

Does Stare Decisis Influence  
The Justices' Voting on the  
Supreme Court?

Saul Brenner

and

Marc Stier

University of North Carolina Charlotte

The legal realist movement of the 1920s and 1930s influenced the behavioral study of the United States Supreme Court in at least two ways. First, it fostered the exploration and testing of the influence of a number of extra-legal variables on Supreme Court decisionmaking. Among these extra-legal variables are: the attitudes of the justices, the fact patterns in the variable issue areas, the justices' social background characteristics, their role perceptions, small group variables, game theoretic strategies, and the influence of interest groups, public opinion, Congress, and the solicitor general. Second, the legal realist movement discouraged the exploration and testing of the influence of legal variables on Supreme Court decisionmaking. Indeed, a number of behavioral Supreme Court scholars argued that such variables were unimportant.

Glendon Schubert (1963), for example, maintained that judicial behavioral scholars "have debunked legal principles as factors controlling decisions." Segal and Cover (1989) advanced a similar view:

Traditional model of analyzing judicial decisions emphasize the importance of legal doctrine and precedent. This is not the place for a complete defense of legal realism, but we do briefly note the following. Supreme Court justices are not bound by the legal doctrines accepted by the Court majority; they are free to use whatever doctrines fit their own preferences. Preferences are typically found on both sides of any case reaching the Supreme Court; and even if the precedents weigh heavily on one side, justices are free to distinguish or overrule them. While precedent might have some value for some justices, the empirical evidence on the importance of precedent consists of little more than Schubert's (1963) exposition of the votes of Justice Clark in courts martial of civilian

personnel and dependents. Evidence on the Court establishes that judicial restraint is little more than a 'cloak for the justices' policy preferences.'

Subsequently Roger Handberg (1991) stated that "Judicial restraint [which he perceived as including respect for precedent]...is a rhetorical fig leaf used to disguise the judges' policy preferences but in itself has no independent force upon decisions."

Finally, in a bold book, Segal and Spaeth (1993) asserted that legal variables, such as the plain meaning of the relevant legal text, original intent, stare decisis and balancing are almost always ambiguous. As a consequence, the justices on the Court are free to vote their attitudes and they almost always do so. It is true, these two scholars point out, that the justices in their opinions, advance legal arguments in support of their decisions. But the justices are not influenced by these legal arguments in deciding how to vote. Rather, they advance these arguments to justify their decisions post hoc. In short, the legal model is "meaningless."

But not all behavioral Supreme Court scholars agree. Many hold that both legal and extra-legal variables influence Supreme Court decisionmaking (see e.g., Baum, 1995A, pp. 143-150; Esler 1994; George and Epstein, 1992; Goldman and Jahnige 1985; Johnson, 1985).

Which group of scholars is right? In an attempt to partly answer this question, we will focus on one element of the legal model - adherence to precedent - and treat it in three ways. First, we will present three arguments why it is reasonable to believe that adherence to precedent influences the votes of the justices. Second, we will review and evaluate the prior empirical literature on this topic, with particular emphasis on the recent innovative study by Segal and Spaeth (1994). Third, we will retest the Segal and Spaeth model.

## I. THREE ARGUMENTS IN FAVOR OF THE POSSIBLE INFLUENCE OF STARE DECISIS ON SUPREME COURT DECISIONMAKING

### *A. Viewing Precedent Through the Perspective of the Justices*

Our first argument is that the culture of law shapes the decisionmaking of Supreme Court justices. This culture very much emphasizes the role of legal reasoning and precedent.

Most political scientists accept the Weberian notion that we must, at least in the first instance, understand human action from the standpoint of the actors involved (Wrong 1970, p. 17; Moon, 1975). We must take the self-understanding of political actors seriously and interpret it in light of their political culture. This central point is understood by both the hardest social scientists, who use statistical tools to study the learning of social roles and norms, and the softest social scientists who engage in depth interviews and avoid the use of statistics. We discover the self-understandings of human beings and the intentions with which they act by examining what they say and what they do. Of course, sometimes there is a gap between what actors do and what they say about what they do. Some actors lack insight into their own actions or the culture that shapes their actions. Or they may deceive others or themselves. But, given the importance of our self-understandings in shaping what we do, in the absence of evidence of such deception or self-deception, we can expect that what actors say about what they do will be systematically related to what they do.

When we think about the political culture that shapes the Supreme Court justices, it is implausible to think that precedent does not influence their decisions. Law school students are trained to reason based on the study of past legal decisions. Lawyers use these tools to predict

how judges will decide the cases they handle and how to frame the arguments they make to influence those decisions.

The study of precedent is so important that it is not clear that it always makes sense to distinguish between a justice's attitudes towards some issue and his understanding of the meaning of past legal decisions. For most lawyers—and many non-lawyers as well—adopt policy positions regarding many issues in the course of learning about important Supreme Court decisions of the past. Can we, for example, specify the nature of a justice's commitment to a certain conception of the proper range of freedom of speech independently of her understanding and reaction to Supreme Court decisions regarding freedom of speech?

