

Norm Violation by the Lower Courts in the Treatment of Supreme Court Precedent: A Research Framework*

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The U.S. Supreme Court rarely overrules its own decisions, overturning fewer than three precedents per term (Brenner and Spaeth, 1995). For the most part, the Court acts instead to preserve the consistency and continuity of the law. However, there are times when the Court formally alters precedent and, in so doing, affirms the decision of a lower court. That is, the Court upholds a lower-court ruling that conflicts with, or even ignores, its past decisions, overruling itself in the process. Such a situation violates two fundamental legal norms. First, as subordinates in the judicial hierarchy, lower-court judges are expected to abide by the decisions of their superior, the Supreme Court, and second, according to the doctrine of stare decisis, the Supreme Court has a duty to follow its own precedents. In this article, we conduct a descriptive analysis of the overruling decisions of the Warren, Burger, and Rehnquist courts that affirmed lower-court rulings. A number of questions are relevant. Under what circumstances do lower courts perceive that a marked deviation from Supreme Court precedent is legally and politically safe? Is there evidence that the lower courts attempt to anticipate the high court's reaction to an alteration in precedent? What role does ideology play in the lower courts' rulings? We address these questions as we examine these unique instances in which lower courts appear to initiate the alteration of Supreme Court precedent.

The U.S. Supreme Court does not often overrule itself. Rather, the high court is more likely to distinguish prior cases as it develops the law. But, sometimes, the Court does reverse itself, and lower-court judges, while recognizing that doctrinal consistency is the standard, are also aware of the possibility of doctrinal change. What do lower-court judges do when they believe that the high court "has it wrong"? How do they reconcile their roles as judicial subordinates and expounders of the Constitution, particularly if they wish to behave strategically?

To address these questions, we examine instances in which the Supreme Court formally alters precedent and affirms a lower court in the process. It should be noted that the Supreme Court does not often behave in this manner. In fact, the Warren, Burger,

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and Rehnquist courts have overruled past decisions in only 143 of 8,561 cases—less than 2 percent.¹ However, in 26 of these 143 cases, the Supreme Court affirmed a lower court in overruling itself. That is, in approximately one-fifth of the cases in which the Supreme Court invalidated existing doctrine, a lower court appears to have anticipated this action. How can a lower-court judge, who usually follows Supreme Court precedent, predict that the case at bar is one of those in which the high court will defer to the lower court's disregard for precedent?

In this article, we conduct a descriptive analysis of the lower-court decisions that are affirmed when the Warren, Burger, and Rehnquist courts overrule previous Supreme Court decisions. There are twenty-seven lower-court rulings that have been upheld by the Court in twenty-six cases.² This is a small number of cases. However, we assert that the narrowness of our focus is offset by the value of our study in that we consider behavior that violates two fundamental legal norms. First, as subordinates in the judicial hierarchy, lower-court judges are expected to abide by the decisions of their superior, the Supreme Court, and second, according to the doctrine of *stare decisis*, the Supreme Court has a duty to follow its own precedents. And while the actual number of cases under consideration is small, these cases constitute a substantial portion—approximately 20 percent—of the cases in which the Supreme Court alters precedent. Such a study should provide a unique perspective on the relations between principal (the high court) and agent (the lower courts).

We do not provide a comprehensive examination of lower-court alterations of Supreme Court precedents. We confine our study to those instances in which lower courts are successful in initiating doctrinal change—i.e., where they are affirmed by the Supreme Court—and we exclude those instances where policy innovation by the lower courts results in high-court reversal. We leave to future research a comparison of cases in which lower courts are, and are not, subsequently vindicated in anticipating precedential modification. Here we seek simply to provide insight into an intriguing phenomenon where both lower courts and the Supreme Court abjure their judicial roles and transform Supreme Court precedent in the process. Our intention is to develop hypotheses that may be tested on the universe of Supreme Court overrulings.

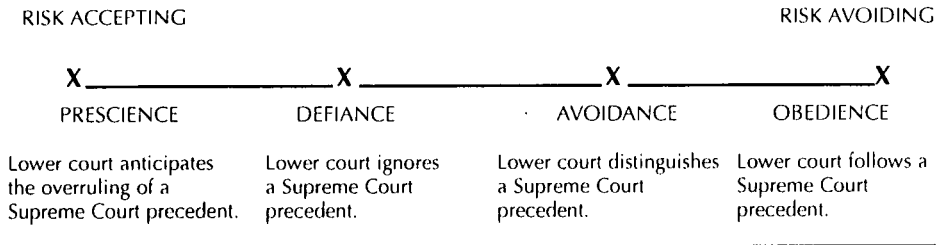
Lower-court rulings can be categorized in one of four ways with respect to their treatment of Supreme Court precedent: *prescience*, *avoidance*, *defiance*, or *obedience*.³

¹ The number of overruling cases was obtained from the Spaeth database (1998) using case citation as the unit of analysis and selecting cases where, according to the majority opinion, precedent was overruled or disapproved or was no longer good law. The total number of Warren, Burger, and Rehnquist court cases was obtained using case citation as the unit of analysis and selecting all formally decided cases (decision types 1, 5, 6, and 7).

² The Supreme Court consolidated two Third Circuit decisions in *Greenwich Collieries/Maher Terminals Inc. v. U.S. Dept. of Labor* (1994); thus, twenty-seven lower court decisions have been affirmed in twenty-six cases. Citations to the twenty-six overruling decisions and the overruled precedents are provided in **Appendix A**, along with the lower courts that were affirmed in the overrulings.

³ *Reid v. Covert* (1957), an order issued by the D.C. District Court, is not placed in one of these categories because we are unable to ascertain the precedential basis for the order.

