RESEARCH NOTE

Variable Voting Behavior on the Supreme Court: A Preliminary Analysis and Research Framework*

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On June 26, 2003, the Supreme Court ruled in *Lawrence v. Texas* that a Texas statute, making it a crime for homosexuals to engage in "deviate sexual intercourse," was an unconstitutional violation of the Fourteenth Amendment's Due Process Clause.[1] In so doing, the Court struck down the 1986 precedent of *Bowers v. Hardwick*.[2] Writing for the Court, Justice Kennedy explained, "The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command."[3] Five justices supported overruling *Bowers* (Breyer, Ginsburg, Kennedy, Souter, and Stevens). Three justices, in dissent, argued that *Bowers* should remain good law (Rehnquist, Scalia, and Thomas). The lone concurrer, Justice O'Connor, agreed with the judgment of the Court (that the Texas statute was unconstitutional), but disagreed with the overruling of *Bowers*. All of the justices' opinions spoke to the need for stability in the law, a concept not lost on academics and practitioners.

Both attitudinal (e.g., Segal and Spaeth, 1993, 2002) and legal (e.g., Dworkin, 1978) approaches to Supreme Court decision making assume that the justices' voting behavior is rational and stable.[4] This is perhaps no more evident than in studies of the justices' voting behavior in precedent-setting and precedent-overruling cases (e.g., Brenner and Spaeth, 1995; Segal and Spaeth, 1996; Spaeth and Segal, 1999).[5] From the attitudinal perspective, justices are assumed to reveal their preferences in precedent-set-

* I thank Dave Clark, the editor, the anonymous reviewers, and especially Wendy Martinek for their insightful comments on earlier versions of this note. Naturally, I assume responsibility for all errors in fact or judgment.

1 123 S. Ct. 2472.

2 478 U.S. 186.

3 123 S. Ct. 2472, at 2483. Justice Kennedy borrows heavily from, and cites, the Court's decisions in *Payne v. Tennessee*, 501 U.S. 808 (1991), and *Helvering v. Hallock*, 309 U.S. 106 (1940), in this quotation.

4 The strategic model, however, allows for the possibility of variable voting behavior depending on the ideological make up of the Court and of the executive and legislative branches (e.g., Epstein and Knight, 1998). In addition, the legal model allows for variable voting behavior provided that the precedent becomes unworkable or results in unforeseen consequences. Unfortunately, from an empirical standpoint, what constitutes an unworkable precedent is uncertain and therefore difficult, if not impossible, to operationalize. See, for example, Justice Scalia's concurrence in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), at 103.

5 Broadly conceived, any and every case decided by the Court constitutes a precedent (Spriggs and Hansford, 2001:1097). More specifically, precedent-setting cases establish a rule of law, given a certain set of facts, to be followed in later cases with similar factual situations. A precedent-overruling case is one in

ting cases and simply apply these preferences to subsequent cases. From the legal perspective, justices are expected to announce the rule of law that governs the precedent-setting case and apply it to the progeny (thus upholding the precedent).[6] The purpose of this note is to examine how often the justices' voting behavior fits these expectations in precedent-setting and precedent-overruling cases and create a research framework for better understanding variable voting behavior in such cases (e.g., that behavior explained neither by the attitudinal or legal models).

To be sure, the Supreme Court rarely overrules itself. During the tenure of the Warren, Burger, and Rehnquist Courts, the Court overruled past decisions in less than 2 percent of cases heard (Reddick and Benesh, 2000). But such cases are of import precisely because of the rarity with which they occur. By overruling itself, the Supreme Court violates the doctrine of *stare decisis*, the canon that the Court has a duty to follow its own precedents. While scholars and students of the Court are well aware of the infrequency with which cases are overruled, little attention has been paid to examining the behavior of individual justices in these cases. Further, those studies that have examined the behavior of the justices have done so by focusing primarily on the frequency with which justices exhibit behavior that is explainable by either the legal or the attitudinal models (e.g., Brenner and Spaeth, 1995; Segal and Spaeth, 1996; Spaeth and Segal, 1999). Thus, little attention has been paid to situations in which individual justices change their views toward cases they initially supported: those occasions where justices vote to set a precedent, but then vote to overrule the very precedent they helped establish. This study attempts to address these occurrences by creating a framework for better understanding the choices justices make in precedent-setting and precedent-overruling cases.

VOTING BEHAVIOR IN PARENT AND PROGENY CASES

Justices who participate in precedent-setting cases, parents, and also in cases that reconsider the viability of precedents, progenies, have two choices available to them in both the parent and the progeny (see **Figure 1**). In the parent case, justices may choose to vote either in support of or against the establishment of precedent. In the progeny, justices may choose to vote to uphold or overturn the precedent-setting case. Brenner and Spaeth (1995) note that these combinations manifest four types of behavior.

First, justices who vote against establishing the precedent may then vote to uphold the precedent (cell 1). Justices who display this type of voting behavior are said

which the Court's majority or plurality opinion explicitly states that the current decision formally alters a previous precedential decision (Brenner and Spaeth, 1995:19).

