

THE DECISION TO DEPART (OR NOT) FROM CONSTITUTIONAL PRECEDENT: AN EMPIRICAL STUDY OF THE ROBERTS COURT

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Constitutional law casebooks, generations of constitutional lawyers, and the Justices themselves say that the Court is more likely to depart from precedent in constitutional cases than in other types. We test this assumption in cases decided by the Roberts Court and find, at odds with earlier studies, that the data provide inconclusive support for it. Other factors, especially criticism of precedent by lower courts and lawyers, are more consistent and stronger predictors of the Court's decisions to depart from precedent. These findings have interesting implications for lawyering, teaching, and judging in the constitutional law context.

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INTRODUCTION

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.¹

Although the above statement from Justice Brandeis about *stare decisis* policy² came in a dissenting opinion, it now has the status of black letter law. Many leading political science and legal analyses of constitutional law quote it,³ generations of constitutional lawyers have

¹ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting). *Stare decisis* means “to stand by things decided.” BLACK’S LAW DICTIONARY 1626 (10th ed. 2014).

² In their opinions in *Citizens United v. FEC*, Chief Justice Roberts and Justice Kennedy—the latter writing for the Court—each referred to *stare decisis* as a “policy.” 558 U.S. 310, 363 (2010) (Kennedy, J.); *id.* at 377 (Roberts, C.J., concurring). Justice Kennedy quoted *Helvering v. Hallock* for the contention that “[s]*tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision.” 558 U.S. at 363 (quoting *Helvering v. Hallock* 309 U.S. 106, 119 (1940)). And Chief Justice Roberts, concurring, cited Chief Justice Rehnquist’s opinion in *Payne v. Tennessee*, which also references *Helvering*. *Citizens United*, 558 U.S. at 337 (Roberts, C.J., concurring) (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)); *Payne*, 501 U.S. at 828 (citing *Helvering*, 309 U.S. at 119). *Helvering*, though, refers to “social policy,” not just “policy.” 309 U.S. at 119 (“We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychological need to satisfy reasonable expectations. But *stare decisis* is a principle of policy . . .”).

The Court has also referred to *stare decisis* in various other ways. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (Breyer, J., plurality opinion) (“the *stare decisis* norm”); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 865 (1992) (“principles of *stare decisis*”); *Hilton v. S.C. Publ. Rys. Comm’n*, 502 U.S. 197, 202 (1991) (“the doctrine of *stare decisis*” (quoting *Welch v. Tex. Dep’t of Highways and Pub. Transp.*, 483 U.S. 468, 494 (1987))). Though these words do not mean precisely the same thing, we will use them interchangeably.

³ *See, e.g.*, CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9, at 771–72 (2014) [hereinafter *CONAN*], available at <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-REV-2014/pdf/GPO-CONAN-REV-2014.pdf>; 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 84 (3d ed. 2000).

This is not to say all scholars agree with Justice Brandeis. For critiques, see William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1426 (1988) (“The super-strong presumption against overruling statutory precedents has never been thoroughly examined by the Court, and its rhetoric ought to be abandoned.”); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 392 (1988) (“[A]ttempts to rely on tangible factors to justify the different degrees of respect accorded to different types of precedent are unpersuasive.”); 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, 1716 (1994) (“[T]he argument that constitutional cases are deserving of a weakened precedential effect fails in certain contexts.”).

rehearsed it,⁴ and the Justices regularly say they are more likely to depart from precedent in constitutional cases than in other types.⁵

But is it true? Despite what the constitutional law books claim, what lawyers might think, and what the Court writes, the answer is hardly a ringing “yes,” at least not for the Roberts Court.

We develop this answer in four parts. In Part I, we review the assumption that precedent is more flexible in constitutional cases,⁶ though we are brief because it is so deeply entrenched in the literature.⁷ Part II considers the existing empirical research on precedent and draws lessons from it for our study, to which we later turn in Parts III and IV. In short, we use regression analysis to determine whether the Court is more likely to depart from precedent (the dependent variable) in constitutional law (the independent variable of primary interest), when holding constant other factors that may explain the Court’s treatment of precedent.

Part III describes our dataset including the dependent variable: the decision to depart or not from precedent. Creating this variable required two steps. The first was to identify cases in which a party or amicus asked the Court to depart—that is, cases in which the Justices had an opportunity to depart from precedent.⁸ The second was to determine whether the Court, in fact, departed from the attacked precedent. While explicit overrulings are departures, they are hardly the only or even usual method for extinguishing “unloved precedents,”⁹ to borrow from Judge Posner. This fact led us to explore the tools of

⁴ The first reference we located is respondent’s brief in *Helvering v. Hallock*. Brief for Respondents at 41, *Helvering v. Hallock*, 309 U.S. 106 (1940) (Nos. 110–112), 1939 WL 48362, at *41. The most recent (as of April 2015) is Petitioners’ Brief on the Merits at 14, *First Fin. Inv. Fund Holdings, LLC v. Berry* (Tex. Mar. 30, 2015) (No. 14-0764), 2015 WL 1481622, at *14.

⁵ See *infra* Part I. As an aside, Eskridge notes the existence of a “three-tiered hierarchy of stare decisis the Court has created, at least in theory,” with a progressively stronger “presumption of correctness” as one moves from constitutional precedents to common law precedents to statutory precedents. Eskridge, *supra* note 3, at 1362. We focus on *Burnet*’s “proposition that constitutional precedents may be overruled more easily than either statutory or common law precedents.” *Id.* at 1365.

⁶ Or its mirror image: precedent has been comparatively stronger in statutory cases. See *infra* Part I.

⁷ See, e.g., *supra* notes 3–5 and accompanying text (providing examples).

⁸ Segal & Howard’s data (and ours too) show that pure sua sponte departures—those requested by neither the parties nor any amici curiae—are rare. Jeffrey A. Segal & Robert M. Howard, *How Supreme Court Justices Respond to Litigant Requests to Overturn Precedent*, 85 JUDICATURE 148, 152 (2001).

⁹ RICHARD A. POSNER, *HOW JUDGES THINK* 277 (2010).

“stealth overruling”¹⁰ or “disavowing,”¹¹ which include questioning, limiting, criticizing, and distinguishing the unloved precedent.

Part III lays out the independent variables in our study—those factors that may explain the Roberts Court’s treatment of precedent. Our chief interest is in constitutional precedent, but we consider other possibilities. These include justifications that come directly from the Roberts Justices’ opinions, such as reliance interests, workability, and strength of reasoning.¹²

The results, reported in Part IV, show that whether a precedent is constitutional plays only a small role (if that) in the Court’s decision to disavow it, despite longstanding Court policy to the contrary. We could say the same of many of the other criteria the Court has offered. Today’s Justices seem less interested in these criteria *qua* criteria and more interested in factors implicating them and their Court. For example, the Justices are sensitive to criticism of their precedents from the rest of the judiciary—the more of it, the more likely they are to depart.

In Part V, we develop a few implications from these findings. Some bear on teaching, others on lawyering and judging. For example, the Justices could, and should, be more transparent in their application of stare decisis policy by reformulating their justifications to reflect what they actually do, not what they say they do.

I

CONSTITUTIONAL LAW AND DEPARTURES FROM PRECEDENT

The Justices have long contended that departing from precedent is not a step they take lightly or, in today’s parlance, absent “special justification.”¹³ In Part III, we consider the current Justices’ under-

¹⁰ Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010); see also RONALD DWORKIN, *THE SUPREME COURT PHALANX: THE COURT’S NEW RIGHT-WING BLOC 47* (2007) (describing Chief Justice Roberts and Justices Scalia, Thomas, and Alito as “an unbreakable phalanx bent on remaking constitutional law by overruling, most often by stealth, the central constitutional doctrines that generations of past justices, conservative as well as liberal, had constructed”); Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1538 (2008) (noting one such technique, allegedly employed by Chief Justice Roberts and Justice Alito, “is to purport to respect a precedent while in fact cynically interpreting it into oblivion”).

¹¹ Eskridge, *supra* note 3, at 1435.

¹² See *infra* Part III.C.2.

¹³ The “special justification” language seems to be of a relatively recent vintage, perhaps originating in Justice O’Connor’s opinion for the Court in *Arizona v. Rumsey*, 467 U.S. 203, 212 (2005) (“Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special

standing of “special justification”—really justifications (plural)—because their understanding informs our choice of the variables to include in a statistical model of departure decisions.

That understanding has differed from Justice to Justice (and from commentator to commentator) over the years.¹⁴ As a threshold matter, though, most Justices have rallied around the idea that adherence to prior decisions should be stickier in statutory cases than in constitutional cases.¹⁵

Some commentators trace this idea to the late-1840s,¹⁶ but Justice Brandeis’s statement in *Burnet* is now taken as authoritative.¹⁷ On this account, *stare decisis* norms should be more flexible in constitutional cases because mistaken constitutional decisions can be fixed only by the Court, short of a constitutional amendment or legislative action of dubious constitutionality.¹⁸ But if the Court misinterprets a statute, Congress can step in.

justification.” (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965); *Smith v. Allwright*, 321 U.S. 649, 665 (1944))). But neither majority opinion cited by Justice O’Connor uses this language; only Justice Douglas’s dissent in *Swift* comes close. *Swift*, 382 U.S. at 134 (Douglas, J., dissenting) (“I am unable to find a justification for overturning a decision of this Court.”).

¹⁴ Lists of these justifications abound. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 377–79 (2010) (Roberts, C.J., concurring) (describing two factors, though the second was broken into three subparts); *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009) (Scalia, J.) (outlining four factors); *Arizona v. Gant*, 556 U.S. 332, 358 (2009) (Alito, J., dissenting) (pointing to five factors that justify departures from a prior decision). Scholars’ lists include Maltz, *supra* note 3, at 368–72 (noting four justifications: certainty and reliance, equality, efficiency, and the appearance of justice and avoidance of arbitrary decisionmaking); Frederick Schauer, *Precedent*, 39 *STAN. L. REV.* 571, 595–602 (1987) (discussing fairness, predictability, strengthened decisionmaking, and stability); Padden, *supra* note 3, at 1694 (identifying “three traditionally accepted rationales for overruling a precedent”—“when there has been an intervening development of law, when the rule it promulgated has proved unworkable, or when its underlying reasoning is outdated or inconsistent with contemporary values”).

¹⁵ Though not all scholars make this claim. *See supra* note 3 (listing critiques of Justice Brandeis’s view).

¹⁶ *See Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849) (Taney C.J., dissenting) (“[The Supreme Court’s] opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.”), *quoted in* SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992*, at 35 (1995).

¹⁷ 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“*Stare decisis* is usually the wise policy . . . even where the error is a matter of serious concern, provided correction can be had by legislation.”). Brandeis certainly did not rule out overruling statutory precedents. In footnote one of his *Burnet* dissent, he observed, “This Court has, in matters deemed important, occasionally overruled its earlier [statutory] decisions although correction might have been secured by legislation,” followed by a long list of cases. *Id.* at 405 n.1.

¹⁸ Of course, Congress can propose a constitutional amendment to “reverse” the Court’s decision. This tactic has succeeded four times. *See Oregon v. Mitchell*, 400 U.S. 112 (1970), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI; Pollock v.

Justice Harlan reiterated the point in his plurality opinion in *Glidden Co. v. Zdanok*,¹⁹ and almost every Justice of the Roberts Court has claimed as much in one case or another.²⁰ Concurring in *FEC v. Wisconsin Right to Life*, Justice Scalia (joined by Justices Thomas and Kennedy) noted the Court has a “considered practice not to apply . . . [stare decisis] policy as rigidly in constitutional as in non-constitutional cases.”²¹ Likewise, in his separate concurrence in *Citizens United v. FEC*, Chief Justice Roberts wrote, “*stare decisis* is neither an inexorable command nor a mechanical formula of adherence to the latest decision, especially in constitutional cases.”²²

And every member of the current Court has written or joined opinions expressing the mirror image rule: Statutory precedents are

Farmers’ Loan and Trust Co., 157 U.S. 429 (1895), *superseded by constitutional amendment*, U.S. CONST. amend. XVI; *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

There is also significant literature in political science exploring Congress’s (sometimes successful) attempts to override or evade constitutional decisions by simple legislation. See, e.g., Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 290 (1957) (discussing ways in which Congress may attempt to “circumvent the [Court’s] decision”); Louis Fisher, *Congressional Checks on the Judiciary*, in CONGRESS CONFRONTS THE COURT: THE STRUGGLE FOR LEGITIMACY AND AUTHORITY IN LAWMAKING 21, 28 (Colton C. Campbell & John F. Stack Jr. eds., 2001) (“[T]here are examples of effective legislation and executive actions in response to court rulings [invalidating government action].”); James Meernik & Joseph Ignagni, *Judicial Review and Coordinate Construction of the Constitution*, 41 AM. J. POL. SCI. 447, 447 (1997) (“Congress often does reverse Supreme Court rulings and . . . public opinion, the position of the president, federal power concerns, and the type of law struck down have the greatest effect on the likelihood that reversal legislation will come to a vote in Congress and will be passed.”).