Figure 1
Continuum of Lower-Court Judges' Acceptance
of the Risk of Supreme Court Reversal



Lower-court *prescience* describes the situation in which a subordinate court doubts the viability of a Supreme Court precedent, often citing the high court's own dissatisfaction with the doctrine. The lower court, relying upon the questionable validity of the precedent and the Supreme Court's indications that it might be abandoned, refuses to apply the precedent in a case where it has been invoked. Lower-court *avoidance* depicts similar behavior but with one notable difference. While the lower court recognizes the dubious status of a precedent, it also heeds its responsibility as a subordinate court, drawing a factual distinction between the suspect precedent and the case at bar to avoid applying the precedent. Lower-court *defiance* refers to the rare event in which the eventually overruled precedent is not cited at all by the lower court, yet that precedent is overturned as the Supreme Court affirms the lower court. Lower-court *obedience* characterizes the use of an ambivalent precedent by a lower court, where the high court ultimately agrees with the outcome of the case but not with the rationale. The precedent applied by the lower court ultimately is deemed unworkable and is overruled.⁴

Principal-agent theory provides one conception of lower-court judges' responses to higher-court prescriptions. These judges are depicted as strategic actors who wish to reach decisions that comport with their own policy goals, while at the same time minimizing the threat of reversal by the higher court (see, e.g., Songer, Segal, and Cameron, 1994). The categorizations we use here illustrate the scope of discretion enjoyed by the lower courts and the creativity they employ in their positions as subordinates in the judicial hierarchy. It is possible to array these categorizations along a continuum according to the extent to which lower-court judges appear to assume the risk of reversal as they pursue outcomes that are consistent with their own attitudes (see **Figure 1**). A lower

⁴ As one reviewer of this manuscript noted, the Supreme Court occasionally overturns precedents that were not relevant to the lower court's decision because there was a different issue before the lower court. Our categories do not encompass this situation because it is one that we did not encounter in the cases we examined.

court is most accepting of the risk of reversal when it innovates and anticipates a Supreme Court overruling (*prescience*). It is this response that is most likely to attract Supreme Court scrutiny and to induce the Court to review the lower court's action. A slightly less chancy, but relatively rare, tactic is to ignore a Supreme Court prescription altogether (*defiance*). Here, the Court may be more likely to defer to the lower court's apparent assessment that the precedent was inapplicable. A lower court is more risk averse when it distinguishes a questionable precedent to evade its application (*avoidance*). In this situation, the lower court utilizes an appropriate legal reasoning technique to justify its failure to follow the precedent, thereby lending legitimacy to its decision. Finally, the safest strategy is that of the lower court that follows existing precedent in spite of incentives to do otherwise (*obedience*).

We examine each of the lower-court rulings that were affirmed as the Supreme Court overruled precedent in order to identify factors that may have influenced the lower court's application of precedent. According to Stidham and Carp (1982:216), "The Supreme Court often uses decisions to signal its inclination to move in a certain direction." But what are these signals? And do the lower courts pay heed?

Perhaps one such signal is the Court's subsequent treatment of the decision it will eventually overrule. When the high court qualifies a decision, perhaps several times, but does not explicitly overrule it, a lower court may nonetheless perceive that the Supreme Court will eventually alter the precedent and may anticipate the overruling before it is even announced. This anticipatory compliance will then be rewarded when the Supreme Court does indeed overrule itself by affirming the prescient circuit or state court.

The age of precedent may also serve as a signal to lower-court judges of the likelihood of its overruling. Some scholars (e.g., Brenner and Spaeth, 1995) speculate that the Supreme Court is reluctant to overturn recently established precedents, as such decisions give the impression that Supreme Court doctrine is ephemeral or unstable. At the same time, the Court may view older precedents as no longer applicable to contemporary issues, so that it is necessary to clear them from the case law.⁵ If such a relationship does exist between the age of precedent and its treatment by the high court, lower-court judges may perceive that the Court is more likely to accede to the alteration of older precedents, as opposed to newer ones, and they may exhibit less respect for older precedents as a result.

Supreme Court ideology may be a factor as well. In their analysis of Supreme Court overruling decisions from 1946 through 1992, Brenner and Spaeth (1995:70) conclude that "the justices' personal policy preferences substantially explain their behavior"—a trend of which lower-court judges are likely aware. Thus, a movement away from the ideological orientation of the Court when it announced its to-be-overruled precedent may signal a decline in support for that precedent and may limit lower-court compliance.

⁵ An alternative hypothesis is also offered in the literature. Brenner and Spaeth, among others, suggest that older precedents are "so fundamental to the Court's view of the Constitution . . . that they cannot be undone" (1995, 11); thus the high court may be less likely to alter long-established doctrine.

In addition, many studies of lower-court decision making have found at least some influence of ideology, even in these lower courts wherein judges are variously constrained (see, e.g., Goldman, 1966, 1975; Howard, 1981; Songer and Haire, 1992; Hall and Brace, 1992). In cases where the Court has not signaled its discontent with a past decision, a lower-court judge who is ideologically opposed to that decision may avoid the decision by distinguishing it or even ignoring it. A judge whose policy views are consistent with a particular, even much-maligned precedent may continue to apply that precedent faithfully. We explore the potential influence of lower-court ideology on reactions to Supreme Court prescriptions as well.⁶

Measuring the Signals

We posit, then, that there are at least four “signals” to which lower-court judges respond as they decide upon the most expedient application of Supreme Court precedent: 1) whether the correctness or usefulness of the precedent has been questioned in subsequent decisions, 2) the age of the precedent, 3) the change in the ideological composition of the Court since the precedent was announced, and 4) their own policy preferences. In **Table 1**, we provide indicators of these signals for each of the lower-court decisions that we discuss in the subsequent sections. We show the percentage of the lower-court majority that is in ideological agreement with the court’s application of the precedent, the change in the ideological composition of the Supreme Court since the overruled precedent was announced, the number of positive and negative treatments by the Supreme Court of the overruled precedent before its reversal, and the number of years since the overruled precedent was established. We also include the lower-court vote in each case.

