REVERSALS OF PRECEDENT AND JUDICIAL POLICY-MAKING: HOW JUDICIAL CONCEPTIONS OF STARE DECISIS IN THE U.S. SUPREME COURT INFLUENCE SOCIAL CHANGE

by

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Associate Justice Robert H. Jackson once suggested that rulings from the Supreme Court of the United States have "a mortality rate as high as their authors."[1] Jackson's quip is significant since it is consistent with the political reality that the Court often manipulates the law to make social policy. The remark is also controversial since it raises the question of whether the Supreme Court, led by Chief Justice William H. Rehnquist, is engaging in result-oriented jurisprudence. This is a significant issue since some claim that the Rehnquist Court uses an unprincipled theory of *stare decisis* to achieve partisan objectives in law. Critics argue that this diminishes the Court's institutional prestige and undermines the rule of law.[2] Notably, since 1986 the Supreme Court seems to invite condemnation in some of its high-profile cases, especially in those instances when a defendant's constitutional rights are at issue.

In *Payne v. Tennessee*,[3] for example, the Supreme Court reversed itself twice by admitting into evidence victim impact statements in capital sentencing proceedings. In *Payne*, dissenting Justice Thurgood Marshall denounced Rehnquist's plurality opinion on the grounds that the Court was creating a novel theory of *stare decisis*. *Payne*, in other words, held that the force of precedent is at its acme in cases involving contract or property rights; and, conversely, that it is at its nadir either in opinions relating to procedural and evidentiary rules, 5-4 decisions, or majority opinions achieved over "spirited dissents." The Chief Justice responded to Marshall by saying that "*stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision . . . .' "[4] As a policy matter, therefore, prior law did not prevent the statements from being admitted into evidence.

This article analyzes if Justice Marshall is correct in castigating the Rehnquist Court and asserting that it is destroying the rule of law through its *stare decisis* jurisprudence.

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[1] Robert H. Jackson, *The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 A.B.A. J. 961, 962 (1953).

[2] Amy L. Padden, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After Payne vs. Tennessee*, 82 GEO. L.J. 1689, 1690 (1994).

[3] 501 U.S. 808 (1991).

[4] *Id*. at 828 (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

It concludes that Justice Marshall is only partially correct. While the ideological direction of its jurisprudence has shifted to the right, the Court's behavior in reversing itself is normal and does not endanger the Court's legitimacy or its faithful adherence to law. A fair assessment of the Rehnquist Court's precedent cases indicates that they are reversals which were decided in times of natural court instability and rapid membership change. As a result, the Rehnquist Court's behavior is not that unusual because it is merely re-examining precedent in periods of constitutional "flux" and legal policy change.[5]

A. Traditional Stare Decisis Analysis

The conception of *stare decisis* fits within a framework of traditional legal analysis that the Court regularly employs in evaluating the viability of precedent. Contrary to the notion that the Rehnquist Court has created an "artificial distinction" to test the legal validity of extant precedent,[6] the criteria by which it decides to depart from precedent has a firm legal basis and enjoys wide acceptance in courts. Even so, although empirical studies have explored *stare decisis* from an attitudinal or legal perspective,[7] none have examined in any detail what type of legal criteria the Rehnquist Court actually uses to depart from binding precedent. Investigating the legal factors that the Court applies to its overruling and overturned cases is important since it may be the first step in understanding whether the Rehnquist Court has adopted a "radical" theory of *stare decisis*.[8] Once such legal factors are ascertained, it is then possible to analyze their application in cases and determine whether the Rehnquist Court is making social policy through its precedent-shattering cases and, in the process, compromising the rule of law with its judicial politics.

A typical discussion of *stare decisis* and its impact on precedent often begins with posing the question of whether there is a "special justification"[9] for overruling past law. While this term defies simple definition, it is clear that the Court tries to adopt a principled approach in its *stare decisis* decision-making where "society [can] presume that bedrock principles are founded in law rather than in the proclivities of

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[5] William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736-37 (1949).

[6] Jeffrey A. Segal and Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of the United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971, 972 (1996).

[7] *See, e.g.*, Saul Brenner and Marc Stier, *Retesting Segal and Spaeth's Stare Decisis Model*, 40 AM. J. POL. SCI. 1036 (1996); Richard A. Brisbin, Jr., *Slaying the Dragon: Segal, Spaeth and the Function of Law in Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1004 (1996).

[8] Payne v. Tennessee, 501 U.S. 808, 845 (1991).

[9] *See, e.g.*, United States v. International Business Machines Corp., 517 U.S. 843, 856 (1996); Welch v. Texas Dep't. of Highways and Pub. Transp., 483 U.S. 468, 479 (1987); Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

individuals."[10] Using this rhetoric allows the Supreme Court to preserve the popular conception that it is a legitimate and neutral arbiter of public law. Justice Antonia Scalia's comments in *Hubbard v. U.S.*[11] illustrate this point. Scalia, who has said that *stare decisis* is merely an "administrative convenience,"[12] cautioned in *Hubbard* against calling the underlying decision "wrongly decided."[13] More justification in reversing precedent is needed, he said, because a judge "who ignores [*stare decisis*] must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong."[14] To do otherwise would completely nullify the doctrine's effect.[15]

Where to draw the judicial line between whimsical and principled behavior is less than clear if one acknowledges the inherent tendency of judges to manipulate the doctrine politically. Nevertheless, an examination of the Court's precedent cases indicates that there are at least five traditional legal criteria that the Court looks to whenever it tries to justify a departure from precedent.[16] Ironically, the preeminent legal realist, Justice Benjamin Cardozo, best expressed these traditional legal standards. In his classic *The Nature of the Judicial Process* Cardozo reminds us that "adherence to precedent should be the rule and not the exception."[17] But, while remaining true to the values of *stare decisis* boasts several advantages (including stability, predictability, and uniformity of law),[18] Cardozo accepts the reality that judges are not irrevocably committed to what has gone on before. Rather, when faced with a decision to depart from *stare decisis*, he states that judges should give more or less weight to precedent according to several factors, including: First, whether the court is deciding a constitutional or statutory case; second, whether the underlying decision is inconsistent with justice or the social welfare; and third, whether the precedent has produced a substantial reliance interest that prevents the court from overruling it.[19] Supplementing the Cardozo formulation are two other legal criteria which are integral components of the judicial decision to overrule. The fourth factor is whether the underlying court spoke with one voice in pronouncing the rule of law; that is, the force of precedent

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[10] Vasquez v. Hillery, 474 U.S. 254, 265 (1986).