¹⁹ 370 U.S. 530, 543 (1962) (Harlan, J., plurality opinion) (“[T]his Court’s considered practice [is] not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases.”).

²⁰ Examples include *Arizona v. Gant*, 556 U.S. 332, 358 (2009) (Alito, J., dissenting) (“I recognize that *stare decisis* . . . applies less rigidly in constitutional cases . . .”), and *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 144 (2008) (Ginsburg, J., dissenting) (“I acknowledge that ‘[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation . . .’” (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989))).

As an aside, it is interesting that many of the grand statements of *stare decisis* policy come not in majority opinions but in separate writings. There is Brandeis’s dissent in *Burnet*, of course, along with the cases cited above. Relatively recent (and prominent) exceptions are several majority opinions from the Rehnquist Court. See *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000); *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991) (“*Stare decisis* is the preferred course . . . [but] not an inexorable command.”); *Patterson*, 491 U.S. at 172–74 (1989) (noting that the Court’s “precedents are not sacrosanct” but invoking the need for “special justification” to not adhere to *stare decisis*).

²¹ 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and in the judgment) (citations omitted) (internal quotation marks omitted).

²² 558 U.S. 310, 377 (2010) (citations omitted) (internal quotation marks omitted).

entitled to extra deference. In 2008, writing for seven members of the Court, Justice Breyer recited a standard formulation of the rule in sustaining earlier decisions concerning statutory limitations periods. “[S]*tare decisis* in respect to statutory interpretation,” he wrote, “has ‘special force,’ for ‘Congress remains free to alter what we have done.’”²³ On this point, at least, the two dissenters agreed.²⁴ Five years later, in *Halliburton Co. v. Erica P. John Fund, Inc.*, the Court was asked to overrule *Basic Inc. v. Levinson*, which held that investors claiming they were defrauded by false statements in securities filings need not show they relied on the statements.²⁵ The Court declined, by a six-to-three vote, with Chief Justice Roberts writing for the majority. He said the Court would not disturb a statutory precedent, and he repeated the formulation recited by Justice Breyer.²⁶ Here again, there was no dispute among the Justices that statutory precedents should be more durable.²⁷

²³ *John R. Sand & Gravel Co.*, 552 U.S. at 139 (quoting *Patterson*, 491 U.S. at 172–73).

²⁴ See *id.* at 142 n.5 (Stevens, J., dissenting) (“The majority points out quite rightly . . . that the doctrine of *stare decisis* has special force in statutory cases” (citations omitted) (internal quotation marks omitted)); *id.* at 144 (Ginsburg, J., dissenting) (“I acknowledge that ‘[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation.’” (quoting *Patterson*, 491 U.S. at 172 (1989))).

²⁵ *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (“Halliburton urges us to overrule *Basic*’s presumption of reliance”); *Basic Inc. v. Levinson*, 485 U.S. 224, 250 (1998) (holding that investors claiming they were defrauded by false statements in securities filings need not show they relied on the statements). The respondents added another consideration (or refinement) in defending *Basic*, arguing it was “a statutory precedent in an area where Congress has repeatedly passed significant legislation without disturbing the Court’s prior construction.” Brief for Respondent at 12, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (No. 13-317). The respondents claimed the Court had not overruled such a precedent since at least *James v. United States*, 366 U.S. 213 (1961). *Id.* But see Eskridge, *supra* note 3, app. at 1435–39 (listing statutory precedents disavowed by the Court between 1961 and 1987).

²⁶ *Halliburton Co.*, 134 S. Ct. at 2411 (“The principle of *stare decisis* has ‘special force’ in respect to statutory interpretation” because ‘Congress remains free to alter what we have done.’” (quoting *John R. Sand & Gravel Co.*, 552 U.S. at 139)).

²⁷ Justice Clarence Thomas, joined by Justices Antonin Scalia and Samuel A. Alito Jr., argued instead that *Basic* “has nothing to do with statutory interpretation” because it concerned a judicially created evidentiary presumption in a judicially created private right of action. *Halliburton Co.*, 134 S. Ct. at 2425 (Thomas, J., concurring in judgment). Justice Thomas then analyzed the *stare decisis* factors he said the Court considers in all cases, statutory and constitutional, in which precedents are at risk: unworkable or badly reasoned decisions; serious questions about theoretical underpinnings; irreconcilability with intervening developments; or otherwise a detriment to coherence and consistency in the law. *Halliburton Co.*, at 2425 (Thomas, J., concurring in judgment) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Justice Thomas noted “[j]ust one of these circumstances can justify our correction of bad precedent; *Basic* checks all the boxes.” *Id.*

II THE EXISTING STUDIES

But does the Court do as it says? Before we attempt to answer this question with an empirical study of our own devising, we consider the literature on stare decisis policy. Understanding how the existing empirical studies have gone right and wrong informs our methodological choices.

Any reader familiar with this literature knows that it is vast. Many, perhaps most, studies have focused on vertical stare decisis²⁸ (not our interest here) but there is a good deal of discussion of horizontal stare decisis too, especially in the Supreme Court. Within this literature, the focus seems to be decidedly normative. Empirically informed commentary, such that it exists, tends to center on particular cases or stories.²⁹

There are, however, seven systematic larger-*n* studies worth considering.³⁰ Each attempts to understand why the Court departs from

²⁸ For empirical studies focusing on vertical stare decisis, see, for example, Chad Westerland, et al., *Strategic Defiance and Compliance in the U.S. Courts of Appeals*, 54 AM. J. POL. SCI. 891, 891 (2010) (analyzing subsequent Courts of Appeals treatment of Supreme Court decisions); Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 534 (2002) (examining lower court compliance with Supreme Court decisions that overruled precedent); Lawrence Baum, *Response of Federal District Judges to Court of Appeals Policies: An Exploration*, 33 W. POL. Q. 217, 217 (1980) (studying the “impact of appellate policies on the corresponding policies of lower courts”).

²⁹ Among the best recent studies of this genre are: MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* (2008) (making limited use of data); Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381 (2007) (focusing on specific Supreme Court opinions); Lauren Vicki Stark, Note, *The Unworkable Unworkability Test*, 80 N.Y.U. L. REV. 1665 (2005) (analyzing eight specific cases).

³⁰ There are also some older empirical studies. See, e.g., 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, 36–38 (Sheldon Goldman & Charles M. Lamb eds., 1986) (empirical analysis of “conflict” on the Supreme Court, including “dissenting behavior”); 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 (1962) (studying “the degree to which a series of background factors are associated with the propensity of justices of the . . . Supreme Court to adhere to precedent”); S. Sidney Ulmer, *An Empirical Analysis of Selected Aspects of Lawmaking of the United States Supreme Court*, 8 J. PUB. L. 414 (1959) (analyzing the frequency of Supreme Court overrulings over time).

More tangential to our concerns is HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* (1999). The idea behind their study is simple: If stare decisis exerts a strong pull, then even Justices who dissented in a precedent-setting case should begin to follow the precedent it established (e.g., Chief Justice Rehnquist, a dissenter in *Roe v. Wade*, should begin to follow *Roe*). *Id.* at 2–3. Finding that very few dissenters ever act in this way, Segal and Spaeth claim that stare decisis is not a constraining doctrine; rather, the decision to adhere to or reject precedent reflects the Justices’ ideological preferences. *Id.* at 288.

(or, more often, why the Court formally overrules) precedent, though they differ enough that we can group them into three categories.³¹

Group 1. Spriggs and Hansford (2001),³² and Hansford and Spriggs (2006).³³ This team explores all cases decided between 1946 and 1999,³⁴ asking why the Court overrules (or otherwise treats negatively) some precedent but not others.

Group 2. Padden (1994),³⁵ Brenner and Spaeth (1995),³⁶ Banks (1999),³⁷ Lindquist and Cross (2009).³⁸ These are the opposite of the Hansford and Spriggs studies. They focus only on cases in which the Court formally departed from a precedent.

Group 3. Segal and Howard (2001).³⁹ They take an in-between approach, looking at cases in which a party requested the Court to overrule a precedent.

We have learned a lot from these studies, especially about the possible predictors of the Court's decision to follow or depart from precedent. For example, of the five studies that analyzed constitutional precedent versus others, all five found that a disproportionate number of overrulings fell into the constitutional category.⁴⁰

Still—and despite the lessons learned—three problems in the existing studies give us some pause about their results. The first is that the studies select too many or too few cases for analysis. The second is an overly restrictive view of departures from precedent, which impli-

³¹ Note that none covers the current Court. To our knowledge, only Frank B. Cross has looked at the Roberts Court's treatment of precedent in any systematic way, but he covered only the Court's first term and was focused on the Chief Justice. Frank B. Cross, *Chief Justice Roberts and Precedent: A Preliminary Study*, 86 N.C. L. REV. 1251 (2008).

³² James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091 (2001).

³³ THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* (2006).

³⁴ They do this in the 2006 study, HANSFORD & SPRIGGS, *supra* note 33, at 43. The 2001 study, Spriggs & Hansford, *supra* note 32, at 1093, runs from the 1946 term through the 1995 term.

³⁵ Padden, *supra* note 3, at 1690 (focusing on cases in which constitutional decisions have been formally overruled).

³⁶ Brenner & Spaeth, *supra* note 16, at 18 (“[O]ur study concerns the cases that altered precedent . . .”).

³⁷ Christopher P. Banks, *Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, 32 AKRON L. REV. 233, 234 (1999) (focusing on the Rehnquist Court's “reversals”).

³⁸ STEFANIE A. LINDQUIST & FRANK B. CROSS, *MEASURING JUDICIAL ACTIVISM* 36 (2009) (stating that it may be an “insurmountable . . . empirical task” to identify the situations where courts “undermine” precedent in less formal ways).

³⁹ Segal & Howard, *supra* note 8, at 148.

⁴⁰ HANSFORD & SPRIGGS, *supra* note 33, at 90–91; Spriggs & Hansford, *supra* note 32, at 1103; Banks, *supra* note 37, at 237; Brenner & Spaeth, *supra* note 16, at 28; Padden, *supra* note 3, at 1715.

cates the dependent variable. Finally, with the exception of Hansford and Spriggs, the studies do not control for multiple explanations simultaneously; they are instead purely descriptive, looking at the relationship between overrulings and various predictors, one predictor at a time. Almost needless to say, a finding of a constitutional law effect in the bivariate context may not hold once we control for other factors that affect the decision to depart from precedent.⁴¹

Let's start with case selection. To us, Hansford and Spriggs selected *too many* cases.⁴² Under their strategy, we must assume that the Court could, if it so desired, depart from any precedent it ever established in any case it ever decided. Although not entirely implausible, this assumption is a little hard to swallow. In the first place, without the opportunity to depart from a precedent—in the form of a request from a party or *amicus curiae*⁴³—the Justices rarely do.⁴⁴ This is a problem for Hansford and Spriggs because between the 2005 and 2013 terms, there was a request to depart (an opportunity) in fewer than half the cases;⁴⁵ in the other half, presumably the Justices would have been extremely reluctant to disavow. Second, Spriggs himself has shown that some precedents are so deeply embedded in the law—almost as if they were written into the Constitution—that their vitality is never in doubt even if they possess some of the attributes that he and Hansford find to predict departures.⁴⁶ Gerhardt calls these “super precedents” and tells us “that they have become practically immune to overturning.”⁴⁷

Studies falling in Group 2 above examine only those cases in which the Court (or individual Justices) formally overruled previous decisions. To see the shortcomings of this approach consider Figure

⁴¹ See LEE EPSTEIN & ANDREW D. MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH 7–8, 37–39, 193–94 (2014) (discussing the importance of controlling for the potential effects of other factors in observational studies).

⁴² We do not want to be too harsh here. Of all the large-*n* studies, theirs are the best. Plus, their strategy of using a duration model to explore the risk of an overruling has the nice feature of overcoming the assumption that cases the Court has not overruled will not be eventually overruled (i.e., it is right censored data).

⁴³ Or the Court may rephrase the question under review, perhaps at the request of a party or *amicus*.

⁴⁴ We borrow this language from Segal & Howard, *supra* note 8, at 151. The suggestion here is that *sua sponte* overrulings are exceedingly rare.

