Explaining the Overruling of U.S. Supreme Court Precedent

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Abstract

The decision to overrule precedent, we argue, results from the justices' pursuit of their policy preferences within intra- and extra-Court constraints. Based on a duration analysis of cases decided from the 1946 through 1995 terms, we show that ideological incongruence between a precedent and a subsequent Court increases the chance of it being overruled. Two legal norms also exert substantive effects, as the Court is less likely to overrule statutory precedents and more likely to overrule precedents that have been previously interpreted negatively by the Court. While certain precedent characteristics also influence this decision, the political environment exerts no such effect. Consequently, one of the principal implications of this research is that legal norms influence Supreme Court decision making.

"Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. . . Nonetheless, we have held that 'any departure from the doctrine of stare decisis demands special justification'"

–Justice Kennedy's majority opinion in Patterson v. McLean Credit Union (1989, 172)

As Justice Kennedy's opinion suggests, the doctrine of stare decisis, by which courts follow the legal precedents articulated in previously decided cases, does not preclude the Supreme Court from overruling a prior case. Yet, as Justice Kennedy also states in his opinion, stare decisis is "'of fundamental importance to the rule of law'" (491 U.S. 164, at 172). Adherence to precedent reportedly serves such goals as clarity, stability, and predictability in the law (Douglas [1949] 1979; Powell 1990; Rasmusen 1994; Stevens 1983), efficiency (Landes and Posner 1976; Stevens 1983), legitimacy (Knight and Epstein 1996; Powell 1990, 286-87; Stevens 1983, 2), and fairness and impartiality (Freed 1996; Padden 1994). Justices and scholars alike argue that for these reasons the Court is loathe to overrule past cases. Between 1946 and 1992, however, the Supreme Court overruled 154 of its prior decisions, for an average of about three overruled decisions each term (Brenner and Spaeth 1995). In this paper, we ask a simple yet important question: What explains why and when the Supreme Court chooses to overrule one of its precedents?

The overruling of a precedent, despite its infrequency, is a significant political and legal

event, most notably because it represents a dramatic form of legal change. Supreme Court opinions set up referents for behavior by providing actors with information necessary to anticipate the consequences of their actions. Adherence to precedent, moreover, facilitates this process by reducing uncertainty and thus allowing individuals to shape their behavior according to stable legal rules. The overruling of a precedent therefore potentially influences social, political, and economic relations as actors alter their behavior based on the new legal rule. For example, Adarand Constructors v. Pena (1995) held in part that courts must apply the strict scrutiny test to analyze federal, as well as state or local, affirmative action programs. In doing so, Adarand overruled Fullilove v. Klutznick (1980) and Metro Broadcasting v. F.C.C. (1990), both of which recommended greater deference to Congress through the use of intermediate scrutiny. The overruling of these two cases possibly caused wide-ranging distributional consequences, as litigants challenge various affirmative action programs and judges analyze them using the new legal rule.

Given this importance, scholars have attempted to explain the overruling of precedent. Prior studies, for instance, argue that the Court overrules precedent as a function of the ideological leanings of the justices (Banks 1992; Brenner and Spaeth 1995; Ulmer 1959). Research also suggests that a variety of legally-relevant factors, such as the legal basis of a precedent (Banks 1992; Brenner and Spaeth 1995), the size of the majority coalition and the presence of separate opinions (Banks 1992; Brenner and Spaeth 1995; Schmidhauser 1962;

Ulmer 1959), the Court's legal treatment of a case (Danelski 1986; Douglas [1949] 1979; Ulmer 1959), and the age of a precedent (Landes and Posner 1976; Ulmer 1959), affect whether an opinion will be overruled.

While past work helps us to understand why the Court overrules precedent, we build on this body of research in three distinct ways. First, we adopt a theoretical orientation that synthesizes prevailing hypotheses into a more unified framework. Our argument, simply put, is that justices pursue their policy preferences within a variety of intra- and extra-Court constraints. The decision to overrule a case thus depends both on a subsequent Court's ideological agreement with a precedent and the Court's decision-making context. Second, we test our hypotheses using data on virtually all Supreme Court cases decided between the 1946 and 1995 terms (we subsequently refer to each of these cases as a precedent). Our research design therefore overcomes the selection bias inherent in nearly all previous studies, since they tend to examine only overruled cases without comparing them to non-overruled cases. Third, past research has not developed a multivariate model explaining why precedents are overruled. Our understanding of the overruling of precedent is therefore incomplete, since at present we cannot determine the relative importance of various explanatory factors. Our analysis shows that the Court's decision to overrule a precedent is partially based on ideological grounds but is also substantially influenced by both legal norms and certain attributes of precedents.

Explaining the Overruling of Precedent

We argue, as do most judicial scholars, that justices are primarily driven by their policy preferences (Segal and Spaeth 1993). However, the literature has also long suggested that justices are constrained in their pursuit of this goal (see Murphy 1964; Schubert 1959; Ulmer 1971). That is, justices attempt to establish legal policy as close as possible to their preferred outcomes, while recognizing that the decision-making context constrains their available alternatives (Maltzman, Spriggs, and Wahlbeck 2000).

