, 62 U.S. (21 How.) 244 (1855), *abrogated by* The Belfast, 74 U.S. (7 Wall.) 624 (1869).*

Amalgamated Food Emps. Union v. Logan Valley Plaza, 391 U.S. 308 (1968), *abrogated by* Hudgens v. NLRB, 424 U.S. 507 (1976).

Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), *overruled by* W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., 493 U.S. 400 (1990).

Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821), *abrogated by* Kilbourn v. Thompson, 103 U.S. 168 (1881).*

Arkansas v. Sanders, 442 U.S. 753 (1979), *overruled by* California v. Acevedo, 500 U.S. 565 (1991).

Ass'n of Westinghouse Salaried Emps. v. Westinghouse Elec. Corp., 348 U.S. 437 (1955), *overruled by* Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827 (1950), *overruled by* Lear, Inc. v. Adkins, 395 U.S. 653 (1969).

Baltic Mining Co. v. Massachusetts, 231 U.S. 68 (1913), *overruled by* Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925).

167. Compare LeRoy, *supra* note 57, with Part V. app.

Becker v. St. Louis Union Trust Co., 296 U.S. 48 (1935), *overruled* by Helvering v. Hallock, 309 U.S. 106 (1940).*

Betts v. Brady, 316 U.S. 455 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

Blackstone v. Miller, 188 U.S. 189 (1903), *overruled by* Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204 (1930).

Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), *overruled by* Or. *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977).

Booth v. Maryland, 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

Boyd v. United States, 116 U.S. 616 (1886), *overruled by* G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977).

Brantley v. Georgia, 217 U.S. 284 (1910), *overruled by* Price v. Georgia, 398 U.S. 323 (1970).

Breedlove v. Suttles, 302 U.S. 277 (1937), *overruled by* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

Brown v. United States, 359 U.S. 41 (1959), *overruled by* Harris v. United States, 382 U.S. 162 (1965).

Brown's Lessee v. Clements, 44 U.S. (3 How.) 650 (1845), *overruled by* Gazzam v. Phillip's Lessee 61 U.S. (20 How.) 372 (1858).*

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Yates v. United States, 354 U.S. 298 (1957), *overruled by* Burks v. United States, 437 U.S. 1 (1978).*