[11] 514 U.S. 695 (1995).

[12] *Payne*, 501 U.S. at 834 (Scalia, J., concurring).

[13] *Hubbard*, 514 U.S. at 716 (Scalia, J., concurring).

[14] *Id.*

[15] *Id.*

[16] The Supreme Court uses these terms. Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) (describing overruling factors as "traditional"); Planned Parenthood v. Casey, 505 U.S. 833, 861 (1992) (describing overruling factors as customary). Scholars employ them as well. Padden, *supra* note 2, at 1694.

[17] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

[18] *See generally* Edward D. Re, *Stare Decisis*, Address at the Seminar for Federal Appellate Judges Sponsored by the Federal Judicial Center 2-3 (May 13, 1975) (transcript available in The University of Akron Law School Library).

[19] CARDOZO, *supra* note 17, at 150, 152-60.

depends upon whether the court making the precedent is unanimous or divided.[20] The last key variable of the traditional paradigm is the age of the precedent, where the weight afforded the principle is contingent upon whether it has emerged as an authoritative rule over time.[21]

Granted, these are not mutually exclusive, or even completely comprehensive, groupings of all the ingredients that go into the decision to reverse. Reasonable minds differ on the criteria of reversal because the judicial moment of analyzing the binding effect of precedent is an amalgam of distinct factual and legal circumstances that vary with the context of each case.[22] Still, with at least four of the criteria -- the type of case, reliance, the unanimity of the opinion, and the precedent's age -- it is possible to ascertain objectively whether the Rehnquist Court is engaging in unprincipled activism in reversing precedent.[23] An analysis of these standards provides some descriptive proof of the method by which the Justices confront the task of overruling a case. This, in turn, allows for a reasoned evaluation of whether the Court is bypassing *stare decisis* for the purpose of successfully writing the Justices' policy preference into law.

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[20] Robert C. Wigton, *What Does It Take to Overrule? An Analysis of Supreme Court Overrulings and the Doctrine of Stare Decisis*, 18 LEGAL STUD. F. 3, 7-8 (1994).

[21] *Id*. at 7.

[22] SAUL BRENNER AND HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946-1992, at 35; *see generally* W. M. Lile, *Some Views on the Rule of Stare Decisis*, 4 VA. L. REV. 95 (1916).

[23] A judge in search of a "special justification" to overrule a case could probably find one in the all-encompassing "consistency of the principle" category suggested by Justice Cardozo. CARDOZO, *supra* note 17, at 150. This is not an objective measure of the Court's overruling behavior, therefore, since it is too ambiguous in its judicial application to cases: that is, it lets courts proffer a seemingly endless stream of subjective reasons why a precedent is "wrongly decided," "badly reasoned," "unworkable," or "confusing" in light of perceived changing circumstances or intervening law. *See*, *e.g*., United States v. International Bus. Mach. Corp., 517 U.S. 843, 856 (1996) ("unworkable" or "badly reasoned"); Planned Parenthood v. Casey, 505 U.S. 833, 860 (1994) ("unworkable"); Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("unworkable" or "badly reasoned"); Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1988) ("inherent confusion created by an unworkable decision"); *see generally* Jerold H. Israel, *Gideon v. Wainwright; The "Art" of Overruling*, 1963 SUP. CT. REV. 211. To illustrate, an examination of the Rehnquist Court overruling cases demonstrates that, of 28 reversals, only 1 case does not use some language implying that the disregarded precedent has fallen victim either to intervening law, changed circumstances, inconsistency, or some combination thereof. *See* Estelle v. McGuire, 502 U.S. 62 (1991). While it is relatively clear that the inconsistency standard is an important, traditional and independent basis for reversing precedent, it is extremely problematic to analyze its use without bias because there is no reasonable way to verify if the grounds for overruling (as characterized by the majority) are accurately describing what the state of the law is at the time of reversal. Thus, while it is a traditional factor for overruling a case, no attempt is made here to draw any conclusions about how it is used.

1. The Type of Case Before the Supreme Court

Justice Louis Brandeis once explained in *Burnet v. Coronado Oil and Gas Co.*[24] that the Supreme Court ought to have more freedom to reverse itself in cases relating to judicial construction of the meaning of the U.S. Constitution (i.e. "constitutional cases"). The reason, said Brandeis, is simple. With constitutional cases, it is nearly impossible for the popularly-elected branch to correct bad or poorly-reasoned decisions.[25] In cases where the Court is asked to interpret a statute (i.e. statutory cases), Brandeis observed that the Court should exhibit more hesitation in upsetting prior law.[26] This is because the Congress, and not the Court, enjoys more latitude to fix erroneous decisions which, implicitly, gives the Court more opportunity to develop a consistent body of stable law.[27]

While a few commentators are skeptical about the validity of this distinction,[28] Appendix A, which lists the overruling decisions of the Rehnquist Court, suggests that the Court regularly applies it in its decision-making. Table 1 (Tables begin on page 249), in particular, indicates that twenty-two of the twenty-eight overruling cases (78.5%) decided since the 1986 Term are constitutional cases.[29] Only six, or 21.5%, are statutory. Of the constitutional cases, 42.9% concern issues of criminal law/procedure, whereas the balance deal with primary claims involving interpretations of the commerce clause (14.5%), the Tenth or Eleventh Amendments (14.5%), habeas corpus and federalism (9.5%), the First Amendment (9.5%), affirmative action (4.8%), and abortion (4.8%).[30] Notably, these areas have been the focus of conservative

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[24] 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

[25] *Id.*

[26] *Id.* at 406.

[27] Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE, 262, 264 (1992).

[28] Earl M. Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367 (1987-88).

[29] Since constitutional, common law, statutory construction, or judicial administration-supervisory issues may be present in one case, reasonable minds differ as to what is a constitutional or statutory case. A constitutional case is defined here as one primarily relating to the adjudication of a dispositive constitutional issue, including those raising judicial supervisory (but not common law) concerns. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722 (1991) (deciding issues of comity/federalism in habeas corpus context). A statutory case primarily concerns statutory construction. *See, e.g.*, Exxon Corp. v. Central Gulf Lines, Inc., 500 U.S. 603 (1991).