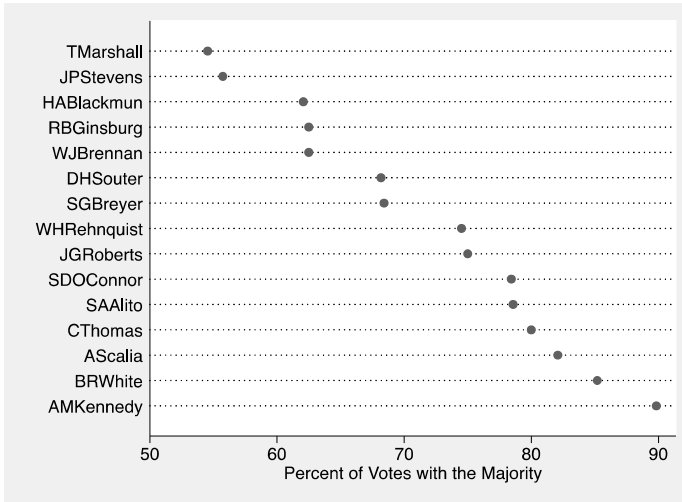
⁴⁵ See *infra* Part III for more details.

⁴⁶ See Ryan C. Black & James F. Spriggs II, *The Citation and Depreciation of U.S. Supreme Court Precedent*, 10 J. EMPIRICAL LEGAL STUD. 325, 334 (2013) (noting that certain decisions become “strongly embedded in the network of Supreme Court law”).

⁴⁷ Gerhardt, *supra* note 29, at 177; see also Brenner & Spaeth, *supra* note 16, at 4 (“Certain decisions . . . are so basic to our understanding of the Constitution or have so changed American society that the probability of their being overruled approximates zero.”).

1.⁴⁸ Here we show whether a Justice voted with the majority when the majority formally overruled a precedent. The idea is that Justices located at the top of the figure are more committed to the policy of stare decisis than those at the bottom because they voted less frequently with the majority when the majority overruled precedent. Some commentators might even conclude that the conservatives (e.g., Thomas and Scalia) are less committed than some of the liberals (e.g., Marshall and Stevens).

FIGURE 1. VOTING WITH THE MAJORITY WHEN THE MAJORITY OVERRULES PRECEDENT, 1986–2013 TERMS (EXCLUDES JUSTICES WITH FEWER THAN 10 VOTES)⁴⁹



Such conclusions would be premature if not downright misleading. The problem is that Figure 1 conveys whether a Justice voted with the majority when the Court considered the vitality of past precedent and *abandoned* it—not when the Court reaffirmed it. So imagine a Justice who almost always votes with the majority when the Court overrules precedent. We might conclude that he lacks a commitment

⁴⁸ Lee Epstein and Andrew D. Martin make the same point about studies that assess judicial self-restraint solely on how Justices voted in cases in which the Court invalidated a law rather than on all cases reviewing the constitutionality of laws. Lee Epstein & Andrew D. Martin, *Is the Roberts Court Especially Activist? A Study of Invalidating (and Upholding) Federal, State, and Local Laws*, 61 EMORY L.J. 737, 740 (2012); see also Lee Epstein & William M. Landes, *Was There Ever Such a Thing as Judicial Self-Restraint?*, 100 CALIF. L. REV. 557, 559 n.7 (2012) (offering as a corrective an expanded dataset that includes cases where the law was challenged but upheld).

⁴⁹ Calculated from the Supreme Court Database using the variable *precedentAlteration*. Harold J. Spaeth et al., *2014 Supreme Court Database, Version 2014 Release 01*, SUPREME COURT DATABASE (July 23, 2014), <http://supremecourtdatabase.org/data.php>.

to stare decisis norms. But now suppose the Justice almost always votes with the majority when a precedent is under attack and the Court fails to abandon the precedent. Would we still say he lacks a commitment to stare decisis? Probably not.⁵⁰

The weaknesses we have just detailed center on the units selected for study. We also take issue with how the studies define departures from precedent: as explicit overrulings. Focusing only on these cases sets the bar too high, as we have already implied and as even some of the studies' authors acknowledge.⁵¹ The Justices have many techniques for undermining the vitality of their precedents: overruling them *sub silentio*, as well as limiting, questioning, criticizing, or distinguishing previous decisions.⁵² These other forms of departure—Friedman's "stealth overrulings"⁵³ and Eskridge's "disavowals"⁵⁴—can be as effective at extinguishing a precedent as an explicit overruling.⁵⁵ *Abood v. Detroit Board of Education*⁵⁶ provides an example. Although the Court has not explicitly overruled it, between the Court's decisions in *Knox v. SEIU*⁵⁷ and *Harris v. Quinn*,⁵⁸ *Abood* has become a precedent *non grata*. The Wisconsin Supreme Court was

⁵⁰ Again, this parallels Epstein and Martin's critique of studies of judicial self-restraint. See *supra* note 48, at 740. A version of this problem exists for the studies that look at the fraction of overrulings that were constitutional. As Padden points out, "If, for example, 75% of all of the Court's decisions are constitutional in nature, the fact that 75% of the overruled decisions are constitutional does not show that constitutional decisions are overruled at a disproportionately greater rate." Padden, *supra* note 3, at 1715 & n.180.

⁵¹ See Segal & Howard, *supra* note 8, at 151 ("[W]e use a very generous definition of 'upholding' a precedent: anything short of overturning. Of course, often the Court can significantly limit, or avoid, an unfavorable precedent without actually overturning that precedent. In such a case we do not code the action as an overturning of precedent.") They give some examples of how their generosity misses cases in which the Court "dispos[ed] of a troublesome precedent without actually so doing," including *Shaw v. Reno*, 509 U.S. 630 (1993), and *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995). *Id.*

⁵² See HANSFORD & SPRIGGS, *supra* note 33, at 45 (listing the different ways that cases' treatments of one another are classified); Friedman, *supra* note 10, at 62 ("[F]ine indeed [is] the line between distinguishing a precedent and overruling it.").

⁵³ Friedman, *supra* note 10, at 4.

⁵⁴ Eskridge, *supra* note 3, at 1435 (listing a number of opinions that "disavowed 'significant reasoning' in a statutory precedent . . . even if . . . technically dictum").

⁵⁵ We use the example of *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to make this point. Hansford & Spriggs incorporate these less explicit overrulings on a larger scale for precedents established between the 1946 and 1999 terms. See HANSFORD & SPRIGGS, *supra* note 33, at 80 n.2.

⁵⁶ 431 U.S. 209 (1977).

⁵⁷ 132 S. Ct. 2277, 2303 (2012) (Breyer, J., dissenting) (stating that the majority's holding "cannot be reconciled" with *Abood*).

⁵⁸ 134 S. Ct. 2618, 2632 (2014) ("The *Abood* Court's analysis is questionable on several grounds."). According to LexisNexis's *Shepard's* Citations Sources, both *Knox* and *Harris* criticized and limited *Abood*.

probably right when it wrote, “The holding of *Abood* may be alive in our jurisprudence, but it is not well.”⁵⁹

Along somewhat different lines, the availability of stealth overrulings and disavowals means that it is not always clear when the Court has overruled a precedent; sometimes the Justices do not even agree. In deriding Justice Stevens’s dissent in *Montejo v. Louisiana*,⁶⁰ in which the majority overruled *Michigan v. Jackson*,⁶¹ Justice Alito wrote:

The dissent . . . invokes *Jackson*’s antiquity, stating that “the 23-year existence of a simple bright-line rule” should weigh in favor of its retention. . . . But in [*Arizona v.*] *Gant*, [556 U.S. 332 (2008)], the Court had no compunction about casting aside a 28-year-old bright-line rule [*New York v. Belton*]⁶². I can only assume that the dissent thinks that our constitutional precedents are like certain wines, which are most treasured when they are neither too young nor too old, and that *Jackson* . . . is in its prime, whereas *Belton* . . . had turned brownish and vinegary.⁶³

Justice Stevens took umbrage, claiming that unlike here, the *Gant* Court “did not overrule our precedent.”⁶⁴

A final shortcoming of the existing studies concerns their empirical strategy. Only Hansford and Spriggs consider multiple explanations for overrulings simultaneously;⁶⁵ the others simply compare one explanation at a time. This is the difference between multivariate and bivariate analysis. And though the latter may be interesting (we do some of this in Part IV), only the former merits our attention with observational data. That is because we know that more than one explanation exists for almost all human behavior—including the decision to depart from precedent.⁶⁶ (And the existing studies don’t even consider the range of explanations, choosing instead to focus on ideology and ignore factors the Justices have said figure into their decision to depart from precedent.⁶⁷ Although we appreciate the inclination not to accept willy-nilly what the Justices say as fact, we do think it worthwhile to at least assess whether they do as they say.)

⁵⁹ *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337, 360 n.16 (Wis. 2014).

⁶⁰ 556 U.S. 778 (2009).

⁶¹ *Michigan v. Jackson*, 475 U.S. 625 (1986); *Montejo*, 556 U.S. at 797 (“*Michigan v. Jackson* should be and now is overruled.”).

⁶² 453 U.S. 454 (1981).

⁶³ *Montejo*, 556 U.S. at 801 (Alito, J., concurring).

⁶⁴ *Id.* at 810 n.5 (Stevens, J., dissenting).

⁶⁵ HANSFORD & SPRIGGS, *supra* note 33; Spriggs & Hansford, *supra* note 32.

⁶⁶ See Epstein & Martin, *supra* note 41, at 37–39 (discussing the importance of controlling for the potential effects of other factors in observational studies).

⁶⁷ Again exceptions are HANSFORD & SPRIGGS, *supra* note 33, and Spriggs & Hansford, *supra* note 32. For these factors, see *infra* Part III.

III OUR STUDY

From Parts I and II, our challenge should be clear: To design a study that allows us to determine whether precedent is more flexible in constitutional cases holding constant other factors that may affect the Court's decision to depart from prior decisions. In what follows, we first describe our dataset and explain why we think it improves on previous efforts. Next, we detail how the data enable us to test the constitutional precedent and other hypotheses.

A. *The Departure-From-Precedent Dataset*

We just critiqued existing studies for selecting too few or too many cases. To overcome both problems, we take cues from Segal and Howard and focus on cases that present an opportunity for the Justices to depart from precedent.⁶⁸ We define this set as those in which a party or amicus curiae asked the Court to depart from a precedent or defended against a departure request.⁶⁹ To develop the dataset—what we will call the Departure-From-Precedent Dataset—we began with the Supreme Court Database.⁷⁰ We retained all 628 orally argued cases decided during the Roberts Court era (2005 to 2013 terms) that resulted in a signed majority or plurality opinion.⁷¹

Next, we conducted searches in Westlaw's Briefs/U.S. Supreme Court file to determine whether any brief asked the Court to disavow

⁶⁸ Segal & Howard, *supra* note 8, at 152.

⁶⁹ Because Segal and Howard focused on requests from the parties to overrule, *see id.* (“Our data consist of all briefs on the merits filed by petitioners and respondents . . .”), they missed several cases in which only amici curiae requested an explicit overruling. That is one reason for including requests from amici curiae. Another is that unlike Segal and Howard, we are studying departures from precedent—not solely overrulings. Amici curiae (perhaps working in coordination with the parties) are less shy of asking for departure than the parties themselves. Finally, when considering the opportunities to depart, the Justices look to the parties and amici. For example, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 579 (2007), Justice Stevens wrote, “Petitioners have not requested that the *Conley* formulation be retired, nor have any of the six *amici* who filed briefs in support of petitioners.” Justice Stevens was not exactly right. The respondent accused the petitioner of “essentially seek[ing] to overturn this long-established precedent” and our reading of the briefs suggests some truth to this. Brief for Respondents at 17, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126). *Scott v. Harris* provides another example. 550 U.S. 372, 388 (2007) (Breyer, J., concurring) (“It is not surprising that commentators, judges, and, in this case, 28 States in an *amicus* brief have invited us to reconsider *Saucier*'s requirement.”).

That said, our dataset identifies whether an amicus or a party requested or defended against a departure. *See infra* Part III.C.

⁷⁰ Harold J. Spaeth et al., *2014 Supreme Court Database, Version 2014 Release 01*, SUPREME COURT DATABASE (July 23, 2014), <http://supremecourtdatabase.org/data.php>.