In **Table 1**, we calculate the percentage of the lower-court majority whose ideology was consistent with that court’s application of the eventually overruled precedent. This measure should indicate whether such behavior was motivated by the judges’ policy views. Personal attitudes may be operative where the members of the lower-court majority had a liberal ideology, and they either failed to follow a conservative precedent or followed a questionable liberal one. For circuit court judges, we use the party affiliation of the president who appointed the judge as an indicator of his ideology, and for state court judges, we use the judge’s own party affiliation.⁷

We also provide a measure of the change in the ideological composition of the Supreme Court between the announcement of the soon-to-be overruled precedent and the lower court’s decision. We use the Segal and Cover (1989) scores as measures of the

⁶ Ideology acts as an internal signal that conditions the responses of lower-court judges, rather than as an external signal as are the signals we have already discussed.

⁷ Studies that have demonstrated the appropriateness of these indicators of judicial ideology include Tate, 1981; Carp and Stidham, 1998; and Hall and Brace, 1992.

Table 1
Lower-Court Treatments of the Eventually Overruled Precedents
and Signals that May Motivate Those Treatments

Lower-court Decision	Lower-court Vote	% Ideological Voting of Lower-court Majority ^a	Change in Ideological Composition of Supreme Court ^b	Positive : Negative "Signals" ^c	Age of Overruled Precedent ^d
PRESCIENCE					
Rowe v. Peyton	6-0	50	-1.06	0 : 0	33
Andrews v. L & N R. Co.	3-0	33	0.21	2 : 4	30
Virginia Citizens Consumer Council v. State Board of Pharmacy	3-0	100	-0.21	1 : 4	32
Welch v. Texas Dept. of Highways	8-6	75	-0.50	0 : 3	22
Rodriguez de Quijas v. Shearson/American Express, Inc.	3-0	33	-0.56	0 : 2	35
Planned Parenthood v. Casey	3-0	67	-0.18; -0.18	0 : 0; 0 : 0	8; 5
United States v. Gaudin	6-5	67	-0.04	0 : 0	64
DEFIANCE					
Vanderbilt v. Vanderbilt	5-2	N/A	-1.14	1 : 1	43
Gregg v. Georgia	7-1	0	0.00	0 : 1	3
Complete Auto Transit v. Brady	9-0	100	0.39	0 : 2	25
AVOIDANCE					
United States v. Fay	2-1	100	-0.09	0 : 1	12
Wages v. Michelin Tire	6-0	100	-0.88	0 : 1	104
GTE Sylvania Inc. v. Continental T.V., Inc.	6-5	67	-0.55	0 : 0	9
United States v. Trammel	2-1	100	-0.48	1 : 0	20
Daniels v. Williams	5-4	80	0.00	0 : 0	3
Mayacamas Corp. v. Gulfstream Aerospace Corp.	2-1	100	0.34; -0.33	2 : 2; 1 : 2	51; 44
The Beer Institute v. Healy	3-0	0	0.72	0 : 1	22
Coleman v. Thompson	3-0	33	-0.67	1 : 40	27
Tennessee v. Payne	5-0	0	0.05; 0.00	1 : 2; 0 : 0	3; 1
United States v. Nichols	2-1	100	-0.33	0 : 1	12
Greenwich Collieries v. Dept. of Labor; Maher Terminals Inc. v. Dept. of Labor	3-0	100	-0.33	0 : 0	10
Seminole Tribe of Florida v. Florida	3-0	67	-0.35	1 : 1	5

OBEDIENCE					
Commonwealth Edison Co. v. Montana	5-0	N/A	-0.56	3 : 0	58
United States v. Solorio	2-0	50	-0.55	1 : 2	17
United States v. Hudson, et al.	3-0	67	-0.31	0 : 1	7

^a Percentage of the lower-court majority that is in ideological agreement with the direction of the lower-court decision.

^b Extent to which the ideological composition of the Supreme Court has changed since the establishment of the eventually overruled precedent; values may range from -2 to 2; negative values indicate that the Supreme Court has moved away ideologically from the direction of the precedent; where two precedents are overruled, values for both precedents are given.

^c Ratio of the number of positive and negative Supreme Court treatments of the eventually overruled precedent; where two precedents are overruled, ratios for both precedents are given.

^d In years; where two precedents are overruled, ages of both precedents are given.

ideologies of Supreme Court justices.⁸ To determine the ideological makeup of a given Court, we calculate the mean of the ideology scores for the justices on that Court. We subtract the mean of the Court that issued the soon-to-be overruled precedent from the mean of the Court sitting at the time the lower court treats the precedent to obtain a measure of the change in the ideological composition of the Court. We then combine this measure with the direction of the precedent so that the findings may be interpreted consistently. To illustrate, if the Supreme Court has become more conservative and the lower court is applying a conservative decision, this measure is positive. If the Court has become more liberal and the lower court is applying a conservative decision, the direction of this measure is negative; the reverse is true when the lower court is applying a liberal decision.

In assessing whether the Supreme Court's subsequent treatment of its precedents influences lower-court responses to those precedents, we Shepardized the eventually overruled decisions. We examined several hundred treatments to determine whether they contained any indication to the lower courts that the precedent was either good or bad, long-standing, or soon to be overruled. In **Appendix B**, we list those decisions that seemingly have a substantive impact on the cited Supreme Court precedent, and in **Table 1**, we compare the number of positive and negative treatments of the overruled precedent.⁹

⁸ To derive attitudinal measures from sources independent of votes, Segal and Cover analyzed the content of newspaper editorials that were published between the nomination and confirmation of each justice. These scores have been updated and backdated to include the nominees of Franklin Roosevelt through Bill Clinton (Segal et al., 1995). These scores range from -1 (extremely conservative) to 1 (extremely liberal). For justices appointed by presidents before Roosevelt, we assign scores of -1 to Republican appointees and 1 to Democratic appointees.