The justices on the Court are, of course, immersed in the culture of precedent. All the participants in the cases assume that the analysis of precedent influences the justices' decisionmaking and they act accordingly. The justices read or hear this analysis of precedent at various stages in the decisionmaking process: (1) in the cert memos written by the law clerks; (2) in the written briefs submitted by the attorneys for both sides; (3) in the bench memos prepared by their law clerks prior to oral argument; (4) at oral argument; and (5) when they are writing their opinions. These opinions are replete with an analysis of precedent. Phelps and Gates (1991), for example, inspected the opinions of Justices Rehnquist and Brennan in the constitutional cases in the 1973-1992 era and discovered that 34% of the paragraphs in Rehnquists' opinions and 38% of the paragraphs in Brennans' were devoted to a discussion of precedent. This data suggests to us that it is plausible to believe that stare decisis influences their decisions. It makes no sense for them to go to so much trouble of analyzing precedent unless they believed that such analysis would make a difference in their decisionmaking.

Baum (1995A, p. 114) makes this point regarding law in general in the following way:

The law helps to shape the Courts' decisions because those decisions are made in a legal context. Justices are trained in a tradition that emphasizes the law as a basis for judicial decisions. They are judged by a legal audience largely in terms of their perceived adherence to the most plausible interpretation of the law. Perhaps, most important, they work in the language of the law, and this language channels judges' thinking and constrains their choices.

That precedent is important to Supreme Court justices should not surprise us. For the emphasis on following precedent in our legal culture serves a number of important goals of our legal system. This is not the place to present the essentially jurisprudential arguments for following precedent. But we do note that adherence to precedent serves: (1) continuity in the law, a goal appreciated by those people who rely on the law in the conduct of their affairs; (2) fairness, because by following precedent the Court treats like cases alike; (3) legitimacy, because adherence to precedent dramatizes the view that the justices do not decide cases capriciously, and (4) enhancement of the Court's decision, because by following precedent, the current justices encourage future justices to do likewise and, thereby, increase the precedential weight of the current justices' decisions (For a fuller discussion of these goals, see Brenner and Spaeth 1995, Chapter 1).

These goals are impressive, but they should not be overemphasized. Despite these goals, at times the justices have reasons to overrule, distinguish, limit or ignore a particular precedent. Perhaps, Cardozo's advice (1921) about what justices should do also gives the best account of what they actually do. He said that "somewhere between worship of the past and exaltation of the present, the path of safety will be found."

It might be argued, however, that the fact that the justices talk about precedents in their opinions does not necessarily indicate that these precedents influence their decision. For we can distinguish, at least in principle, between the reasoning used to arrive at a decision and the reasoning used to justify that decision. Thus, it can be argued that the justices spend so much time with case analysis not because they believe that this activity is useful in deciding which litigant ought to win, but because case analysis is useful in justifying that decision. But before we accept this claim, we ought to ask why the justices might care about justifying their decisions. Presumably, the justices are concerned with justifying their decisions to give other people a reason to respect or follow it. That is, the justice's are primarily concerned with the third and fourth goal we mentioned above (i.e. legitimacy and the enhancement of the Court's decisions). For if, the justices are only pretending to follow precedent, as opposed to really doing so, the first and second reasons (i.e. continuity in the law and fairness) would not carry any weight with them.

But does it make sense to think that the justices ignore precedent and decide on the basis of their own attitudes and yet also believe that they must justify their decisions in terms of precedent to maintain the legitimacy of the Court or to influence future justices? Now, if many justices believed this, it is hard to understand how they could have kept it quiet all these years.<sup>1</sup> To have cynically deceived the public in this way would qualify as one of the greatest confidence games of all time. Imagine a secret of this sort not slipping out in Washington, a town where secrets of all sorts are leaked in a matter of hours. How could Bob Woodward have missed this one? Moreover, if most of the justices were not concerned with following precedent in making their decisions and knew that other justices acted in the same way, then the fourth reason for following precedent (i.e. enhancement of the Court's decisions) would fall by the wayside. For if

a justice thinks that his fellow justices, now and in the future, will not follow precedent, there is no point to trying to influence these justices by pretending to be following precedent. Thus the only possible rationale for the pretense of following precedent would be to seek public legitimacy for the the Court's decision (i.e. the fourth reason presented above). The general public, however, knows and cares about few Supreme Court decisions. And we suspect that its reaction to these decisions rarely depends on whether the Court followed precedent, overturned precedent, distinguished precedent, or ignored precedent. Rather, the public's reaction is heavily influenced by whether it likes the outcome or not. At any rate, it is hard to understand why an effort to convince the public that Supreme Court justices follow precedent has to be as elaborate as it appears to be. Does it really take such detailed and lengthy opinions to convince an uneducated and uninterested public that Supreme Court justices follow precedent?

