The Influence of Stare Decisis *on the Votes of United States Supreme Court Justices**

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Theory: We test arguments from the legal model claiming that United States Supreme Court justices will follow previously established legal rules even when they disagree with them; i.e., that they are influenced by *stare decisis.*
Hypothesis: Because of the institutional features facing Supreme Court justices, we argue that justices who dissent from or otherwise disagree with Supreme Court precedents established in landmark cases are free not to support those decisions in subsequent cases.
Methods: A systematic content analysis of the votes and opinions of dissenting Supreme Court justices in a random sample of landmark decisions and their progeny.
Results: Overwhelmingly, Supreme Court justices are not influenced by landmark precedents with which they disagree. We replicate the research for nonlandmark decisions and find similar results. Alone among the justices studied, only Potter Stewart and Lewis Powell show any systematic support for *stare decisis* at all.

Stare decisis is the fundamental principle on which judicial decision making is supposed to rest. Benjamin Cardozo, who broke with more than a few precedents in his time, nevertheless argued that "Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice" (1921, 34).

While adherence to precedent is forcefully urged in terms of lower court respect for upper court decisions, the normative arguments supporting stare decisis are less clear when dealing with Supreme Court respect for its own precedents. Some argue, as did Justice Douglas, that "A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it" (quoted in *South Carolina* v. *Gathers* 1989, 825). In a similar vein, Justice Rehnquist argued for the

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Court in *Payne* v. *Tennessee* (1991) that some precedents are more appropriately disregarded than others. "Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved . . . the opposite is true in cases such as the present one involving procedural and evidentiary rules" (1991, 737).[1]

Alternatively, some still speak reverently of the need to respect precedents, or at least those they like. In *Payne* v. *Tennessee* (1991), Thurgood Marshall, who as a litigator may have been responsible for more precedents being overturned than anyone in the 20th Century, argued in dissent that "'this Court has repeatedly stressed that fidelity to precedent is fundamental to 'a society governed by the rule of law'. . . . Stare decisis . . . 'is essential if case-by-case judicial decision-making is to be reconciled with the principle of the rule of law, for when governing standards are open to revision in every case, deciding cases becomes a mere existence of judicial will'" (1991, 751). The majority opinion's "'debilitated conception of stare decisis would destroy the Court's very capacity to resolve authoritatively the abiding conflicts between those in power and those without" (1991, 754). Justices O'Connor, Kennedy, and Souter noted in *Planned Parenthood* v. *Casey* (1992), that "no 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 precedents is, by definition, inescapable" (1992, 699–700).[2] In short, appeal to precedent is the primary justification justices provide for the decisions they reach. One recent study, for example, found that over 80% of the constitutional arguments raised by Justices Brennan and Rehnquist in majority opinions were based on precedent (Phelps and Gates 1991, 594).[3]

[1] Justice Harlan suggests an even more arbitrary distinction than Rehnquist's. He claimed in *North Carolina* v. *Pearce* (1969) that his "usual practice is to adhere until the end of the Term to views I have expressed in dissent during the Term," but not thereafter (1969, 744). Yet his more typical response is never to accede to any statement supportive of a majority opinion from which he dissented. See, e.g., *Graham* v. *Richardson* (1971), where Harlan concurred in the result, refusing to join those parts of the opinion that cited *Shapiro* v. *Thompson* (1969).

[2] Ironically, this opinion replaced the compelling interest standard established by the majority in *Roe* v. *Wade* (1973) with a more lenient "undue burden" standard urged by O'Connor's solo concurrence in *Webster* v. *Reproductive Health Services* (1989). The opinion also overruled holdings in *Akron* v. *Akron Center for Reproductive Health* (1983) and *Thornburgh* v. *American College of Obstetricians and Gynecologists* (1986).

[3] Textual and intentionalist arguments, hotbeds of scholarly concerns, occupy less than 7% of Rehnquist's arguments and less than 5% of Brennan's.

Beyond the normative arguments lies an empirical question: are justices influenced by precedent in reaching their decisions on the merits? While no one today could credibly argue that legal factors, most notably precedent, are all that influence Supreme Court decisions, the legal model still has an impressive array of adherents. Rosenberg, for instance, claims that justices "apply a set of interpretive canons, a set of principles that guide them in interpreting the Constitution, statutes, precedent, and derive an outcome" (1994, 7). Gibson (1991) argues that judges and justices are normatively constrained by feelings of what they ought to do, and, if Howard (1981) is right, high on any judge's list of things he or she ought to do is follow precedent. Two of the leading legal scholars of this generation, Ronald Dworkin and Bruce Ackerman, leave substantial room for legalistic factors in their assessments of the justices' decisions (Ackerman 1991; Dworkin 1978; see Smith 1994 for a discussion). Lawrence Baum, who argues that "policy preferences almost certainly provide the best explanation for differences among justices in decisional behavior" (1992, 145), nevertheless claims that "justices frequently vote to uphold precedents with which they disagree" (1992, 135). As Epstein and Kobylka (1992) put it, "'the law,' as legal actors frame it, matters, and it matters dearly" (xiv).[4] Even rational-choice theorists, who are typically hardheaded about the motivations of political actors, find room for legalistic criteria when explaining judicial choice (Ferejohn and Weingast 1992; McNollgast 1994).

Alternatively, attitudinalists argue that because the Supreme Court sits atop the judicial hierarchy, and because in the type of cases that reach the Supreme Court legal factors such as text, intent, and precedent are typically ambiguous, justices are free to make decisions based on their personal policy preferences (Segal and Spaeth 1993). Even when text, intent, and precedent are clear, they are easily avoided.[5] Caldeira, for example, can think of "no political scientists who would take plain meaning, intent of the framers, and precedent as good explanations of what the justices do in making decisions" (1994, 485). The legal model is a "silly formalism" that "no one who has taken introduction to American government or read *Marbury* v. *Madison* or witnessed the fights over nominations to the Court during the Reagan and Bush years is going to ascribe to" (1994, 485).

Missing from these arguments has been any systematic empirical evidence on the role of legal factors in general (or at least those legal factors

[4] See also Epstein, Walker, and Dixon (1989).

[5] See as examples *Home Building and Loan* v. *Blaisdell* (1934) on text, *Williams* v. *Florida* (1970) on intent, and *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985) on precedent.

not consistent with attitudinal factors),[6] and precedent in particular at the Supreme Court level. Part of the problem, no doubt, is a lack of agreement as to what precedent means (Brenner and Spaeth 1995, chap. 1). The classic statement on legal reasoning obscures as much as it answers. As Edward Levi described the process, first:

> similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case . . . The scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process (1949, 1–2).

In other words, judges "set boundaries in fact spaces" (Cameron 1993, 45) and apply those boundaries to subsequent cases. Of course, determining whether a boundary has been crossed is easier when cases are unidimensional: a declaration that a 3.1% deviation from district equality (*Kirkpatrick* v. *Preisler* 1969) violates the constitution necessarily implies that a 5% deviation also violates the constitution. But such a ruling does not answer whether a 2.4% deviation is constitutional (*White* v. *Weiser* 1973). Requiring a warrant for searches pursuant to the Occupational Safety and Health Act (*Marshall* v. *Barlow's Inc.* 1978) does not necessarily imply requiring one for searches pursuant to the Federal Mine Safety and Health Act (*Donovan* v. *Dewey* 1981). Thus, our rules for determining whether precedents are followed (see below) necessarily account for the factual content in each case.