⁹ According to *Shepard's* coding manual, "followed" denotes positive treatment of the cited case; "questioned," "limited," "criticized," and "distinguished" indicate negative treatments; and "explained" and "harmonized" are neutral treatments (Spriggs and Hansford, 1998). Our characterizations of the treatments of the

We calculate the number of years between the eventually overruled decisions and the lower-court decisions to determine the age of precedent at the time it is applied by the lower courts. We expect that lower-court judges are more likely to disregard older precedents because they perceive that the Supreme Court will acquiesce to such actions, given that older precedents may be less authoritative than newer ones.

In the sections that follow, we discuss our classification of the lower-court decisions into the categories of *prescience*, *defiance*, *avoidance*, and *obedience*. We focus upon the lower courts' justification for their behavior and the relationship between this behavior and the signals we have discussed.

Lower-Court Prescience

Walter Murphy, in an early impact study, asserts that the lower courts, even when in doubt as to the efficacy of a given precedent, should still heed the Supreme Court's earlier prescription. In other words, "inferior judges should follow doubtful precedents until the Supreme Court specifically voids them" (1959:1027). Judge Calvert Magruder of the First Circuit echoes this belief: "We should always express a respectful deference to controlling decisions of the Supreme Court, and do our best to follow them. We should leave it to the Supreme Court to overrule its own cases" (quoted in Murphy, 1959:1027).

However, we know this not to be the case. In our study, we find several lower-court rulings thwarting Supreme Court precedent that are ultimately affirmed as the Court overrules the offended precedent. This is known in the literature as "anticipatory compliance" (Gruhl, 1980). Gruhl argues that, if the Supreme Court's decisions in a given area develop in a logical pattern, it becomes possible for the lower courts to anticipate the Supreme Court's next decision, thereby "anticipat[ing] the Court's next move, and . . . act[ing] to comply with it" (1980:509). Klein speaks of this anticipatory decision making as well, defining such behavior as "ruling in the way one predicts the higher court would" (1998:1). Although Klein examines lower-court decision making in areas without Supreme Court guidance, his study remains relevant.

Judges ought to fear reversal (Baum, 1997), but perhaps they equally crave affirmation. In fact, the prospect of being affirmed when they rule against Supreme Court precedent might be even more attractive than avoiding reversal. Here we find that there

eventually overruled precedents as positive or negative are consistent with *Shepard's* in most respects. However, we classify Supreme Court decisions that "explained" or "harmonized" the cited precedent as positive treatments, and we count as negative treatments those dissenting opinions in which a justice speaks disparagingly of the cited case.

We do not list all of the "negative" treatments provided by *Shepard's* as some of them do not substantially treat the eventually overruled decision. In addition, some citations to the decision found in dissenting opinions are included while others are not. The determination of which treatments are potential signals from the high court is somewhat subjective. However, when a citation is borderline, we include it as a potential influence on the lower court. It is fairly clear in reading these decisions which ones truly treat the high-court case and which merely cite it or use it for other purposes.

are seven instances in which the Supreme Court upholds a lower-court ruling that overtly conflicts with past decisions, overruling itself in the process.

Perhaps the best example of lower-court prescience in the cases we examined is the Third Circuit's decision in *Planned Parenthood v. Casey*.¹⁰ Here the unanimous panel reviewed the Supreme Court's recent abortion decisions and determined that the Court had displaced the strict scrutiny standard of review for such cases. In its abortion jurisprudence, the Supreme Court had consistently criticized *Roe v. Wade*¹¹ but had not offered an alternative to which a majority of the Court could agree. The Third Circuit panel cited *Marks v. United States*¹² as authority for the proposition that "the controlling opinion in a splintered opinion is that of the Justice or Justices who concur on the 'narrowest grounds'"¹³ and gleaned the undue burden standard from Justice O'Connor's concurring opinions in *Webster v. Reproductive Health Services* and *Hodgson v. Minnesota*.¹⁴ Although the Supreme Court interpreted the undue burden standard somewhat differently in reviewing the Third Circuit's decision, it upheld the lower court's application of a new standard of review. In so doing, the Court overturned in part its decisions in *Akron v. Akron Center for Reproductive Health* (1983) and *Thornburgh v. American College of Obstetricians and Gynecologists* (1986).

Similarly, in other instances of anticipatory decision making, lower courts relied upon the high court's erosion of its own precedents in later decisions and even suggested that the Court wanted them to abandon such precedents. For example, in *Rowe v. Peyton*, Chief Judge Haynsworth gave the following justification for abandoning the doctrine of *McNally v. Hill* (1934):

This Court, of course, must follow the Supreme Court, but there are occasional situations in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court to a conclusion inconsistent with an older Supreme Court case.¹⁵

In affirming the Fourth Circuit's decision, the Supreme Court found itself "in complete agreement with this conclusion and the considerations underlying it."¹⁶

The Fifth Circuit was even more unequivocal in projecting the high court's intention to overrule *Moore v. Illinois Central R. Co.* (1941). It described the case of *Andrews v. L & N R. Co.* as "precisely the case for which the Supreme Court has been waiting"¹⁷ to overrule *Moore*. The Supreme Court had provided ample notice that it would in fact like

¹⁰ 947 F. 2d 682 (3rd Cir. 1991).

¹¹ 410 U.S. 113 (1973).

¹² 430 U.S. 188 (1977).

¹³ 947 F. 2d 682, at 693.

¹⁴ 492 U.S. 490 (1989); 497 U.S. 417 (1990).

¹⁵ 383 F. 2d 709 (4th Cir. 1967), at 714.

¹⁶ 391 U.S. 54, at 58 (1968).

¹⁷ 441 F. 2d 1222, at 1224 (5th Cir. 1971).

to overrule that decision. While *Moore* had been decided by a unanimous Court, subsequent Courts disagreed more often than not with its rationale. Justice Black, a member of the *Moore* Court, criticized his colleagues for their negative treatment of *Moore* in a dissenting opinion in *Republic Steel Corp. v. Maddox*, describing the Court as “rais[ing] the overruling axe so high that its falling is just about as certain as the changing of the seasons.”¹⁸ The majority in *Republic Steel Corp.* denied this charge, asserting that they “d[id] not mean to overrule [*Moore*]”; rather, “consideration of such action should properly await a case presented under the Railway Labor Act in which the various distinctive features of the administrative remedies provided by that Act can be appraised in context.”¹⁹ Although the Court did not expressly overrule *Moore*, it seemingly invited a case in which it could. And it did.