6 Throughout this note, the terms "precedent-setting case" and "parent" will be used interchangeably. "Progeny" refers to those circumstances in which the justices were given the opportunity to reconsider the viability of precedent. "Overruling progeny" is used to refer specifically to those instances where the justices overturned a precedential decision.

Figure 1
Choices Available to Justices in Parents and Progenies

	Progeny	
	Uphold Precedent	~ Uphold Precedent
~ Set Precedent	1	2
Parent		
Set Precedent	3	4

to defer to the doctrine of *stare decisis*. That is, although such justices reveal a preference against the establishment of the precedent in the parent case, they nonetheless vote to uphold the precedent in subsequent progeny.

Second, justices may vote against the establishment of precedent and then vote to overturn said precedent in the progeny (cell 2). This behavior is consistent with the attitudinal model (e.g., Segal and Spaeth, 1993, 2002). In such circumstances, the justices reveal a policy preference incompatible with the parent decision and then apply this preference to the progeny. Such justices do not defer to *stare decisis*, nor do they alter their preferences against the precedent-setting position.

Third, justices who vote to establish precedents can vote to uphold the precedents they helped establish (cell 3). As Brenner and Spaeth (1995:73-74) posit, such voting behavior is consistent with both deferral to *stare decisis* and with the attitudinal model. On the one hand, justices exhibiting such behavior adhere to the rule of law present in the precedent-setting case. On the other hand, such justices also exhibit what Brenner and Spaeth (1995: 73) refer to as personal *stare decisis*, which is fully consistent with the attitudinal model.[7]

Finally, justices may vote to set a precedent and then vote to overrule the very precedent they helped establish (cell 4). Such voting behavior can be explained neither by the attitudinal model nor as deferral to *stare decisis*. While we might expect that such behavior is uncommon on the Court, in fact it makes up a substantial proportion—approximately 30 percent—of the voting behavior of the justices participating in precedent-overruling cases during the 1953 to 1995 terms.

RESEARCH DESIGN AND DATA

In this note, I do not provide a comprehensive examination of the justices' adherence to precedent. I confine my study to those instances in which justices who participated in precedent-setting cases also participated in precedent-overruling cases. However, unlike

[7] Brenner and Spaeth (1995) define personal *stare decisis* as behavior fitting into cells 2 and 3.

previous studies on the subject (e.g., Brenner and Spaeth, 1995; Segal and Spaeth, 1996; Spaeth and Segal, 1999), I focus my attention on the behavior of those justices who voted in support of the establishment of a precedent and then voted to overrule the very precedent they helped establish. Though restricted in focus, I believe this narrowness is offset by the value of the study in that such behavior by the justices violates both a legal norm and what many argue is an empirical regularity.

First, proponents of the legal model (e.g., Dworkin, 1978) highlight the import of the doctrine of *stare decisis*. Clearly, justices who vote to establish a precedent and then subsequently vote to overrule said precedent violate this norm. Second, this behavior on the part of the justices violates what many believe to be an empirical regularity—the fact that, all things being equal, the justices cast their votes on the basis of their ideological preferences (e.g., Pritchett, 1948; Rohde and Spaeth, 1976; Schubert, 1965, 1974; Segal and Spaeth, 1993, 2002). Though not all agree with the utility of this view of judicial decision making (e.g., Gillman, 2003; Merrill, 2003) or its completeness (e.g., Richards and Kritzer, 2002), it nonetheless may be the "best representation of voting on the merits in the nation's highest court" (Hall and Brace, 1996:238). That neither the legal model nor the attitudinal model can explain or account for this voting behavior makes it of particular interest, and this study provides a unique perspective on the applications and limitations of these models of judicial decision making, as well as a framework for future studies that may be tested on the universe of Supreme Court alterations of precedent.

The votes examined in this analysis include the votes cast by every justice who participated in a precedent-setting case and its overruling progeny during the 1953 to 1995 terms. Precedent-overruling cases were identified on the basis of whether or not the majority or plurality opinion of the Court explicitly stated it was overturning a previous decision of the Court. As such, relevant precedents are identified for this study on the basis of their being overturned by a declaration stating as much in the precedent-overruling case. The majority of such case pairs (fifty-seven)—parent and overruling progeny—were derived from Brenner and Spaeth (1995). Supplementary data, bringing this analysis current to the 1995 term, come from Spriggs and Hansford (2001), who applied the coding guidelines established by Brenner and Spaeth.[8] Spriggs and Hansford identified seven additional case pairs relevant to this study, bringing the total number of parent-overruling progeny case pairs up to sixty-four. Twenty justices cast 307 votes in both precedent-setting and precedent-overruling cases during this time frame. **Appendix A** reports the complete set of parent and overruling progeny cases, as well as the issue areas in which they fall.