The constraints on justices' decisions often take the form of formal or informal rules which limit the choices available to actors (see Knight 1992). To produce Court outcomes that are both as close as possible to their preferences and that have long-lived impact, justices must understand the consequences of their choices. Such rules impact decision makers by influencing beliefs about the consequences of their actions. Informal rules, such as stare decisis, or formal arrangements, such as the Constitution's separation of powers, possibly influence the Court by signaling the short- and long-term implications of alternative decisions. To capture the influence of such forces on the decision to overrule a case, we examine three formal or informal rules: the legal basis of a precedent, the Court's legal treatment of precedents over time, and the Constitution's separation of powers. In addition, we suggest that several characteristics of precedents influence how decision makers interpret and implement them and thus affect whether they are ultimately overruled. Case characteristics, as discussed below, influence decision

makers' beliefs about the propriety or utility of disregarding a previously decided case (Johnson 1987; Spriggs 1996). After outlining the role of policy preferences, we turn to a discussion of each of these constraints.

The first and most obvious factor affecting the Court's decision to overrule a precedent is the ideological compatibility of the Court with the precedent. Decades of judicial research demonstrate an undeniable causal connection between the justices' ideological orientations and their votes (see Segal and Spaeth 1993). Scholars also provide some evidence that the Court's decision to overrule a case depends on the justices' attitudes. Brenner and Spaeth (1995), for example, conclude that the overruling of precedent occurs in large measure due to the changing ideological orientation of the Supreme Court over time (see also Banks 1992). Even Supreme Court justices admit (and sometimes lament) that policy preferences matter. Thurgood Marshall's dissent in Payne v. Tennessee (1991, 850) criticized the majority for overruling Booth v. Maryland (1987) and South Carolina v. Gathers (1989) based on ideological reasons: "It takes little detective work to discern just what has changed in Booth and Gathers: this Court's own personnel." Marshall, of course, was referring to Justice Kennedy's and Souter's replacement of, respectively, Powell and Brennan between the time when the Court decided and subsequently overruled the two precedents. Since justices make decisions based on their policy preferences, we expect:

> Hypothesis 1: The greater the ideological disparity between a precedent and a subsequent Court the more likely the precedent will be overruled.

In addition to acting on their policy preferences, justices on the Court respond to constraints imposed by formal or informal rules. The Court, first of all, can not realistically overrule all prior decisions with which it disagrees. To do so could quite possibly undermine the Court's authority and legitimacy and thus reduce the impact of its opinions (see Gibson, Caldeira, and Baird 1998; Knight and Epstein 1996; Mondak 1994). The Court may also feel bound to follow precedent so that its decisions are respected by future Courts (Rasmusen 1994). By changing law incrementally and, at some level heeding precedent, the Court maximizes the probability of its opinions having greater impact. In this sense, stare decisis may constitute a self-enforcing norm resulting from the justices' desire to write efficacious legal doctrine. In sum, the overuse of the power to overrule precedent can erode the legitimacy of the Court and undermine the impact of its opinions. For this reason, we argue that justices abide by a set of informal norms regarding the limited appropriate context for the overruling of precedent.

One of the most frequently cited constraints on the Court's ability to overrule a case is the legal basis for the Court's decision (Freed 1996, 1770-1771; Levi 1949, 6-7; Maltz 1988, 388; Rehnquist 1986, 350). Justices often state that an informal Court rule constrains their ability to overrule an opinion if it was based on statutory, rather than constitutional, interpretation (Ginsburg 1990, 144-145; Scalia 1994, 38; Payne v. Tennessee 1991, 828). According to Justice Powell (1990, 287): "The idea has long been advanced that stare decisis should operate with special vigor in statutory cases because Congress has the power to pass new legislation correcting

any statutory decision by the Court that Congress deems erroneous." The traditional justification for this informal rule is that Congress can alter an incorrectly interpreted statute by amending it. Revisions of a constitutional decision, however, generally require a constitutional amendment, and thus for most practical purposes only the Court can change a piece of constitutional doctrine. Consequently, if the legislature does not alter the Court's interpretation of a statute, and thus silently acquiesces to it, this informal norm asserts the precedent should not be overruled. Brenner and Spaeth (1995, 32, 47), Banks (1992, 1999), and Padden (1994) provide some empirical support for this claim. Given this informal norm regarding statutory versus constitutional interpretation, we expect:

> Hypothesis 2: A precedent is less likely to be overruled if it was based on statutory, rather than constitutional, interpretation.

The traditional view of the overruling of precedent, moreover, is that it is causally linked to past Supreme Court treatments of the precedent (Ball 1978; Ulmer 1959). The Court's reliance on a precedent to justify subsequent decisions (i.e., positive treatment) should institutionalize a precedent and reduce the likelihood of it being overruled in the future. Ulmer (1959), for example, concludes that if opinions were previously followed at least two times then they were less likely to be overruled. Wahlbeck (1997) shows that the probability of restrictive legal change decreases when the Court had ruled consistently in the past. We further expect that the Court's prior negative treatment of a precedent makes it less costly for the Court to overrule it. It does so by influencing the justices' beliefs about the likely impact that the overruling of

precedent will have on the legitimacy and ultimate impact of the Court's opinions. Conventional wisdom, for example, suggests that the Court is more likely to overrule a precedent that has been gradually undermined by being negatively interpreted in a series of cases. According to Justice Douglas: "Commonly the change extended over a long period; the erosion of a precedent was gradual. The overruling did not effect an abrupt change in the law; it rather recognized a fait accompli" (Douglas [1949] 1979, 524). Based on our expectation that the overruling of a precedent depends in part on the Court's past interpretations of that case:

> Hypothesis 3a: The more often the Court has treated a precedent positively (i.e., expressly followed the precedent), the less likely the precedent will be overruled.
>
> Hypothesis 3b: The more often the Court has treated a precedent negatively (e.g., by distinguishing or limiting it), the more likely the precedent will be overruled.