In four other cases—*Virginia Citizens Consumer Council v. State Board of Pharmacy*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, *Welch v. Texas Dept. of Highways*, and *United States v. Gaudin*²⁰—lower courts perceived marked changes in Supreme Court doctrine and declined to apply that doctrine as a result. However, such doctrinal changes were not always obvious to all members of these courts. In *United States v. Gaudin*, a 6–5 en banc decision, Judge Kozinski lambasted the majority for its treatment of *Sinclair v. United States* (1929):

Court of appeals opinions, particularly en banc opinions, frequently raise waves on the waters of the law. Today’s opinion is more akin to a tsunami. It’s not every day, after all, that we provoke a conflict with every other regional circuit, *defy Supreme Court authority*, [and] implicitly overrule several lines of our own case law.²¹

Similarly, only nine of the fifteen judges of the Fifth Circuit agreed to the abandonment of *Parden v. Terminal Railway of Alabama* (1964) in *Welch v. Texas Dept. of Highways*.²² According to the six dissenters, “*Parden* is still the law.”²³

With respect to two of these cases—*Virginia Citizens Consumer Council v. State Board of Pharmacy* and *Rodriguez de Quijas v. Shearson/American Express, Inc.*—the Supreme Court had in fact raised substantial doubt regarding the authority of existing precedent. *Valentine v. Chrestensen* (1942), which was eventually overruled by *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976), had been variously treated by the Supreme Court, surely providing a cue to the lower courts of the potentiality of its overruling. In *Bigelow v. Virginia*, the majority characterized the *Valentine* ruling as “a distinctly limited one,”²⁴ and in *Lehman v. Shaker Heights*, Justice

¹⁸ 379 U.S. 650, at 667 (1965).

¹⁹ *Id.*, at 657 note 14.

²⁰ 373 F. Supp. 683 (E.D.Va. 1974); 845 F. 2d 1296 (5th Cir. 1988); 780 F. 2d 1268 (5th Cir. 1986); 28 F. 3d 943 (9th Cir. 1994).

²¹ 28 F. 3d. 943 (9th Cir. 1994), at 955, emphasis added.

²² 780 F. 2d 1268 (5th Cir. 1986).

²³ *Id.*, at 1281.

²⁴ 421 U.S. 809, at 819 (1975).

Brennan (not on the *Valentine* Court) wondered “whether the ‘commercial speech’ distinction announced in *Valentine* . . . retain[ed] continuing validity.”²⁵ Justice Douglas even announced that his views had changed since the decision in *Valentine*, stating that “commercial materials also have First Amendment protections”²⁶ and that the “holding [in *Valentine*] was ill-conceived and ha[d] not weathered subsequent scrutiny.”²⁷ Justice Stewart also described the *Valentine* ruling as retaining little force.²⁸ In their numerous qualifications and revisions, these justices provided ample indication of the possibility of a future overruling.

The Court also provided numerous signals of the imminent demise of *Wilko v. Swan* (1953), which was eventually overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.* (1989). The Court gradually eroded *Wilko* in each decision in which it was applied, refusing to extend its rationale to any other situation. It is clear that the Fifth Circuit, which was ultimately affirmed in *Rodriguez de Quijas*, picked up on these signals. In a 1987 decision, the Fifth Circuit recognized that the Supreme Court’s decision in *Shearson/American Express, Inc. v. McMahon*²⁹ had undercut every aspect of *Wilko v. Swan*. The court went on to speculate that “a formal overruling of *Wilko* appear[ed] inevitable—or, perhaps, superfluous.”³⁰

Of the seven cases we placed in the lower-court prescience category, there were two (*United States v. Gaudin* and *Welch v. Texas Dept. of Highways*) in which the Supreme Court’s intention to overrule itself was not apparent to all members of the lower court. We find some evidence of ideological motivations behind the dissenters’ desire to remain true to past precedent in these cases. All five of the *Gaudin* dissenters who objected to the majority’s treatment of *Sinclair*, a conservatively oriented decision, were elevated to the courts of appeals by Republican presidents. And in *Welch*, of the six judges who advocated adherence to *Parden*, which was decided in a liberal direction, five were appointed by Democrats. While considerations other than personal attitudes may have motivated anticipatory decision making in the cases discussed above, it is possible that those who objected to such behavior did so because of their own policy goals, especially in light of Supreme Court pronouncements on the matter.

Lower-Court Defiance

In three of the lower-court decisions that the Supreme Court ultimately affirmed in overruling precedent, that precedent was not mentioned. In *Vanderbilt v. Vanderbilt*,³¹ the Court of Appeals of New York cited other Supreme Court precedents but did not refer to

²⁵ 418 U.S. 298, at 314 note 6 (1974).

²⁶ *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, at 398 (1973).

²⁷ *Dun & Bradstreet v. Grove*, 404 U.S. 898, at 905 (1971).

²⁸ 413 U.S. 376, at 401.

²⁹ 482 U.S. 220 (1987).

³⁰ 823 F.2d 849, at 851 (5th Cir. 1987).

³¹ 135 N.E. 2d 553 (N.Y. 1956).

Thompson v. Thompson (1913), the decision that the Court ultimately abandoned. In *Gregg v. Georgia*,³² the Supreme Court of Georgia did not attempt to reconcile its decision with *McGautha v. California* (1971), where the U.S. Supreme Court had stated that it was not possible to derive death penalty standards. Finally, in *Complete Auto Transit, Inc. v. Brady*,³³ the Supreme Court of Mississippi relied upon *Interstate Oil Pipeline Co. v. Stone*,³⁴ a plurality opinion in which the Supreme Court had affirmed the Mississippi high court. However, the court made no reference to *Spector Motor Service v. O'Connor* (1951), which the Supreme Court subsequently overturned in reviewing *Complete Auto Transit v. Brady* (1977).