The paramount difficulty in this analysis was determining whether or not the justices supported the rule of law established in both the parent and overruling progeny

[8] See Brenner and Spaeth (1995:18-23) for a more comprehensive discussion of the criteria for determining the alteration of precedent and a discussion of the merits of their case selection as compared to the available alternatives.

cases. Brenner and Spaeth (1995) consider all justices in the majority on a parent as supporting the precedent and all justices in the minority as opposing the precedent. Similarly, they regard all justices in the majority in the overruling progeny as supporting the alteration of precedent and all justices in the minority as voting to support the status quo. However, the fact that justices who author or join special concurring opinions may agree with the majority's disposition of the case (e.g., reverse or affirm) does not necessarily imply that they agree—in whole or in part—with the majority's decision to overrule precedent (as is apparent by Justice O'Connor's concurring opinion in *Lawrence v. Texas*). Thus, their study likely overestimated the number of justices in the majority in both parent and overruling progeny cases. To avoid this situation, I formulated a simple decision rule: if the author, and by implication joiner, of a special concurring opinion *explicitly* stated disagreement with the rule of law established in the Court's opinion or if these justices *explicitly* offered an alternative rule of law inconsistent with that of the majority, these justices are considered to have broken from the majority.[9]

Justice O'Connor's concurrence in *Lawrence* exemplifies this decision rule at work: "The Court today overrules *Bowers v. Hardwick*. I joined *Bowers*, and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional" (citations omitted).[10] Similarly, in *Jackson v. Virginia* (1979), Justice Stevens, joined by Chief Justice Burger and Justice Rehnquist, states the following: "The adoption of this novel constitutional rule is not necessary to the decision of this case. Moreover, I believe it is an unwise act of lawmaking."[11] As such, these justices are categorized as having voted against establishing the precedent. Conversely, in *Yates v. Evatt* (1991), Justice Scalia, joined by Justice Blackmun, offers overt agreement with "the Court's carefully constructed methodology for determining harmless error with respect to unlawful presumptions";[12] however, these justices disagree with the Court's application of that rule in the case. Accordingly, Justices Scalia and Blackmun are classified as having agreed with the rule of law created by the majority and therefore as supporting the establishment of precedent.[13]

9 The data identifying special concurring authors and joiners were obtained from the Spaeth database (1999). Justices are considered to have authored special concurring opinions if they agree with the Court's disposition (e.g., reverse or affirm), but disagree with the majority's rationale. Justices are considered to have authored regular concurring opinions if they agree with the Court's disposition and reasoning, but expand on the majority's rationale.

10 123 S. Ct. 2472, at 2484.

11 443 U.S. 307, at 327.

12 500 U.S. 391, at 411.

13 Of the nineteen authors and joiners of special concurring opinions in parent cases, the following justices are classified as having voted against setting the precedent: Justice Douglas in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts* (1966), Justice White and Justice Marshall in *Simpson v. Rice* (1969), Justice Stevens in *Arkansas v. Sanders* (1979), Chief Justice Burger, Justice Rehnquist, and Justice Stevens in *Jackson v. Virginia* (1979), and Justice Powell in both *Parratt v. Taylor*

The final classification is as follows. All justices who voted in the minority in the precedent-setting cases, along with justices who authored or joined special concurring opinions disagreeing with the majority's rule of law, are categorized as having voted against the establishment of precedent. All justices who voted with the majority in the parent case, with the exception of those special concurrers identified above, are classified as having voted in support of setting the precedent. All justices who voted in the minority in the overruling progeny cases, along with those justices who authored or joined special concurring opinions disagreeing with the majority's rule of law, are categorized as having voted against overruling the precedent. All justices who voted in the majority on the overruling progeny cases, with the exception of those special concurrers identified above, are classified as having voted to overrule the precedent.

ANALYSIS OF THE JUSTICES' VOTING BEHAVIOR IN PARENT AND OVERRULING PROGENY CASES

Table 1 reports the frequency with which the justices' behavior fits the classification scheme Brenner and Spaeth (1995) devised. Several patterns are of particular interest. First, justices most commonly exhibit behavior consistent with the attitudinal model. In 34 percent of the votes cast in which precedents are overruled, justices who voted against the establishment of precedent subsequently voted to overrule the precedent. Similarly, in 31 percent of votes cast, justices who voted to set a precedent then voted to uphold the precedent.[14] Second, these results indicate that justices who voted against setting a precedent subsequently voted to uphold the precedent only 6.5 percent of the time. Considering that this behavior (fitting into cell 1) is consistent only with the legal model, these findings suggest that precedent rarely acts as a mechanistic force for the justices, leading inexorably to an outcome consistent with the legal principle embedded in the precedent. Finally, the results indicate that, contrary to what might be expected, justices exhibit variable voting behavior almost 30 percent of the time—voting to support the establishment of precedents and then voting to overrule the precedents they helped establish. Further, the justices who exhibit this voting behavior represent a diverse spectrum of ideologies, ranging from Rehnquist's conservatism to Clark and White's more moderate ideologies to Brennan's liberalism. Thus, the findings reveal not only that this type of variable voting behavior occurs quite often on the Court, but also that the justices who partake in it represent a diverse ideological gamut.

(1981) and *Robbins v. California* (1981). Of the eighteen authors and joiners of special concurring opinions in overruling progeny cases, Justice White in *Illinois v. Gates* (1983) and *Hudgens v. NLRB* (1976) and Justice Stevens in *Rose v. Clark* (1986) are classified as having voted against overruling the precedent.