The third relevant institutional rule is the American political system's reliance on separation of powers and checks and balances. These formal rules provide the broader political environment with the potential to constrain the Court and thus create a context in which the Court's behavior may be dependent on the actions of the elected branches of government. Congress, in particular, possesses a variety of tools that can be used in response to a Court opinion (see Eskridge 1991). For this reason, scholars commonly argue that the Court acts strategically to prevent negative responses from Congress. That is, while the Court makes decisions and writes opinions as close as possible to its true preferences, it must also anticipate and preemptively defuse possible congressional and presidential responses (Hansford and

Damore 2000; Spiller and Gely 1992; cf. Segal 1997). The Court may thus consider Congress' and the President's agreement with a precedent in deciding whether to overrule it. Thus, we expect:

> Hypothesis 4: The closer ideologically the prevailing political environment is to the precedent the less likely the precedent will be overruled.

Certain precedent characteristics are also likely to play a role in the overruling of precedent. As previously stated, Court opinions can be viewed as formal rules that structure decision making by setting up referents for behavior. The Court's decisions therefore affect decision makers (including, for instance, judges, bureaucracies, etc.) by providing information about the consequences of alternative choices and by signaling sanctions for departing from past legal interpretations (see Spriggs 1996). In short, Court opinions help solve information problems and thus allow social actors to generate expectations about both the consequences of their behavior and the Court's possible responses to specific legal questions.

Opinions, however, vary in their capacity to instruct decision makers about the consequences of their choices. Characteristics of precedents matter because they influenc the persuasiveness and efficacy of the legal rules contained in the opinions.[1] Cases that, for example, are saddled with uncertainty and criticism from within the Court may prove to be less robust. Thus, just as characteristics of Court opinions influence how federal bureaucracies (Spriggs 1996, 1997) or lower court judges (Johnson 1979, 1987) implement Court opinions, they may also affect how future justices react to opinions (Johnson 1986).

The most important opinion characteristic conditioning the information conveyed by a Court opinion is its voting and opinion coalitions. Non-consensus in a case signifies that the decision is weak in some respect (Brenner and Spaeth 1995, 46) and affects how future decision makers view the viability of an opinion. If the justices did not strongly support an opinion then actors are less likely to perceive the Court as credibly committed to the legal rule. This diminished expectation results because the presence of small majority voting coalitions or the existence of separate opinions leads to reduced compliance and an increased possibility of future legal change (Danelski 1986; Johnson 1979, 1987). Separate opinions, for example, suggest alternative ways to interpret the majority opinion. The size of the majority coalition also signals the potential of noncompliance and the possibility of the Court dealing with the issue differently in the future (Murphy 1964, 66). In justifying the overruling of both Booth (1987) and Gathers (1989) in Payne v. Tennessee, Justice Rehnquist suggests the Court is more apt to overrule a case decided "by the narrowest of margins" (501 U.S. 808, at 829). Given that smaller coalitions and separate opinions cast doubt on an opinion and lead to an increased possibility of future legal change, we argue that:

> Hypothesis 5a: A precedent is more likely to be overruled if the precedent's supporting decision coalition consisted of a bare majority of justices.
>
> Hypothesis 5b: A precedent is less likely to be overruled if its decision coalition was unanimous in size.
>
> Hypothesis 6: The larger the number of concurring opinions that were published with a precedent the greater the chance it will be overruled.

Data and Methods

To test our hypotheses, we gathered data for all orally argued Supreme Court cases decided during the 1946-95 terms that resulted in a full opinion, per curiam opinion, or judgment of the Court (n = 5,971).[2] Each of these cases constitutes a precedent in our analysis. To determine whether and when each precedent was subsequently overruled by the Court, we primarily relied on Brenner and Spaeth's (1995) list of overruled cases from 1946-92. We updated this list by applying Brenner and Spaeth's coding rules to the overruled precedents in Spaeth (1995, 1997), the Congressional Research Service's The Constitution of the United States of America, Analysis and Interpretation (Epstein et al. 1996, Table 2-14), and Shepard's Citations. This approach produced a total of 97 cases that the Supreme Court decided and overruled between the 1946 and 1995 terms. For further detail on the process by which we identified overruled precedents, see the Appendix.

The observed dependent variable in our analysis is the length of time, in years, that a precedent set by a Court decision lasts or "survives" before being overruled by a subsequent Court. In this analysis, time "starts" the year that the precedent was decided and "ends" the year that the case was overruled. The minimum survival time in our data set is one year, while the maximum survival time for a case that was overruled during the span of our data is 40 years. Our data set is constructed as follows. Each case (i.e., precedent) in our data set is decided at time t_0. We include an observation on this case for each subsequent year (t_1, t_2, …, t_j … , t_{exit})

until the case is either overruled or has survived unscathed until the end of the 1995 term. The data then include a dummy variable for each observation indicating whether the case is overruled that year.