Even if we decide, moreover, that a precedent applies to a particular case, this does not answer whether justices are influenced by that precedent. The problem with systematically assessing the influence of precedent is that in many cases Supreme Court decision making would look exactly the same whether justices adhered to precedent or not. Consider a collegial court that could choose x or y as a decision (or a decision rule) in case z_1. Assume that a majority chooses x, while a group of disssenters chose y. In the next case, z_2, the majority again chooses x. While we could say that the choice in z_2 was based on the precedent set in z_1, it is just as reason-

[6] Virtually all support for the legal model at the Supreme Court level is based on the importance of case stimuli or fact patterns on decisions (e.g., George and Epstein 1992; Segal 1984). Yet as Segal and Spaeth (1993, chap. 6) note, the influence of fact-patterns is consistent with both legal and attitudinal models. Thus, no systematic support for the legal model exists that does not simultaneously support the attitudinal model. Where the two models diverge the attitudinal model finds systematic support and the legal model, to date, does not.

able—if not more so—to say that the court would have chosen x in z_2 even without the precedent in z_1. Thus, even in a system without precedent Justice Blackmun would continue to support abortion rights while Justice Scalia would continue to support the death penalty. When prior preferences and precedents are the same it is not meaningful to speak of decisions as being determined by precedent. For precedent to matter as an *influence* on decisions, it must achieve results that would not otherwise have been obtained. As Judge Jerome Frank stated "*Stare decisis* has no bite when it means merely that a court adheres to a precedent that it considers correct. It is significant only when a court feels constrained to stick to a former ruling although the court has come to regard it as unwise or unjust" (*United States* v. *Shaughnessy* 1955, 719). Our goal, then, is to examine systematically the influence of precedent on the votes of Supreme Court justices. We do so by establishing a set of circumstances where we know that the justices' preferred outcomes,[7] whatever their bases, differ from precedent and then evaluate the votes of justices in those situations.

This is not to say that precedent might not have other influences. Obviously, it is used to enhance the legitimacy of courts as adjudicative bodies (Shapiro 1972), but that is well beyond the scope of this article. Also beyond this article's scope is vertical *stare decisis*. Obviously, lower courts, at least in part, are influenced by higher courts (Songer, Segal, and Cameron 1994). More relevant to our purposes, *stare decisis* could shore up votes of justices who might otherwise stray from rulings they once liked. Or precedent might influence justices who come on the Court after a landmark case is decided. Unfortunately, in these cases we simply do not know that the justices' "preferences" differ from the precedent in question. We can only systematically examine precedent in situations where falsifiable tests can be created. In these sorts of situations, falsifiable tests have not been developed either by us or by proponents of the legal model.

We start, then, with consideration of the conditions that exist when a landmark decision occurs. Justices, for whatever reasons, vote on one side or the other in the case. These votes represent their preferred outcomes, or, in the language of economists, "revealed preferences." These revealed preferences could conceivably be based on innumerable factors, including their reading of text or intent, as legalists believe, or their attitudes and values, as attitudinalists believe. (Thus, for the purposes of this paper, it is not necessary to specify the factors that go into the justices' decisions. We simply use their votes as a *baseline* in considering their behavior in future cases.) In this case some number of justices will be in the majority

[7]By "preferred outcome" we mean the sum of all factors that lead to a decision. We do not make any claims in this paper as to the determinants of their preferred outcomes.

or plurality, while others might dissent. Landmark decisions also typically impose tests or standards to be followed in future cases dealing with the same issue. For instance, in *Schenck* v. *United States* (1919), the Court established the "clear and present danger" rule. Other times, these cases simply set a rule to be followed. Thus in *Brown* v. *Board of Education* (1954), the Court ruled that separate but equal schools were inherently unequal without setting a standard to be followed in future cases. Often, they do both. In *Roe* v. *Wade* (1973), the Court restricted state regulation of abortion and set a compelling interest standard for future cases.

When future related cases are decided, it is impossible to distinguish whether justices in the original majority who adhere to their position are following precedent, are following their original revealed preferences, or are following some combination of the two. We do, however, have a test of precedent for those justices who were in the minority. If they subsequently adopt the majority position, arguably they did so out of respect for precedent (though obviously other factors might have led to such a switch. We will discuss this further below). In such cases, precedent may be said to dominate over their baseline position. If they continue to dissent or otherwise oppose the position established in the original case, then it is clear that the creation of a landmark precedent was not sufficient to get the justices to change their minds. In these cases, their revealed preferences from the original case, whatever their bases, dominate over precedent.[8]

Research Design

To determine whether justices are influenced by precedent, we focus on the voting patterns of dissenting justices in landmark cases. We examine dissenting justices because we know that their revealed preferences differ from the established precedent and thus we can distinguish whether or not these justices arguably were influenced by the established precedent in future cases. We choose landmark cases because they are more likely to establish precedential guidelines for future cases and because landmark cases are more likely to actually generate progeny that we can analyze (Pacelle 1991). (We conclude, nevertheless, with

[8]For justices who joined the Court subsequent to the landmark decision, the situation is a bit more complex. Joining the dissenting position is clearly an antiprecedent vote, whereas joining the majority could be either due to a respect for precedent or else due to a preference for the original decision. Thus, although it is possible to determine the number of times such justices vote against precedent, it is impossible to distinguish in their promajority votes between those based on precedent and those based on their preferences.

a replication of our findings for nonlandmark cases.) For each dissenting justice we will determine whether that justice accepts the relevant landmark decision in subsequent cases dealing with the same issue. Thus, if we were to examine *Roe* v. *Wade* (1973) and its progeny, we would ask whether *Roe* dissenters Rehnquist or White subsequently: 1) adopted the position that abortion statutes are subject to a compelling-interest standard, and 2) agreed that the Constitution accepts the fundamental right to abortion until the fetus is viable.

This is not an unobtainable standard. Examples of justices changing their votes in response to established precedents clearly exist. In *Griswold* v. *Connecticut* (1965), Stewart rejected the creation of a right to privacy and its application to married individuals. Yet in *Eisenstadt* v. *Baird* (1972) he accepted *Griswold's* right to privacy and was even willing to apply it to unmarried persons. Justice White dissented when the Court established First Amendment protections for commercial speech (*Bigelow* v. *Virginia* 1975); he thereafter supported such claims. (See *Virginia Pharmacy Board* v. *Virginia Consumer Council* 1976; *Bates* v. *Arizona State Bar* 1977). And while Justice Rehnquist dissented in the jury exclusion cases *Batson* v. *Kentucky* (1986) and *Edmonson* v. *Leesville Concrete Co.* (1991), he concurred in *Georgia* v. *McCollum* (1992), providing an explicit and quintessential example of what it means to be constrained by precedent: "I was in dissent in *Edmonson* v. *Leesville Concrete Co.* and continue to believe that case to have been wrongly decided. But so long as it remains the law, I believe it controls the disposition of this case. . . . I therefore join the opinion of the Court" (1992, 52).[9] The question, then, is not whether precedent influences any of the justices' decisions, for surely it does. The question is whether such behavior exists at systematic and substantively meaningful levels.