⁷¹ In other words, we limited our study to *decisionType=1* (opinion of the Court) or *decisionType=7* (judgment of the Court) cases. We exclude all per curiams.

a precedent (or not).⁷² Many departure requests were unambiguous (e.g., “As Justice Kennedy has explained, that case was simply wrongly decided and should be overruled.”⁷³). But they need not have been so explicit. Just as we think that it is unrealistic to define departures from precedent as occurring solely when the Court formally and explicitly overrules a prior decision, it is equally limiting to confine the briefs to this criterion when they too use subtler forms of argumentation to push for abrogating prior decisions. For example, the brief in *General Dynamics Corp. v. United States* declared: “Given its proven potential to erode accountability and deprive righteous litigants of their day in court, the Court should use this case to reevaluate the *Reynolds* framework”⁷⁴ This too is an attack on precedent, though somewhat less explicit than the first example.⁷⁵

We refer to these as “offensive” attacks, not because they are insulting or disrespectful, but because they are aggressive moves on the part of parties or amici or both. We also include “defensive” attacks.⁷⁶ Sometimes these push back departure, such as respondents in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*: “*Bazzle*’s allocation to arbitrators of decisional authority over the precise issue presented here has already proved workable and incurred substantial reliance. . . . There is no reason to reverse this workable and widely accepted rule.”⁷⁷ Also falling into the “defensive” category are accusations of departure requests, for example: “In multiple ways, petitioners and their amici advance arguments that effectively ask this Court to revisit and overrule *Geier*.”⁷⁸

⁷² Our search term was: overrull! or vitality or reexamine! or “good law” or revisit! or repudiate! or reevaluat! or “wrongly decided” or reconsider! or abandon! or unworkab! or “sub silentio” or “dicta” or eviscerat! or “cast doubt” or “casts doubt.” We eliminated cases without requests to depart.

⁷³ Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Respondent at 20, *Smith v. Texas*, 550 U.S. 297 (2007) (No. 05-11304).

⁷⁴ Brief of the Constitution Project as *Amicus Curiae* in Support of Petitioners at 14, *General Dynamics Corp. v. United States*, 131 S. Ct. 1900 (2011) (No. 09-1298).

⁷⁵ We also looked carefully at claims that a party or amicus was requesting a departure, such as this: “The essence of the argument made by Amici Curiae in Support of Petitioners, Law Professors Arthur R. Miller et al., is that the Court should effectively overrule *Thermtron*.” Brief *Amici Curiae* of the Securities Industry Association and the Bond Market Association in Support of Respondent at 9 n.2, *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006) (No. 05-409). In many instances, the accusers were correct.

⁷⁶ If there are both offensive and defensive attacks, we code the offensive attack.

⁷⁷ Brief for Respondent at 22–23, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010) (No. 08-1198).

⁷⁸ Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Respondents at 10, *Williamson v. Mazda Motor of Am.*, 562 U.S. 323 (2011) (No. 08-1314).

For purposes of analysis we code offensive and defensive moves separately,⁷⁹ but throughout we refer to both as attacks on precedent. Sure, some defensive moves may seem little more than a debater's tactic ("Ruling for my adversary would require the Court to overrule *Marbury v. Madison*"). But the puzzle of why attorneys would think they could get away with this in the overstuffed Supreme Court leads us to suspect that many of the defensive moves came in response to offensive attacks that our search terms did not pick up. Take *Bell Atlantic Corp. v. Twombly*,⁸⁰ in which respondents contended:

Petitioners essentially ask the Court to change orthodox pleading standards, demarcated by the Court nearly a half-century ago in *Conley v. Gibson*, 355 U.S. 41 (1957)—and reaffirmed by the federal courts countless times since—by elevating the requirements, with regard to both persuasiveness and specificity, for claims asserting antitrust conspiracy.⁸¹

Our reading of the petitioner's brief suggests that the respondent's claim is not overblown. But because the petitioner did not use the magic words "abandon," "depart," or "overrule," in asking the Court to abandon *Conley's* "no set of facts"⁸² language, it did not turn up in our search. Only by sifting through the respondent's brief did we learn the offensive attack was there.

Including both offensive and defensive moves, our searches produced an interesting set of cases—or, at least, one larger than we might have anticipated. In 46% of the 628 cases (n=288), a brief attacked (or defended against attack) one or more prior Supreme Court decisions. Discounting duplicates, attorneys asked the Court to reconsider (or reaffirm) 455 precedents in the 288 cases (see the Appendix for the list). But duplicates abound. Some precedents came under attack multiple times in multiple cases, such as *City of Boerne v. Flores*⁸³ (questioned in briefs in three different cases⁸⁴) or the more

⁷⁹ See *infra* Part III.C.

⁸⁰ 550 U.S. 544 (2007).

⁸¹ Brief for Respondents at 1, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126).

⁸² 355 U.S. 41, 45 (1957).

⁸³ 521 U.S. 507 (1997).

⁸⁴ See Brief of *Amici Curiae* The Lawyers' Committee for Civil Rights Under Law, National Asian Pacific American Legal Consortium, People for the American Way Foundation & The National Association for the Advancement of Colored People in Support of Petitioners at 20–29, *United States v. Georgia*, 546 U.S. 151 (2006) (Nos. 04-1203, 04-1236) (attacking *Boerne's* "congruence and proportionality" standard); Brief of the Constitutional Accountability Center as *Amicus Curiae* Supporting Petitioner at 35–37, *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012) (No. 10-1016) (same); Brief of Justice and Freedom Fund as *Amicus Curiae* in Support of Petitioner at 22–27, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96) (same).

extreme example of *Auer v. Robbins* (six cases⁸⁵). Also, in about a quarter of the 288 cases, two or more precedents were in play.⁸⁶

Including repeats, across the 288 cases, 558 precedents came under attack. These 558 constitute our study's unit of analysis; that is, for each precedent under attack we seek to determine whether or not the Court surrendered, and why it responded as it did.

Table 2, showing our study's independent variables (to which we'll soon turn), provides some information about the 558 attacks. For example, 322 (57.7%) were offensive and 236 were defensive.⁸⁷ Also note that the oldest precedent traces back 207 years to the Marshall Court (*Strawbridge v. Curtiss*⁸⁸) and the most recent to three Roberts Court decisions.⁸⁹ The mean falls in the early Burger years (1973) with a standard deviation (about 34 years) stretching back to the late Hughes Court and up to the second term of the Roberts Court.

Putting all these numbers in context is not so simple. Take the 558 distinct precedents questioned between the 2005 and 2013 terms (51 per term). In comparison to the nearly 28,000 precedents established (cases decided) between the 1791 and 2004 terms, 588 may seem tiny. Or maybe not. It turns out that Supreme Court precedents depreciate at a rather rapid rate. In an update of Landes and Posner's classic study,⁹⁰ Black and Spriggs show that after 20 years, 80% of prior decisions are never cited; and after 50 years, the probability of citation is under 0.10%.⁹¹ Under a generous set of assumptions, this leaves the Roberts Court with, say, 4,000 "live cases"—about 14% of which were the subject of departure requests (or pushbacks) in the last nine years.

⁸⁵ See Brief of Respondents at 58–59, *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014) (Nos. 12-79, 12-86, 12-88) (attacking *Auer* deference); Brief for Respondent at 42 n.12, *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013) (Nos. 11-338, 11-347) (same); Brief for Respondent at 51, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) (No. 11-204) (same); Brief for Respondent at 59–60, *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034 (2012) (No. 10-1042) (same); Reply Brief for Petitioner at 11–12, *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007) (No. 05-705) (same); Reply Brief of Petitioner at 16, *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (No. 03-1238) (same).

⁸⁶ Twenty-six percent (n=145).

⁸⁷ We derive the figures by adding together the variables *Offensive Party Attack* and *Offensive Amicus Attack* (113 + 209 = 322 offensive attacks) and subtracting 322 from 558 (=236).

⁸⁸ 7 U.S. (3 Cranch) 267 (1806).

⁸⁹ *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Mayo Collaborative Servs. v. Prometheus Labs, Inc.*, 132 S. Ct. 1289 (2012).

⁹⁰ William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. LAW & ECON. 249 (1976).

⁹¹ Black & Spriggs, *supra* note 46, at 343 fig.1.

B. *Dependent Variable*

When considering these requests, are the Justices more likely to respond positively when the precedent is constitutional? To answer this question our empirical strategy aims at predicting (1) departures from precedent (the outcome or dependent variable) on the basis of (2) inputs (the independent variables). The primary independent variable of interest is whether the precedent is constitutional or not. Other predictors of departure decisions come from the Justices themselves and the existing literature, as we detail below.

Let's start with the first task: measuring how the Court responded to departure requests. We took two related approaches. First, in line with existing studies, we tried to identify cases in which the Court formally overruled precedent. This wasn't easy.⁹² We consulted three different authorities—the Supreme Court Database (the Database),⁹³ the Congressional Research Service's *The Constitution Annotated* (CONAN),⁹⁴ and LexisNexis's *Shepard's Citations Services* (*Shepard's*).⁹⁵ There is some agreement but hardly unanimity.⁹⁶

⁹² Because of the lack of consensus among authorities, authors of the existing studies struggled to identify overruled decisions. Brenner & Spaeth, *supra* note 16, at 19–23, devote five pages to the subject, and HANSFORD & SPRIGGS, *supra* note 33, app., include an Appendix explaining how they sorted through the various conflicting “authorities” to determine whether the Court had overruled a case or not. Padden, *supra* note 3, at 1715, notes discrepancies between her count of overrulings and Chief Justice Rehnquist's in *Payne*. She attributes this to “differences in criteria for determining whether a case was overruled or for classifying cases as constitutional or nonconstitutional.” *Id.*

⁹³ Harold J. Spaeth et al., *2014 Supreme Court Database, Version 2014 Release 01*, SUPREME COURT DATABASE (July 23, 2014), <http://supremecourtdatabase.org/data.php> [hereinafter “SUPREME COURT DATABASE” or “the Database”].

⁹⁴ S. DOC. NO. 112-9 (2014) [hereinafter CONAN], available at <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-REV-2014/pdf/GPO-CONAN-REV-2014.pdf>.

⁹⁵ See *Shepard's Citations Services*, LEXISNEXIS, <http://www.lexisnexis.com/en-us/products/shepards.page> (last visited Aug. 14, 2015) [hereinafter *Shepard's*], for an overview of *Shepard's*.

⁹⁶ We checked the Database's coding against CONAN and *Shepard's*. The Database lists all but one case in CONAN and *Shepard's*. The exception is *School Committee of Boston v. Board of Education*, 389 U.S. 572 (1968) (per curiam), which CONAN records as overruled by *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). Because only the dissenting opinions cited *School Committee of Boston*, neither the Database nor *Shepard's* lists it as an overruled case. See, e.g., *Parents Involved*, 551 U.S. at 803 (Stevens, J., dissenting) (“The Court has changed significantly since it decided *School Comm. of Boston* in 1968. It was then more faithful to *Brown* and more respectful of our precedent than it is today.”). There are other disagreements among these sources. For example, both *Shepard's* and the Database coded *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), as overruling *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911), but CONAN did not. Also the Database identifies *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), as overruling (a statement) in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). *Shepard's* treats it as “Criticizing” rather than overruling.

Because the Database includes all but one case listed in *CONAN* or *Shepard's* and is explicit about its coding rules, we relied on it to determine whether the Court overruled a precedent.

The lack of consensus among the three authorities and even the Justices themselves again highlights the problem of defining precedent departures solely in terms of overruling.⁹⁷ In response, we developed another dependent variable, which draws mostly⁹⁸ on *Shepard's* analysis of how the Court's majority (or plurality) "treated" the precedent it cited.⁹⁹ According to *Shepard's*, "followed" is a positive citation indicating that the Court adhered to the precedent. "Cited," "explained," and "harmonized" are neutral citations implying that the Court neither followed nor departed. "Criticized," "distinguished," "limited," "overruled" (in part or in full), and "questioned" are negative citations, suggesting relative forms of departure or disavowal. To simplify matters, we divided *Shepard's* analysis into two categories: departing from the attacked precedent (=1) or not (=0), where 1 corresponds to *Shepard's* negative citations and 0 corresponds to the two other groupings, positive and neutral.

Table 1 describes both dependent variables. Explicit overrulings are rare, occurring in only 3.9% (n=22) of the 558 attacked precedents. Departures are more frequent, occurring in about 27.6%. This is slightly lower than the figure Hansford and Spriggs reported for all cases the Court negatively interpreted between the 1946 and 1999 terms (34%).¹⁰⁰

⁹⁷ See also *supra* note 92.

⁹⁸ For the sake of consistency, if the Database identified the Court as overruling a case, we code that as "overruled" regardless of *Shepard's* coding. *Shepard's* coded negatively 17 of the 22 overruled cases. In four instances, it coded the Court's treatment of the attacked precedent as neutral but in one it coded it as followed (*Thornton v. United States*, 541 U.S. 615 (2004)). This required recoding five cases.

⁹⁹ We use *Shepard's*, rather than Westlaw or Bloomberg, because HANSFORD & SPRIGGS, *supra* note 33, conducted a thorough interrogation of *Shepard's* coding protocols and found them to produce reliable and valid data. However, *Shepard's* is not perfect. See, e.g., *supra* notes 96, 98. To provide another example, *CONAN* and the Database identify *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), as overruling three cases (*Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1875)); *Shepard's* treats the case as "explaining" all three.