14 As noted earlier, this behavior is consistent with both the attitudinal and legal models.

Table 1
Examining the Individual Justice's Voting Behavior in Parents and Overruling Progenies, 1953-1995 Terms

Parent / *Overruling Progeny*	SP / UP	~SP / ~UP	~SP / UP	SP / ~UP
Black	1 (6)	15 (83)	2 (11)	0 (0)
Blackmun	10 (43)	2 (9)	0 (0)	11 (48)
Brennan	16 (37)	9 (21)	2 (5)	16 (37)
Burger	1 (11)	1 (11)	0 (0)	7 (78)
Burton	2 (100)	0 (0)	0 (0)	0 (0)
Clark	11 (79)	0 (0)	0 (0)	3 (21)
Douglas	1 (5)	18 (82)	2 (9)	1 (5)
Frankfurter	0 (0)	2 (100)	0 (0)	0 (0)
Harlan	10 (63)	1 (6)	0 (0)	5 (31)
Kennedy	0 (0)	3 (75)	0 (0)	1 (25)
Marshall	15 (68)	3 (14)	3 (14)	1 (5)
O'Connor	1 (11)	6 (67)	1 (11)	1 (11)
Powell	1 (17)	2 (33)	0 (0)	3 (50)
Rehnquist	1 (5)	10 (50)	3 (15)	6 (30)
Scalia	0 (0)	4 (80)	0 (0)	1 (20)
Souter	0 (0)	0 (0)	0 (0)	1 (100)
Stevens	8 (47)	2 (12)	3 (18)	4 (24)
Stewart	5 (24)	3 (14)	0 (0)	13 (62)
Warren	1 (6)	13 (81)	0 (0)	2 (13)
White	10 (27)	10 (27)	4 (11)	13 (35)
Total	94 (30.6)	104 (33.9)	20 (6.5)	89 (28.9)

Numbers in parentheses indicate percentages. These may not equal 100 due to rounding.

SP indicated justice voted to set precedent in parent. UP indicates justice voted to uphold precedent in overruling progeny.

Why do justices behave in this seemingly inconsistent fashion; voting to set a precedent and then overrule it? As a framework for understanding this behavior, I offer four hypotheses. To evaluate these hypotheses, I compare the attributes of justices who voted to set a precedent and then voted to uphold a precedent (cell 3) to justices who voted to set a precedent and subsequently voted to overrule the precedent (cell 4). Such a comparison offers leverage over this question in two ways. First, this comparison provides a type of natural control. That is, because justices who exhibited both of these types of voting behavior (cells 3 and 4) supported the original precedent, intuitions can be gained from their decision to support the precedent in the first place. Second, and relatedly, this comparison is particularly fruitful because unlike justices who joined the minor-

ity in the precedent-setting cases, justices who were in the majority had the opportunity to engage in several activities unique to their status as members of the majority coalition, such as authoring the majority opinion and concurring opinions; clearly, members of the minority have no such options.

Decades of research on Supreme Court decision making reveal the paramount importance of ideology in shaping the justices' votes and opinions (e.g., Pritchett, 1948; Rohde and Spaeth, 1976; Schubert, 1965, 1974; Segal and Spaeth, 1993, 2002). Though majority opinion authors do not enjoy complete control over the content of the majority's opinion, they do retain significant and disproportionate influence over its content (Maltzman, Spriggs, and Wahlbeck, 2000:35; Rohde and Spaeth, 1976:172). With regard to the present analysis, the expectation is that, as the ideological distance between the majority opinion author in the parent case and the individual justices in the overruling progeny increases, justices will be more likely to vote to overrule the precedents they initially supported, as compared to more ideologically proximate justices. Thus, we would expect justices who exhibit behavior falling into cell 4 to be more ideologically distant from the majority opinion author in the parent case than justices falling into cell 3.

H_1: *As the ideological distance between a justice and the majority opinion author in the parent case increases, the justice will be more likely to vote to overturn the precedent.*

Further, we would expect majority opinion authors to rarely exhibit unstable behavior (e.g., vote to overrule precedents they authored) due to both their public and psychological commitments to the majority opinions they authored. First, majority opinion authors, by making a public commitment to a precedent, put their reputations on the line and this is "a potent means of commitment" (Schelling, 1963:29). Should majority opinion authors then "switch" and vote to overrule a precedent they authored, they may appear irresolute to their fellow justices and the public. Second, majority opinion authors are likely to avow a high degree of preference for the position they authored because of their substantial (if not total) influence over the content of the Court's opinion.