We believe that our operational definition is both reasonable and, unlike other definitions, falsifiable. Compare our definition to one that counts a justice as following precedent as long as he or she cites some case or cases that are consistent with that justice's vote. Since there are always some cases supporting both sides in virtually every conflict decided by the Court, such a definition turns *stare decisis* into a trivial concept, at least for explanatory purposes. Moreover, a justice-centered view of precedent makes precedent a personal decision, not the institutional decision that it so clearly is supposed to be.

[9]See also Schubert (1963) for an examination of Justice Clark changing his position in three court martial cases decided in the 1959 term in response to newly established precedents. Clark also dissented in *Miranda* v. *Arizona* (1966) before acceding to it in his opinion in *United States* v. *Wade* (1967).

Sampling

We arrive at our sample of cases for investigation through a multistep procedure. First, we originally limit our precedent-setting cases to major ones decided by the Court.[10] We do so, as stated above, for the simple reasons that major cases are more likely to be relied on as precedent and are more likely to have progeny. We operationalize "major cases" as those listed in *Congressional Quarterly's Guide to the U.S. Supreme Court* as "Major Decisions" (Witt 1990, 883–929). Common alternatives, such as appearance in constitutional law books, almost completely ignore statutory cases.[11]

Second, we limit ourselves to decisions since the start of the Warren Court. We plan to backdate our analyses in subsequent work.[12]

Third, we exclude unanimous decisions. Only dissenters can be conflicted between their stated preferences in major decisions and the majority precedent established in that case.

Fourth, we exclude from the population of cases those that unambiguously contain no progeny during the period we analyze. Obvious examples are *United States* v. *Nixon* (1974), and *Powell* v. *McCormick* (1969). We also deleted other cases if the issue they contained was sufficiently ad hoc to mitigate the likelihood of progeny; e.g., *Trop* v. *Dulles* (1958) or *Robinson* v. *California* (1962), two cruel and unusual punishment cases that did not involve the death penalty. Also beyond consideration were cases that resolved a nonrecurring issue: e.g., the silver platter doctrine of *Elkins* v. *United States* (1960); *Ker* v. *California* (1963), holding that state searches and seizures are governed by the same standards as those conducted by federal officials; and *Griffin* v. *Prince Edward County School Board* (1964), holding that the "with all deliberate speed" formula for the desegregation of schools was no longer operative. Finally, we excluded cases that marked the virtual end of a line of decisions; e.g., *Elfbrandt* v. *Russell* (1966) and *Keyishian* v. *Board of Regents* (1967). These rulings signalled the end of loyalty oath litigation. Indeed, if we had included them, *Keyishian* would have produced no progeny and been *Elfbrandt's* only one. We provide a complete list of cases deleted for clear lack of progeny in Appendix 1. There remained 131 cases for consideration. From these we took a 40% random sample using the random numbers table provided in

[10] We provide a summary examination of nonlandmark cases in the conclusion.

[11] Cook (1993) found Witt to contain the most reliable list of contemporary landmarks among 15 sources examined.

[12] We originally limited our study so that we could use Spaeth's Supreme Court database to find a complete list of cases in the same issue area as the majority decision (Segal and Spaeth 1994). We now have access to Lexis and thus do not need to rely on the database.

Table 1 of Wonnacott and Wonnacott (1984). The selected cases are presented in Appendix II.[13] We next examine the progeny of these landmark cases. Conceptually, we define progeny as any case that applies the holding of a majority or plurality opinion of the Supreme Court. We exclude non-orally argued cases in order to assure decisional parity between precedents and progeny. All of the former were orally argued.[14]

Because we deal with words, not actions, the determination of progeny is not a bright-line enterprise. Even though we define the concept narrowly and attempt to provide a set of intersubjectively transmissible operational criteria, efforts to replicate our work will likely produce some discrepancies. In order to lessen subjectivity, we take pains to justify as best we can decisions at the margins of our definition of progeny.

Operationally, we determine progeny by using Lexis to Shepardize the precedents. We primarily key on Shepard's analysis of a decision as "followed."[15] Secondly, we focus on those cases that Shepard's identifies as "explained," "questioned," or "distinguished." Finally, we consider those cases in which Shepard's finds several "dissenting" or other unidentified references. None of these considerations, however, are considered either necessary or sufficient in themselves. A number of decisions, for example, follow *Roe* v. *Wade* (1973), but only insofar as standing to sue is concerned; e.g., *Singleton* v. *Wulff* (1976). The *Roe* dissenters, of course, did so on the merits.

Relatedly, Shepard's sometimes reserves "followed" for only one of the issues that a case contains. Thus, *In re Winship* (1970) is considered as authority for "beyond reasonable doubt" as the standard in criminal proceedings rather than the applicability of the standard to juvenile matters. One of the three dissenters, Black, held that the Constitution requires no such standard; the others (Burger and Stewart) objected to treating juvenile proceedings as criminal. Hence, in considering *Winship's* progeny we need

[13] Those interested in completely replicating our sample can take the cases from Witt since the start of the Warren Court, eliminate the unanimous decisions and those we eliminate for lack of progeny (see Appendix I). Then, starting from the top of Wonnacott and Wonnacott, read down in three digit columns. The first three-digit number less than or equal to 131 (our number of remaining cases) is 028. We thus took the 28th case from those remaining on the Witt list (*Benton* v. *Maryland* 1969). We continued this process until we achieved a 40% sample.

[14] Inclusion of summary decisions would substantially swell our progeny. Thus, Brennan and Marshall systematically dissented from all death penalty cases based on their original statement in opposition thereto. Typically, though, justices do not bother to file dissents from summary decisions.

[15] Thus, following Shepard's definitions, we count *Donovan* v. *Dewey* (1981) as a progeny of *Marshall* v. *Barlow's* (1978) even though the Court in *Donovan* claims to distinguish *Marshall.*

look to cites that do not carry the "followed" description and also distinguish the Black dissent from that of Burger and Stewart.

Several other cases also produced bifurcated dissents. In *Williams* v. *Florida* (1970), Black and Douglas dissented only on the self-incrimination issue, Marshall only on the matter of a six-member jury. In *Regents* v. *Bakke* (1978), of course, only Justice Powell did not dissent from either of the mutually exclusive four-member blocs. In *United States* v. *Leon* (1984), Brennan and Marshall dissented on the merits, while Stevens did so only insofar as a remand was concerned.

If Shepard's either fails to identify a citation or describes it as a "dissenting opinion," we expect that the case will contain the name or the holding of the precedent in the syllabus of the decision compiled by the Court's reporter. If the lead opinion of a potential progeny is self-identified as a "companion case" to the case establishing the precedent we exclude it from consideration.[16]

Because we did not examine cases in which a single Shepard citation was identified as a "dissenting opinion," we may have overlooked a few progeny in which the dissenter specifically based his or her opinion on disagreement with the established precedent. The reverse, however, did not occur because we did examine all multiple unidentified citations to the same case, along with those described as followed, explained, criticized, etc.