Given the nature of our theory and data, we employ a duration model to test our hypotheses. Duration models allow a researcher to examine and explain the manifestation and timing of events (Allison 1995; Box-Steffensmeier and Jones 1997; Yamaguchi 1991). Restated in more technical terms, the dependent variable in a duration model is the hazard rate, or the instantaneous risk that an event will occur at time t, conditional on the event not having occurred prior to time t.[3] For the purposes of our analysis, the hazard rate is the instantaneous risk that a case will be overruled in a particular year, given that it has not been overruled previously. Essentially, this method allows us to examine, year by year, how at risk a case is of being overruled.

Duration models possess two specific features that are particularly attractive for the analysis of the overruling of precedent. First, duration models are well suited for examining how changing context influences the timing and sequence of events. Over time, the Court's decision context changes. Duration models allow for the inclusion of time-varying independent variables which can capture the influence of these changes. We can therefore directly test, for instance, whether shifts in the Court's ideology or alterations in the Court's interpretation of a precedent affect the Court's decision to overrule a case.

The second central advantage duration models offer for this study is their ability to handle censored data and thus prevent bias in the estimated effects of the independent variables or loss of important information (Yamaguchi 1991). One of the methodological problems with past research is that it has not adequately dealt with the inevitable right-censoring associated with the study of precedent over time. Previously, researchers have had to choose between falling into the selection bias trap of examining only cases which have been overruled or assuming that cases that have not been overruled will not be overruled in the future. Since a duration model can handle right-censored data, our data contain both overruled and non-overruled cases.

For the above reasons, we chose to employ duration analysis to investigate the overruling of precedent. From the family of duration models, we selected the Cox proportional hazards model and estimated it with robust standard errors. This robust estimation technique corrects for any correlation of errors that might occur between multiple observations on a particular precedent (at times $\underline{t}_1, \underline{t}_2, \ldots, \underline{t}_{exit}$).[4]

Since most cases in our analysis were not overruled by 1995, a large portion of our data consist of right-censored observations. The principal issue with which to be concerned when facing such a high rate of censoring is whether the censoring is "informative" (Allison 1995).[5] Given the nature of our data, the best way to both ascertain the existence and to mitigate the impact of informative censoring is to include a variable for the "start" time of a case (i.e., the time the precedent was decided). Thus, we included a series of dummy variables to capture the

effect of start time. More specifically, we included a dummy variable representing the decade in which the precedent was decided (excluding one for the 1940s). Thus, a precedent decided in 1954 will have a value of one on the 1950s dummy variable.[6]

Independent Variables

Ideological Distance. To generate a measure of the ideological distance between a precedent and the Court in each subsequent year, we took the absolute value of the difference between the median ideological score of the justices in the majority coalition for a case of precedent and the median ideological score of the justices on the Court in each subsequent year. As a measure of individual justice ideology, we used the percentage of the time the justice voted for the liberal outcome over his or her entire Court career in each of Spaeth's (1995, 1997) 12 value areas (e.g., civil rights, First Amendment, etc.) (see Epstein et al. 1996, Table 6-2).[7] For cases in which Spaeth includes two value areas, we averaged the justices' scores across both.

Statutory Issue. To test the difference between statutory and constitutional cases, we created three variables from Spaeth (1995, 1997). ***Statutory Issue*** assumes the value of one if the precedent decided a statutory issue and zero otherwise. We also created two other dichotomous variables--the first is coded as one if the precedent was based on a constitutional issue (otherwise zero), and the second, ***Other Issue***, takes on the value of one (otherwise zero) if the precedent had neither a constitutional nor a statutory basis (e.g., supervisory authority over

lower courts). Our model includes both the ***Statutory Issue*** and the ***Other Issue*** variables, using constitutional interpretation as the baseline category.

Positive Treatment. To determine the number of times that a Supreme Court precedent has been used in a positive manner in subsequent Supreme Court majority opinions, we used Shepard's Citations via Lexis and Westlaw, two on-line legal services. Shepard's Citations is a widely-used legal resource that reports citations of Supreme Court decisions in subsequent opinions, categorizing them according to the substantive treatment of the precedent. A variety of past judicial research has employed Shepard's Citations to generate the progeny of a precedent (see Brenner and Stier 1996; Johnson 1979; Kemper 1998; Spaeth and Segal 1999). Shepard's contains two coding categories--"followed" and "parallel"--that represent a positive treatment of precedent. Thus, ***Positive Treatment***, at time t, is measured as the total number of times that the precedent has been "followed" or "paralled" by subsequent majority opinions up until and including time t.[8] To ensure that Shepard's coding of these treatments is reliable, we conducted an intercoder reliability analysis, finding that, as used here, the data are reliable.[9]

Negative Treatment. We measured this variable in the same fashion as ***Positive Treatment***. Here, however, we counted each time a subsequent majority opinion "distinguishes," "questions," "criticizes," or "limits" the precedent. These are the treatment categories that Shepard's Citations labels as negative.

Minimum Winning Coalition. This variable has a value of one when the number of

justices in the majority voting coalition of the precedent exceeded those in the minority by only one, and zero otherwise. For example, if the precedent was decided 5-4, then this variable equals one. These data were derived from Spaeth (1995, 1997).

Unanimous Coalition. From Spaeth (1995, 1997), we coded this variable as one if all participating justices who decided the precedent joined the majority voting coalition. Otherwise, this variable was coded zero.