H_2: *Justices who authored the majority opinion in the parent case will be more likely to vote to uphold the precedent than the other members of the precedent-setting coalition.*

Canon 19 of the Canons of Judicial Ethics discourages concurring opinion authorship, "except in case of conscientious difference of opinion on fundamental principle."[15] This notion of concurring opinion authorship, similar to that of the attitudinal

[15] Quoted in Murphy (1964:63). Although Canon 19 deals primarily with dissenting opinion authorship, it has been readily interpreted to encompass all separate opinion writing, including concurrences (e.g., Jones, 1980; Maveety, 2002).

model, "accommodates concurrence mainly as an indication of a less strongly-held ideological preference by members of the majority coalition" (Maveety, 2002:1). The expectation is that justices who authored or joined concurring opinions in precedent-setting cases will choose to overrule precedents they helped establish more often than the other members of the majority coalition who did not author such opinions. Simply put, such justices exhibit weaker preferences for the position of the parent's majority opinion as compared to justices who did not author or join concurring opinions.

H_3: *Justices who authored or joined concurring opinions in the parent case will be more likely to vote to overrule the precedent than the other members of the precedent-setting coalition.*

Finally, past research suggests that justices in their freshman terms on the Court have yet to acclimate themselves to the Court and, as such, their voting behavior is more variable than that of their senior colleagues (e.g., Brenner, 1983; Dorff and Brenner, 1992; Hagle, 1993; Snyder, 1958; cf. Heck and Hall, 1981; Pacelle and Pauly, 1996). This suggests that freshman justices may be less wedded to their earlier policy preferences than they are to their more recent policy preferences.[16] Accordingly, the expectation is that freshman justices will more frequently vote to overrule precedents they helped establish, relative to their more senior colleagues.

H_4: *Justices who vote to set precedents as freshman will be more likely to vote to overrule the precedent than justices who were not freshman in the precedent-setting case.*

Table 2 reports on the differences between those justices who supported the establishment of precedent and voted to uphold the precedent and those justices who supported the precedent and voted to overrule it. First, the ideological distance[17] between the majority opinion author in the parent and the justices in the progeny is greater for those justices who vote to overrule precedent than for those who vote to uphold precedent, though a simple difference-of-means test fails to achieve statistical significance.

16 Freshman justices might exhibit variable voting behavior, as compared to their more senior colleagues, not because of fundamental changes in policy preferences that occur over time, but instead because their preferences may be better defined later in their careers.

17 The ideological distance measure is the absolute value of the difference between the ideology score of the majority opinion author in the parent case and the ideological score of the individual justice in the overruling progeny. The majority opinion author's ideology is calculated as the percentage of the time the author voted for the liberal outcome in the issue area in which the case was involved during the previous term of the Court in which the parent decision was made. The individual justices' ideologies are calculated as the percentage of the time they voted for the liberal outcome in the issue area in which the case was involved during the previous term of the Court in which the overruling progeny decision was made. If a justice was a freshman majority opinion author (as were Justice Stewart in *Brown v. US* [1959] and Justice Marshall in *Amalgamated Food v. Logan Valley Plaza* [1968]), was a freshman in both parent and overruling

Table 2
Attributes of Justices Who Supported the Establishment of Precedent

	Justices Who Voted to Uphold Precedent (N = 94)	Justices Who Voted to Overrule Precedent (N = 89)
Ideological Distance from Majority Opinion Author		
	26.8	29.6
p for t-test = 0.241 (one-tailed)		
Authored Majority Opinion		
Yes	18.0 (9.8%)	6.0 (3.3%)
No	76.0 (41.5%)	83.0 (45.4%)
Chi² for Table = 6.18 (p = 0.013)		
Authored or Joined Concurring Opinion (inclusive of all concurring opinions)		
Yes	6.0 (3.3%)	18.0 (9.8%)
No	88.0 (48.1%)	71.0 (38.8%)
Chi² for Table = 7.69 (p = 0.006)		
Authored or Joined Regular Concurring Opinion		
Yes	4.0 (2.2%)	10.0 (5.5%)
No	90.0 (49.2%)	79.0 (43.2%)
Chi² for Table = 3.15 (p = 0.076)		
Authored or Joined Special Concurring Opinion		
Yes	2.0 (1.1%)	8.0 (4.4%)
No	92.0 (50.3%)	81.0 (44.3%)
Chi² for Table = 4.17 (p = 0.041)		
Freshman		
Yes	18.0 (9.8%)	27.0 (14.8%)
No	76.9 (41.5%)	62.0 (33.9%)
Chi² for Table = 3.09 (p = .079)		

N = 183. Number in parentheses indicate within table percentages.

progeny (as was Justice Souter in *Yates v. Evatt* [1991] and *Estelle v. McGuire* [1991]), or did not cast any votes in the issue area in which the cases were involved (as did Justice Brennan in privacy cases during the 1987 term, the term prior to *Webster v. Reproductive Health Services* [(1989]) their ideologies were calculated as the percentage of the time they cast liberal votes during the term the cases were decided in each of the issue areas the case involved. For the Court's *per curiam* opinion in *Mills v. Louisiana* (1960), I calculated the mean percent of the time each justice in the majority cast liberal votes during the previous term in criminal procedure cases, with the exception of Justice Stewart, who was a freshman in this case. For Justice Stewart, I used the percentage of the time he cast liberal votes during the 1960 term in criminal procedure cases. For each of these measures I used Spaeth's (1999) twelve issue areas and case citation plus split vote as the unit of analysis to determine the frequency of liberal votes. Though not perfect, I believe this measure to be the best available proxy for ideological distance. It is preferable to the Segal and Cover (1989) scores for the reasons stated in Epstein and Mershon (1996), most notably because these scores fail to vary between issue areas. In addition, these scores allow ideology to vary over time (and it is for this reason that these scores are not standardized per Baum [1988]). Finally, the ideological distance measure employed is based on the direction of the individual justices' votes, which is not equivalent to the decision to overrule precedent and, as such, it is a reasonably independent measure of ideology.