In the terms that comprise our analysis, we note an abundance of string citations. These diminish the precedential effect of the landmark decision because of a lack of a singular focus on the cited case. Progeny themselves tend to become precedents for subsequent decisions. A tree branching process results. Precedent A produces a progeny B. In case C, B rather than A is cited as authority. Thus, for example, the myriad of death penalty cases decided subsequent to *Gregg* v. *Georgia* (1976) tend not to cite *Furman* v. *Georgia* (1972) and its companions as authority, but rather rely on post-*Gregg* decisions. Thus while there are a large number of death penalty cases following *Gregg* and company, only 11 meet our definition of *Furman* progeny.

Note also that our operational definition of progeny is time bound. When no dissenter from the precedent remains on the Court, our analysis ceases, even though the case may be extensively cited thereafter. Note further that our decision rules do not preclude a case from being a precedent

[16] We explicitly define a companion case as one in which the opinions either state in so many words, or their equivalent, that a case is a "companion" to another; e.g., *Noto* v. *United States* (1961) with regard to *Scales* v. *United States* (1961). Cases decided on the same day and in the same general issue are only companion cases if the Court declares them as such. Thus, *Sheet Metal Workers* v. *EEOC* (1986) and *Firefighters* v. *Cleveland* (1986) are not companion cases.

for certain progeny and for that progeny to serve in turn as a precedent for still other progenies; e.g., *Regents* v. *Bakke* (1978) and *Richmond, City of* v. *J.A. Croson Co.* (1989). Nor for a given case to serve as progeny for more than a single precedent; e.g., *FEC* v. *Massachusetts Citizens for Life* (1986) and *Allegheny County* v. *ACLU* (1989).

We conclude our search for progeny at the end of March 1995, or at such time that the landmark decision was reversed or substantially limited by subsequent cases. Thus our search for progeny of *National League of Cities* v. *Usery* (1976) ended with the decision in *Garcia* v. *San Antonio Metropolitan Transportation Authority* (1985) as the *Usery* case could no longer be considered a valid precedent. Our operational definition produced 146 progeny from the 54 landmark cases, yielding 346 usable votes. The precedents and their progeny are listed in Appendix II.

Evaluation

Our final step is to determine whether the dissenting justices from the landmark cases adopt the majority's results and/or standards in subsequent decisions. In most instances the results are simple to identify. E.g., in the four progeny of *Katz* v. *United States* (1967), the dissenter, Justice Black, made his position crystal clear by citing his *Katz* dissent as the basis for his vote. A few cases, however, pose some difficulty. How, for example, should we treat landmark dissenters who join the progeny's majority when the new majority 1) seemingly retains its original standards, but 2) reaches the result favored by the original dissenters? In *Fitzpatrick* v. *Bitzer* (1976), for example, Blackmun and Marshall agreed with the majority that the Eleventh Amendment was no bar to an employment discrimination suit against a state, a position that the dissenters had taken in the precedential case, *Edelman* v. *Jordan* (1974). Their vote is clearly consistent with their preferences while the opinion they join presumably conforms to the precedent. So also are their votes, along with that of Brennan, in *Milliken* v. *Bradley II* (1977). In these and similar progeny we consider the votes of members of the majority to be decisive over the opinion when the result achieved is that preferred by the original dissenters and 1) the majority's position in the progeny moves toward the position taken by the original dissenters (see, e.g., the majority opinion in *Rogers* v. *Lodge* 1982), or 2) the stimuli presented by the fact situation in the progeny appear less extreme (compared to the preferences of the dissenters) than that of the precedent.[17] Alternatively, if votes and opinions differ and a justice writes the

[17] From an attitudinal perspective, this would be the case if the *j*-points of the progeny appear to be to the right (left) of the *j*-points of the landmark for conservative (liberal) dissenters.

majority opinion, or silently joins the majority in a case or opinion more extreme than the precedent, we consider membership in the opinion coalition to be decisive over the result achieved.

Consider also the case where a justice uses the same tests or standards as the majority in a landmark case but reaches a different result. See, for example, White's dissent in *San Antonio Independent School District* v. *Rodriguez* (1973). If the justice joins the original majority in subsequent cases that are further away from his or her position than the landmark, then he or she is considered to vote precedent. If the justice joins the majority in subsequent cases that are closer to his or her position than the landmark, then the justice is considered to vote what we will subsequently call "preferences," with the understanding that we mean the justices' previous "revealed" or "baseline" preferences, and not necessarily their "personal policy preferences." Thus in *Kadrmas* v. *Dickinson Public Schools* (1988), we count White as voting preferences because the inequality in *Kadrmas* appears far less severe than the inequality in *San Antonio.*[18] Thus, while we do not explicitly model Court decisions in the cases we examine, we do pay careful attention to case stimuli in an effort to ensure that the landmarks and their progeny are comparable to one another.

Relatedly, we also consider preference votes those in which dissenters chastise the majority for adhering to a precedent. Ostensibly the dissenters appear to accept the precedent in question, but a close reading of their opinion indicates they do not, e.g., Scalia's dissent, which White and Rehnquist joined, in *Johnson* v. *Transportation Agency* (1987, 657, 666–7).

Because of the potential subjectivity involved in such an analysis we subjected our results to an inter-coder reliability analysis. We proceeded as follows: before establishing specific standards of evaluation we double coded 10% of the data. Following discussion of one or two borderline cases we established the standards discussed above and coded the complete set, double coding a different 10% sample. We reached 100% agreement on the double coding.

Results

We list the effect of precedent on the votes of justices who dissented in our landmark cases in Appendix II. These are arrayed in chronological order.

[18]Unlike the substantial and severe inequalities in *San Antonio, Kadrmas* simply involved a state law allowing local school districts to decide whether to charge a bus fee. Note that had Marshall silently joined the majority in *Kadrmas* that would have been considered a precedential vote as: 1) Marshall urged a compelling interest standard in *San Antonio,* and 2) the result is opposite his *San Antonio* vote.

Note that ten of the precedents produced no progeny including four of the most recently decided five. Congress overruled two others, *Grove City College* v. *Bell* (1984) and *Zurcher* v. *Stanford Daily* (1978). The Civil Rights Restoration Act of 1988 authorizes institution-wide sanctions for sex discrimination instead of only the educational program that received federal aid, while the Privacy Protection Act of 1980 requires the attorney general to issue guidelines restricting the use of warrants for journalists and other third parties not suspected of any crime. *Thornburgh* v. *American College of Obstetricians and Gynecologists* (1986) was overruled six years later by *Planned Parenthood* v. *Casey* (1992). *Cleburne* v. *Cleburne Living Center* (1985) contains a set of facts sufficiently distinctive to minimize the likelihood of progeny. Even more so does *Washington County* v. *Gunther* (1981), for which Shepard's finds only two passing citations. Finally, although three justices dissented in *Arlington Heights* v. *Metropolitan Housing Corp.* (1977), two—Brennan and Marshall—did so only partially, while White objected to the majority's failure to remand the case in light of an intervening decision. In *Arlington Heights'* progeny their votes did not pertain to their dissents.