Concurring Opinions. We measured this variable as the number of concurring opinions accompanying the precedent, as taken from Spaeth (1995, 1997).

Political Environment. To measure this variable, we developed a "zone of acquiescence" for each year in the data set. First, we placed the president, House, Senate, and majority coalition of the precedent on a unidimensional ideological scale ranging from zero (most conservative) to 100 (most liberal). We used W-Nominate scores (Poole and Rosenthal 1997) for the president, House (Judiciary Committee median), and Senate (Judiciary Committee median),[10] and for the Court we used the measure of median majority coalition ideology described above. Next, we determined the ideal points of the president, House, and Senate for each year and established which actor was the most conservative and which was the most liberal (relatively speaking). If the median ideology of the majority coalition of the precedent fell within the zone of acquiescence, as bounded by the most conservative and most liberal governmental actors, then this variable equals zero. If the majority coalition falls outside of this zone, then it

equals the absolute value of the ideological score of the governmental actor closest to the coalition minus the median ideology of the opinion coalition.[11]

We also included two control variables. First, we used ***Remaining Justices*** to capture any non-ideological effect of membership changes on the Court. Specifically, we measured ***Remaining Justices*** as the number of justices from the Court that set the precedent in question who then remain on the Court in subsequent years. Since we include a variable for changes in the Court's ideology over time (***Ideological Distance***), ***Remaining Justices*** captures any remaining non-ideological influence in membership turnover. Second, we control for the legal complexity of a precedent. Since complex cases involve several legal issues and multiple statutory or constitutional provisions, there are a variety of bases on which future Courts might revisit the case. Thus, legally complex cases may be at greater risk of being overruled. We measure ***Legal Complexity*** based on a factor analysis of two indicators of complexity, both derived from Spaeth (1995, 1997): number of issues raised by the case and number of legal provisions involved. We used the factor score of a case as the measure of legal complexity (see Wahlbeck, Spriggs, and Maltzman 1998).[12]

Functionally speaking, our independent variables can be grouped into two categories: time-constant and time-varying. ***Statutory Issue***, ***Other Issue***, ***Minimum Winning Coalition***, ***Unanimous Coalition***, ***Concurring Opinions***, and ***Legal Complexity*** are all time-constant in that their value does not change over time for a particular precedent. The values of the remaining

variables--***Ideological Distance***, ***Positive Treatment***, ***Negative Treatment***, ***Remaining Justices***, and ***Political Environment***--can change from year to year for a precedent and thus are time-varying.

Results

We present the results of the Cox regression in Table 1. The data analysis generally supports our theoretical claim that the overruling of precedent results from both the justices' pursuit of their policy preferences and the decision making context. The chi-squared statistic is highly significant, indicating that we can reject the null hypothesis that our independent variables jointly have no effect. More importantly, the estimated coefficients for the independent variables largely conform to our expectations. First, the coefficient for ***Ideological Distance*** is positive and statistically significant, showing that the greater the ideological distance between a precedent decided at time t_0 and a subsequent Court at time t_j, the greater the hazard of the precedent being overruled at time t_j. By exponentiating this coefficient, we obtain a corresponding hazard ratio of 1.044. This means that a one-unit increase in ***Ideological Distance*** increases the hazard of a case being overruled by 4.4%. We will further discuss the size of this effect shortly.

Table 1 Here

In addition to the influence of the Court's ideological agreement with a precedent, legal norms also wield a significant impact on the risk of a case being overruled in a given year. The

estimate for ***Statutory Issue***, as we expected, is negative and statistically significant, indicating that the Court is influenced by a legal norm granting less discretion to overrule statutory precedents.[13] Cases decided on a statutory, rather than constitutional, basis are thus less likely to be overruled in the future. More specifically, the hazard ratio reveals that the risk of a statutory case being overruled in any one year is 48.2% smaller than that of a constitutional case.

The results for our second legal norm, the influence of the Court's legal treatment of a precedent, are somewhat mixed. The coefficient for ***Positive Treatment*** is in the predicted direction but is quite small and does not approach conventional levels of statistical significance. ***Negative Treatment***, on the other hand, does appear to exert a substantial effect on the risk of a precedent being overruled. For each time a precedent has been treated negatively by the Court in the past, the hazard of that precedent being overruled in a given year increases by 57.4%. This result suggests that while a precedent may not be bolstered much by subsequent positive treatments by the Court, it can be weakened through being distinguished, limited, and the like.[14]

We further argued that one formal rule--the Constitution's separation of powers--would also affect the Court's decision to overrule a case. The data, however, do not support the existence of a separation-of-powers constraint as the coefficient for ***Political Environment*** is not in the predicted direction. This formal rule thus appears not to systematically influence the Court's decision to overrule a case.[15]