[30] Particular issues are identified by recording the majority number of subject matter headnotes in West's Reporter in an overruling case. Where headnotes are unclear, a case is classified in accordance with the most salient issue(s) decided by the Court. Criminal law cases are: Griffith v. Kentucky, 479 U.S. 314 (1987); Alabama v. Smith, 490 U.S. 794 (1989); Collins v. Youngblood, 497 U.S. 37 (1990); Estelle v. McGuire, 502 U.S. 62 (1991); Arizona v. Fulminante, 499 U.S. 279 (1991); California v. Acevedo, 500 U.S. 565 (1991); Payne v.

Rehnquist Court jurisprudence and supply some proof that precedents do not stand in the way of the judicial policy pronouncements of an activist Court.[31]

That the type of case before the Court makes a critical difference confirms its significance as a legal factor that affects public policy change. For example, the results of Table 1 are in accord with Brenner and Spaeth's analysis of Rehnquist Court overturns (as of 1992), which tells us that thirteen of twenty overruling cases, or 65%, fall into the constitutional category, and four, or 20%, are statutory.[32] Other studies report that most Supreme Court overrulings fall into the constitutional law category as well.[33]

2. Reliance

Perhaps one of the most venerated tenets of the doctrine of *stare decisis* is the one invoking a reliance interest. Long considered an essential element of hornbook law relating to contracts, the legal conception of reliance is also a key aspect of the historical perspective of the rule of law, especially pertaining to the protection of individual property rights. *Stare decisis* is "strictly applied" in contract or property cases because society "has a right to know what the law is, that the law is fixed, and will not be overturned or reversed by a court that is second-guessing."[34] Judicial deference to reliance interests is critical because people need to order their legal expectations in society. For this reason, the Court describes *stare decisis* as a rule of property.[35]

Tennessee, 501 U.S. 808 (1991); U.S. v. Dixon, 509 U.S. 688 (1993); U.S. v. Gaudin, 515 U.S. 506 (1993). Commerce Clause cases are: Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue, 483 U.S. 232 (1987); Healy v. The Beer Inst., 491 U.S. 324 (1989); Quill Corp. v. North Dakota, 504 U.S. 298 (1992). Eleventh/Tenth Amendment cases are Welch v. Texas Dep't of Highways & Transp., 483 U.S. 468 (1987); South Carolina v. Baker, 485 U.S. 505 (1988); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). Habeas corpus/federalism cases are: Coleman v. Thompson, 501 U.S. 722 (1991); Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). First Amendment cases are: Thornburgh v. Abbott, 490 U.S. 401 (1989); and Agostini v. Felton, 521 U.S. 203 (1997); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (addressing abortion); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (addressing affirmative action).

[31] David M. O'Brien, *Charting the Rehnquist Court's Course: How the Center Folds, Holds, and Shifts*, 40 N.Y.L. SCH. L. REV. 981, 988 (1996).

[32] The balance of cases are common law (2, or 10%) and supervisory authority over federal court (3, or 2.6%) decisions. BRENNER & SPAETH, *supra* note 22, at 36.

[33] Banks, *supra* note 27, at 263 (showing that according to Table 1, from the Marshall Court to the Rehnquist Court (until 1991), 60.5% of overturns are constitutional cases and 27% of overturns are statutory cases).

[34] Herbert C. Kaufman, *A Defense of Stare Decisis*, 10 HASTINGS L. J. 283, 285 (1959).

[35] The Genesee Chief, 53 U.S. 443, 458 (1851); *see also* Vimar Seguros y Reaseguros v. M/V Sky Reefer, 515 U.S. 528, 534 (1995).

In contemporary times the reliance interest linked with precedent has assumed more substantive meaning and, on occasion, enjoys broad application in the judicial politics of the Rehnquist Court. As Justices O'Connor, Kennedy, and Souter explained for a divided Court in the abortion case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[36] the Court refused to overrule the "central holding" of *Roe v. Wade*[37] because to do so would wrongly deny that,

> for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.[38]

Recognition of the reliance interest, moreover, has surfaced in other politically-charged decisions that have little to do with the preservation of contract or property rights.[39] As these cases and others[40] aptly demonstrate, the question of reliance--which "counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application"[41]--increasingly is a point of departure for knowing if fixed legal principles in the Rehnquist Court change or remain constant.

While reliance interests are a high priority in *stare decisis* jurisprudence, the opposite is true for those implicating procedural or evidentiary rules, particularly in constitutional cases.[42] For every case that is given more weight due to a reliance interest, there are an equal number of opinions having less force because they pertain to some element of the mechanics underlying the judicial process. Contracts and property cases have a higher *stare decisis* priority because they preserve an expectation that courts will extend protection to interests that become more valuable as time elapses. While procedural or evidentiary issues insure governmental neutrality in litigation, they simply do not create the sort of vested commercial interests that become more significant in the future. Hence they are given less weight in the decisional processes of courts.

Analysis of the overturned decisions in the Rehnquist Court reveals that reliance

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[36] 505 U.S. 833 (1992).

[37] 410 U.S. 113 (1973).

[38] *Casey*, 505 U.S. at 856.

[39] *See* Payne v. Tennessee, 501 U.S. 808 (1991) (deciding on the admissibility of evidence in capital sentencing proceeding); Hubbard v. U.S., 514 U.S. 695 (1995) (addressing the fraud/federal false statement statute); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (addressing affirmative action).

[40] *E.g.*, Quill Corp. v. Heitkamp, 504 U.S. 298 (1992); *see also* U.S. v. Lopez, 515 U.S. 549, 584 (1995) (Thomas, J., concurring).

[41] *Casey*, 505 U.S. at 856.

[42] *E.g.*, U.S. v Gaudin, 515 U.S. 506 (1993).

considerations are in fact given special weight. Table 2 illustrates that the Court tends to follow precedent more often in reliance interest cases and, conversely, rejects it in those raising procedural or evidentiary subject matter. The difference in treatment is quite marked. Of the total percentage of cases relating to either reliance or non-reliance interests (47.1%), only two property or contract cases, or 5.9%, were overturned. Conversely, fourteen cases involving a procedural or evidentiary issue, or 41.2%, were upset by the Supreme Court. On balance, this persuasively indicates that the Supreme Court applies the conventional logic of presuming that property or contract precedents merit compelling force, whereas non-reliance interests have less precedential value.