Space does not allow a full discussion of our evaluation of the 346 votes in question. Readers interested in a fuller evaluation should consult Segal and Spaeth (1994). In summary, 90.8% of the votes conform to the justices' revealed preferences. That is, only 9.2% of the time did a justice switch to the position established in the landmark precedent.

Apportionment of the Justices' Votes

Table 1 orders the justices by the proportion of preferential votes each individually cast. Only Stewart and Powell remotely display adherence to precedent, with the others overwhelmingly supportive of their preferences at a minimum rate of at least 80%. No justice cast more than six precedential votes (Stewart), followed by Powell with five. Half of Stewart's, however, result from *Benton* v. *Maryland* (1969), while all of Powell's conform to *Furman* v. *Georgia* (1972). Indeed, the 11 *Furman* progeny account for ten of the 32 precedential votes, with the three *Benton* progeny producing five others. Accordingly, two of our 54 landmark decisions (3.7%) spawn 45.7% of the precedential votes.

Court watchers might notice that our two most precedential justices are also justices who have situated themselves at or about the median position on the Court. Perhaps precedent plays a substantial role in Supreme Court decision making due to the behavior of one or two highly influential justices. Unfortunately, the results do not bear out the hypothesis. Of the 146 progeny, the results in only five can arguably be tied to the influence of precedent: four death penalty cases, where Powell (*Woodson* v. *North*

Table 1. Justices' Support for Preference and Precedent

Justice	Preference	Precedent	% Preference
Douglas	17	0	100.0
Clark	5	0	100.0
Warren	1	0	100.0
Rehnquist	55	1	98.2
Marshall	49	2	96.1
Brennan	38	2	95.0
Stevens	15	1	93.8
O'Connor	11	1	91.7
White	42	4	91.3
Burger	20	3	87.0
Blackmun	25	4	86.2
Black	6	1	85.7
Harlan	8	2	80.0
Stewart	12	6	66.7
Powell	10	5	66.7
Totals	314	32	90.8

Carolina 1976, *Roberts* v. *Louisiana* 1976), Powell and Blackmun (*Sumner* v. *Shuman* 1987), and O'Connor (*Penry* v. *Lynaugh* 1989) were instrumental in forging a liberal majority; and one campaign finance case, where Brennan and Marshall were instrumental in striking expenditure prohibitions by nonprofit advocacy groups (*FEC* v. *Massachusetts Citizens for Life* 1986).

Discussion and Conclusions

One remarkable and unexpected finding is that all but two of our 32 precedential votes move a justice from a conservative to a liberal position. Both belong to Justice White: his dissent in *Plyler* v. *Doe* (1982), which prohibited states from discriminating against illegal immigrants in education; and his majority position in *City of Richmond,* v. *J.A. Croson Co.* (1989), which struck minority set-asides. In both cases, moreover, White's increasing conservatism over time might be an alternative explanation for the votes. Five other precedential votes involve justices accepting First Amendment limits on campaign finance: Brennan's in *Citizens* v. *Berkeley* (1981) and *FEC* v. *Massachusetts Citizens for Life* (1986), progeny of *First National Bank* v. *Bellotti* (1978); Marshall's vote in *Massachusetts Citizens,* which is a progeny of *FEC* v. *National Conservative PAC* (1985) as well as *Bellotti;* and Rehnquist's vote in *National Conservative PAC* all

opposed fiscal accountability and supported the First Amendment. Given a conventional definition of liberal as a vote that invariably upholds the exercise of First Amendment freedoms, these votes may be read as liberal, with only White's two votes yielding conservative outcomes.

While our results are the basis of qualitative judgments, we believe that they are both valid and reliable. Validity requires that we measure what we say we are measuring, and we believe we have a reasonable measure of the *influence* of precedent. A lot of behavior is consistent with precedent. Voting to establish a precedent in one case and then voting consistently with it in a subsequent case is one example. But such behavior is also consistent with voting one's preferences, whatever their source. We have no evidence from such an example that the second vote was influenced by the precedent set in the first case. It is just as sensible to assume that whatever factors led to the decision in the first case led to the decision in the second case. We believe, as does Judge Frank, that a claim that precedent influenced a decision requires that the decision be different from what would have occurred without the existence of the precedent. To us, that requires examining cases where a justice does not agree with the established precedent.

Critics might argue that there are alternative lines of precedents that dissenters might be using in our cases, and that these justices are in fact following precedent. This argument, though, proves too much. For if all decisions are consistent with precedent broadly defined, then precedent is useless as an explanation of judicial behavior. We are not aware of any falsifiable operationalizations of the influence of precedent superior to ours.

We have systematically established the reliability of our judgments. Because most cases are in fact clear cut, there is not much room for dispute. While there are problematic cases, we believe the specific rules we established substantially eliminate random or systematic errors in our decisions. By detailing, moreover, the specific cases and progeny that we study, as well as our decision rules, readers can assess for themselves the reliability of our results.

The fact that we only examine a sample of cases and justices limits generalization. We cannot argue that earlier Courts would exhibit the same results. Indeed, 20th century changes in the Court's rules (e.g., docket control) and the apparent breakdown of cooperative behavior (Walker, Epstein, and Dixon 1988) might mean that earlier justices were more likely to respect precedent.[19] Such a conclusion must await further research. Justices

[19]The size of the Supreme Court is small enough that one could imagine, and probably model, risk averse justices supporting precedents they do not like in return for ideologically opposite justices doing the same in a repeated game.

Stewart's and Powell's behavior does suggest that justices may possibly be influenced by *stare decisis.* We only claim that modern era justices are typically not so influenced, at least in a manner susceptible to testing.

We are fairly confident in generalizing about the post-Vinson era because we have taken a random sample of recent landmark cases. While some might argue that Witt (1990) improperly included or excluded cases, her list appears reasonable. At the very least it avoids the exclusively constitutional focus of using cases from constitutional law casebooks. Our small n might be a problem, but our results are so clear that we believe it unlikely that a larger sample would produce markedly different results.[20]

Neither does it appear that our generalizations are limited because we rely on major cases. To examine nonlandmark cases, we drew a random sample of 30 decisions during the Warren, Burger and Rehnquist Courts.[21] After excluding four cases that appeared on Witt's landmark list, we proceeded as above to determine the influence of precedent.[22] Of the 26 nonlandmark cases, 17 produced no progeny while the remaining nine produced a total of 23 cases.[23] (By contrast, 44 of the 54 landmark decisions produced 146 progeny.) Of the 43 votes in the 23 run-of-the-mill cases, 41 were preferentially consistent (95.3%), as compared with 90.8% of those in the landmark decisions. The sole exceptions were Rehnquist's votes in the unanimously decided *Frazee* v. *Illinois Dept.* (1989), a progeny of *Thomas v. Indiana Review Board* (1981), a free exercise of religion case in which Rehnquist was the only dissenter, and Marshall's vote in the unanimously decided *Hill* v. *Lockhart* (1985), an ineffectual assistance of counsel case in which Marshall was the only dissenter. We present the results in Appendix III.