Specific case characteristics, we have suggested, also matter because of their influence on

the way that opinions are interpreted and thus implemented. Our results provide substantial support for our claim that the nature of the voting and opinion coalitions in precedents affects their risk of being overruled. This effect occurs because non-consensus lowers the credibility of an opinion and signals the possibility of future legal change. Cases decided with minimum winning coalitions are thus more likely to be overruled, while cases decided by unanimous decision coalitions have a smaller risk of being rejected by future Courts. More specifically, a minimum winning coalition increases the risk of an overrule by 53.6% and a unanimous coalition decreases it by 46.9%. In addition, cases with a larger number of concurring opinions are more likely to be overruled in the future. For each additional concurrence, the hazard of the case being overruled increases by 22.4%. As with the size of the precedent's majority coalition, concurrences lower the credibility of a precedent and, moreover, offer alternative legal rationales. In addition, our control variable for the legally complexity of precedents shows that legally complex cases are more at risk to be overruled. Finally, the baseline hazard, while nearly flat, does exhibit a very slight decrease as a case ages. This result is thus somewhat consistent with Landes and Posner (1976) and Scalia's (South Carolina v. Gathers 1989, 824) argument that older precedents are less likely to be overruled.[16]

While the coefficients and hazard ratios presented in Table 1 provide much useful information, the substantive meaning of our results may need further explanation. For the average case decided in the 1940s, the risk of being overruled is small for all subsequent years.

In the 25th year of its existence, for example, the hazard of an average case (a case in which all variables equal their mean or modal values) being overruled by the Court is .000356 (equivalent to a .0356% chance of being overruled in this year). This result should not be surprising, as most cases are at a very low risk of being overruled.

It is not until several factors are present that the hazard of a case being overruled becomes substantial. To illustrate this point, we graph in Figure 1 the survival functions for three hypothetical cases decided in the 1940s. The survival function is directly related to the hazard function and it represents the probability of a case surviving beyond a given time *t*. Survival curve "A" represents the survival function of an average precedent in which our independent variables are set at their mean values. This curve shows that the average precedent is at little risk of being overruled and will likely survive a very long time. Survival curve "B" represents the survival function of a constitutional case that was decided by a minimum winning coalition. In addition, for this hypothetical case the Court becomes slowly more ideologically distant from the precedent as time progresses. Specifically, the measure of ***Ideological Distance*** increases from 0 (its minimum value) to 55.85 (its maximum value) over the case's "life." Thus, when this precedent is 50 years old, the Court is very ideologically distant from this case. Curve "B" indicates that this hypothetical case is substantially less likely to survive beyond year 50 than the average precedent represented in curve "A." By year 50, there is a 77.9% probability that precedent "B" will survive, as opposed to 97.1% for case "A."

Insert Figure 1 Here

The final curve, that for hypothetical case "C," also represents the survival of a case that is constitutional and was decided by a minimum winning coalition. Unlike case "B," however, there is no increase in ***Ideological Distance*** over time for this case. Instead, the cumulative number of negative treatments increases from zero to 10, with a negative treatment occurring every five years. Curve "C" illustrates the dramatic effect of ***Negative Treatment*** on the likelihood of a case surviving over time. Case "C' has only a 19.6% chance of surviving beyond year 50. The only difference between case "B" and "C" is that in the former the variable ***Ideological Distance*** approaches its maximum value found in our data (55.85) while in the latter ***Negative Treatment*** approaches its maximum value (11). Thus, Figure 1 allows for some comparison as to the relative importance of the effects of these two variables. Clearly, increasing prior negative treatment has a greater impact on the survival of a precedent than increasing ideological distance.

In sum, further examination of the results of our duration model provides some interesting information. To start, the likelihood of an average case being overruled by the Court is small. Indeed, even when one or two of the factors associated with the overruling of precedent are present, the risk of a case being overruled is still relatively small. However, the likelihood of a case being overruled becomes increasingly substantial when many of the relevant characteristics are present.[17] The greatest effect on the risk of a case being overruled is the extent

to which the case has been treated negatively by subsequent Courts. Interestingly, and counter to prior research, our model clearly indicates that negative treatment matters more than ideological distance. Indeed, ideological distance, while exerting a statistically significant effect on the hazard of a case being overruled, does not have a particularly large substantive effect.

Conclusion

What explains why and when the Supreme Court overrules one of its precedents? We argue that this decision results from the justices pursuit of their policy preferences within constraints imposed by legal norms, certain characteristics of precedents, and the Constitution's separation of powers. Our duration model of the overruling of Supreme Court cases supports our general theoretical claim. As expected, a precedent is more likely to be overruled when it is ideologically incongruent with the preferences of a subsequent Court. This result indicates that, for example, liberal precedents are more likely to be overruled by more conservative Courts.

In addition, our results have important implications for the role of legal norms at the Court. While scholars debate their influence at both a theoretical and empirical level (e.g., Spaeth and Segal 1999; Knight and Epstein 1996; Brenner and Stier 1996; Songer and Lindquist 1996), we show that the Court's choice to overrule a case is constrained by two informal legal rules. The Court, we find, follows an informal norm regarding statutory, as opposed to constitutional, interpretation, and cases based on the former are therefore less likely to fall.

Second, the norm of stare decisis, as operating through prior legal treatment, influences the Court. A precedent is at greater risk of being overruled if the Court previously interpreted it in a negative manner. In addition, particular characteristics of precedents affect the overruling of precedent by helping structure how justices subsequently interpret and implement opinions. Thus, the greater the consensus and clarity of a precedent, as seen in its voting and opinion coalitions, the less likely it will be overruled. The Court, however, appears not to respond to any potential separation-of-powers constraint.