¹⁰⁰ HANSFORD & SPRIGGS, *supra* note 33, at 51.

TABLE 1. SUMMARY STATISTICS FOR THE DEPENDENT VARIABLES IN THE DEPARTURE-FROM-PRECEDENT MODELS, 2005–2013 TERMS (N=558 PRECEDENTS UNDER ATTACK)

<u>Variable</u>	<u>Measure</u>	<u>Percentage</u>
<i>Overruled or not</i>	Court overruled precedent (=1)	3.9%=overruled
	Court did not overrule precedent (=0)	(n=22)
<i>Departed or not</i>	Court departed from precedent (=1)	27.6%=negative
	Court did not depart from precedent (=0)	(n=154)

C. Independent Variables

To explain departures from precedent, we developed (1) a measure of constitutional precedent and two other sets of independent variables: (2) Special Justification and (3) Institutional and Ideological. We consider each below, though we acknowledge that there is some overlap between (2) and (3).

1. Constitutional Precedent

This variable reflects the hypothesis of primary interest: the Justices are more likely to depart if the Court established the precedent in a constitutional case.¹⁰¹ To tap this, we created the variable *Constitutional Precedent*, which is equal to 1 if a constitutional precedent came under attack and 0 otherwise. Table 2, which summarizes all the independent variables, shows that about 53% of the challenged precedents fall into the constitutional category.¹⁰²

¹⁰¹ Derived from two variables in the Supreme Court Database: *lawType* and *authorityDecision*. If *lawType* was “constitutional” or “constitutional amendment” or if *authorityDecision* was “judicial review,” we coded the case as “constitutional.” For multiple issue cases, we also identified whether *lawType*=constitution/constitutional amendment or *authorityDecision*=Judicial review for the second issue, using the version of the Database organized by issue/legal provision. For cases with precedents older than 1946 (at present the Database covers only the 1946 Term forward), we followed the Database’s coding rules.

¹⁰² In addition to *Constitutional Precedent*, we also considered whether the case before the Roberts Court, as opposed to the attacked precedent, was a constitutional case or not. We did so because there is incomplete overlap between whether the precedent under attack is constitutional and whether the case in which the Roberts Court is considering the precedent is constitutional. Including this variable does not change the results in Table 3 in any meaningful way (and it is never statistically significant).

TABLE 2. SUMMARY STATISTICS FOR THE INDEPENDENT VARIABLES IN THE DEPARTURE-FROM-PRECEDENT MODELS

<u>Variable</u>	<u>Measure</u>	<u>N</u>	<u>Summary</u>	<u>Range</u>
<i>Constitutional Precedent</i>				
<i>Constitutional Precedent</i> (under attack)	1=yes; 0=no	558	53.1%=yes (n=296)	0–1
<i>Special Justification: Reliance/Age of Precedent</i>				
<i>Age of Precedent</i>	In Years	558	37.2 years=mean (34.1=std. dev.)	0–207
<i>Economic Activity</i>	1=yes; 0=no	558	19.5%=yes (n=109)	0–1
<i>Average (Analyzed) Cites Per Year</i>	Number	557	31.8 citations=mean (107.5=std. dev.)	0–1525
<i>Special Justification: Workability</i>				
<i>Fraction Negative (Analyzed) Cites</i>	Fraction	558	0.17=mean (0.12=std. dev.)	0.0–0.9
<i>Fraction Positive (Analyzed) Cites</i>	Fraction	558	0.45=mean (0.22=std. dev.)	0.0–1.0
<i>Prior Attack</i>	1=yes; 0=no	558	16.5%=yes (n=92)	0–1
<i>Special Justification: Strength of Reasoning</i>				
<i>Unanimous</i>	1=yes; 0=no	558	30.5%=yes (n=170)	0–1
<i>Concurrences</i>	Number	558	1.0=mean (1.4=std. dev.)	0–8
<i>One-Vote Margin</i>	1=yes; 0=no	558	26.5%=yes (n=140)	0–1
<i>Institutional and Ideological</i>				
<i>Great Justice (Plus Kennedy)</i>	1=yes; 0=no	558	27.2%=yes (n=152)	0–1
<i>Full Court</i>	1=yes; 0=no	558	79.8%=yes (n=445)	0–1
<i>Offensive Party Attack</i>	1=yes; 0=no	558	20.3%=yes (n=113)	0–1
<i>Offensive Amicus Attack</i>	1=yes; 0=no	558	37.5%=yes (n=209)	0–1
<i>Median Distance</i>	Absolute value	493	0.36=mean (0.31=std. dev.)	0.0–1.6

Again, determining whether 53% is big, small, or something in between is a little hard because we lack a baseline. The Supreme Court Database, which we used to create these variables, (at present) covers only the 1946 term forward. What we can say is this: Of the 558 precedents in our study, the Court set 471 (84.4%) during the 1946 to 2013 terms; and 53.1% of the 471 were constitutional cases. This percentage of 53.1% is significantly greater than the percentage of all

cases decided since the 1946 term that were constitutional (36.7%).¹⁰³ This makes sense. Assuming that the Court follows its policy of laxer stare decisis standards in constitutional cases, attorneys would be more likely to challenge precedent in those cases. We call this the “selection” effect. It is likely to have an important bearing on our empirical analysis because we expect attorneys to continue to challenge constitutional precedents in more (and weaker) cases until at the margin the likelihood of departure will be about the same for constitutional and nonconstitutional precedents. In short, the selection effect should weaken (and possibly even eliminate) the statistical significance of the constitutional precedent variable.¹⁰⁴

2. *Special Justification[s]*

As we have mentioned, the Court seems to demand “special justification” before it departs from stare decisis norms.¹⁰⁵ Based on our reading of their opinions, special justification for the Roberts Justices boils down to (1) reliance interests, (2) workability, and (3) strength of reasoning.

These three appear in almost all of the Justices’ efforts to formulate precedent on precedent¹⁰⁶—and sometimes in both directions.¹⁰⁷ Consider reliance interests, for example. In overruling *Austin v. Michigan Chamber of Commerce*,¹⁰⁸ Justice Kennedy contended, “No serious reliance interests are at stake.”¹⁰⁹ To which Justice Stevens in dissent responded, “State legislatures have relied on their authority to regulate corporate electioneering, confirmed in *Austin*, for more than

¹⁰³ $p \leq 0.05$.

¹⁰⁴ This suggests a follow-up empirical project that models the relationship between the decision to ask the Court to depart from precedent (the dependent variable that takes the value 1 if the Court is asked to depart from precedent and 0 if it is not) and a set of independent variables (that include variables associated with the likelihood the Court will depart from precedent).

¹⁰⁵ See *supra* note 13 and accompanying text (describing the history of the Court’s usage of the term).

¹⁰⁶ Other factors are more idiosyncratic or sporadic.

¹⁰⁷ In *Montejo v. Louisiana*, 556 U.S. 778 (2009) (citing *Pearson v. Callahan*, 555 U.S. 223, 234–35 (2009)), Justice Scalia wrote, “Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.” Alito includes reasoning on his list of criteria for departing from precedent, *e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 234 (2009); Kennedy cited reasoning in *Citizens United v. FEC*, 558 U.S. 310, 362–63 (2010); and, in a concurring opinion in *Randall v. Sorrell*, 548 U.S. 230, 267 (2006) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion)), Justice Thomas declared, the “Court has never felt constrained to follow precedent” when based on “unworkable or . . . badly reasoned” decisions.

¹⁰⁸ 494 U.S. 652 (1990).

¹⁰⁹ *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

a century.”¹¹⁰ Besides, Stevens continued, “*McConnell* is only six years old, but *Austin* has been on the books for two decades”¹¹¹

To determine whether reliance interests, workability, and reasoning are more than rhetoric, we develop empirical indicators of each.

As a rough measure of reliance, we include in the regression analysis an *Age of Precedent* variable (the number of years between the creation of the precedent and the year the Court decided the case in which a brief attacked the precedent). We expect that the older and more established the precedent, the greater the reliance on the information embodied in the precedent and the greater the costs to society if the Court departs from the precedent. There is, however, an equally plausible argument that cuts in the opposite direction. As precedents age, they are likely to depreciate in response to changes in circumstances so the earlier information embodied in the precedent becomes less useful. If depreciation dominates, the Court should be more, not less, willing to depart from older precedents. We also include in the statistical model the *Age of Precedent Squared* which tests if age effects tend to diminish or increase with the age of the precedent attacked.

Because age is unlikely to tap all considerations relating to reliance, we include two other measures: *Economic Activity* and *Average Citations Per Year*. Several members of the Roberts Court have expressed agreement with Rehnquist’s view that “[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights.”¹¹² Because some (many?) commercial cases implicate these concerns, we include *Economic Activity*, which indicates whether the Supreme Court Database classifies the case as one in the economic area (=1) or in another (=0).¹¹³ *Average Citations Per Year* is the total number of federal and state courts that discussed the precedent (not merely cited it) divided by the number of years since the

¹¹⁰ *Id.* at 411 (Stevens, J., dissenting).

¹¹¹ *Id.* at 412.

¹¹² *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). This view may originate with *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (1 How.) 443, 458 (1851) (“The case of the Thomas Jefferson did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it notwithstanding the opinion we have expressed.”). See Alito’s majority opinion in *Pearson*, 555 U.S. at 233, where he quotes Rehnquist, and Kagan’s dissent in *Harris v. Quinn*, 134 S. Ct. 2618, 2652 (2014), where she too quotes Rehnquist.

¹¹³ In the Supreme Court Database, *issueArea*=8. This variable may be too gross to capture the reliance interests to which Rehnquist referred. Perhaps future research will refine it.

Court set the precedent.¹¹⁴ We expect that the greater the number of citations, other things constant, the stronger the reliance interests.¹¹⁵

Turning to workability,¹¹⁶ the Justices seem to agree that an unworkable precedent is one that the lower courts cannot apply coherently and consistently.¹¹⁷ We use *Shepard's* to define unworkability. For each precedent attacked in the briefs, we look at how the judiciary treated the precedent in the year before the Court's decision on whether to depart or not: the fraction of citations to the case that indicate departures—that is, negative treatment (*Negative Citations*)—and the fraction that suggest “following” or positive treatment (*Positive Citations*).¹¹⁸ Workability is negatively related to the first and positively related to the second. We also include a third measure: *Prior Attack*, which is a dummy variable indicating whether a brief previously asked the Roberts Court to depart from the precedent under attack (or pushed back against departure). The idea here is that continued requests to depart may signal unworkability.

The third broad factor in Table 2 is strength of reasoning. The weaker the reasoning in the original precedent, the more likely the Court is to depart from the precedent. We use several measures to capture the strength of reasoning in the original precedent: whether

¹¹⁴ This count includes only citations that *Shepard's* codes as “treating” the precedent; that is, following, distinguishing, limiting, etc. We do not include merely “citing” the precedent in this variable. For some robustness checks, we estimate some models that include a variable, *Average Citations Per Year (All)*, which is the number of treating and citing precedents. The basic results depicted in Table 3 do not change.

¹¹⁵ Citations are a very rough measure of reliance. Two problems arise with citations. One is the earlier mentioned problem of the super precedent—i.e., a precedent that so well settles an area of law that few disputes arise and, therefore, the precedent is rarely cited. Another is that the number of citations will depend on the number of times the court is presented with the issue related to the precedent. In both examples, the reliance interest may be strong and yet the precedent may be infrequently cited.

¹¹⁶ This is not a new criterion. See, e.g., *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) (“[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.”); *Malloy v. Hogan*, 378 U.S. 1, 34 (1964) (White, J., dissenting) (“This rule seeks and achieves a workable accommodation between what are obviously important competing interests.”); *Beauharnais v. Illinois*, 343 U.S. 250, 303 (1952) (Jackson, J., dissenting) (“Punishment of printed words, based on their tendency either to cause breach of the peace or injury to persons or groups, in my opinion, is justifiable only if the prosecution survives the ‘clear and present danger’ test. It is the most just and workable standard yet evolved . . .”). For a more detailed analysis, see Stark, *supra* note 29.

¹¹⁷ See *supra* note 107.

¹¹⁸ Again the denominator is the total number of citations that *Shepard's* codes as treating the precedent. Merely “cited” are omitted; again, for robustness checks we include variables, *Positive Citations (All)* and *Negative Citations (All)*, that include cited cases in the denominator. The basic results depicted in Table 3 change in one important way: For model (2a), *Constitutional Precedent* is no longer significant.

the precedent-setting decision was *Unanimous* (=1) or not (=0);¹¹⁹ whether it was decided by a *One-Vote Margin* (=1) or not (=0);¹²⁰ and the *Number of Concurrences*.¹²¹ Assuming bad or at least questionable reasoning is an important factor in the Court's decision to disavow a precedent, *Unanimous* should be negatively related to the decision to depart and the two others positively related.¹²² It is worth noting that the *Prior Attack* variable could also relate to reasoning because criticism of prior precedents might reflect weak rationale.