Even if the general public does not care much about whether Supreme Court justices follow precedent, the Court watchers—such as journalists and law professors—might care. This could be an explanation for the presence of the long and detailed opinions written by the justices. The problem with this argument, however, is that the best, indeed perhaps the only way for the Supreme Court justices to convince the Court watchers that they do follow precedent is actually to follow precedent a good deal of the time. And it is not enough to simply cite the precedents. To persuade the Court watchers that their position is legitimate, Supreme Court justices have to make what are considered good arguments. A Supreme Court justice who does not care about the opinion of Court watchers—perhaps Justice Douglas would be an example—would probably write shorter opinions that did not draw on precedents in the usual ways. As a consequence, his or her decisions would not be highly respected by the Court watchers, as many of Douglas's were not. In any event, it is very difficult for most of us to convince anyone of anything unless we



believe it ourselves. And there is no reason to believe that Supreme Court justices are different from most people in this respect.

It might be argued, however, that because all precedents are ambiguous, the justices cannot follow precedent even if they want to. We admit that legal precedents are often ambiguous. But there is a difference between holding that legal precedents are ambiguous and assuming that any interpretation of precedent is equally plausible. We would argue that in a number of cases decided by the Court (including in some non-unanimous ones) only one outcome can be justified by good legal arguments. Walter Murphy (1964) tells us that because the “rules are not infinitely malleable” some possible decisions “cannot write,” i.e., cannot be justified by good legal arguments. And the legal realist Karl Llewellyn (1978, p.73) made the same point:

For while it is possible to build a number of divergent logical ladders up out of the same cases and down again to the same dispute, there are not so many that can be built defensibly.

Almost any decision can be supported by bad legal arguments, but most justices on the Court will try to avoid making such arguments. Thus, despite the ambiguity of legal materials, it is credible to believe that Supreme Court decisionmaking will be constrained by the legal materials available to the justices, including the available precedents.

We have taken seriously the possibility Supreme Court justices are, singularly or together, engaged in a conspiracy in which they hide their disdain for precedent beneath a veneer of attention to it. But this is an extremely dubious claim. For it is very hard to believe that most Supreme Court justices are so cynical. Nor is it likely that they would be so dedicated to

justifying their decisions in terms of precedent if they did not believe that this is what they should do in deciding cases.

A more plausible claim is that the justices write long opinions justifying their decisions in terms of precedent because they believe that they do and should follow precedent in many cases. And presumably they do so because they are trying to attain all four of the goals we mentioned a moment ago. Thus, if those who say that the justices do not follow precedent are right, the justices are deceiving themselves about how they decide cases.

Is this claim plausible? In our view it is not. Any justice who believes that his or her decisions should be determined by precedent will try to conform to precedent at least some of the time. To believe that we should follow a rule is to try to conform to it except under unusual circumstances. Someone who says he believes in a rule (e.g. that he ought to follow precedent) but does not act on it either does not really believe in the rule or is suffering from weakness of will or lack of self-control. There is no reason to believe that Supreme Court justices believe that they should follow precedent but are unable to act on this belief. Unless the critics are right to say that precedent can *never* determine the decision of a justice—a position we have rejected—then the determination of the justices to follow precedent will lead them to do so.

### *B. Stare Decisis and the Costs of Calculation*

Our first argument, then, holds that the most plausible reason that the justice defend their decisions in terms of precedent is that they believe that precedent should influence their decisions and that, in fact, it does so. We would like to supplement this argument with a second, related one. Those scholars who say that judicial opinions are a mere fig leaf thrown over the attitudes of the justices must hold that the justices keep two sets of books in their minds. First, they keep

track of their attitudes towards public policy which actually lead them to decide one way or another. Second, they keep track of the legal arguments they can use to justify their decisions to others. Moreover, each time they come to a new case, they must bring the arguments found in both sets of books to bear on their decision. They have to decide the case on the basis of their policy attitudes. Then they have to think about how to justify the decision in terms of precedent. And, then, if they care at all about advancing good arguments, they sometimes have to reconsider their decision in light of what they can justify in terms of precedent.

Most of us who have thought about the kinds of issues that come before the Supreme Court have a hard enough time keeping one set of books. And, when we have to render an opinion about some new or different issue, we look for precedents in our own decisions or those of others to help us make up our minds. We frequently invoke analogies to past situations and decisions to help us decide what to do or think in a new case. Supreme Court justices are not superhuman. It is hard to believe that every time they address a new case, they go through all the calculations needed to come to a decision and then determine whether it could be justified in terms of legal precedent. It would be difficult enough for them to work through each one of these processes of thought when a new case came before them. The more plausible route for them is to follow precedent in most cases. Only if the precedent does not work would they seek a *de novo* solution to the problem presented by the case. As Cardozo (1921) stated, “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the course laid by others who have gone before him.”

### *C. Firmly Based Precedents*

We have argued that first, the importance of precedent in our legal culture and the justices concern for the status and influence of the Court gives them good reasons to follow precedent, and second, that following precedent reduces the burden of calculation on the justices. A third argument in favor of the influence of stare decisis concerns firmly based precedents. There are a number of decisions of the Court that have so changed American society or have so altered our understanding of the Constitution that any justice, or at least any new justice, no matter what his or her policy preferences, would feel compelled to follow them. We call these decisions “firmly based precedents.”