In conclusion, our analysis indicates that Supreme Court justices are constrained decision makers. Justices are motivated by their policy preferences, but when deciding to overrule cases they are also constrained by both informal norms and specific precedent characteristics. Indeed, our empirical results indicate that legal norms exert a stronger substantive influence on the overruling of precedent than the justices' policy preferences. Thus, one of the principal implications of this research is that legal norms can exert considerable influence on Supreme Court decision making.

Appendix: Dependent Variable Data Sources

To obtain our list of overruled cases, we started by examining the list provided by Brenner and Spaeth (1995). We used this list because it is the most reliable and comprehensive source of information on overruled precedents and because it provides an explicit set of coding rules (see Brenner and Spaeth 1995, 18-22).[18] In brief, Brenner and Spaeth consider a precedent overruled if the overruling cases's majority (or plurality) opinion specifically states it is overruling the precedent. From this list, we identified all overruled cases that were decided in or after the 1946 term. This approach yielded 84 cases. The Brenner and Spaeth data only extend to 1992 and thus it was necessary to locate cases overruled after 1992. To do so, we generated a list of overruled precedents from three other data sources that extend beyond 1992: the Congressional Research Service's The Constitution of the United States of America, Analysis and Interpretation (Epstein et al.1996, Table 2-14), Spaeth (1997), and Shepard's Citations. We then read the opinions of the cases that were identified as overruling the precedent and applied the coding rules of Brenner and Spaeth (1995). From the list of cases, we located nine additional overruled cases that satisfied the criteria (case in parentheses is the overruling case): 384 U.S. 503 (514 U.S. 695), 430 U.S. 817 (518 U.S. 343), 404 U.S. 97 (509 U.S. 86), 446 U.S. 222 (511 U.S. 738), 462 U.S. 393 (512 U.S. 267), 491 U.S. 1 (517 U.S. 44), 495 U.S. 508 (509 U.S. 688), 497 U.S. 547 (515 U.S. 200), 448 U.S. 448 (515 U.S. 200).

We then compared the lists of overruled cases provided by the Congressional Research

Service (Epstein 1996, Table 2-14), Spaeth (1995, 1997), and *Shepard's Citations* that occurred prior to 1992 with the list provided by Brenner and Spaeth (1995). From these three alternative data sources, we identified nine potential cases that had not been included in Brenner and Spaeth (1995). Again following Brenner and Spaeth's coding procedures, we read the majority opinions of the cases that were purported to overrule the precedent. From the cases identified by the other sources, we located three that met the Brenner and Spaeth definition of an overruled case (case in parentheses is overruling case): 386 U.S. 753 (504 U.S. 298), 463 U.S. 277 (501 U.S. 957), and 500 U.S. 391 (502 U.S. 62). Additionally, Brenner and Spaeth (1995, 21) identified 341 U.S. 651 as being overruled by 403 U.S. 88, but they excluded it from their appendix since the overruling case identifying it as being overruled fell outside the time frame of their study. We included this case in our data. Thus, we added a total of 13 cases to the Brenner and Spaeth list of overruled cases--nine that occurred after 1992, one that technically fell outside the time frame of their coding rules, and three that apparently were mistakenly omitted. Finally, there are five cases in our data set that, according to the above sources, have been overruled more than once. For these cases, we considered the case to be overruled and, thus to have exited the data set, after it had been overruled the first time.

Endnotes

[1]It is important to recognize that case characteristics do not themselves constitute informal rules. Rather, they influence the content and persuasiveness of the legal precedent (which is a formal rule) contained in the Court's opinions.

[2]For our analysis it is necessary to drop the few cases for which Spaeth (1995, 1997) assigns no ideological direction. Since a duration model will not permit a duration of length zero, we must also drop all cases decided in the 1996 calendar year.

[3]The hazard of an event occurring is loosely analogous to the probability of an event occurring. The main difference is that a hazard rate, unlike a probability, does not have an upper bound of 1.

[4]We used the "stcox" command in Stata 6.0 to estimate the model, using the Breslow method for tied failures. We are confident that ties are not influencing our results because our estimates and standard errors are extremely stable if we instead use either the Weibull or a discrete time logit model, each of which is unaffected by ties.

[5]In our case, informative censoring--which can bias parameter estimates--would be present if the cases that are censored, after controlling for the effects of the independent variables, have a different hazard rate than the cases that are uncensored. Essentially, the question is whether recent cases of precedent, which are much more likely to be censored because they have not been at risk for long, have different hazard rates than the cases decided further in the past.

[6]Duration models tend to be robust even when the data manifest a high rate of censoring,

especially when the sample size is large (Tuma and Hannan 1984). When there is a high degree of censoring, the parameter estimates tend to remain highly accurate, although the size of the standard errors increases (Tuma and Hannan 1984). We should note that Tuma and Hannan's results are based on at most a 90 percent censoring rate, which is lower than the rate in our data.

We also performed a diagnostic to ensure that censoring was not influencing our statistical results. Specifically, we used a statistical estimator developed by King and Zeng (1999) and Tomz, King, and Zeng (1999) that controls for possible bias in both estimates and standard errors introduced by skewed binary dependent variables. The results in Table 1 are extremely similar to those produced by their estimator. Thus, we conclude that censoring has little influence on our data analysis.

[7]While not perfect, we think this measure is the best available proxy for ideological distance. In this context, we prefer our measure to the most obvious alternative, a measure developed by Segal and Cover (1989), for the reasons stated in Epstein and Mershon (1996). What is more, the ideological direction of a case outcome is not equivalent to the decision to overrule precedent and thus is reasonably exogenous.