3. *Institutional and Ideological Concerns*

Four of the five variables under the category "Institutional and Ideological" in Table 2 reflect institutional concerns.

(1) *Great Justice* takes into account the possibility that the Court is less likely to question a precedent set in an opinion by one of the "great" Justices or at least those who regularly appear on lists of the "greats": Hugo Black, Louis Brandeis, William Brennan, Felix Frankfurter, Oliver Wendell Holmes, John Marshall, Robert Jackson, William Rehnquist, and Earl Warren.¹²³ We also include Anthony Kennedy, not because he is necessarily "great"—only time will tell—

¹¹⁹ Other scholars have invoked this measure too. *E.g.*, Brenner & Spaeth, *supra* note 16, at 45–47; Banks, *supra* note 37, at 236.

¹²⁰ One-vote margin cases are cases decided by 5-4 (127/558 precedents), 5-3 (16/558), 4-3 (1/558), or 4-2 votes (4/558). The outcome of 5-3 or 4-2 to reverse depends on a single vote.

¹²¹ HANSFORD & SPRIGGS, *supra* note 33, controlled for these in their study. We also considered the fraction (rather than the number) of concurring votes and the number (or fraction) of dissenting opinions. Adding dissenting opinions (either as numbers or fractions) to the model does not change the results in Table 3. Substituting dissenting opinions for concurring opinions strengthens *Constitutional Precedent*. We have more to say about this in the text.

¹²² The *One-Vote Margin* and *Number of Concurrences* variables will also reflect how badly the Court is divided. Note also that a plurality, rather than a majority opinion would be another measure of the strength of reasoning. *See, e.g.*, *Alleyn v. United States*, 133 S. Ct. 2151, 2165 (2013) (Sotomayor, J. concurring) ("We have said that a decision may be 'of questionable precedential value' when 'a majority of the Court expressly disagreed with the rationale of [a] plurality.'" (alteration in original) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996)). But plurality opinions are very rare in our dataset: only 1.96% of the 459 precedents (n=9). *See also* Justice Alito's response to Justice Sotomayor in *Alleyn*, at 2173 n.* ("Decisions in which no one rationale commands a majority of the Court—including prominent decisions based on the views of a single Justice—are often thought to have precedential effect. . . . [I]f *Harris* is not entitled to *stare decisis* weight, then neither is the Court's opinion in this case.").

¹²³ All these Justices appeared on Cass Sunstein's recent list of great justices with the exception of Hugo Black. Cass R. Sunstein, *Home-Run Hitters of the Supreme Court*, BLOOMBERG VIEW (Sept. 23, 2014, 5:03 PM), <http://www.bloombergview.com/articles/2014-04-01/home-run-hitters-of-the-supreme-court>. Because Black appears on many other lists, for example, the lists in LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 460–61 tbl.5-8 (5th ed. 2012), we include him.

but because opinion writers departing from (read: treating negatively) a Kennedy product may do so at their own peril given his role as a Super Median on the Roberts Court.¹²⁴

(2) *Full Court Attack* tests the hypothesis that the Court is less willing to depart from precedent set by a Court of nine Justices relative to a number less than nine.

(3 and 4) Recall that in our coding of the 558 precedents, we distinguished between offensive and defensive attacks on precedent and whether the amicus or party launched the attack. Because it is possible that the Court is more likely to depart in the face of an offensive attack leveled by a party,¹²⁵ we created three dummy variables: *Defensive Attack*, *Offensive Party Attack*, and *Offensive Amicus Attack*. *Defensive Attack* is an omitted category.¹²⁶

For ideological considerations,¹²⁷ we calculated *Median Distance*, which is the (absolute) ideological difference between the median of the Court in the case that set the precedent and Justice Kennedy, the median of the Roberts Court for all nine terms. To measure ideology for both, we used the Martin-Quinn ideology score of the median in the term establishing the precedent and Justice Kennedy's term-by-term score.¹²⁸

IV RESULTS

Before considering the effect of the variables in Table 2 on the two outcomes of interest—whether or not the Court explicitly overruled a precedent and whether or not the Court departed from a precedent—we look at the simple (bivariate) relationship between constitutional precedent and departure decisions. It turns out that there is none.

Of the 558 attacked precedents in our dataset, the Court formally overruled 22. If constitutional precedents are more flexible, we might

¹²⁴ Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 41 (2008). As we explain in *infra* Part IV, we estimate the models with Kennedy removed from *Great Justice* and entered separately as a dummy variable, *Kennedy wrote*=1 or not=0.

¹²⁵ *But see supra* note 69 (noting the Court looks to requests to depart from precedent from amici as well).

¹²⁶ One category has to be omitted for statistical purposes, but it does not matter which one.

¹²⁷ As we note in *infra* Part IV, we tried several other measures of ideology but none produce significant results.

¹²⁸ Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002). The scores are available at MARTIN-QUINN SCORES, <http://mqscores.berkeley.edu/measures.php> (last visited Aug. 18, 2015). Unfortunately, they are available only for the 1937 to 2013 terms (covering 85% of the 558 precedents).

expect the great majority of the 22 to fall into the constitutional category. However they do not. Of the 296 constitutional law precedents under attack, the Court formally altered 4.4% (=14/296); of the 304 nonconstitutional law precedents, the Court overruled 3.4% (=9/262). The difference isn't significant.

Turning to the second dependent variable, whether or not the Court departed from precedent, the difference is larger (31.4% of the constitutional law decisions versus 23.3% of nonconstitutional law decisions) and statistically significant under the conventional ($p \leq 0.05$) level.¹²⁹

Does this latter finding change when we use regression analysis to account for the other independent variables in Table 2? The answer is: It depends on the model as Table 3 shows. There we display the results of regressing each dependent variable on the inputs listed in Table 2.¹³⁰ The numbers in the cells are logit coefficients, with z-scores in parentheses.

We summarize the regression results as follows.

(1) Although the coefficients on *Constitutional Precedent* are positive (indicating a greater willingness to depart from constitutional precedent) in the four regressions, in only one model (2a) is it statistically significant. And even here the result is not especially stable. For example, substituting the negative and positive fractions of all citations rather than only treated citations¹³¹ yields an insignificant coefficient on *Constitutional Precedent*. But substituting dissents for concurrences strengthens *Constitutional Precedent* across three of the regressions, even though the dissent variable has no effect. Then there is the fact that in the vast majority of models we estimated (but do not report in Table 3) *Constitutional Precedent* is not a significant predictor of overruling or departure decisions.

What should we conclude? On the one hand, perhaps it's surprising that we attained any results at all for *Constitutional Precedent* in light of the selection problem we mentioned earlier. On the other, the results are so model dependent and unstable that we worry about rejecting the null hypothesis that the Court is equally willing to depart from or adhere to constitutional precedent and all others.¹³² This is

¹²⁹ The significance level is $p=0.07$.

¹³⁰ We reestimated models (1a) and (1b) using the rare event logit model. See generally Gary King & Langche Zeng, *Logistic Regression in Rare Events Data*, 9 POL. ANALYSIS 137 (2001) (discussing statistical analysis of rare events data). The results do not change.

¹³¹ See *supra* note 118.

¹³² In some regressions we used all citations (instead of analyzed citations) for the denominators of *Average Citations Per Year*, *Fraction Negative Citations*, and *Positive Citations*. In others, we added a variable for the number of dissenting votes, replaced

TABLE 3. LOGISTIC REGRESSION RESULTS FOR THE COURT'S
DECISION TO OVERRULE OR DEPART FROM PRECEDENT

	<i>Dependent Variable</i>			
	<i>Formally Overrule Precedent</i>		<i>Depart from Precedent</i>	
	(1a)	(1b)	(2a)	(2b)
<i>Constitutional Precedent</i>	1.124 (1.88)	0.635 (0.97)	0.477* (2.06)	0.358 (1.47)
<i>Age of Precedent</i>	0.008 (0.33)	-0.055 (0.99)	-0.014 (1.42)	-0.028 (1.31)
<i>Age of Precedent Squared</i>	0.000 (0.01)	0.001 (1.20)	0.000 (1.40)	0.000 (1.36)
<i>Economic Activity</i>	1.723* (2.81)	1.312 (1.86)	0.138 (0.50)	-0.158 (0.50)
<i>Average Citations Per Year</i>	-0.000 (0.18)	-0.000 (0.14)	-0.000 (0.89)	-0.001 (0.92)
<i>Fraction Negative Citations</i>	4.570* (2.14)	4.269 (1.77)	4.231* (3.78)	5.220* (4.06)
<i>Fraction Positive Citations</i>	3.131 (1.70)	2.463 (1.14)	1.007 (1.38)	1.364 (1.74)
<i>Prior Attack</i>	0.894 (1.67)	0.633 (1.07)	0.646* (2.46)	0.645* (2.34)
<i>Unanimous</i>	-0.265 (0.45)	0.164 (0.24)	-0.444 (1.71)	-0.238 (0.86)
<i>One-Vote Margin</i>	-0.199 (0.29)	0.239 (0.33)	-0.445 (1.69)	-0.325 (1.18)
<i>Concurrences</i>	0.075 (0.38)	0.146 (0.74)	0.172* (2.26)	0.196* (2.51)
<i>Great Justice (Plus Kennedy)</i>	-0.868 (1.38)	-0.639 (0.98)	-0.447 (1.90)	-0.473 (1.92)
<i>Full Court</i>	1.245 (1.52)	1.133 (1.16)	0.679* (2.33)	0.750* (2.36)
<i>Offensive Amicus Attack</i>	-1.709 (1.52)	---	0.046 (0.20)	0.072 (0.29)
<i>Offensive Party Attack</i>	1.911* (3.24)	2.495* (4.25)	0.613* (2.27)	0.661* (2.27)
<i>Median Distance</i>	---	0.979 (1.21)	---	0.578 (1.57)
<i>Constant</i>	-8.522* (4.20)	-8.107* (3.37)	-2.776* (3.82)	-3.309* (3.97)
N	557	492	557	492
Log likelihood	-67.135	-57.088	-299.699	-268.850

Notes: (1) The cell entries are logit coefficients, with z-scores in parentheses. * $p \leq 0.05$.

(2) We omit the variable *Offensive Amicus Attack* in Model 1(b) because it perfectly predicts nonoverruling.

especially so since other predictors of departures are far more stable, as we detail below.

(2) We find no significant effects of the *Age of Precedent* variables. This is not surprising because of the tradeoff between reliance

dissenting and concurring numbers with fractions, and substituted various other measures of ideology. See *supra* notes 114, 118, 121.

(settled expectations) and obsolescence so the net effect of age is unclear.

(3) Because the Court has said that commercial interests should be more secure under stare decisis policy, we expected a negative coefficient on *Economic Activity*. The results do not support this prediction. Of the four regression coefficients on the *Economic Activity* variable, only one is significant but in the wrong direction. It may be that our measure of economic activity is too crude to capture the sort of reliance interests to which Chief Justice Rehnquist alluded to in *Payne*.¹³³

(4) *Average Citations* is negatively related to departure decisions as we expected (the more citations, the greater the reliance and so the less justification to disavow the precedent) but the coefficients are insignificant in all regressions.

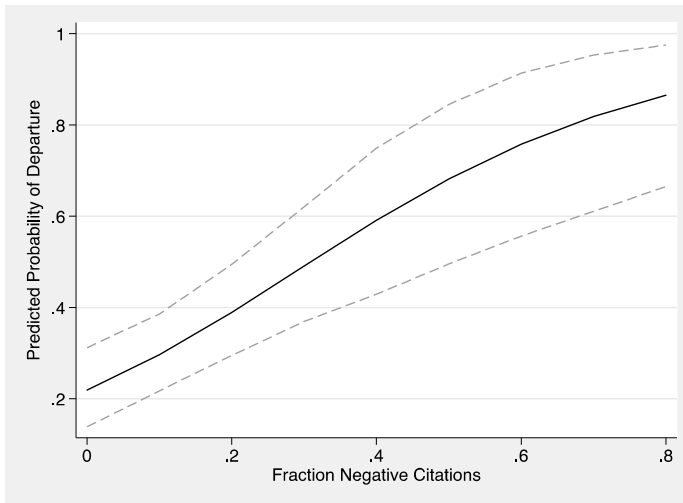
(5) The results for the criteria of workability and reasoning are more promising. Although the *Fraction Positive Citations* is never statistically significant, the *Fraction Negative Citation* is positive and significant in three of the four regressions (as well as in almost all other models we estimated but do not report in Table 3). It also exerts a strong substantive effect. For example, holding constant the other variables in model (2a) at their mode or mean, the likelihood of the Court departing from a precedent is 0.22 when there are no negative citations;¹³⁴ that figure jumps to 0.90 when the fraction of negative citations is 0.89 (the maximum in our dataset).¹³⁵ Figure 2 shows the predicted probabilities in between the two.