A good example of a firmly based precedent is *Brown v. Board of Education* (1954). When Chief Justice Rehnquist was a law clerk to Justice Jackson he wrote a memo to his boss in favor of *Plessy v. Ferguson* (1896), which upheld the constitutionality of a Louisiana statute that required trains to provide “separate but equal” cars for black and white passengers. Although Rehnquist later denied that this memo represented his views, there is no evidence, aside from his statement, that this is true (see Kluger 1975, Schwartz 1989). But Chief Justice Rehnquist, no matter what his views then or now, would not vote to overrule *Brown*. Even former Judge Bork (1990) supports *Brown*, though he believes in original intent and argues that the framers of the Fourteenth Amendment did not intend that this amendment should be interpreted to prohibit racial segregation in the public schools. For *Brown* cannot be changed without drastically changing American society.

*Brown* is not the only example of a firmly based precedent. Monaghan (1988) tells us that the *Second Legal Tender Case*, (1871) which upheld the constitutionality of Congress’ power to make paper money legal tender for the payment of debts, and the series of cases that upheld Congress’ power to enact the New Deal legislation and to create the administrative state,

are unlikely to be overruled. Regarding the *Second Legal Tender Case*, for example, Robert Bork (1990) states that “if a judge today were to decide that paper money is unconstitutional, I would think he ought to be accompanied not by a law clerk but by a guardian.” This is true even though Bork notes that this decision is contrary to original intent.

One might easily add to the list *Marbury v. Madison* (1803), *Martin v. Hunter’s Lessee* (1816), the interpretation of the necessary and proper clause in *M’Culloch v. Maryland* (1819), the interpretation of the commerce clause in *Gibbons v. Ogden* (1824), *Barron v. Baltimore* (1833), *Cooley v. Board of Warden’s* (1852), the scope of the privileges and immunities clause of the Fourteenth Amendment in *The Slaughterhouse Cases* (1873), *Santa Clara County v Southern Pacific Railroad Co.* (1886), the series of decisions that incorporated most of the provisions of the Bill of Rights into the due process clause of the Fourteenth Amendment, *Bolling v. Sharpe* (1954), *Baker v. Carr* (1962), *Gideon v. Wainwright* (1963), *Reynolds v. Sims* (1964), *Wesberry v. Sanders* (1964), *Heart of Atlanta Motel v. United States* (1964), *Katzenbach v. McClung* (1964) and *Katzenback v. Morgan* (1966). Yet, almost all these decisions were highly controversial when they were first decided and some remained so in the decade after they were handed down.

It might be argued that the issue in *Brown* (and in these other cases) will never be raised again before the Court and, therefore, will not influence their decisionmaking. But this is not true. In at least four decisions after *Brown*, the Court followed *Brown* and rejected the segregated practice. These are: *Mayor of Baltimore v. Dawson* (1955), (legally segregated beaches), *Holmes v. Atlanta* (1955), (golf courses), *New Orleans v. Detiege* (1958), (parks) and *Johnson v. Virginia* (1963), (courtroom). Whether *Brown* will be followed in this way in the future is difficult to determine. Any justice, if he or she so wished was free to argue in any case

that may be relevant to the issue, that *Brown* was wrongly decided. That it is unthinkable that any justice would have advanced this argument suggests that *Brown* structures decisionmaking on the Court, by imposing outer limits which the Court will not violate. The other firmly based precedents do the same.

Which cases fall into the category of “firmly based precedents” and which do not is often a matter of interpretation. Indeed, it may be more realistic to think of the Courts’ decisions in terms of a continuum rather than in dichotomous terms. And whether a case ought to be placed at one point of the continuum or at another may change over time. *Plessy*, after all, might once have been classified as a “firmly based precedent”. Nevertheless, it is difficult to deny that at any time in Supreme Court history, except for the very earliest period, there were firmly based precedents that the justices felt compelled to follow.

## II. THE PRIOR EMPIRICAL LITERATURE

We advanced three arguments for believing that adherence to precedent influences the votes of the justices. All three arguments are common sense arguments. As such, they suggest that precedent is influential, but do not prove that precedent is in fact influential or show the extent of such influence. The only way to do the latter is to conduct quantitative, empirical research.

Behavioral scholars have posited and tested various legal models, which contained variables derived from Supreme Court decisions in given issue areas (See e.g., Segal 1984, 1986 regarding search and seizure and George and Epstein 1992 regarding capital punishment). Some scholars, have argued, however, that these studies are methodologically flawed (See Hagle, n.d.; Lindquist and Songer, 1994). Other scholars have maintained that the reason why these models

work is that the case stimuli included in the models are similar to the case stimuli that induce consistent voting patterns in the Guttman scales (See Segal and Spaeth, 1993; Baum, 1995B). Whether the above criticism ought to undermine our faith in the explanatory power of the legal models is uncertain. At a minimum, the above criticism reminds us that testing legal models may not be the ideal way of measuring whether precedent influences the justices' votes.

Brenner and Spaeth (1995) have also investigated the influence of precedent on the justices' vote. But, as these two scholars readily admit, their study also does not offer an ideal test of this influence, because they are examining cases in which the Court overturned precedent, i.e., cases in which a majority of the justices who voted in the case refused to follow precedent.