B. Unanimity or Dissension from the Court Creating the Precedent

Former Chief Justice Charles Evan Hughes once said that, "a dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day when a later decision may possibly correct the error into which the dissenting judge believes the court has been betrayed."[43] The brooding spirit of dissension substantially undercuts judicial devotion to a legal rule over time. Without unanimity, adherence to the rule of law is difficult because "[t]he first essential of a lasting precedent is that the court or the majority that promulgates it be fully committed to its principle."[44]

That courts analyze extant precedent in light of the solidarity of the court issuing the underlying rule of law is intuitive. The more dissension in a case cannot help but signal to prospective litigants and courts that a disfavored precedent is on weak footing and ripe for an aggressive challenge in court. Table 3, a summary of the percentage of unanimity or dissension in overturned cases by the Rehnquist Court, partially belies this traditional logic, however. Of the total number of overturned cases, twelve, or 36.4%, were decided by a bare majority (i.e. a 5-4 vote). In addition, in cases featuring three dissents or more, the Court reversed them nearly one-half (48.5%) the time. These findings show that opinions resulting from closely-divided Courts are indeed more vulnerable to subsequent attack. Nevertheless, Table 3 also discloses that unanimity is not a guarantee that precedent is sacrosanct. Of the thirty-four toppled decisions, eleven precedents, or 33.3%, were unanimous. While unanimity or dissension is still a conventional part of the Court's approach to *stare decisis*, the expectation that unanimity strengthens the force of precedent and dissension weakens it is not, therefore, completely met.

C. The Age of the Precedent

The final legal factor affecting the laws' stability is the age of the precedent under review. Courts are more apt to re-examine extant principles if they are less seasoned or

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[43] AYITAH & SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW, 130 (quoting Chief Justice Hughes).

[44] Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 335 (1944).

not well-established over time. Thus, in their study of 154 Supreme Court precedents, Brenner and Spaeth report that 50.0% are less than twenty-one years old at the time of overturning; whereas, only 6.4% of the overturned decisions are older than ninety years.[45] They also observe that the average and median age of the precedents overturned in the Rehnquist Court (up to 1992) is 38.8 and 23.0 years, respectively. Half of the overruled cases they studied lasted less than twenty-one years, and only 10% predate 1900.[46] Their major findings therefore support the conventional wisdom that recent principles of law are more at risk than older principles. It seems fair to say, then, that a legal principle of recent origin is more susceptible to having the Rehnquist Court give that principle a second look and, under the right circumstances, reverse it.

Table 4 identifies, in ten-year increments, the precise age of the precedent reversed by the Rehnquist Court since 1986. It discloses that the preponderance of overturned cases are relatively young in age. For example, 29.4% were only on the books less than ten years, and 17.7% were upset after having an age between eleven and twenty years. 23.5% had an age of twenty-one to thirty years. The most striking finding, though, is that the age of nearly half (47.1%) of the overturned cases is less than twenty years; almost three-quarters (70.6%) of the overturned cases have an age of thirty years or less; and, over two-thirds (76.5%) are forty years or less. While 14.7% of the overturned rulings are more than ninety-one years old, only 8.8% are over 100 years old. Though the percentages slightly differ, these findings are generally consistent with Brenner and Spaeths' major conclusions. It is relatively certain, therefore, that the Rehnquist Court will reverse younger, less seasoned law while, at the same time, hesitate in overturning older cases.

In summary, a review of the pertinent elements reveals that the traditional *stare decisis* paradigm has a pervasive influence on the Supreme Court's precedent jurisprudence. These findings also diminish the claim that the legal criteria for overruling a case in *Payne* are novel. Clearly, if only the asserted legal grounds for overruling the decision are considered, Marshall's criticism of Rehnquist is unsubstantiated since the judicial standard outlined in *Payne*--that precedent has less force if it involves a procedural or evidentiary issue or if it is a 5-4 decision--fall squarely in the normal category of reliance and unanimity or dissension. Although Rehnquist also stated in *Payne* that cases have less weight if they are passed over "spirited dissents,"[47] it is fair to associate that element with the unanimity or dissension factor.[48] In the end, Marshall

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[45] BRENNER & SPAETH, *supra* note 22, at 29.

[46] *Id*.

[47] Payne v. Tennessee, 501 U.S. 808, 829-30 (1991).

[48] *Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to be Associate Justices of the Supreme Court of the United States, 1971: Before the Committee on the Judiciary*, 92nd Cong. 19, 55, 76, 138 (1987); *Nomination of William H. Rehnquist to be Chief Justice of the Supreme Court of the United States, 1986: Before the Committee on the Judiciary*, 99th Cong. 133, 271 (1987) [hereinafter, *Nomination of*

incorrectly accused the Chief Justice of inventing legal standards of precedent which are non-traditionally based. However, the substance of Justice Marshall's political criticism of the Court is validated when the Rehnquist Court's propensity to engage in conservative judicial activism in its precedent cases is considered.

D. Precedent and the Judicial Activism of the U.S. Supreme Court

In exploring why the Supreme Court reverses precedent, it is instructive to know whether the Justices themselves believe non-political forces explain judicial behavior. In 1986, for example, Chairman Strom Thurmond (R-S.C.) asked then-Associate Justice Rehnquist at his confirmation hearings whether he knew why the Supreme Court tends to overrule its own decisions.[49] The answer, said Rehnquist, is found with the large number of constitutional cases on the Court's docket. Since less weight is normally given to constitutional cases, Rehnquist thought that the Court would review more cases and accordingly reverse more precedents.[50] With these comments Rehnquist unwittingly raised the issue that the Court's caseload has an association with the number of cases the Court overturns.

Political scientists have investigated the hypothesis that there is a correlation between larger caseloads and the Court's reversal rate. In their study of state supreme courts' reversals, Stephanie Lindquist and Kevin Pybas tested Sidney Ulmer's hypothesis that there is a statistical correlation between a court's docket and the rate of reversals.[51] Notably, they confirm Rehnquist's suspicion that a relationship exists by reporting that the volume of a court's docket is positively associated with an increased rate of reversals. There are two explanations for the existence of this relationship. First, the pressures of a higher caseload create more judicial mistakes in drafting opinions, which in turn compels courts to correct the errors by reversing imprecise rulings. Second, the sheer size of a docket gives a court more chances to overturn cases, especially if the docket continues to grow.[52]

Tables 5 and 6 lend mixed support to these hypotheses, however. Table 5, which pertains to the Supreme Court's total docket, and Table 6, which considers only the amount of full written opinions issued by the Court, at best show that a moderate association exists. The Pearson correlation coefficient in Table 5 implies, for example, that having more cases on the total docket will not result in more cases reversed (-.46, $p<.152$). Table 6, however, presents a slightly different picture since the coefficient in this case is positive (.48) instead of negative; yet, it is still insignificant at $p<.129$. As a

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Rehnquist 1986].