In two of these cases, the neglected precedent had been questioned since its announcement. The Supreme Court had limited *Thompson* in *Armstrong v. Armstrong*,³⁵ holding that the "*Thompson* case stands alone in the United States Reports" in the precedent it established. *Armstrong* was cited by the New York court so it is possible that the lower court saw *Thompson* as lacking precedential value. *Spector* had been described by one Mississippi Supreme Court justice as "a derelict and an aberration"³⁶ that should be discarded. *McGautha's* demise had not been indicated explicitly by the Supreme Court, but it may have been clear to lower courts that the high court was moving toward upholding the death penalty. Clearly, the lower courts had grounds for challenging the viability of these precedents. However, it is interesting that these courts chose not to mention the problematic precedent at all, rather than to reference the high court's dissatisfaction with the precedent and to avoid its application on that basis, as other judges in similar situations have done.

Some impact scholars assert that the communication of Supreme Court decisions is a potential problem in their implementation (Wasby, 1970; Baum, 1976; Johnson and Canon, 1999). There are no formal efforts made within the system to inform other courts of a decision or to ensure that judges have copies of an opinion. In fact, none of the overruled decisions discussed in this section are classified as salient ones by *Congressional Quarterly*, and the *Thompson v. Thompson* ruling is somewhat dated. If the communication of judicial decisions does in fact limit compliance, the behavior of the lower courts in these cases may be explainable in those terms.³⁷

The behavior of the state court judges in these cases may also have been influenced, at least in part, by their personal policy preferences. The Mississippi Supreme Court was composed entirely of Democrats, who chose to ignore an applicable conservative precedent that would likely have led to a conservative outcome. At the same time, the Georgia

³² 210 S.E. 2d 659 (Ga. 1974).

³³ 330 So. 2d 268 (Miss. 1976).

³⁴ 377 U.S. 436 (1964).

³⁵ 50 U.S. 568 (1956).

³⁶ *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, at 115 (1975).

³⁷ In this regard, it is instructive to note that the lone dissenting judge in *Gregg v. Georgia* did not cite *McGautha v. California*, the ultimately overruled decision, in his dissent; rather, he cited the more prominent decision of *Furman v. Georgia*, 408 U.S. 238 (1972). Similarly, the two dissenters in *Vanderbilt v. Vanderbilt* failed to cite *Thompson v. Thompson* in support of their position.

high court was also made up of Democratic judges, but these judges upheld Georgia's new capital punishment statute—clearly a conservative ruling. Both of these cases were decided in the early 1970s, and many southern Democrats at this time were as conservative, if not more so, than many Republicans (see, e.g., Shelley, 1983). But while this might account for the Georgia court's decision, it would necessarily negate our explanation of the Mississippi court's ruling.³⁸

Lower-Court Avoidance

A number of impact studies recognize that narrowly interpreting a precedent is one tactic a strategic jurist may employ to evade a seemingly relevant precedent without violating his duty as a judicial subordinate (Murphy, 1959; Baum, 1978; Johnson and Canon, 1999). In twelve of the cases we examined, we found that lower courts avoided the application of Supreme Court precedents by distinguishing them. In several of these instances, the majority did so with the unequivocal disapproval of the dissenters. Evasion may have been more subtle in such instances, but it was evasion nonetheless, particularly in the minds of the dissenting judges.

At least two of the lower-court rulings we classify as avoiding Supreme Court precedent contain language similar to that discussed in the section on lower-court prescience. Yet, these judges are more cautious in anticipating the Supreme Court's aims. They point out the weaknesses of particular precedents but recognize that they do not have the authority to forecast high-court behavior. They go on to make a factual distinction between the precedent and the case at bar. For example, in *The Beer Institute v. Healy*,³⁹ the Second Circuit was asked to apply *Joseph E. Seagram & Sons v. Hostetter* (1966) to uphold a liquor price affirmation provision. *Seagram* had involved retrospective affirmation provisions, but the Supreme Court had declined to apply this ruling to prospective affirmation provisions in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*.⁴⁰ However, the panel's opinion evinced its fidelity to high-court authority:

We, of course, are not empowered to overrule Supreme Court precedent. However, we clearly perceive that the basis of the *Seagram* decision has been eroded and that the Court has indicated strongly that *Seagram* may not survive the decision in *Brown-Forman*. . . . Accordingly, we decline to *extend* the *Seagram* precedent to validate a simultaneous affirmation provision.⁴¹

Similarly, in *Seminole Tribe of Florida v. Florida*,⁴² the Eleventh Circuit recognized that the current Supreme Court might not adhere to its plurality decision in *Pennsylvania v.*

³⁸ We were able to ascertain the party affiliation of only two of the judges on the New York Court of Appeals; thus, we cannot assess the influence of ideology in that court.

³⁹ 849 F. 2d 753 (2nd Cir. 1988).

⁴⁰ 476 U.S. 573 (1986).

⁴¹ 849 F. 2d 753, at 760 (2nd Cir. 1988), emphasis in original.

⁴² 11 F. 3d 1016 (11th Cir. 1994).

Union Gas Co. (1989). However, they “refuse[d] to disregard *Union Gas*”⁴³ and instead found that it was distinguishable from the case at bar.