Thus, it appears that, although justices who exhibit unstable voting behavior (those justices fitting into cell 4) are more ideologically distant from majority opinion authors than those who exhibit more stable voting behavior (those justices fitting into cell 3), this variable likely offers only a partial explanation for this behavior. Note, however, that justices vote to overturn precedents they author far less than those they did not author. Interestingly, of the justices who voted to overrule precedents they authored, all of the justices, with the exception of Justice Souter in *Estelle v. McGuire* (1991), either authored the subsequent majority opinion[18] or authored a concurrence addressing their decision to overturn.[19] Further, two justices, Justice White in *Batson* and Justice Rehnquist in *Scott*, explicitly spoke to societal concerns regarding their decisions to vote to overrule. This suggests that, at least to some extent, the decision to overturn precedents may be due to the influence of public opinion.[20]

Third, the findings reveal that concurring opinion authors and joiners[21] in parent cases are more likely to vote to overrule these precedents than members of the majority coalition who do not author or join such concurring opinions in the parent case. This supports the notion that concurrers demonstrate weaker preferences than non-concurrers for their positions in the parent cases. This, coupled with the finding regarding majority opinion authors, suggests that much can be gained by examining opinion authorship to explain and predict the behavior of jurists. Though not a completely novel concept for scholars (e.g., Schubert, 1963), little attention has been paid by researchers to the connection between opinion authorship and voting behavior. Finally, the results indicate justices in their freshman terms[22] on the Court vote to overrule precedents they helped establish more often than their more senior colleagues. Thus, there is some suggestive evidence in support of a "freshman effect" with regard to justices' decision to overturn precedent.

18 See Justice Rehnquist in *United States v. Scott* (1978) and *Daniels v. Williams* (1986) and Justice Powell in *Rose v. Clark* (1986).

19 See Justice White in *Batson v. Kentucky* (1986) and Justice Blackmun (concurring in part, dissenting in part) in *Planned Parenthood v. Casey* (1992).

20 Similarly, in *Lawrence*, Justice Kennedy, writing for the Court, spoke to changing societal norms regarding homosexual behavior as an explanation for overruling *Bowers*. Conversely, Justice Scalia, in dissent in *Lawrence*, wrote that, in overruling *Bowers*, the Court's majority have "largely signed on to the so-called homosexual agenda, by which [he] mean[s] the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct" (123 S. Ct. 2472, at 2496).

21 The data identifying special and regular concurring authors and joiners were obtained from the Spaeth database (1999).

22 Justices are considered to be in their freshman terms on the Court during their first three years of service (e.g., Howard, 1968). As Hagle (1993:1145) notes, there is no generally accepted length of time to test for the freshman effect: periods tested in extant research vary from one to five years. The substantive results presented here do not change if justices are only considered to be freshman in their first term on the Court or their first two terms.

CONCLUSIONS

In this note, I have provided a preliminary analysis of and research framework for understanding variable voting behavior on the part of the justices in precedent-overruling cases, uncovering several important findings in the process. First, I found that justices who exhibit variable voting behavior are more ideologically distant from the majority opinion authors of precedent-setting cases than justices who vote to uphold precedents in precedent-overruling cases. While attitudinal scholars have generally assumed judicial preferences to be stable (e.g., Segal and Spaeth, 1993), recent research suggests that at least some changes in attitudes may occur over time (e.g., Epstein et al., 1996; Martin and Quinn, 2002). Clearly, such a consideration will be crucial to the broader study of the justices' variable voting behavior, particularly if we accept that the justices' decision making is rational.

Second, I found that majority opinion authors support their precedents more frequently than the other members of the majority coalition, while concurring opinion authors and joiners defect from their precedent-setting coalitions more often than nonconcurrers. These findings suggest that much can be gained from examining opinion-writing patterns to explain and predict the behavior of jurists. Though not an entirely new idea, little attention has been paid by researchers to date to the connection between opinion authorship and voting behavior. Further, these results imply that the public commitments made by justices, in the form of opinion authorship, offer additional insight into the consistency of judicial decision making. Finally, the results indicate that freshman justices exhibit more variable voting behavior than their senior counterparts. Such a finding implies that an acclimation effect occurs for newly tenured justices and is of import as it suggests that a relationship may exist between membership change and the stability of law.