Our procedures treat all instances of justices changing their votes following establishment of a precedent as support for that precedent. *Needless to say, other factors might explain some of these votes.* For example, Blackmun's vote in *Sumner* v. *Shuman* (1987) could just as easily be explained

[20]Indeed, if we assume independence between results, the binomial distribution puts a 95% confidence interval at $.874 < p < .942$.

[21]The 30 cases represent a 1% sample of all formally decided cases in the United States Supreme Court Judicial Database, using citation as the unit of analysis.

[22]The four are *Baker* v. *Carr* (1962), *Miranda* v. *Arizona* (1966), *Keyes* v. *Denver School District* (1973), and *Karcher* v. *Daggett* (1983).

[23]The seventeen without progeny are *Nilva* v. *United States* (1957), *Peurifoy* v. *Comr.* (1959), *FHA* v. *The Darlington* (1959), *Scripto* v. *Carson* (1960), *Shelton* v. *Tucker* (1960), *Gibson* v. *Florida Legislative Committee* (1963), *United States* v. *Bishop* (1973), *United States* v. *Feola* (1975), *Lockhart, City of* v. *United States* (1983), *Furniture Drivers* v. *Crowley* (1984), *Felder* v. *Casey* (1988), *United States* v. *Dalm* (1990), *Carnival Cruise* v. *Shute* (1991), *Suter* v. *Artist M.* (1992), *Allied Signal* v. *Director* (1992), *Int'l Society for Krishna* v. *Lee* (1992), and *Reno* v. *Flores* (1993).

by his increased liberalism and his growing distaste for the death penalty as it could by respect for the majority opinion in *Furman.* Nevertheless, we do not quibble. Even if all of the potentially precedential votes are fully allocated to *stare decisis,* support for this most fundamental of all legal doctrines remains extremely low. While we do not claim that *stare decisis* never affects the decisions of any justice, it appears to affect only two in any sort of systematic fashion. The other justices' support for *stare decisis,* when it exists at all, is clearly idiosyncratic.

We must note, moreover, that we have not conducted a test on the legal model writ large, just one aspect of it.[24] *Stare decisis* is, nevertheless, a crucial component of the legal model, as judged by the comments of the justices and scholars cited earlier, the arguments made by attorneys in their briefs, and the justification for their decisions by the justices in their written opinions. We also are unable to conclude from this study what factors *do* affect Supreme Court decision making; we simply claim that one normatively important factor does not.

The evidence is rather convincing. While we have no argument with Cardozo's claim that *stare decisis* should be the rule and not the exception, the empirical results are to the contrary. Potter Stewart and Lewis Powell are the sole exceptions among modern Supreme Court justices who virtually never subjugate their preferences to the norms of *stare decisis.*

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[24] Furthermore, we make no claims about vertical *stare decisis.*

APPENDIX I
Cases Excluded from Original Sampling Due to Lack of Progeny

Pennsylvania v. *Nelson.* 1956. 350 U.S. 497.
Trop v. *Dulles* (1958)
Kent v. *Dulles.* 1958. 357 U.S. 116.
Elkins v. *United States* (1960)
Robinson v. *California* (1962)
NAACP v. *Button.* 1963. 371 U.S. 415.
Edwards v. *South Carolina.* 1963. 372 U.S. 229.
Ker v. *California* (1963)
Griffin v. *County School Board* (1964)
Griffin v. *California.* 1965. 380 U.S. 609.
Elfbrandt v. *Russell* (1966)
South Carolina v. *Katzenbach.* 1966. 383 U.S. 301.
Harper v. *Virginia State Board of Elections.* 1966. 383 U.S. 663.
Keyishian v. *Board of Regents* (1967)
United States v. *Robel* (1967)
Flast v. *Cohen.* 1968. 392 U.S. 83.
Powell v. *McCormick* (1969)
Gaston County v. *United States* (1969)
Oregon v. *Mitchell.* 1970. 400 U.S. 112.
New York Times v. *United States.* 1971. 403 U.S. 713.
United States v. *Brewster.* 1972. 408 U.S. 501.
Buckley v. *Valeo.* 1976. 424 U.S. 1.
Columbus Board of Education v. *Penick* (1979)
Davis v. *Passman.* 1979. 442 U.S. 228.
United States v. *Helstoski.* 1979. 442 U.S. 264.
Hutchinson v. *Proxmire.* 1979. 443 U.S. 111.
Plyler v. *Doe* (1982)
Board of Education, Island Trees v. *Pico.* 1982. 457 U.S. 853.
Nixon v. *Fitzgerald.* 1982. 457 U.S. 731.
Harlow v. *Fitzgerald.* 1982. 457 U.S. 800.
Bob Jones University v. *United States.* 1983. 461 U.S. 574.
Solem v. *Helm.* 1983. 463 U.S. 277.
INS v. *Chadha.* 1983. 462 U.S. 919.
Bowers v. *Hardwick.* 1986. 478 U.S. 186.
Bowsher v. *Synar.* 1986. 478 U.S. 714.
Morrison v. *Olson.* 1988. 487 U.S. 654.

Appendix II
Random Sample of Major Cases and Progeny

Precedent/Progeny	Preferences	Precedent	Unclear
Scales v. *U.S.* (1961)			
U.S. v. *Robel* (1967)	Blk, Brn, Doug, War		
Engel v. *Vitale* (1962)			
Abington Sch Dist v. *Schempp* (1963)	Stwt		
Fay v. *Noia* (1963)			
Townsend v. *Sain* (1963)	Clk, Har, Stwt		
Sanders v. *U.S.* (1963)	Clk, Har	Stwt	
Henry v. *MS* (1965)	Clk, Har, Stwt		
Kaufman v. *U.S.* (1969)	Har, Stwt		
Wainwright v. *Sykes* (1977)	Stwt		
Escobedo v. *IL* (1964)			
Miranda v. *AZ* (1966)	Clk, Har, Stwt, BW		
Davis v. *NC* (1966)	Clk, Har	Stwt, BW	
In re Gault (1967)			
In re Winship (1970)	Stwt		
McKeiver v. *PA* (1971)	Stwt		
Katz v. *U.S.* (1967)			
Terry v. *OH* (1968)	Blk		
Alderman v. *U.S.* (1969)	Blk		
Desist v. *U.S.* (1969)	Blk		
U.S. v. *White* (1971)	Blk		
Terry v. *OH* (1968)			
New Orleans v. *Wainwright* (1968)	Doug		
Adams v. *Williams* (1972)	Doug		
U.S. v. *Robinson* (1973)	Doug		
U.S. v. *Brignoni-Ponce* (1975)	Doug		

Appendix II (Continued)