But, Segal and Spaeth (1994) have presented a clever research design for measuring the influence of precedent. These two scholars inspected a 20% random sample of salient, nonunanimous cases decided by the Supreme Court in the 1946 through 1992 era.. They also examined the progeny of these cases, i.e., orally argued, full opinion cases that applied "the holding of the majority or plurality opinion" of the salient case (p.8). They tested whether the dissenting justice in Case 1 (the salient case) supported the precedent of Case 1 in Case 2 (the progeny case) or voted the same way as he voted in Case 1, i.e., voted his "preferences." In conducting this research, Segal and Spaeth made the reasonable assumption that the dissenting justices' preferences did not change between Case 1 and Case 2.

Note three characteristics of their research design. First, and most important, they treat situations in which the justice's preferences (based on his vote in Case 1) indicates that he will vote one way and conformity to precedent indicates that he vote the other way. This is a productive way to proceed. For the best way of showing that a precedent is influential is to focus on the situation when conformity to precedent is in conflict with a justice's preference.

Second, Segal and Spaeth talk about the justices “preferences” and not about their “attitudes.” They did so because they did not wish to assume that the justices’ votes in Case 1 was necessarily based on their attitudes. This is a good cautious move.

Third, Segal and Spaeth focus on salient cases. They state that they chose these cases “because they are more likely to establish precedential guidelines for future cases and because they are more likely to actually generate progeny that we can analyze” (p.6). In addition, the rule of the law set forth in the salient cases is likely to be sufficiently unambiguous and sufficiently dramatic that the justices in Case 2 will be forced to either uphold the precedent or refuse to do so. The justices cannot simply ignore the precedent.

Segal and Spaeth (1994) discovered that the justices voted their preferences 91.2% of the time and voted in conformity with precedent 8.8% of the time. These results are based on 27 salient cases (17 of which were from the Burger Court), 62 progeny cases, and 148 votes. Of the four justices who cast at least 15 votes, Rehnquist and Brennan voted their preferences 100% of the time, while White and Marshall voted their preferences 95.4% and 93.8% of the time.

Segal and Spaeth’s results are impressive. One might wonder whether additional research is needed. We believe that it is on two grounds. First, adherence to precedent is likely to be justice specific. It is entirely possible that some justices that Segal and Spaeth did not study, or did not study with a sufficient N, behaved differently. Fifty-nine percent of the votes they examined were cast by strong ideologues in the crucial civil liberties area, the subject matter of the overwhelming number of the salient cases. It is precisely these kinds of justices who are less likely to conform to precedent when the precedent is contrary to their preferences.



Second, we suspect that some of the methods they used to identify the progeny cases biased their results in favor of their finding that the justices generally voted their preferences. We will present our argument on this point later in this article.

We, now, turn to our empirical study, which followed the same general research design employed by Segal and Spaeth (1994).

### III. RETESTING THE SEGAL & SPAETH MODEL

There has been a great deal of literature concerning why the Burger Court did not overturn the liberal decisions of the Warren Court. We believe that we could add to this literature and at the same time study whether stare decisis influences the justices' voting. Perhaps, part of the answer is that some of the dissenting justices in the middle and later Warren Court were willing to conform to the liberal precedents of that Court. As a consequence, these decisions were less likely to be overturned or substantially altered in the more conservative Burger Court.

We will investigate four "center" justices: Harlan, Clark, Stewart, and White. A "center" justice is defined as a justice who voted in favor of civil liberties 40% to 60% of the time. These justices obtained pro-civil liberties scores in the 1953 to 1992 era of 44.4% (HA), 51.3% (CL), 42.4% (ST) and 43.7% (WH). (See Epstein, et al., 1994, Table 6, pp. 427-430.) We evaluated the justices on the basis of civil liberties scores because over 90% of the salient cases in the post - 1953 era are civil liberties (i.e., "C" scale) cases. (The percentage for the Warren Court is 96%).

These four justices cast 27 (Harlan), 17 (Clark), 15 (Stewart), and 11 (White) dissenting votes in 36 salient cases on the Warren Court. All of these salient cases were decided in a liberal

direction. Our list of salient cases was derived from Witt (1990) and is the same source as used by Segal and Spaeth (1994).

What does the prior research tell us regarding the extent to which these four center justices followed precedent? Dorin (1982) interviewed Tom Clark after his retirement from the Court. Clark told him that he followed three rules when on the Court: (1) He dissented from a case he disagreed with during the term in which the precedent was established. Subsequently, he followed precedent. (2) If, however, he was able to persuade four of his colleagues to overturn the precedent, he would do so. (3) If possible (and it was not always possible) he would overturn the precedent explicitly. Dorin (1986), in addition, pointed out a number of cases in which Clark followed precedent even though he disagreed with it.

Schubert (1963) investigated the behavior of nine Warren court justices in cases involving the courts-martial trials of civilians. He concluded that in four cases Clark voted against his attitudes and in support of stare decisis. Finally, Segal and Spaeth (1994) point out that *U.S. v Wade* (1967) Clark abandoned his dissent in *Miranda*. In his concurring opinion, Clark asserted, “I dissented in *Miranda* but I am bound by it now, as we all are.” Segal and Spaeth (1994), on the other hand, discovered that Clark failed to follow precedent in three progeny cases.