[8]We, of course, excluded any case in our count decided on or after the day the case overruling a precedent was decided. We also did not double count a progeny case if it includes more than one positive cite to the precedent. If, however, an opinion uses the precedent in more than one way (i.e., both positively and negatively), then we counted both treatment types in their respective

categories.

[9]See Spriggs and Hansford (2000) for an empirical analysis of the reliability and validity of Shepard's Citations.

[10]W-Nominate scores are a valid and reliable measure of congressional preferences created by scaling nearly all Congressional roll call votes (Poole and Rosenthal 1997). Research indicates that Nominate scores contain little measurement error, especially as compared to interest group ratings (e.g., ADA scores) (Poole and Rosenthal 1997, 186-187; Snyder 1992)

W-Nominate scores for presidents only go as far back as Eisenhower. We therefore found it necessary to predict a score for Truman by regressing the Nominate scores onto an alternative measure of presidential ideology presented by Zupan (1992), which includes data for Truman. The resulting regression equation is used to predict the W-Nominate score for Truman. We prefer not to simply use the Zupan score as our final measure because, unlike the W-Nominate scores for presidents, it is not intended to be directly comparable with the W-Nominate scores for the House and Senate.

[11]While our measure of Court ideology is not perfectly analogous to the W-Nominate scores, we think it is the best option for two reasons. First, the distributions of the measures are quite comparable and the means are similar. The mean of the House Judiciary Committee is 52.96, the Senate Judiciary Committee is 50.58, the President is 50.54, and the Court is 50.47. While not conclusively showing that these measures are comparable, it is encouraging to see that the

average ideology of the Court's precedents is centered near the same point on the ideological continuum as the ideological positions of the other branches of government. Second, our measure is reasonably consistent with that employed in the most recent published research on the separation-of-powers (Segal 1997; Hansford and Damore 2000).

[12]Various justices (Stevens 1983, 2; 501 U.S. 808, at 827-28) and scholars (Rehnquist 1986, 347; Banks 1999) suggest that the Court is less likely to overrule cases involving economic issues because decision makers must rely on them in structuring their decisions. As we make clear, all Court opinions, as formal rules, set up referents for behavior and thus reduce uncertainty. Therefore, we theoretically expect the Court's opinions to have such an effect in <u>all</u> issue areas, not just property, contracts, and the like.

[13]It is conceivable that the Court is less likely to overrule a statutory case because Congress already has. We investigated this possibility by running our model after having censored any case in the year it was overturned by Congress. We obtained data for congressional overrides from 1960-95 (see Eskridge 1991; Hansford and Damore 2000) and thus we estimated our model on this time span. We find that the empirical results are virtually unchanged when one censors these cases, as opposed to not censoring them, for this time period.

[14]One might conjecture that prior legal treatment is endogenous with the decision to overrule a case. More specifically, there are two ways in which negative legal treatment might be endogenous. First, the Court could negatively treat a precedent that it wants to overrule. The

Court could then overrule the case a year or so after treating it negatively. Theoretically, we see no reason why the Court would feel obliged to negatively treat a case that it wishes to overrule. Empirically speaking, this type of endogeneity suggests that negative treatment of precedents should occur shortly before the overrule. The data do not support this as the average negative treatment (for a case that is subsequently overruled) occurs 61.5% of the way through the precedent's life span. The timing of negative treatments thus does not fully comply with the expectation surrounding this type of endogeneity.

The second type of endogeneity would exist if negative treatment occurs as the Court becomes ideologically removed from a precedent, but the Court is not so ideologically distant that it overrules the case yet. Thus, the presence of negative treatments would be a by-product of the increasing ideological distance and not a cause of the overrule. To this, we respond that it is likely that ideological distance between the current Court and the precedent increases the likelihood of negative treatment. The question is, does negative treatment exert an independent effect on subsequent decisions to overrule? From a theoretical standpoint, we argue that negative treatment has an independent effect on the likelihood of the precedent being overruled. We also note that some of the overruled precedents were not preceded by negative treatments. This implies that it is not a given that the Court will negatively treat a case on the way to becoming ideologically distant enough to overrule it. In addition, if these variables lead to a serious endogeneity problem, one would expect the ***Ideological Distance*** coefficient to increase in

magnitude when the legal treatment variables are excluded from the model. We estimated the model without the legal treatment variables, and see no noticeable change in the coefficient for the ***Ideological Distance*** variable.

[15]We also tested whether the political environment acted as a constraint only in statutory cases, and found no support for this hypothesis.

[16] For example, the average baseline hazard for cases during their first ten years of existence is .000932. This number decreases to .000466 for cases between 31 and 40 years old.

[17]It is important to note that we are not implying a conditional relationship between the independent variables and the hazard of a case being overruled. For example, it does not take the presence of a large ideological distance between the precedent and the current Court in order for the negative treatments to matter. We are demonstrating the existence of an additive, not multiplicative, effect.

[18]We did, however, correct two typographical errors in their appendix. First, 413 U.S. 15 overruled 383 U.S. 413, while the Brenner and Spaeth (1995) appendix lists the overruled case as 383 U.S. 412. Second, 371 U.S. 542 (overruling 344 U.S. 178) was decided in 1963, but their appendix incorrectly lists the year as 1962.

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