Precedent/Progeny	Preferences	Precedent	Unclear
Kirkpatrick v. *Preisler* (1969)			
White v. Weiser (1973)		Stwt, BW	
Karcher v. *Daggett* (1983)	BW		
Shapiro v. *Thompson* (1969)			
Dandridge v. *Williams* (1970)	Har		
Graham v. *Richardson* (1971)	Blk, Har		
Benton v. *MD* (1969)			
NC v. *Pearce* (1969)		Har, Stwt	
Ashe v. *Swenson* (1970)		Har, Stwt	
Crist v. *Bretz* (1978)		Stwt	
In re Winship (1970)			
McKeiver v. *PA* (1971)	Burg, Stwt	Blk	
Santosky v. *Kramer* (1980)	Burg		
Williams v. *FL* (1970)			
Apodaca v. *OR* (1972)	Mar		
Wardius v. *OR* (1973)	Doug		
Colegrove v. *Battin* (1973)	Mar		
Ballew v. *GA* (1978)	Mar		
Brown v. *LA* (1980)	Mar		
Younger v. *Harris* (1971)			
Samuels v. *Mackell* (1971)	Doug		
Boyle v. *Landry* (1971)	Doug		
Perez v. *Ledesma* (1971)	Doug		
Dyson v. *Stein* (1971)	Doug		
Lake Carriers' Assn v. *MacMullan* (1972)	Doug		
Mitchum v. *Foster* (1972)	Doug		
Gibson v. *Berryhill* (1973)	Doug		
Steffel v. *Thompson* (1974)	Doug		
Roe v. *Norton* (1975)	Doug		
Doran v. *Salem Inn* (1975)	Doug		

Kastigar v. *U.S.* (1972)			
Zicarelli v. *NJ Committee* (1972)	Doug, Mar		
NJ v. *Portash* (1979)	Mar		
Pillsbury Co v. *Conboy* (1982)	Mar		
Furman v. *GA* (1972)			
Gregg v. *GA* (1976)	Blkm, Burg, Pow, Rehn		
Proffitt v. *FL* (1976)	Blkm, Burg, Pow, Rehn		
Jurek v. *TX* (1976)	Blkm, Burg, Pow, Rehn		
Woodson v. *NC* (1976)	Blkm, Burg, Rehn	Pow	
Roberts v. *LA* (1976)	Blkm, Burg, Rehn	Pow	
Gardner v. *FL* (1977)	Rehn	Blkm, Burg, Pow	
Coker v. *GA* (1977)	Burg, Rehn	Blkm, Pow	
Zant v. *Stephens* (1983)	Blkm, Burg, Pow, Rehn		
Pulley v. *Harris* (1984)	Blkm, Burg, Pow, Rehn		
McCleskey v. *Kemp* (1987)	Burg, Pow, Rehn	Blkm	
Sumner v. *Shuman* (1987)	Rehn	Blkm, Pow	
Branzburg v. *Hayes* (1972)			
Zurcher v. *Stanford Daily* (1978)	Mar, Stwt		
Houchins v. *KQED* (1978)	Brn, Stwt		
U of PA v. *EEOC* (1990)			Brn, Mar
Roe v. *Wade* (1973)			
Planned Parenthood v. *Danforth* (1976)	Rehn, BW		
Colautti v. *Franklin* (1979)	Rehn, BW		
Bellotti v. *Baird* (1979)	Rehn, BW		
Harris v. *McRae* (1980)	Rehn, BW		
Akron v. *Akron Center* (1983)	Rehn, BW		
Planned Parenthood v. *Ashcroft* (1983)	Rehn, BW		
Thornburgh v. *American College* (1986)	Rehn, BW		
Webster v. *Reproductive Health* (1989)	Rehn, BW		
Planned Parenthood v. *Casey* (1992)	Rehn, BW		

Appendix II (Continued)

Precedent/Progeny	Preferences	Precedent	Unclear
San Antonio Sch Dist v. *Rodriguez* (1973)			
Plyler v. *Doe* (1982)	Mar	BW	Brn
Papasan v. *Allain* (1986)	Brn, Mar, BW		
Kadrmas v. *Dickinson Pub Schs* (1988)	Brn, Mar, BW		
Edelman v. *Jordan* (1974)			
Fitzpatrick v. *Bitzer* (1976)	Blkm, Brn, Mar		
Milliken v. *Bradley* (1977)	Blkm, Brn, Mar		
Hutto v. *Finney* (1978)	Blkm, Brn, Mar		
FL Dept v. *Treasure Salvors* (1982)	Blkm, Brn, Mar		
Guardians Assn v. *NYC CSC* (1983)	Mar		Blkm, Brn
Pennhurst State Hosp v. *Haldeman* (1984)	Blkm, Brn, Mar		
Oneida County v. *Oneida Nation* (1985)	Brn, Mar		Blkm
Atascadero State Hosp v. *Scanlon* (1985)	Blkm, Brn, Mar		
Green v. *Mansour* (1985)	Blkm, Brn, Mar		
Papasan v. *Allain* (1986)	Blkm, Brn, Mar		
Welch v. *TX Highways Dept* (1987)	Blkm, Brn, Mar		
PATH v. *Feeney* (1990)	Blkm, Brn, Mar		
Milliken v. *Bradley* (1974)			
Hills v. *Gautreaux* (1976)	Brn, Mar, BW		
Milliken v. *Bradley* (1977)	Brn, Mar, BW		
Washington v. *Davis* (1976)			
Arlington Hts v. *Metro Housing* (1977)	Brn, Mar		
Personnel Administrator v. *Feeney* (1979)	Brn, Mar		
Columbus Bd of Ed v. *Penick* (1979)	Brn, Mar		
Mobile v. *Bolden* (1980)	Brn, Mar		
Williams v. *Brown* (1980)	Brn, Mar		
Hernandez v. *NY* (1991)	Mar		

Natl League of Cities v. *Usery* (1976)			
UTU v. *L.I.R. Co.* (1982)	Brn, Mar, Stvn, BW		
EEOC v. *WY* (1983)	Brn, Mar, Stvn, BW		
Garcia v. *SAMTA* (1985)	Brn, Mar, Stvn, BW		
Runyon v. *McCrary* (1976)			
Patterson v. *McLean Credit Union* (1989)	Rehn, BW		
Elrod v. *Burns* (1976)			
Abood v. *Detroit Bd of Ed* (1977)	Burg, Pow, Rehn		
Branti v. *Finkel* (1980)	Pow, Rehn	Burg	
Rutan v. *IL GOP* (1990)	Rehn		
Craig v. *Boren* (1977)			
Califano v. *Goldfarb* (1977)	Burg, Rehn		
Michael M. v. *Superior Court* (1981)	Burg, Rehn		
Arlington Heights v. *Metro Housing* (1977)	NO PROGENY		
1st Natl Bank v. *Bellotti* (1978)			
Citizens v. *Berkeley* (1981)	Mar, BW	Brn	
FEC v. *Nat'l Right to Work Comtee* (1982)	Mar, Rehn, BW		Brn
FEC v. *Nat'l Conservative PAC* (1985)	Brn, Mar, BW	Rehn	
FEC v. *MA Citizens for Life* (1986)	Rehn, BW	Brn, Mar	
Austin v. *MI C of C* (1990)	Brn, Mar, Rehn, BW		
Marshall v. *Barlow's Inc* (1978)			
Donovan v. *Dewey* (1981)	Blkm, Rehn, Stvn		
MI v. *Clifford* (1984)	Blkm, Rehn, Stvn		
Zurcher v. *Stanford Daily* (1978)	NO PROGENY		
Regents v. *Bakke* (1978)			
Fullilove v. *Klutznick* (1980)	Blkm, Brn, Mar, Rehn, Stvn, Stwt		
Guardians Assn v. *NYC CSC* (1983)	Burg, Rehn	Stvn	
Richmond v. *J.A. Croson Co* (1989)	Blkm, Brn, Mar	BW	
Scott v. *IL* (1979)			
Baldasar v. *IL* (1980)	Blkm, Brn, Mar, Stvn		
Nichols v. *U.S.* (1994)	Blkm, Stvn		