In other cases, lower-court majorities did not exhibit such respect for Supreme Court precedent and were called to task by the dissenters as a result. For example, a Second Circuit panel relied on “exceptional circumstances” to avoid the application of *Darr v. Burford* (1950) and, thus, to grant federal habeas corpus relief. Although the majority was following the lead of the Supreme Court, which had ruled similarly in *Mattox v. Sacks*,⁴⁴ Judge Moore responded in dissent:

If each case is to be decided on its own “exceptional situation” basis, let this principle be declared so that consideration of the scores of habeas corpus appeals which come before this court every year can be unfettered by legal principles.⁴⁵

In *Daniels v. Williams*,⁴⁶ the Fourth Circuit attempted to avoid the Supreme Court’s decision in *Parratt v. Taylor* (1981). In *Parratt*, the Supreme Court ruled that the negligent loss of property deprived a prisoner of an interest protected by the Due Process Clause. In considering *Parratt*, an en banc Fourth Circuit held 5–4 that the Court “intended to limit its decision to claims for the deprivation of property asserted by a prisoner” and that “the difference in treatment between a prisoner’s property and his person may easily be justified.”⁴⁷ Such a distinction was not readily apparent to the dissenters, who argued that *Parratt* had not been confined to property interests.

Another decision in which the dissenting judges objected to the majority’s narrow application of precedent was *GTE Sylvania Inc. v. Continental T.V., Inc.*⁴⁸ In a 6–5 en banc decision, the Ninth Circuit held that *United States v. Arnold, Schwinn & Co.* (1967) was “readily distinguishable” from the case before them, while the dissenters argued that *Schwinn* was “squarely on point.” Other lower-court rulings that relied on factual distinctions to avoid questionable Supreme Court precedents include *Wages v. Michelin Tire*, *United States v. Trammel*, *Mayacamas Corp. v. Gulfstream Aerospace Corp.*, *Coleman v. Thompson*, *Tennessee v. Payne*, *United States v. Nichols*, and *Greenwich Collieries v. U.S. Dept. of Labor/Maher Terminals, Inc. v. U.S. Dept. of Labor*.⁴⁹

In many of the decisions we characterize as lower-court avoidance, judges may be somewhat vindicated in their dismissal of precedent by the Supreme Court’s own treatment of the precedent. *Low v. Austin*’s (1871) demise in *Michelin Tire v. Wages* (1976) may have been signaled by the dissenters in *Youngstown Sheet & Tube Co. v. Bowers*.⁵⁰

⁴³ *Id.*, at 1027.

⁴⁴ 369 U.S. 656 (1962).

⁴⁵ *United States v. Fay*, 300 F. 2d 345, at 372 (2nd Cir. 1962).

⁴⁶ 748 F. 2d 229 (4th Cir. 1984).

⁴⁷ *Id.*, at 231.

⁴⁸ 537 F. 2d 980 (9th Cir. 1976).

⁴⁹ 214 S.E. 2d 349 (Ga. 1975); 583 F. 2d 1166 (10th Cir. 1978); 806 F. 2d 928 (9th Cir. 1986); 895 F. 2d 139 (4th Cir. 1990); 791 S.W. 2d 10 (Tenn. 1990); 979 F. 2d 402 (6th Cir. 1992); 990 F. 2d 730 (3rd Cir. 1993), 992 F. 2d 1277 (3rd Cir. 1993).

⁵⁰ 358 U.S. 534 (1959).

The Court in *Wyatt v. United States* may have foreshadowed *Hawkins v. United States*' (1958) overruling by *Trammel v. United States* (1980), as the majority spoke of a large and generally acknowledged exception to the *Hawkins* ruling.⁵¹ *Enelow v. New York Life Insurance Co.* (1935) and *Ettelson v. Metropolitan Life Insurance Co.* (1942), which were replaced by *Gulfstream Aerospace Corp. v. Mayacamas Corp.* (1988), were certainly criticized by later Courts. One Court stated that the ruling in *Enelow* had "elements of fiction,"⁵² and dissenters in another case lamented the majority's opinion, declaring that "it [is] an undesirable practice for this Court to overrule past cases without saying so."⁵³ Before it was overruled by *Coleman v. Thompson* (1991), *Fay v. Noia* (1963) suffered considerable attack from both sides as the Court moved from granting habeas corpus petitions in most cases to exhibiting a preference for finality. With respect to *Pennsylvania v. Union Gas* (1989), which was reversed in *Seminole Tribe of Florida v. Florida* (1996), Justice Scalia later wrote in a concurring opinion that the holding "ma[de] no sense."⁵⁴ Thus, the Supreme Court gave some indication of the potential demise of most of the precedents avoided by the lower courts, although there are occasional anomalies that may be the result of attitudinally driven decision making by lower-court judges.

As with those judges who spoke out against lower-court "prescience," there is limited evidence that the dissenting judges in these cases professed allegiance to precedents that comported with their ideological preferences. The four judges who objected to the majority's conservative limitation of *Parratt* to property interests were all appointed by Democratic presidents. In the conservatively decided *GTE Sylvania*, four of the six members of the majority were Republican appointees, while the four Democratic appointees on the en banc panel split in supporting the majority and minority positions.

It is perhaps noteworthy that the two state high courts that distinguished a questionable precedent to avoid its application were unanimous in doing so. In *Wages v. Michelin Tire*, the justices of the Georgia Supreme Court were in complete agreement in allowing a tax on imported goods in spite of *Low v. Austin*, which would have required a different result. Similarly, in *Tennessee v. Payne*, all members of the Tennessee high court concurred in holding that a judge's decision to allow victim impact statements at trial did not violate *Booth v. Maryland* (1987) and *South Carolina v. Gathers* (1989). *Michelin Tire* was a liberal decision, and it may be explained by the fact that the Georgia court was composed entirely of Democrats. Interestingly, *Payne*, which was conservative in direction, was also unanimously decided by a court of Democratic judges.

Lower-Court Obedience

We found three instances in which lower-court judges acted as faithful agents of their high-court principal. In these cases, the lower courts may have been inadvertent insti-

⁵¹ 362 U.S. 525 (1960).

⁵² *Baltimore Contractors v. Bodinger*, 348 U.S. 176, at 184 (1955).

⁵³ *Morgantown v. Royal Insurance Co.*, 337 U.S. 254, at 261 (1949), Justices Black and Rutledge dissenting.