[49] *Nomination of Rehnquist 1986*, *supra* note 48, at 132-33.

[50] *Id.*

[51] Stephanie A. Lindquist and Kevin Pybas, Address at the Annual Meeting of the Midwest Political Science Association (April 1997) (transcript on file with author).

[52] *Id.*

result, perhaps the most important finding of the correlation analysis is that it appears to show that how the Court's docket is defined makes a considerable difference in proving whether caseload impacts the reversal rate. If so, then whether there is a negative or positive correlation, and ultimately whether the Court's caseload results in more reversals as a statistical issue, appears to be affected by one's conception of what is the best measure of the Court's docket.[53] At bottom, however, the findings here make clear that there is little evidence that a larger caseload makes the Court reverse itself more often.

Tables 5 and 6 also imply that the Rehnquist Court is not an activist Court in terms of the sheer frequency of overruling and overruled cases. Although Table 5 reports a mean of 2.55 reversals per Term, the mean percentage of reversals is still infinitesimal (the mean is less than one-half percent, at .041) if the total docket is considered. Table 6, on the other hand, suggests that reversals constitute a more substantial (but still small) part of the Court's work, with a mean percentage rate of 2.02% per Term. In any event, both Tables acknowledge that overrulings are a rare event in terms of the total number of cases on the docket and in relation to how many full, written opinions the Court produces. Also, the amount of law being reversed is not, in the aggregate, impressive. In terms of the Court's total docket, the mean rate of overturned cases is slightly less than one-half percent (.046%). Likewise, the mean percentage for overturned cases is 3.09% if the full written opinion docket is only taken into account.

While these findings shed some light on what is influencing the reversal patterns of the Rehnquist Court, there is a more fundamental reason why the precedent is reexamined. A number of observers of the judicial process argue that the law's stability is greatly affected by who is sitting on the Court at a determinate time in political history.[54] As the Court's membership changes through the presidential appointment process, so too does the ideological scope and content of constitutional law. Justice William O. Douglas perhaps said it best when he noted that the Supreme Court inevitably enters into periods of constitutional "flux," or times when newly-appointed Justices are given the opportunity to re-evaluate the decisions of their predecessors.[55] In times of flux, there is a rapid turnover of Justices, and precedents are likely to fall as new majorities coalesce on the bench and write their own policy preferences into law as a natural part of their judicial function.[56] In this sense, the rule of law is transformed into a principle of political convenience, where the "friends" of *stare decisis* are only

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[53] The full opinion docket, which consists of signed and per curiam opinions, may be the best choice in *stare decisis* research because reversals of prior law usually need to be based upon a written rationale in order to preserve the Court's legitimacy as a neutral arbiter of the law.

[54] Israel, *supra* note 23, at 219; Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402-3 (1987).

[55] Douglas, *supra* note 5, at 736-37

[56] *Id.*

"determined by the needs of the moment."[57]

Since 1986, when William Rehnquist became Chief Justice, there have been six natural courts,[58] twenty-eight reversals, and thirty-four overturned decisions in the Supreme Court. While the most number of reversals (7) transpired in the second natural court period, the bulk of reversals (22), or 78.6% of the total overruling decisions, occurred in the first four natural courts. During this period, which spanned almost seven years (1986 to 1993), twenty-seven precedents fell, or 79.4% of the total number (34). Moreover, the first natural court emerged with the departure of Chief Justice Warren Burger and President Ronald Reagan's appointment of William Rehnquist as his successor. Over the seven year period of the first four natural courts, four new members, Justices Scalia, Anthony Kennedy, David Souter, and Clarence Thomas, were appointed by politically conservative presidents. Notably, the new conservative appointments replaced three Justices, namely Brennan, Marshall, and Byron White, put on the bench by liberal presidents.[59]

As Table 7 suggests, when the new conservative bloc of judicial appointments coalesced into a majority in a relatively short period of time (approximately seven years), the Rehnquist Court re-examined precedent and, at times, significantly altered legal and public policy. The overruling decisions during the first four natural court periods demonstrate the "interpretative instability" and fluidity of constitutional law, one dimension of the Courts' judicial activism. As political scientist Bradley Canon explains, interpretative stability is one of six dimensions of judicial activism and it "measures the degree to which a Supreme Court decision either retains or abandons precedent or existing judicial doctrine."[60] Moreover, he notes, "[t]he most visible and dramatic instance of interpretative instability comes when the Court explicitly overrules one of its own earlier decisions."[61]

Through its reversals of precedent the Rehnquist Court has been politically successful in narrowing the scope of civil rights of those who come into contact with the criminal justice system.[62] In *Thornburgh v. Abbott*,[63] for example, the Court increased the power of prison authorities to inspect incoming mail sent to prisoners.

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[57] Cooper, *supra* note 54, at 402.

[58] "Natural courts" represent a time when the Court's membership is stable. A new natural court is created when membership changes and a justice either begins or ends service on the bench. O'Brien, *supra* note 31, at 981.

[59] Justice Lewis Powell (part of the first natural court), a Nixon appointee, also left Court service. THE SUPREME COURT OF THE UNITED STATES 22-23 (1997).

[60] Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 237, 241 (1983).

[61] *Id*.

[62] O'Brien, *supra* note 31, at 996-98.

[63] 490 U.S. 401 (1989).

With a trio of important cases, the Rehnquist Court also altered prior doctrine and extended the application of the harmless error rule to involuntary confessions in *Arizona v. Fulminante*;[64] broadened the right of the police to search closed containers in automobiles without a warrant in *California v. Acevedo*;[65] and, in *Payne v. Tennessee*,[66] condoned the admission of victim impact statements in a capital sentencing. In still other criminal procedure cases, the Court made it easier to insulate judges from having their criminal sentencing determinations upset on appeal in *Alabama v. Smith*[67] and *Collins v. Youngblood*.[68] Finally, in two significant habeas corpus/federalism cases, *Coleman v. Thompson*[69] and *Keeney v. Tamayo-Reyes*,[70] the Rehnquist Court continued to limit the ability of convicted felons to seek collateral relief in federal court on the basis of alleged violations of constitutional rights. Significantly, these last two rulings are influential in light of other Rehnquist Court decisions limiting the right of habeas corpus and the Chief Justices' own effort (as the titular head of the federal judiciary) to restrict the right in federal courts.[71]

That the Rehnquist Court has sought to curtail rights of criminal defendants is not surprising to those familiar with his judicial philosophy. During his 1986 confirmation hearings, Rehnquist testified that the constitutional rights of the accused must be balanced against the right of society to "apprehend the guilty and exonerate the innocent."[72] In his view, "[the] endless expansion of constitutional rights for defendants by judicial construction is not a welcomed thing."[73] While the Supreme Court's movement to the right of the political spectrum is aligned with Rehnquist's attitude on criminal justice, the Supreme Court under his leadership has also made an impact on other areas of constitutional law jurisprudence.