The only systematic data of which we are aware regarding White, Stewart, and Harlan comes from Segal and Spaeth (1994). These two scholars found that White voted in conformity with the precedent of the salient case in only 1 out of 22 votes (4.6%). The equivalent statistics for Stewart and Harlan are 5 out of 13 (38.5%) and 0 out of 5 (0%).

### *Identifying the Progeny Cases*

When the Court hands down a memo decision, it is easy to identify the progeny cases. For in these cases the Court almost always states that the decision of the lower Court is vacated and remanded “for consideration in the light of” the salient case. But when the Court renders an opinion in an orally argued, full opinion case, it is difficult to determine whether the salient case is a precedent for a given case. Any possible progeny cases are rarely on all fours with any precedent. For if they were on all fours, why would the Court go to the trouble of holding oral argument and handing down a written opinion?

But no matter how difficult the task, we must attempt to identify the progeny cases in both situations as well as in the per curiam cases. We will treat a case as a progeny case if: (1) *Shepard’s Citations* lists it as “following” the salient case; (2) The Court in the progeny case states, in its majority, plurality, per curiam, or memo opinion, that it is following the salient case; (3) the main issue in both cases is sufficiently similar for us to conclude that the salient case is precedent for the progeny case; and (4) the outcome of both cases are in the same direction (e.g., in both cases the Court voted in favor of the criminal defendant.)

We used *Shepard’s* (Rule 1 above) to avoid having to read the entire *U.S. Reports*. *Shepard’s*, however, cites a case as following a prior case when the Court merely cites it favorably. Thus, we use Rules 2 and 3 to limit our analysis to those cases which ought to be perceived as precedents in a more traditional way. Rule 2 requires the main opinion in the case to state that it is following the salient case. Rule 3 requires the issues in the two cases to be sufficiently similar. Rule 3 is not an operational definition. In a given case, for example, it might be uncertain whether the main issue before the Court in a possible progeny case is a logical extension of the main issue before the Court in the salient case, in which situation we will use the case, or constitutes a new issue. We will answer this question and other relevant questions by

using our traditional lawyer-like skills. We would have preferred to be guided by an operational definition for this purpose, but we could not think of one that might work. Segal and Spaeth (1994) tell us that “the determination of progeny is not a bright-line enterprise” (p.8), and that there is “potential subjectivity involved in such an analysis” (p. 11). We agree. We have included our list of cases (See Table 1) so that our critics can evaluate whether we have selected the appropriate cases. Rule 4 above was adopted because we believe that when the Court votes for a different outcome in Case 2 (a possible progeny case) than it did in Case 1 (the salient case), the justices who dissented in Case 2 are quite happy to vote with the majority in Case 2. For the Court in Case 2 usually has either narrowed the scope of the precedent of Case 1 or has overturned that precedent. In either event, we cannot expect them to dissent in Case 2 and, as a consequence, be more Catholic than the Church (or the Court). People rarely behave this way. Indeed, Justice Clark specifically stated that he voted to overturn precedent when he was able to convince four of his colleagues to do so. (Dorin 1982).

We will include memo and per curiam decisions as progeny cases. If we fail to do so, we will not obtain a complete picture of the possible influence of precedent on the Courts’ decisionmaking. Regarding memo decision, we will not follow Rule 3 above. We will take the Courts’ word that their decision in Case 2 was based on the precedent in Case 1 and will not attempt to determine whether the main issue in both cases was similar.

How do the rules we adopted differ from the rules adopted by Segal and Spaeth (1994)? First, instead of using Rule 1 and 2 above, they consider a case as a progeny case if it applied the holding of the majority or plurality opinion of the Court and (1) if the salient case was listed in the syllabus of decision compiled by the Court Reporter (which rarely occurs), (2) if the Court Reporter stated the holding of the precedent in the syllabus, or (3) if the progeny prominently

cited the salient case as authority for its holding. We believe that their more complex rules are similar to our Rules 1 and 2, although we know of some progeny cases they use that are not listed in *Shepard's* as “following” the salient cases.

Second, instead of using a similar issue rule (our Rule 3) Segal and Spaeth measure whether the progeny case concerns the same legal provision and is located in the same narrow-based Spaeth scale as the salient case. These two scholars recognized some exceptions to this rule. Although Segal and Segal’s rule constitutes an operational definition, it results in the inclusion of cases in which the main issue in the progeny case is very different than the main issue in the salient case. As a consequence, dissenting justices in the salient case can hardly be expected to follow the precedent of that case in Case 2. Indeed, in these situations they rarely mention the salient case in their dissenting opinions.

Third, instead of excluding all cases in which the Court voted for a different outcome in Case 2 than it did in Case 1 (the salient case) (our Rule 4), Segal and Spaeth posited various rules for exclusion and inclusion. They even included as a progeny case, a case which overturned a salient case. Thus, here too they included cases in which it cannot be expected that the dissenting justices in the salient case will dissent in Case 2 and thereby uphold the precedent.

Finally, Segal and Spaeth excluded both memo and per curiam decisions. In other words, they excluded those cases in which the dissenting justices in Case 1 are particularly likely to follow precedent in Case 2 because in these situations the law is more likely to be clear.