¹³³ *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“*Stare decisis* is the preferred course because it . . . fosters reliance on judicial decisions.”); see also *supra* note 112 and accompanying text (describing Rehnquist’s view favoring stare decisis in cases involving commercial interests).

¹³⁴ The 95% confidence interval is [0.14, 0.31]. We used CLARIFY (at: <http://gking.harvard.edu/publications/clarify-software-interpreting-and-presenting-statistical-results>) to estimate this and all predicted probabilities (and confidence intervals) reported in this article. In estimating the probabilities (and unless otherwise noted), we use a slight variation of model (2a): We eliminated *Offensive Amicus Attack* and so estimate the effect of *Offensive Party Attack* against all others. All other variables remain the same as model (2a) and do not change in meaningful ways. For example the coefficient on *Fraction Negative Citations* is 4.231 ($p < 0.05$) in Table 3 and 4.232 ($p < 0.05$) in the slightly modified model.

¹³⁵ The 95% confidence interval is [0.71, 0.99].

FIGURE 2. PREDICTED PROBABILITY OF THE COURT DEPARTING FROM PRECEDENT AS THE FRACTION OF NEGATIVE CITATIONS INCREASES



Notes: (1) The predictions are based on model (2a) in Table 2; (2) the solid line shows the predicted probability and the dashed lines show the 95% confidence interval.

(6) The *Prior Attack* variable (whether an earlier brief had previously asked the Court to depart from the precedent) is positive and significant in all the models.¹³⁶ We expected as much but are not sure exactly why. One possibility is that the briefs are picking up signals from Justices critical of the precedent's workability or rationale, and so continue to hammer away at it. If so, the estimate on *Prior Attack* fits with the results showing an association between the Roberts Court's disavowal of precedent and *Concurrences*, a measure of reasoning.¹³⁷ A precedent accompanied by many concurrences, we hypothesized, might signal a weakly reasoned precedent. And the results for departures in regressions (2a) and (2b) (though not overrulings) suggest as much: The greater the number of concurrences in the precedent-setting case, the higher the likelihood of subsequent negative treatment by the Roberts Justices. With no concurrences, the odds of a departure are 0.32, all else equal.¹³⁸ They increase to 0.36¹³⁹

¹³⁶ Using model (2a) (with the modification described in note 134), the probability of a departure in case with one or more prior attacks during the Roberts years is 0.52 [0.36, 0.67], compared with 0.36 [0.26, 0.46] for a case with no prior attacks.

¹³⁷ The other two measures, *One Vote* and *Unanimous*, are not significant in any of the models.

¹³⁸ Again using (modified) model (2a) and setting all other variables at their mean or mode. The 95% confidence interval is [0.22, 0.42].

¹³⁹ The 95% confidence interval is [0.26, 0.45].

when there is one concurrence (about the mean in our dataset) and to 0.44¹⁴⁰ when there are three (slightly less than two standard deviations from the mean).

(7) *Great Justice* has the expected effect in all the models: The Court is less likely to disavow a precedent set in an opinion by Holmes, Brandeis, Black, and the rest. But there are two important caveats. First, in no model does the variable produce a coefficient significant at $p < 0.05$, though models (2a) and (2b) are close at $p \leq 0.054$ and $p = 0.058$ respectively. Second, even for models (2a) and (2b), the effect is due almost entirely to Kennedy. Adding a variable indicating whether Kennedy wrote the attacked opinion or not¹⁴¹ and removing him from the *Great Justice* variable continues to return a negative coefficient on *Great Justice* but it is not statistically significant. The coefficient on the *Kennedy* variable is both negative and significant, indicating that the Justices are less likely to disavow a Kennedy precedent.¹⁴² When anyone other than Kennedy wrote, there is a 36% chance of departure;¹⁴³ when Kennedy was the majority (or plurality) opinion writer, the chance of departure is only 14%.¹⁴⁴ (All other variables in model (2a) remain consistent with those reported in Table 3).

(8) We expected that the Court would be less likely to depart from a precedent set by a full (nine-person) Court. We find the reverse and the coefficients are significant in regressions (2a) and (2b). One possible explanation is that nine-person Courts generate more concurrences than short Courts, but this does not hold in our data either (the mean is about 1 for full and short Courts). Another is that nine-person Courts generate more important or salient precedent, which may be targeted for attack down the road. Our data provide a bit of support for this possibility: Precedents established by a full Court generated, on average, 35.7 total (analyzed) cites; for short Courts, 16.4 cites.¹⁴⁵

(9) Who attacked and the type of attack produce significant coefficients across all four models. The Court is far more likely to depart (even overrule a precedent) when one of the parties (not an amicus) launches an offensive (not defensive) attack on the precedent. Reestimating a slight variation of model (2a),¹⁴⁶ the predicted probability of

¹⁴⁰ The 95% confidence interval is [0.32, 0.56].

¹⁴¹ Justice Kennedy wrote the plurality or majority opinion in 28 of the attacked precedents. Because six of the precedents appear multiple times in our dataset, Kennedy's $n=35$.

¹⁴² -1.259 (z-score=2.54).

¹⁴³ The 95% confidence interval is [0.27, 0.46].

¹⁴⁴ The 95% confidence interval is [0.06, 0.30].

¹⁴⁵ But the difference (19.3 cites) is significant only at $p=0.09$.

¹⁴⁶ For more information on this variation of model (2a), see *supra* note 134.

departure is 0.36 when a party or amicus makes a defensive claim or when an amicus makes an offensive move.¹⁴⁷ When a party launches an offensive attack, the probability jumps to 0.50, all else equal.¹⁴⁸

(10) Finally, in Table 3 we include *Median Distance* to tap ideological considerations. It is positive, meaning that the greater the distance between the median of the Court that set the precedent and Kennedy, the Roberts Court median, the more likely the Court is to depart. But neither *Median Distance*, nor any of the other indicators of ideology that we tried, is statistically significant.¹⁴⁹

CONCLUSION

The conventional wisdom and some earlier studies do not seem to describe aptly the current Court's approach to stare decisis. For the Roberts Court, there is only a modicum of evidence suggesting that constitutional precedents are more vulnerable to departure than statutory ones.

The factors that do seem to matter in predicting the stability of precedents are reflections of a kind of consensus formation in the legal culture writ large. The Justices take seriously criticism of the precedent (or the lack thereof) as the coefficients on *Fraction Negative Citations* suggest. They are also less reluctant to disturb precedents when there have been questions about their underlying rationale—in the form of concurrences or perhaps prior attacks. Finally, the Roberts Court is less cowed by the great Justices than by one of its own. Departing from a Kennedy precedent-setting opinion is probably not a strategy designed to win his vote. And without luring Justice Kennedy, it is very difficult for either the left or the right side of the Roberts Court to do much of anything important.¹⁵⁰

Should these results hold on deeper inspection (especially using more refined measures), we see three implications. First, our findings showing little difference between the Court's treatment of constitutional and all other precedent raises a challenge to the conventional wisdom that we hope is not neglected by lawyers, scholars, and the Justices themselves. Whatever the merits of Brandeis's formulation in

¹⁴⁷ The 95% confidence interval is [0.27, 0.45].

¹⁴⁸ The 95% confidence interval is [0.36, 0.63].

¹⁴⁹ These include the ideological distance between the opinion writers and the ideological direction of the precedent (liberal or conservative).

¹⁵⁰ For example, of the 141 decisions of the Roberts Court resulting in a 5-4 vote (excluding per curiams), Kennedy was in the majority in 83% (n=117)—more than any other Justice (save O'Connor who participated in only two 5-4 cases during her very brief tenure on the Roberts Court). Justice Thomas is a distant second, at 67% (n=94). Calculated from the Supreme Court Database.

theory,¹⁵¹ the Roberts Justices do not seem to be following it in practice to the extent that many commentators—and maybe even the Justices themselves—believe.

Second, assuming the Justices desire greater consistency in their precedent on precedent (as some think they should),¹⁵² our results call for an approach that is more transparent and supported by more empirically verified justifications. Transparency requires the Justices to say what they mean by “special justification”—that, in practice, does not seem to be about the kind of case or whether outside interests rely on the precedent or even whether it is workable or well reasoned. Rather, departures seem to follow from the Justices’ own doubts that arise from features of the precedent-setting decision and, most especially, from criticism by courts and attorneys below. An empirical approach would apply a battery of measures—akin to the ones we developed here—to requests to depart from precedent in order to determine whether the attacked precedent meets the measures. This would bring greater predictability to a doctrine that begs for it.¹⁵³

Finally, our findings have practical applications. The measures set out above may aid litigants in identifying vulnerable precedents. The results also suggest that intellectual entrepreneurs seeking to shape the law would be wise to attack precedents they hope to undermine in every available setting.

¹⁵¹ See *supra* note 3 and accompanying text (noting that many analyses quote it and some criticize or question it).

¹⁵² Especially Justice Alito. See, e.g., *Alleyn v. United States*, 133 S. Ct. 2151, 2172 (2013) (Alito, J., dissenting) (citation omitted) (“*Stare decisis* is, of course, not an ‘inexorable command’ in the field of constitutional law. . . . Nevertheless, the Court ought to be consistent in its willingness to reconsider precedent.”).

¹⁵³ As we noted earlier, an important qualification to our finding that the Court is not more likely to depart from constitutional than nonconstitutional precedent is the selection problem. Even assuming the Court is more likely to depart from constitutional precedents, the data may not show this because the parties are more likely to ask the Court to depart from constitutional precedents in weaker and weaker cases where they have less chance of succeeding in their departure requests.

APPENDIX

Precedent Attacked in Briefs in Cases Decided by the Roberts Court, 2005–2013 Terms (in order of frequency).

Auer v. Robbins, 519 U.S. 452 (1997)	6
Buckley v. Valeo, 424 U.S. 1 (1976)	5
Almendarez-Torres v. United States, 523 U.S. 224 (1998)	4
Basic Inc. v. Levinson, 485 U.S. 224 (1988)	4
Diamond v. Diehr, 450 U.S. 175 (1981)	4
Abood v. Detroit Board of Education, 431 U.S. 209 (1977)	3
Bates v. Dow Agrosociences, 544 U.S. 431 (2005)	3
Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)	3
City of Boerne v. Flores, 521 U.S. 507 (1997)	3
Coleman v. Thompson, 501 U.S. 722 (1991)	3
Flast v. Cohen, 392 U.S. 83 (1968)	3
Henry v. Mississippi, 379 U.S. 443 (1965)	3
Machinists v. Street, 367 U.S. 740 (1961)	3
Missouri v. Holland, 252 U.S. 416 (1920)	3
Roe v. Wade, 410 U.S. 113 (1973)	3
Rowan Cos. v. United States, 452 U.S. 247 (1981)	3
Thermtron Products Inc. v. Hermansdorfer, 423 U.S. 336 (1976)	3
Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)	2
Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990)	2
Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)	2
Burlington Industries Inc. v. Ellerth, 524 U.S. 742 (1998)	2
Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925)	2
Carlson v. Green, 446 U.S. 14 (1980)	2
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986)	2
Cipollone v. Liggett Group Inc., 505 U.S. 504 (1992)	2
County of Allegheny v. ACLU, 492 U.S. 573 (1989)	2
Davis v. Washington, 547 U.S. 813 (2006)	2
Employment Division v. Smith, 494 U.S. 872 (1990)	2
FCC v. Pacifica Foundation, 438 U.S. 726 (1978)	2
FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956)	2
Faretta v. California, 422 U.S. 806 (1975)	2
Geier v. American Honda Motor Co., 529 U.S. 861 (2000)	2
Gottschalk v. Benson, 409 U.S. 63 (1972)	2
Graham v. Collins, 506 U.S. 461 (1993)	2
Grutter v. Bollinger, 539 U.S. 306 (2003)	2
Hans v. Louisiana, 134 U.S. 1 (1890)	2
Harris v. United States, 536 U.S. 545 (2002)	2
Hensley v. Eckerhart, 461 U.S. 424 (1983)	2