Of course, this note offers only a preliminary analysis and descriptive profile of variable voting behavior by the justices and its framework is limited in scope. Nonetheless, it moves beyond prior studies by providing a useful structure to better understand this behavior and, as such, should provide future researchers a foundation for more rigorous analyses of this behavior. Future researchers may be well advised to consider the influence of public opinion and strategic considerations as affecting the manifestation of this behavior. In regard to the former, several justices spoke to the point of changing societal norms as influencing their decisions to alter precedent. Undoubtedly, a consideration of this possibility will aid our understanding of seemingly irrational behavior on the part of the justices and will likely contribute to our understanding of whether or not the Court is a countermajoritarian institution. In regards to the latter, several scholars posit that changes in the ideological make up of Congress and the executive may influence the decision making of the justices or that changes in Court composition may affect such behav-

ior (e.g., Epstein and Knight, 1998; Maltzman, Spriggs, and Wahlbeck, 2000; Murphy, 1964). Accounting for the possibility of such strategic behavior will, no doubt, aid in our understanding of variable voting behavior on the Court. **jsj**

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APPENDIX TABLE 1
Parent and Overruling Progeny Cases

Parent	Issue[a]	Overruling Progeny
Lewis v. United States, 348 U.S. 419 (1955)	Criminal Procedure	Marchetti v. United States, 390 U.S. 39 (1968)
Westinghouse Employees v. Westinghouse Corporation, 348 U.S. 437 (1955)	Judicial Power	Smith v. Evening News Association, 371 U.S. 195 (1962)
Kinsella v. Krueger, 351 U.S. 470 (1956)	Civil Rights	Reid v. Covert, 354 U.S. 1 (1957)
Reid v. Covert, 351 U.S. 487 (1956)	Civil Rights	Reid v. Covert, 354 U.S. 1 (1957)
Delli Paoli v. United States, 352 U.S. 232 (1957)	Criminal Procedure	Bruton v. United States, 391 U.S. 123 (1968)
Morey v. Doud, 354 U.S. 457 (1957)	Economic Activity	New Orleans v. Dukes, 427 U.S. 297 (1976)
Crooker v. California, 357 U.S. 433 (1958)	Criminal Procedure	Escobedo v. Illinois, 378 U.S. 478 (1964) Miranda v. Arizona, 384 U.S. 436 (1966)
Cicenia v. Lagay, 357 U.S. 504 (1958)	Criminal Procedure	Escobedo v. Illinois, 378 U.S. 478 (1964) Miranda v. Arizona, 384 U.S. 436 (1966)
Hawkins v. United States, 358 U.S. 74 (1958)	Criminal Procedure	Trammel v. United States, 445 U.S. 40 (1980)
Knapp v. Schweitzer, 357 U.S. 371 (1958)	Criminal Procedure	Murphy v. Waterfront Commission, 378 U.S. 52 (1964)
Perez v. Brownell, 356 U.S. 44 (1958)	Civil Rights	Afroyim v. Rusk, 387 U.S. 253 (1967)
Brown v. United States, 359 U.S. 41 (1959)	Criminal Procedure	Harris v. United States, 382 U.S. 162 (1965)
Frank v. Maryland, 359 U.S. 360 (1959)	Criminal Procedure	Camara v. Municipal Court, 387 U.S. 523 (1967)
Mills v. Louisiana, 360 U.S. 230 (1959)	Criminal Procedure	Murphy v. Waterfront Commission, 378 U.S. 52 (1964)
Forman v. United States, 361 U.S. 416 (1960)	Criminal Procedure	Burks v. United States, 437 U.S. 1 (1978)
Jones v. United States, 362 U.S. 257 (1960)	Criminal Procedure	United States v. Salvucci, 448 U.S. 83 (1980)
Cohen v. Hurley, 366 U.S. 117 (1961)	Criminal Procedure	Spevack v. Klein, 385 U.S. 511 (1967)
Hoyt v. Florida, 368 U.S. 57 (1961)	Civil Rights	Taylor v. Louisiana, 419 U.S. 522 (1975)
Monroe v. Pape, 365 U.S. 167 (1961)	Civil Rights	Monell v. Department of Social Services, 436 U.S. 658 (1978)
Kesler v. Department of Public Safety, 369 U.S. 153 (1962)	Judicial Power	Swift and Company v. Wickham, 382 U.S. 111 (1965)
Kesler v. Department of Public Safety, 369 U.S. 153 (1962)	Economic Activity	Perez v. Campbell, 402 U.S. 637 (1971)
Sinclair Refining Company v. Atkinson, 370 U.S. 195 (1962)	Union Activity	Boys Markets v. Retail Clerks, 398 U.S. 235 (1970)

[a] Source: United States Supreme Court Database, 1953-1999 Terms.