Thus, both the rules they adopted and the kind of votes they examined (i.e., 59% cast by “extreme” justices) biased their results in favor of the conclusion that the justices will vote their preferences. It is not surprising, therefore, that their findings support that conclusion.

## *Data*

There were 36 salient cases on the Warren Court in which Justice Clark, White, Stewart, or Harlan dissented. These 36 salient cases generated 48 progeny cases (see Table 1) and 74 votes.

## *Hypotheses*

Although the primary purpose of this study is to determine whether the four dissenting justices subsequently followed the precedents in the salient decision of the Warren Court, we will also test two hypotheses. First, we will test whether the dissenting justices in Case 1 are less likely to conform to precedent if the decision of the Court was handed down in the same term as the salient case than if it was handed down in a subsequent term. This hypothesis, of course, was directly influenced by Clark's first rule, presented above. But the other justices as well might perceive same term cases as related to the decision in Case 1 and, therefore, believe that they ought to handle both cases the same way. Indeed, many of the progeny cases that were decided in the same term as the salient case were held by the Court pending the decision in that case.

Second, we will test, both regarding same term and subsequent term progeny cases, whether the justices are more likely to conform to precedent when they handed down memo decisions than when they rendered a full or per curiam decision. Presumably the law is more likely to clear when the Court hands down a memo decision.

## *Results*

Overall we discovered that the four center justices who dissented in Case 2 joined the main opinion and, therefore, voted for the precedent in Case 2 in 32 votes, dissented in 31 votes and concurred or voted to deny cert in 6 votes (see Table 2). Thus, overall the justices joined the main opinion over joining the main opinion and dissenting 51% of the time. We also obtained scores for the individual justices: Clark 73%, Stewart 69%, White 60%, and Harlan 28%.

We discovered that the justices were more likely to follow precedent in subsequent terms than in the same term (64% v 31%) (Gamma = .59). Thus, H1 was supported. (see Table 2)

H2, however, was only supported regarding the same term. In that term, the justices were more likely to follow precedent in memo decisions than in non-memo decisions. (36% v 16%; Gamma = .55) In subsequent terms, however, the results are the same (64%) in both situations. (Gamma = -.10)

Because Clark articulated explicit rules regarding the following of precedent,(see discussion above), it is useful to ascertain whether he conformed to his own rules. In subsequent terms, he always followed these rules - voted in conformity with precedent in all four votes. But he claimed that in the same term he would dissent. Clark, however, dissented in only 3 out of the 7 votes. In other words, he was even more willing to conform to precedent than his own explicit rules suggested.

To gain insight into the motivation of the justices who dissented in Case 2 after having dissented in Case 1, we read their dissenting opinions in Case 2 or those in which they joined. We inspected the full opinion and per curiam cases only. There were 11 cases and 11 dissenting opinions. In seven opinions the dissenting justice reaffirmed his dissenting opinion from the

salient case. In six opinions the dissenting justice argued either that the decision of the lower court conformed to the Court's decision in Case 1 or that the Court's decision in Case 2 goes beyond the decision in Case 1. Both statements were made in three opinions and in one opinion there was no specific mention of the salient decision.

## CONCLUSION

We discovered that 51% of the time four center justices on the Court conformed to precedent, even though the precedent was contrary to their previous votes in the salient cases. This finding, of course, suggests that the legal model, or at least one element of it, is not yet dead.

But this finding should not be overdramatized for two reasons. First, it does not suggest that adherence to precedent is likely to influence the voting of all the justices. We suspect that strongly ideological justices are less likely to be influenced by this variable.

Second, we wonder whether justices are more likely to be influenced by precedent in cases that are progeny to salient cases than in cases that do not share this characteristic. Precedents in salient cases, after all, are more dramatic and, therefore, are more likely to be noticed by the justices in subsequent cases, and by outside legal audiences. On the other hand, Lindquist and Songer (1994) maintain that justices might be *less* willing to follow precedent in progeny cases because these cases are likely to involve issues that are more important to them. These issues were, of course, first raised in the salient cases, but it is likely that they remain salient in the progeny cases.

We do not consider this article to be the last empirical word on the importance of stare decisis in Supreme Court decisionmaking. It is closer to being the first word. Future research is needed regarding other dissenting justices and concerning the extent to which new justices on the



Court follow precedent. The study of new justices is more difficult than our study because it is not obvious how to measure whether the new justices' progeny vote is or is not in conformity with their preferences.

## ENDNOTE

<sup>1</sup> It is possible that each justice is a closet legal realist but does not tell the other justices this. So each justice thinks that he or she is the only legal realist. This would be a colossal case of what the sociologists call pluralistic ignorance. It is no more likely than the conspiracy theory we discuss in the text.