In fact, if all six natural courts are considered, the Court's precedent-altering behavior reveals that its conservative judicial politics has been incorporated into the dynamic area of Eleventh Amendment jurisprudence. With *Welch v. Texas Department of Highways and Transportation*,[74] and later in *Seminole Tribe of Florida v. Florida*,[75] the Justices fortified the principle that the Eleventh Amendment is a restriction on the

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[64] 499 U.S. 279 (1991).
[65] 500 U.S. 565 (1991).
[66] 501 U.S. 808 (1991).
[67] 490 U.S. 794 (1989).
[68] 497 U.S. 37 (1990).
[69] 501 U.S. 722 (1991).
[70] 504 U.S. 1 (1992).
[71] *See* Felker v. Turpin, 518 U.S. 651 (1996); *see also* William H. Rehnquist, *1996 Year-End Report on the Federal Judiciary* <http://www.uscourts.gov\cj96.htm>.
[72] *Nomination of Rehnquist 1986*, *supra* note 48, at 211.
[73] *Id*. at 211-12.
[74] 483 U.S. 468 (1987).
[75] 517 U.S. 44 (1996).

power of federal courts to abrogate state sovereign immunity. Clearly these rulings emphasize the conservative view that the Eleventh Amendment is an affirmative limitation on the power of the federal government. In regard to abortion, even though the Court preserved the "central holding" of *Roe v. Wade* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[76] the Court overturned two rulings restricting the governments' power to regulate abortions and seriously undercut much of what *Roe* stood for by not treating the right to choose to have an abortion as a fundamental right and by rejecting *Roe's* trimester analysis. *Casey* is the most significant Rehnquist Court attempt to eliminate *Roe* from the constitutional map of protected civil rights and liberties.[77] In *Adarand Constructors, Inc. v. Pena*,[78] and *Agostini v. Felton*,[79] the Court continued its progress toward making affirmative action an anachronism and increasing the right of government to accommodate religious beliefs.

In sum, the Rehnquist Court exhibits the type of judicial activism that one would normally expect from a predominately moderate to conservative Court. Its judicial politics in precedent cases reveals that it tips the scales of justice towards law enforcement at the expense of a felon's civil rights and liberties; it limits federal power and defers to the states; and it restricts the substantive content of abortion and affirmative action rights. Still, it is an overstatement to say that the Rehnquist Court is completely successful in charting a revolutionary course in conservative judicial politics through its overruling decisions. One could, in fact, interpret the *Casey* ruling in 1992 (in the fourth natural court period) as the highwater mark for the judicial activism of the Rehnquist Court since *Roe* was not explicitly overturned as many of conservatives had hoped. And, the sharp increase in reversals in the sixth natural court period (Table 7) suggests that the appointments of Justices Ruth Bader Ginsburg and Stephen Breyer mark the beginning of a new period of moderate to liberal activism, especially if President William Clinton gets the opportunity to appoint more Justices to the high bench during the remainder of his second term in office.

Yet, Justice Marshall was partially correct in *Payne* in forecasting that a number of precedents were in jeopardy as a result of the Rehnquist Court's approach to *stare decisis*. As Table 8 indicates, in the six year period after *Payne* at least four of the seventeen, or 23.5%, of the precedents identified by Justice Marshall have been overturned in part. Moreover, four other cases have been distinguished or limited in subsequent rulings by the Court, a sign that their precedential force is weakening. If the explicit overrulings are combined with the cases that have been distinguished, nearly fifty percent (47.0%) of the cases on the "endangered precedents" list have been either overruled in part or seriously weakened through the incremental process of distinguishing precedent. Notably, too, all of the eight precedents receiving negative

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[76] 505 U.S. 833 (1992); *see also* Roe v. Wade, 410 U.S. 113 (1973).
[77] O'Brien, *supra* note 31, at 994.
[78] 515 U.S. 200 (1995).
[79] 521 U.S. 203 (1997).

treatment are less than twelve years old and, in eight of the thirty-four overturned decisions (23.5%), Justice William Brennan, one of the Court's most liberal members, wrote the opinion for the Court.[80] These results lend force to the argument that the Rehnquist Court has shifted constitutional doctrine through an ongoing process of reversing cases and distinguishing precedent.[81] The ultimate issue, though, is not whether the Rehnquist Court has been successful in achieving conservative change; there is little question that it has, at least to a certain degree. More important is the question of whether the Court's re-examination and alteration of precedent is necessarily harmful to the rule of law or the American polity, a claim that implicates the Court's institutional legitimacy.

E. Conclusion

In *Seminole Tribe of Florida v. Florida*,[82] a 5-4 decision, Chief Justice William Rehnquist held that *Pennsylvania v. Union Gas Company*[83] had lost its value as an enduring principle of law and must be overruled. *Union Gas*, Rehnquist argued, was wrongly decided because a plurality endorsed it while a majority rejected it; and, as a result, lower federal courts were confused as to its meaning and application in subsequent cases. Worse still, it was at odds with other lines of more established, and correctly decided, federalism jurisprudence. Accordingly, over the spirited dissents of Justices David Souter and John Paul Stevens, the Court ruled that the Eleventh Amendment prevents Congress from authorizing lawsuits by Indian tribes against the states to enforce federal legislation pursuant to the Indian Commerce Clause.

Seminole Tribe well illustrates that the Rehnquist Court is willing to disregard precedent that is flawed in several traditional respects. Not only was *Union Gas* only seven years old as a controlling legal principle, it also was created through a divided Court and deemed to be inconsistent with prevailing law. Moreover, it was a constitutional case and, at least implicitly, did not command any sort of reliance interest that would make the Court hesitate in overruling it. Instead of manipulating the law through a novel theory of *stare decisis* created by a result-oriented Rehnquist Court, the overruling of precedent in *Seminole Tribe* indicates that the Supreme Court applied all five of the conventional factors normally associated with the re-examination of constitutional law principles.