Fay v. Noia, 372 U.S. 391 (1963)	Criminal Procedure	Coleman v. Thompson, 501 U.S. 722 (1991)
Townsend v. Sain, 372 U.S. 293 (1963)	Criminal Procedure	Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992)
Aguilar v. Texas, 378 U.S. 108 (1964)	Criminal Procedure	Illinois v. Gates, 462 U.S. 213 (1983)
General Motors Corporation v. Washington, 377 U.S. 436 (1964)	Economic Activity	Tyler Pipe Industries v. Department of Revenue, 483 U.S. 232 (1987)
Parden v. Terminal Railway of Alabama, 377 U.S. 184 (1964)	Economic Activity	Welch v. Texas Highway Department, 483 U.S. 468 (1987)
Swain v. Alabama, 380 U.S. 202 (1965)	Civil Rights	Batson v. Kentucky, 476 U.S. 79 (1986)
A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966)	First Amendment	Miller v. California, 413 U.S. 15 (1973)
Joseph E. Seagram and Sons v. Hostetter, 384 U.S. 35 (1966)	Economic Activity	Brown-Forman Distillers Corporation v. New York State Liquor Authority, 476 U.S. 573 (1986)
United States v. Arnold, Schwinn and Company, 388 U.S. 365 (1967)	Economic Activity	Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977)
Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968)	First Amendment	Hudgens v. NLRB, 424 U.S. 507 (1976)
Maryland v. Wirtz, 392 U.S. 183 (1968)	Union Activity	National League of Cities v. Usery, 426 U.S. 833 (1976)
Desist v. United States, 394 U.S. 244 (1969)	Criminal Procedure	Griffith v. Kentucky, 479 U.S. 314 (1987)
O'Callahan v. Parker, 395 U.S. 258 (1969)	Civil Rights	Solorio v. United States, 483 U.S. 435 (1987)
Shapiro v. Thompson, 394 U.S. 618 (1969)	Civil Rights	Edelman v. Jordan, 415 U.S. 651 (1974)
Simpson v. Rice, 395 U.S. 711 (1969)	Criminal Procedure	Alabama v. Smith, 490 U.S. 794 (1989)
Griggs v. Duke Power Company, 401 U.S. 424 (1971)	Civil Rights	Ward's Cove Packing Company v. Antonio, 490 U.S. 642 (1989)
McGautha v. California, 402 U.S. 183 (1971)	Criminal Procedure	Gregg v. Georgia, 428 U.S. 153 (1976)
Ohio v. Wyandotte Chemicals Corporation, 401 U.S. 493 (1971)	Economic Activity	Illinois v. Milwaukee, 406 U.S. 91 (1972)
Williams v. United States, 401 U.S. 646 (1971)	Criminal Procedure	Griffith v. Kentucky, 479 U.S. 314 (1987)
Bonelli Cattle Company v. Arizona, 414 U.S. 313 (1973)	Federalism	Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, 429 U.S. 363 (1977)
Roe v. Wade, 410 U.S. 113 (1973)	Privacy	Webster v. Reproductive Health Services, 492 U.S. 490 (1989)
Procunier v. Martinez, 416 U.S. 396 (1974)	First Amendment	Thornburgh v. Abbott, 490 U.S. 401 (1989)
United States v. Jenkins, 420 U.S. 358 (1975)	Criminal Procedure	United States v. Scott, 437 U.S. 82 (1978)
National League of Cities v. Usery, 426 U.S. 833 (1976)	Union Activity	Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)
Bounds v. Smith, 430 U.S. 817 (1977)	Due Process	Lewis v. Casey, 518 U.S. 343 (1996)
Marks v. United States, 430 U.S. 188 (1977)	Criminal Procedure	Rose v. Clark, 478 U.S. 570 (1986)

Arkansas v. Sanders, 442 U.S. 753 (1979)	Criminal Procedure	California v. Acevedo, 500 U.S. 565 (1991)
Colautti v. Franklin, 439 U.S. 379 (1979)	Privacy	Webster v. Reproductive Health Services, 492 U.S. 490 (1989)
Jackson v. Virginia, 443 U.S. 307 (1979)	Criminal Procedure	Rose v. Clark, 478 U.S. 570 (1986)
Parratt v. Taylor, 451 U.S. 527 (1981)	Civil Rights	Daniels v. Williams, 474 U.S. 327 (1986)
Robbins v. California, 453 U.S. 420 (1981)	Criminal Procedure	United States v. Ross, 456 U.S. 798 (1982)
Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)	Privacy	Planned Parenthood v. Casey, 505 U.S. 833 (1992)
NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983)	Union Activity	Director v. Greenwich Collieries Director, 512 U.S. 267 (1994)
Solem v. Helm, 463 U.S. 277 (1983)	Criminal Procedure	Harmelin v. Michigan, 501 U.S. 957 (1991)
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)	Privacy	Planned Parenthood v. Casey, 505 U.S. 833 (1992)
Booth v. Maryland, 482 U.S. 496 (1987)	Criminal Procedure	Payne v. Tennessee, 501 U.S. 808 (1991)
South Carolina v. Gathers, 490 U.S. 805 (1989)	Criminal Procedure	Payne v. Tennessee, 501 U.S. 808 (1991)
Grady v. Corbin, 495 U.S. 508 (1990)	Criminal Procedure	United States v. Dixon, 509 U.S. 688 (1993)
Metro Board v. FCC, 497 U.S. 547 (1990)	Civil Rights	Adarand Constructors v. Pena, 515 U.S. 200 (1995)
Yates v. Evatt, 500 U.S. 391 (1991)	Criminal Procedure	Estelle v. McGuire, 502 U.S. 62 (1991)