Hill v. Colorado, 530 U.S. 703 (2000)	2
Hines v. Davidowitz, 312 U.S. 52 (1941)	2
International Shoe Co. v. Washington, 326 U.S. 310 (1945)	2
J.I. Case Co. v. Borak, 377 U.S. 426 (1964)	2
Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005)	2
Johnson v. Eisentrager, 339 U.S. 763 (1950)	2
Johnson v. Texas, 509 U.S. 350 (1993)	2
Jurek v. Texas, 428 U.S. 262 (1976)	2
Keller v. State Bar of California, 496 U.S. 1 (1990)	2
Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991)	2
Lemon v. Kurtzman, 403 U.S. 602 (1971)	2
Lockett v. Ohio, 438 U.S. 586 (1978)	2
Malley v. Briggs, 475 U.S. 335 (1986)	2
Massachusetts v. EPA, 549 U.S. 497 (2007)	2
McConnell v. FEC, 540 U.S. 93 (2003)	2
McMillan v. Pennsylvania, 477 U.S. 79 (1986)	2
Medtronic Inc. v. Lohr, 518 U.S. 470 (1996)	2
Michigan v. Jackson, 475 U.S. 625 (1986)	2
Monell v. Department of Social Services, 436 U.S. 658 (1978)	2
Morton v. Mancari, 417 U.S. 535 (1974)	2
Murray v. Giarratano, 492 U.S. 1 (1989)	2
National Muffler v. United States, 440 U.S. 472 (1979)	2
Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003)	2
Parker v. Flook, 437 U.S. 584 (1978)	2
Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)	2
Presser v. Illinois, 116 U.S. 252 (1886)	2
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)	2
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	2
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)	2
Roper v. Simmons, 543 U.S. 551 (2005)	2
Saucier v. Katz, 533 U.S. 194 (2001)	2
Slaughter-House Cases, 83 U.S. 36 (1873)	2
Southland Corp. v. Keating, 465 U.S. 1 (1984)	2
Stenberg v. Carhart, 530 U.S. 914 (2000)	2
United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956)	2
United States v. Cruikshank, 92 U.S. 542 (1876)	2
Walz v. Tax Commission, 397 U.S. 664 (1970)	2
Washington v. Seattle School District No. 1, 458 U.S. 457 (1982)	2
Williams v. Taylor, 529 U.S. 362 (2000)	2

Williamson County Regional Planning v. Hamilton Bank, 473 U.S. 172 (1985)	2
AEP v. Connecticut, 2011 U.S. LEXIS 4565 (2009)	1
Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 (1897)	1
Alexander v. Gardner-Denver, 415 U.S. 36 (1974)	1
Alexander v. United States, 201 U.S. 117 (1906)	1
Allegheny Pittsburgh Coal Co. v. County Commission, 488 U.S. 336 (1989)	1
Allied-Signal Inc. v. Director, Division of Taxation, 504 U.S. 768 (1992)	1
Altria Group Inc. v. Good, 555 U.S. 70 (2008)	1
American Airlines v. Wolens, 513 U.S. 219 (1995)	1
American Communications Association v. Douds, 339 U.S. 382 (1950)	1
American Fruit Growers Inc. v. Brogdex Co., 283 U.S. 1 (1931)	1
Anderson's-Black Rock, Inc. v. Pavement Salvage Co., 396 U.S. 57 (1969)	1
Ankenbrandt v. Richards, 504 U.S. 689 (1992)	1
Apprendi v. New Jersey, 530 U.S. 466 (2000)	1
Arizona v. California, 460 U.S. 605 (1983)	1
Arizona v. Rumsey, 467 U.S. 203 (1984)	1
Arkansas Department of Health & Human Services v. Ahlborn, 547 U.S. 268 (2006)	1
Aro Manufacturing Co. v. Convertible Top Replacement Co. (Aro II), 377 U.S. 476 (1964)	1
Asahi Metal v. Superior Court, 480 U.S. 102 (1987)	1
Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)	1
Ashe v. Swenson, 397 U.S. 436 (1970)	1
Associated General Contractors of California Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983)	1
Atwater v. City of Lago Vista, 532 U.S. 318 (2000)	1
Bank of the United States v. Deveaux, 9 U.S. 61 (1809)	1
Board of the County Commissioners v. Brown, 520 U.S. 397 (1997)	1
Bell v. Wolfish, 441 U.S. 520 (1979)	1
Bifulco v. United States, 447 U.S. 381 (1980)	1
Bilski v. Kappos, 561 U.S. 593 (2010)	1
Blakely v. Washington, 542 U.S. 296 (2004)	1
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)	1
Blum v. Stenson, 465 U.S. 886 (1984)	1
Bolling v. Sharpe, 347 U.S. 497 (1954)	1
Bonaparte v. Tax Court, 104 U.S. 592 (1881)	1
Boy Scouts of America v. Dale, 530 U.S. 640 (2000)	1

Boykin v. Alabama, 395 U.S. 238 (1969)	1
Breard v. Greene, 523 U.S. 371 (1998)	1
Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288 (2001)	1
Brewer v. Williams, 430 U.S. 387 (1977)	1
Brinegar v. United States, 338 U.S. 160 (1949)	1
Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)	1
Buchanan v. Kentucky, 483 U.S. 402 (1987)	1
Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011)	1
Burns v. United States, 501 U.S. 129 (1991)	1
Burton v. Stewart, 549 U.S. 147 (2007)	1
Busic v. United States, 446 U.S. 398 (1980)	1
C & A Carbone v. Town of Clarkston, 511 U.S. 383 (1994)	1
California Department of Corrections v. Morales, 514 U.S. 499 (1995)	1
Califano v. Sanders, 430 U.S. 99 (1977)	1
Camps Newfound/Owatonna Inc. v. Town of Harrison, 520 U.S. 564 (1997)	1
Cannon v. University of Chicago, 441 U.S. 677 (1979)	1
Carey v. Musladin, 549 U.S. 70 (2006)	1
Caspari v. Bohlen, 510 U.S. 383 (1994)	1
Central Bank v. First Interstate, 511 U.S. 164 (1994)	1
Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980)	1
Central R.R. Co. of Pa. v. Pennsylvania (1962)	1
Chimel v. California, 395 U.S. 752 (1969)	1
Christian Legal Society v. Martinez, 561 U.S. 661 (2010)	1
Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)	1
Citizen Publishing Co. v. United States, 394 U.S. 131 (1969)	1
City of Milwaukee v. Illinois, 451 U.S. 304 (1981)	1
City of Burlington v. Dague, 505 U.S. 557 (1992)	1
City of Canton v. Harris, 489 U.S. 378 (1989)	1
City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365 (1991)	1
City of Rome v. United States, 446 U.S. 156 (1980)	1
Clemons v. Mississippi, 494 U.S. 738 (1990)	1
Cobbledick v. United States, 309 U.S. 323 (1940)	1
Cochrane v. Deener, 94 U.S. 780 (1877)	1
Coker v. Georgia, 433 U.S. 584 (1977)	1
Colony Inc. v. Commissioner, 357 U.S. 28 (1958)	1
CPERL v. Nyquist, 413 U.S. 756 (1973)	1

Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986)	1
Complete Auto Transit Inc. v. Brady, 430 U.S. 274 (1977)	1
Cone v. West VA Pulp, 330 U.S. 212 (1947)	1
Conley v. Gibson, 355 U.S. 41 (1957)	1
Consolidated Textile Corp. v. Gregory, 289 U.S. 85 (1933)	1
Continental Bag, 210 U.S. 405 (1908)	1
Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)	1
Cress v. United States, 243 U.S. 316 (1917)	1
Cullen v. Pinholster, 2011 U.S. LEXIS 2616 (2011)	1
Davis v. FEC, 554 U.S. 724 (2008)	1
Davis v. Passman, 442 U.S. 228 (1979)	1
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Deakins v. Monaghan, 484 U.S. 193 (1988)	1
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Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980)	1
Doe v. Bolton, 410 U.S. 179 (1973)	1
Dolan v. City of Tigard, 512 U.S. 374 (1994)	1
Dows v. City of Chicago, 78 U.S. 108 (1871)	1
Doyle v. Ohio, 426 U.S. 610 (1976)	1
Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911)	1
Duren v. Missouri, 439 U.S. 357 (1979)	1
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Elkins v. United States, 364 U.S. 206 (1960)	1
Ellis v. Brotherhood, 466 U.S. 435 (1984)	1
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)	1
Ex parte Hennen, 38 U.S. 230 (1839)	1
Ex parte Quirin, 317 U.S. 1 (1942)	1
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FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986)	1
Fidelity Federal Savings v. de la Cuesta, 458 U.S. 141 (1982)	1

Finn v. United States, 123 U.S. 227 (1887)	1
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)	1
Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma, 426 U.S. 776 (1976)	1
Florida v. Meyers, 466 U.S. 380 (1984)	1
Fong Foo v. United States, 369 U.S. 141 (1962)	1
Foster v. California, 394 U.S. 440 (1969)	1
Franks v. Bowman Transp. Co., 424 U.S. 747 (1976)	1
Frew ex rel. Frew v. Hawkins, 540 U.S. 431 (2004)	1
Freytag v. Commissioner, 501 U.S. 868 (1991)	1
Friends of the Earth Inc. v. Laidlaw Environmental Services, 528 U.S. 167 (2000)	1
Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127 (1948)	1
Gaffney v. Cummings, 412 U.S. 735 (1973)	1
Garcetti v. Ceballos, 547 U.S. 410 (2006)	1
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)	1
Garner v. Jones, 529 U.S. 244 (2000)	1
General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982)	1
General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938)	1
Giles v. California, 554 U.S. 353 (2008)	1
Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948)	1
Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989)	1
Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911)	1
Gonzales v. Raich, 545 U.S. 1 (2005)	1
Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975)	1
Grable & Sons Metal Products Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308 (2005)	1
Graham v. Florida, 560 U.S. 48 (2010)	1
Graham v. John Deere Co., 383 U.S. 1 (1966)	1
Granberry v. Greer, 481 U.S. 129 (1987)	1
Granfinanciera v. Nordberg, 492 U.S. 33 (1989)	1
Gratz v. Bollinger, 539 U.S. 244 (2003)	1
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Great-West v. Knudson, 534 U.S. 204 (2002)	1
Green Tree v. Bazzle, 539 U.S. 444 (2003)	1
Griffin v. California, 380 U.S. 609 (1965)	1
Griffith v. Kentucky, 479 U.S. 314 (1987)	1
Gross v. FBL Financial Services Inc., 557 U.S. 167 (2009)	1
Hamdan v. Rumsfeld, 548 U.S. 557 (2006)	1

Harmelin v. Michigan, 501 U.S. 957 (1991)	1
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Hodgson v. Minnesota, 497 U.S. 417 (1990)	1
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Howlett v. Rose, 496 U.S. 356 (1990)	1
Howsam v. Dean Witter Reynolds Inc., 537 U.S. 79 (2002)	1
Humphrey's Executor v. United States, 295 U.S. 602 (1935)	1
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I.N.S. v. Chadha, 462 U.S. 919 (1983)	1
Illinois v. Caballes, 543 U.S. 405 (2005)	1
Illinois v. Gates, 462 U.S. 213 (1983)	1
Imbler v. Pachtman, 424 U.S. 409 (1976)	1
In re Yamashita, 327 U.S. 1 (1946)	1
International Paper Co. v. Ouellette, 479 U.S. 481 (1987)	1
International Salt Co. v. United States, 332 U.S. 392 (1947)	1
Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)	1
Johnson v. New York, 344 U.S. 48 (1952)	1
Kalina v. Fletcher, 522 U.S. 118 (1997)	1
Katz v. United States, 389 U.S. 347 (1967)	1
Katzenbach v. Morgan, 384 U.S. 641 (1966)	1
Kendall v. United States, 107 U.S. 123 (1883)	1
Kepner v. United States, 195 U.S. 100 (1904)	1
Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)	1
Kiowa Tribe v. Manufacturing Technologies, 523 U.S. 751 (1998)	1
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Lane & Bodley Co. v. Locke, 150 U.S. 193 (1893)	1
Lawrence v. Florida, 549 U.S. 327 (2007)	1
Lear v. Adkins, 395 U.S. 653 (1969)	1
Lee v. Weisman, 505 U.S. 577 (1992)	1

Lindh v. Murphy, 521 U.S. 320 (1997)	1
Lisenba v. People of State of California, 314 U.S. 219 (1941)	1
Locke v. Davey, 540 U.S. 712 (2004)	1
Lockyer v. Andrade, 538 U.S. 63 (2003)	1
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)	1
Lynch v. Donnelly, 465 U.S. 668 (1984)	1
MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005)	1
Mabry v. Johnson, 467 U.S. 504 (1984)	1
Madsen v. Women’s Health Center, 512 U.S. 753 (1994)	1
Manson v. Brathwaite, 432 U.S. 98 (1977)	1
Mapp v. Ohio, 367 U.S. 642 (1961)	1
Markham v. Allen, 326 U.S. 490 (1946)	1
Marsh v. Chambers, 463 U.S. 783 (1983)	1
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Maxwell v. Dow, 176 U.S. 581 (1900)	1
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