Table 1  
Salient & Progeny Cases

- (1) Slochower v Bd of Higher Education of New York City (1956) (HA)\*  
(A) Nothing
- (2) Yates v U.S. (1957) (CL)  
(A) Wellman v U.S. (1957) (Memo) (Same Term)  
(B) Noto v U.S. (1960)
- (3) Watkins v U.S. (1957) (CL)  
(A) Flaxer v U.S. (1957) (Memo) (Same Term)  
(B) Flaxer v U.S. (1958)
- (4) Trop v Dulles (1958) (CL, HA)  
(A) Mendoza-Martinez v Mackey (1958) (Memo) (Same Term)
- (5) Kent v Dulles (1958) (CL, HA)  
(A) Nothing
- (6) Elkins v U.S. (1960) (CL, HA)  
(A) Euziere v U.S. (1960) (Memo) (Same Term)  
(B) Camara v U.S. (1960) (Memo) (Same Term)
- (7) Mapp v Ohio (1961) (Stew, HA)  
(A) Winkle v Bannan (1961) (Memo)  
(B) James v La (1965) (PC)
- (8) Robinson v California (1962) (CL, White)  
(A) Nothing
- (9) Engel v Vitale (1962) (Stew)  
(A) Nothing
- (10) Baker v Carr (1962) (HA)  
(A) Scholle v Hare (1962) (Same Term) (PC)  
(B) WMCA v Simon (1962) (Same Term) (PC)
- (11) Fay v Noia (1963) (HA, CL, Stew)  
(A) Sanders v U.S. (1963) (Same Term)  
(B) Scarnato v La Vallee (1963) (Memo)
- (12) NAACP v Button (1963) (HA, CL, Stew)  
(A) United Mine Workers v Ill Bar Association (1967)  
(B) In Re Primus (1978)

- (13) Edwards v S.C. (1963) (CL)  
(A) Fields v S.C. (1963) (Memo) (Same Term)  
(B) Henry v Rock Hill (1964) (P.C.)  
(C) Cox v La (1965)
- (14) Gray v Sanders (1963) (HA)  
(A) Nothing
- (15) Aptheker v Secretary of State (1964) (CL, White)  
(A) Copeland v Sec of State (1964) (Memo) (Same Term)
- (16) Esobedo v Ill (1964) (HA, Stew, White, CL)  
(A) Nothing
- (17) Malloy v Hogan (1964) (HA, Stew, White, CL)  
(A) Nothing
- (18) Wesberry v Sanders (1964) (HA, Stew)  
(A) Martin v Bush (1964) (Memo) (Same Term)  
(B) Duddleston v Grills (1967) (Memo)
- (19) Reynolds v Sims (1964) (HA)  
(A) Myers v Thigpen (1964) (Same Term) (PC)  
(B) William v Moss (1964) (Same Term) (PC)  
(C) Swann v Adams (1964) (Memo) (Same Term)  
(D) Noland v Sive (1964) (Memo) (Same Term)  
(E) Germano v Kerner (1964) (Memo) (Same Term)  
(F) Marshall v Hare (1964) (Memo) (Same Term)  
(G) Hearne v Smylie (1964) (Memo) (Same Term)  
(H) Pinney v Butterworth (1964) (Memo) (Same Term)  
(I) Hill v Davis (1964) (Memo) (Same Term)  
(J) Swann v Adams (1966)  
(K) Duddleston v Grills (1967) (Memo)
- (20) Dombrowski v Pfister (1965) (HA, CL)  
(A) Nothing
- (21) Griswold v Conn (1965) (Stew)  
(A) Nothing
- (22) Griffin v Calif (1965) (Stew)  
(A) Banks v Calif (1966) (Memo)  
(B) Carter v Ky (1981)

- (23) Elfrandt v Russell (1966) (White, CL, HA, Stew)  
(A) Nothing
- (24) Miranda v Arizona (1966) (CL, HA, Stew, White)  
(A) In Re Gault (1966)  
(B) Mathis v U.S. (1968)  
(C) Doyle v Ohio (1966)  
(D) Edwards v Arizona (1981)  
(E) Smith v Ill (1984) (PC)
- (25) Harper v Virginia State Bd of Elections (HA)  
(A) Nothing
- (26) In Re Gault (1967) (Harlan, Stew)  
(A) In the Matter of Whittington (1968) (PC)  
(B) In the Matter of Fischer (Memo)
- (27) Keyishian v Bd of Regents (1967) (CL, HA, Stew, White)  
(A) Perry v Sindermann (1972)  
(B) Elrod v Burns (1976)
- (28) U.S. v Robel (1967) (White, HA)  
(A) Nothing
- (29) Jones v Alfred H. Mayer Co. (1968) (HA, White)  
(A) Sullivan v Park (1968) (Memo) (Same Term)  
(B) Sullivan v Park (1969)
- (30) Duncan v La (1968) (HA)  
(A) Nothing
- (31) Flast v Cohen (1968) (HA)  
(A) Nothing
- (32) Tinker v Des Moines Independent Community School District (1969) (HA)  
(A) Nothing
- (33) Shapiro v Thompson (1969) (HA)  
(A) Waggoner v Rosenn (1969) (Memo) (Same Term)
- (34) Powell v McCormack (1969) (Stew)  
(A) Nothing
- (35) Chimel v Calif (1969) (White)  
(A) Mincey v Arizona (1978)

(36) Kirkpatrick v Preisler (1969) (HA, Stew, White)  
(A) Nothing

---

\*Justice Dissented

N of Salient Cases = 36

N of Progeny Cases = 49