Consequently, *Seminole Tribe* is a significant Eleventh Amendment case that

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[80] Parden v. Terminal Railway, 377 U.S. 184 (1964); Fay v. Noia, 372 U. S. 391(1963); South Carolina v. Gathers, 490 U.S. 805 (1989); Grady v. Corbin, 495 U.S. 508 (1990); Metro Broad., Inc. v. F.C.C., 497 U.S. 547 (1990); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); Aguilar v. Felton, 473 U.S. 402 (1985); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985).

[81] O'Brien, *supra* note 31.

[82] 517 U.S. 44 (1996).

[83] 491 U.S. 1 (1989).

advances a particular partisan vision about what federalism means in America today. For this reason critics of the Court may claim that cases like *Seminole Tribe* are politically motivated and legally unsound. Yet, while the ruling in this case and others disclose that the Rehnquist Court is engaging in a conservative brand of judicial activism, they do not establish that the rule of law is being undermined through loose or unprincipled interpretations of *stare decisis.* The opposite, if anything, is true since the Court re-examines precedent as an inevitable part of the natural court instability which characterizes all courts during times of rapid personnel change. As a result, Justice Rehnquist is right by asserting that "*stare decisis* is not an inexorable command"[84] in preventing change in constitutional law. How could it be? For, if it were, the doctrine of *stare decisis* would violate the maxim that all citizens have a basic right to enjoy their freedom by living under a Constitution that evolves throughout time.

TABLES

Table 1 - Overrulings by Type of Case in Rehnquist Court

Term	Total Number of Overrulings	Constitutional Cases	Statutory Cases
1986-87	5	80.0%	20.0%
1987-88	2	50.0%	50.0%
1988-89	4	75.0%	25.0%
1989-90	1	100.0%	0.0%
1990-91	6	83.3%	16.7%
1991-92	3	100.0%	0.0%
1992-93	1	100.0%	0.0%
1993-94	1	0.0%	100.0%
1994-95	3	66.7%	33.3%
1995-96	1	100.0%	0.0%
1996-97	1	100.0%	0.0%
Total	28	78.6%	21.4%

Note: Percentages are derived by dividing the number of constitutional or statutory overruling decisions in a Term by the total number of overrulings for the Term at issue.
Source: Overruling cases listed in Appendix A.

[84] Payne v. Tennessee, 501 U.S. 808, 828 (1991).

Table 2 - Percentage of Overturned Cases With Reliance Interest in Rehnquist Court

Term	Total Cases	Property/ Contract Cases	Perc.	Procedural/ Evidentiary	Perc.	Excluded Cases	Perc.
1986-87	5	0	0.0%	0	0.0%	5	100.0%
1987-88	3	0	0.0%	0	0.0%	3	100.0%
1988-89	4	1	25.0%	1	25.0%	2	50.0%
1989-90	2	0	0.0%	2	100.0%	0	0.0%
1990-91	8	1	12.5%	6	75.0%	1	12.5%
1991-92	4	0	0.0%	2	50.0%	2	50.0%
1992-93	1	0	0.0%	0	0.0%	1	100.0%
1993-94	1	0	0.0%	1	100.0%	0	0.0%
1994-95	3	0	0.0%	2	66.7%	1	33.3%
1995-96	1	0	0.0%	0	0.0%	1	0.0%
1996-97	2	0	0.0%	0	0.0%	2	100.0%
Total	34	2	5.9%	14	41.2%	18	52.9%

Note: "Excluded" cases did not involve either property/contract or procedural/evidentiary interests.
Source: Overturned cases listed in Appendix A.

Table 3 - Percentage of Unanimity or Dissension In Overturned Cases in Rehnquist Court

Term	Unanimous	One Dissent	Two Dissents	Three Dissents	Four Dissents
1986-87 (N=5)	1	0	1	1	2
1987-88 (N=3)	2	0	1	0	0
1988-89 (N=4)	2	0	2	0	0
1989-90 (N=1)	0	0	0	0	1
1990-91 (N=8)	3	1	1	1	2
1991-92 (N=4)	0	0	0	2	2
1992-93 (N=1)	0	0	0	0	1
1993-94 (N=1)	1	0	0	0	0
1994-95 (N=3)	2	0	0	0	1
1995-96 (N=1)	0	0	0	0	1
1996-97 (N=2)	0	0	0	0	2
Total (N=33)	**11**	**1**	**5**	**4**	**12**

Table 3 - Percentage of Unanimity or Dissension In Overturned Cases in Rehnquist Court					
Percent	**33.3%**	**3.0%**	**15.2%**	**12.1%**	**36.4%**

Note: One case, *Thompson v. Utah*, 170 U.S. 343 (1898), is excluded from the analysis due to the uncertainty of its voting coalitions, as taken from the U.S. Reports.
Source: Overturned cases listed in Appendix A.

Table 4 - Age of Overturned Cases in Rehnquist Court

Term	0-10	11-20	21-30	31-40	41-50	51-60	61-70	71-80	81-90	91-100	Over 100
1986-1987 (N=5)		1	3								1
1987-1988 (N=3)					1	1				1	
1988-1989 (N=4)		2	1	1							
1989-1990 (N=2)										1	1
1990-1991 (N=8)	4	1	2								1
1991-1992 (N=4)	2		2								
1992-1993 (N=1)	1										
1993-1994 (N=1)		1									
1994-1995 (N=3)	1			1			1				
1995-1996 (N=1)	1										
1996-1997 (N=2)	1	1									
Total (N=34)	10	6	8	2	1	1	1	0	0	2	3
Percent	**29.4%**	**17.7%**	**23.5%**	**5.9%**	**2.9%**	**2.9%**	**2.9%**	**0.0%**	**0.0%**	**5.9%**	**8.8%**

Source: Overturned cases listed in Appendix A.