Appendix II (Continued)

Precedent/Progeny	Preferences	Precedent	Unclear
Steelworkers v. *Weber* (1979)			
Firefighters v. *Cleveland* (1986)	Burg, Rehn		
Johnson v. *Transportation Agency* (1987)	Rehn		
Payton v. *NY* (1980)			
Steagald v. *U.S.* (1981)	Rehn, BW	Burg	
MI v. *Summers* (1981)	Burg, Rehn, BW		
Welsh v. *WI* (1984)	Rehn, BW		Burg
NY v. *Harris* (1990)	Rehn, BW		
Washington County v. *Gunther* (1981)	NO PROGENY		
Enmund v. *FL* (1982)			
Cabana v. *Bullock* (1986)	Burg, O'C, Pow, Rehn		
Tison v. *AZ* (1987)	O'C, Pow, Rehn		
Planned Parenthood v. *Ashcroft* (1983)			
Simopoulos v. *VA* (1983)	O'C, Rehn, BW		
Thornburgh v. *American College* (1986)	O'C, Rehn, BW		
Hodgson v. *MN* (1990)	O'C, Rehn, BW		
OH v. *Akron Center* (1990)	O'C, Rehn, BW		
Planned Parenthood v. *Casey* (1992)	O'C, Rehn, BW		
Grove City v. *Bell* (1984)	NO PROGENY		
Lynch v. *Donnelly* (1984)			
Allegheny County v. *ACLU* (1989)	Blkm, Brn, Mar, Stvn		
Schall v. *Martin* (1984)			
U.S. v. *Salerno* (1987)	Brn, Mar, Stvn		
U.S. v. *Leon* (1984)			
MA v. *Sheppard* (1984)	Brn, Mar		
IL v. *Krull* (1987)	Brn, Mar, Stvn		
AZ v. *Evans* (1995)	Stvn		

Garcia v. *SAMTA* (1985)			
SC v. *Baker* (1988)	O'C		
FEC v. *Nat'l Conservative PAC* (1985)			
FEC v. *MA Citizens for Life* (1986)	BW	Mar	
Wallace v. *Jaffree* (1985)			
Grand Rapids Sch Dist v. *Ball* (1985)	Rehn, BW		Burg
Aguilar v. *Felton* (1985)	Burg, Rehn, BW		
Allegheny County v. *ACLU* (1989)	Rehn, BW		
Cleburne v. *Cleburne Living Center* (1985)	NO PROGENY		
Lockhart v. *McCree* (1986)			
Buchanan v. *KY* (1987)	Brn, Mar, Stvn		
Franklin v. *Lynaugh* (1988)	Brn, Mar, Stvn		
Holland v. *IL* (1990)	Brn, Mar, Stvn		
Thornburgh v. *American College* (1986)	NO PROGENY		
Ford v. *Wainwright* (1986)			
Penry v. *Lynaugh* (1989)	Rehn, BW	O'C	
Sheet Metal Workers v. *EEOC* (1986)			
U.S. v. *Paradise* (1987)	O'C, Rehn, BW		
Johnson v. *Transportation Agency* (1987)	O'C, Rehn, BW		
Richmond v. *J.A. Croson Co* (1989)	O'C, Rehn, BW		
Firefighters v. *Cleveland* (1986)			
Sheet Metal Workers v. *EEOC* (1986)	Burg, Rehn		BW
Johnson v. *Transportation Agency* (1987)	Rehn, BW		
U.S. v. *Paradise* (1987)	NO PROGENY		
McCleskey v. *Kemp* (1987)	NO PROGENY		
Edwards v. *Aguillard* (1987)	NO PROGENY		
Richmond v. *J.A. Croson Co* (1989)			
Metro Broadcasting v. *FCC* (1990)	Blkm, Brn, Mar		
NTEU v. *VonRaab* (1989)	NO PROGENY		
Totals	314	32	10

Legend: Blk = Black, Blkm = Blackmun, Brn = Brennan, Burg = Burger, Clk = Clark, Doug = Douglas, Har = Harlan, Mar = Marshall, O'C = O'Connor, Pow = Powell, Rehn = Rehnquist, Stvn = Stevens, Stwt = Stewart, BW = White.

Appendix III
Random Sample of Non-Landmark Cases and Progeny

Precedent/Progeny	Preferences	Precedent	Unclear
In re Groban (1957)			
Anonymous v. *Baker* (1959)	Blk, Doug, Brn, War		
Konigsberg v. *State Bar* (1957)			
Konigsberg v. *State Bar* (1961)	Har, Frk, Clk		
U.S. v. *Gilmore* (1963)			
Comr. v. *Tellier* (1966)	Blk, Doug		
U.S. v. *Guest* (1966)			
Griffin v. *Breckenridge* (1971)	Har		
AT&SF R. Co. v. *Wichita Bd. of Trade* (1973)			
BN Inc. v. *U.S.* (1982)	Brn, BW, Rehn		
Michigan v. *Mosley* (1975)			
Moran v. *Burbine* (1986)	Brn, Mar		
Arizona v. *Roberson* (1988)	Brn, Mar		
Thomas v. *Review Board* (1981)			
U.S. v. *Lee* (1982)	Rehn		
Bowen v. *Roy* (1986)	Rehn		
Hobbie v. *Florida Comn.* (1987)	Rehn		
Oregon Dept. v. *Smith* (1988)	Rehn		
Frazee v. *Illinois Dept.* (1989)		Rehn	
Oregon Dept. v. *Smith* (1990)	Rehn		
Strickland v. *Washington* (1984)			
Hill v. *Lockhart* (1985)		Mar	
Darden v. *Wainwright* (1986)	Mar		
Kimmelmann v. *Morrison* (1986)	Mar		
Nix v. *Whiteside* (1986)	Mar		
Murray v. *Carrier* (1986)	Mar		
Smith v. *Murray* (1986)	Mar		
Burger v. *Kemp* (1987)	Mar		
Perry v. *Leeke* (1989)	Mar		
Mackey v. *Lanier Agency* (1988)			
Ingersoll-Rand v. *McClendon* (1990)	Blkm, O'C, Scal, Ken		
D.C. v. *Washington Bd. of Trade* (1992)	Blkm, O'C, Scal, Ken		
Totals	41	2	

Legend: Blk = Black, Blkm = Blackmun, Brn = Brennan, Burg = Burger, Clk = Clark, Doug = Douglas, Har = Harlan, Mar = Marshall, O'C = O'Connor, Pow = Powell, Rehn = Rehnquist, Scal = Scalia, Stvn = Stevens, Stwt = Stewart, War = Warren, BW = White.

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