Table 5 - Frequency of Overrulings and Overturned Precedents in Rehnquist Court (Total Docket)

Year	Total Cases on Docket	Overruling Cases	Percent Overruling	Overturned Cases	Percent Overturned
1986-87	5123	5	0.098%	5	0.098%
1987-88	5268	2	0.038%	3	0.057%
1988-89	5657	4	0.071%	4	0.071%
1989-90	5746	1	0.017%	2	0.035%
1990-91	6316	6	0.095%	8	0.127%
1991-92	6770	3	0.044%	4	0.059%
1992-93	7245	1	0.014%	1	0.014%
1993-94	7786	1	0.013%	1	0.013%
1994-95	8100	3	0.037%	3	0.037%
1995-96	7565	1	0.013%	1	0.013%
1996-97	7602	1	0.013%	2	0.026%
Total	73178	28	0.038%	34	0.046%
Mean	6652.55	2.55	0.041%	3.09	0.050%
Median	6770	2	0.037%	3	.037%
Mode	--	1	--	1	--
Pearson's Correlation		**-0.463 p<.152**			

Source: The total number of cases on the docket, which consists of all cases, summarily-decided or otherwise on the Court's docket per Term, is data obtained from the U.S. Clerk's Office, United States Supreme Court.

Table 6 - Frequency of Overrulings and Overturned Precedents in Rehnquist Court (Full Written Opinions' Docket)

Year	Total Number of Full Written Opinions	Overruling Cases	Percent Overruling	Overturned Cases	Percent Overturned
1986-87	174	5	2.874%	5	2.874%
1987-88	160	2	1.250%	3	1.875%
1988-89	168	4	2.381%	4	2.381%
1989-90	146	1	0.685%	2	1.370%
1990-91	125	6	4.800%	8	6.400%
1991-92	123	3	2.439%	4	3.252%
1992-93	115	1	0.870%	1	0.870%
1993-94	99	1	1.010%	1	1.010%
1994-95	94	3	3.191%	3	3.191%
1995-96	90	1	1.111%	1	1.111%
1996-97	90	1	1.111%	2	2.222%
Total	1384	28	2.023%	34	2.457%
Mean	125.82	2.55	1.975%	3.09	2.414%
Median	123	2	1.25%	3	2.22%
Mode	90	0	1.11%	1	--
Pearson's Correlation		**0.487 P<.129**			

Source: The total number of full written opinions, which consists of only those cases disposed of by signed or per curiam opinions on the Court's docket per Term, is data obtained from the U.S. Clerk's Office, United States Supreme Court.

Table 7 - Rehnquist Court Reversals During Natural Court Periods (September 26, 1986 to Present)

Chief Justice		Natural Court	Reversals	Total No. Precedents Reversed
Rehnquist	N1	9/26/86-2/18/88 *J. Rehnquist promoted to CJ 9/26/86 (Replacing CJ Warren Burger) *J. Scalia takes oath 9/26/86 *CJ Burger left service 9/26/86 *J. Powell left service 6/26/87	5	5
	N2	2/18/88-10/9/90 *J. Kennedy takes oath 2/18/88 *J. Brennan left service 7/20/90	7	9
	N3	10/9/90-10/23/91 *J. Souter takes oath 10/9/90 *J. Marshall left service 10/1/91	5	6
	N4	10/23/91-8/10/93 *J. Thomas takes oath 10/23/91 *J. White left service 6/28/93	5	7
	N5	8/10/93-8/3/94 *J. Ginsburg takes oath 8/10/93 *J. Blackmun left office 8/3/94	1	1
	N6	8/3/94- present *J. Breyer takes oath 8/3/94	5	6
			Total: 28	34

Source: Natural Courts are created by examining the dates of departure from Court service and the dates of oath for the respective Justices in THE SUPREME COURT OF THE UNITED STATES, prepared by the Supreme Court of the United States, and published with the cooperation of the Supreme Court Historical Society (available directly from U.S. Supreme Court). Although each departure and oath date, respectively, technically creates a new natural court, for purposes of this table the aggregate number of natural courts are collapsed into periods of court stability that begin (and end) with the oath date of each newly appointed Justice. *See* O'Brien, *supra* note 31, at 981 n.5. The number of reversals and number of precedents reversed are compiled from Appendix A.

Table 8 - Rehnquist Court's Treatment of "Endangered Precedents"

Endangered Precedent	Subsequent Treatment
1. Metro Broad. v. F.C.C. 497 U.S. 547 (1990).	*Overruled (in part) by*: Adarand Constructors v. Pena, 515 U.S. 200 (1995).
2. Grady v. Corbin 495 U.S. 508 (1990).	*Overruled (in part) by*: United States v. Dixon, 509 U.S. 688 (1993).
3. Mills v. Maryland 486 U.S. 367 (1988).	*None*
4. United States v. Paradise 480 U.S. 149 (1987).	*None*
5. Ford v. Wainwright 477 U.S. 399 (1986).	*Distinguished in:* Herrera v. Collins, 506 U.S. 390 (1993). Stanford v. Kentucky, 492 U.S. 361 (1989). H.J. Inc. v. Northwestern Bell Tel. Co.492 U.S. 229 (1989).
6. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986).	*Overruled (in part) by:* Planned Parenthood v. Casey, 505 U.S. 833 (1992).
7. Aguilar v. Felton 473 U.S. 402 (1985)	*Overruled (in part) by:* Agostini v. Felton, 1997 U.S. Lexis 4000 (1997)
8. Rutan v. Republican Party 497 U.S. 62 (1990)	*None*
9. Peel v. Attorney Registration & Disciplinary Comm. 496 U.S. 91 (1990)	*None*
10. Zinermon v. Burch 494 U.S. 113 (1990)	*None*
11. James v. Illinois 493 U.S. 307 (1990)	*None*
12. Rankin v. McPherson 483 U.S. 378 (1987)	*None*
13. Rock v. Arkansas 483 U.S. 44 (1987)	*None*
14. Gray v. Mississippi 481 U.S. 648 (1987)	*Distinguished and Limited in:* Ross v. Oklahoma, 487 U.S. 81 (1988)
15. Maine v. Moulton 474 U.S. 159 (1985)	*Distinguished in:* McCoy v. Court of Appeals, 486 U.S. 429 (1988)
16. Garcia v. San Antonio Transit Auth. 469 U.S. 528 (1985)	*Distinguished in:* N.Y. v. U.S., 112 S.Ct. 2408 (1992)
17. Pulliam v. Allen 466 U.S. 522 (1984)	*None*

"Endangered Precedents" are the decisions identified by Justice Thurgood Marshall in *Payne v. Tennessee*, 501 U.S. 808 (1991) (J. Marshall, dissenting) which, in his view, are likely to be overturned on the basis that they are 5-4 decisions and did not involve property or contract reliance interests. "Subsequent Treatment" refers to decisions that the Supreme Court of the United States overturned, distinguished, or limited. Dissenting opinions are excluded from the analysis.