⁵⁴ *Hoffman v. Income Maintenance Dept.*, 492 U.S. 96, at 105 (1989).

gators of change in Supreme Court doctrine. Judges on these courts followed relevant precedents in spite of statements by both fellow judges and Supreme Court justices questioning the continuing credibility of these precedents. In so doing, they may have demonstrated to the high court the difficulties of applying these precedents. Upon review, the Court agreed with the lower-court outcomes but laid to rest the unworkable doctrines.

In *Commonwealth Edison Co. v. Montana*, the Supreme Court of Montana held, in spite of arguments to the contrary, that the U.S. Supreme Court had consistently recognized the vitality of *Heisler v. Thomas Colliery Co.* (1922).⁵⁵ Under *Heisler*, states could tax goods before their entry into the stream of interstate commerce, and the Montana court applied *Heisler* to uphold a coal severance tax. The U.S. Supreme Court rejected *Heisler's* "mechanical approach" in allowing the tax. The *Commonwealth Edison* Court ruled that a state tax does not offend the Commerce Clause if the tax "'is applied to an activity with a substantial nexus within the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State."⁵⁶

In *United States v. Hudson, et al.*, the Tenth Circuit applied *United States v. Halper* (1989) to deny a double jeopardy challenge to civil penalties.⁵⁷ According to *Halper*, the relevant inquiry is whether a particular sanction may be considered punishment. The circuit court seemed undeterred by recent Supreme Court rulings that substantially narrowed the scope of the *Halper* standard. In a 1994 decision, Justices Scalia and Thomas cautioned that the protection against double jeopardy applies only to double prosecutions, not double punishments, and urged the Court to "put the *Halper* genie back in the bottle."⁵⁸ In a 1996 case, the Court held that *Halper* was not applicable to civil forfeiture, further limiting *Halper's* impact.⁵⁹ In *Hudson, et al. v. United States* (1997), the Supreme Court finally closed the book on *Halper*, deeming it unworkable and stating simply that the protection against double jeopardy applies to criminal, not civil, penalties.

In *United States v. Solorio*, the professed allegiance of the Court of Military Appeals to Supreme Court authority was somewhat dubious.⁶⁰ Here the court was asked to decide whether a member of the Coast Guard who sexually abused the daughters of fellow coast guardsmen could be tried by court martial. Under *O'Callahan v. Parker* (1969), offenses must be "service connected" to be tried by court martial. The Court of Military Appeals held that this offense was in fact service connected, because "sex offenses against young children . . . have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned."⁶¹ The court insisted that it was "not trying to rewrite the

⁵⁵ 615 P. 2d 847 (Mont. 1980).

⁵⁶ 453 U.S. 609, at 617 (1981).

⁵⁷ 92 F. 3d 1026 (10th Cir. 1996).

⁵⁸ *BFP v. Resolution Trust Corp.*, 128 L. Ed. 2d 556, at 804.

⁵⁹ *United States v. Ursery*, 135 L. Ed. 2d 549.

⁶⁰ 21 M.J. 251 (C.M.A. 1986).

⁶¹ *Id.*, at 254.

Supreme Court's decision in *O'Callahan*. . . . Instead, [it] sought to apply *O'Callahan* to conditions as they now exist" in the military community and in society at large, citing contemporary society's concern for crime victims. In so ruling, the lower court was following a pattern established by the Supreme Court in *Relford v. Commandant*.⁶² In *Relford*, the Court upheld the jurisdiction of a court martial for a rape charge where the rape was allegedly committed on the base. Perhaps to dispose of these somewhat labored applications of the "service connection" doctrine, the Supreme Court overruled *O'Callahan* in reviewing *Solorio* and held that court martial jurisdiction depended solely on the military status of the accused.

In these cases, as well, there is evidence that personal attitudes motivated lower-court judges' application of Supreme Court precedent. The Montana high court was dominated by Democratic judges and was unanimous in applying *Heisler* to uphold a state tax in the face of a Commerce Clause challenge, creating a liberal ruling.⁶³ Similarly, two Republican appointees and one Democratic appointee interpreted *Halper* to require a conservative outcome, while the Court of Military Appeals panel that used *O'Callahan* to reach a conservative decision was composed of one Republican appointee and one Democratic appointee.

Discussion

We have suggested that lower-court judges, as strategic actors, respond to certain signals as they determine the most appropriate application of Supreme Court precedent: whether the correctness or usefulness of the precedent has been questioned in subsequent decisions, the age of the precedent, the change in the ideological composition of the Court since the precedent was announced, and their own policy preferences. We have posited that these factors are related to lower-court judges' efforts to reach decisions that comport with their own preferences, while minimizing the likelihood of Supreme Court reversal.

Table 2 allows an initial assessment of the relationship between these signals and lower-court applications of Supreme Court precedent. Here we provide summary measures of these signals for each of the four categories of lower-court treatments. A comparison of these measures among the four categories is instructive in developing preliminary hypotheses regarding the differential responses of lower courts to high-court authority. While we recognize that we examine only a small number of cases here, and that we conduct no rigorous statistical analysis as a result, interesting trends in lower-court behavior are apparent.

The first signal we examine is the effect of the political attitudes and values of lower-court judges. We report mean and median scores for the percentage of ideological agreement of the lower-court majorities with the direction of the lower-court deci-

⁶² 401 U.S. 355 (1971).

⁶³ We were unable to identify the party affiliation of all of the justices of the Montana Supreme Court, but we determined that at least three of the five justices were Democrats.

Table 2
Comparison of Signals that May Motivate Lower-Court Treatments
of the Eventually Overruled Precedent

Signals		Prescience (N=14) ^e	Defiance (N=3)	Avoidance (N=8) ^e	Obedience (N=3)
% Ideological Voting of Lower-Court Majority ^a	Median	67.0	N/A	90.0	N/A
	Mean	60.7		70.6	
Change in Ideological Composition of Supreme Court ^b	Median	-0.20	0.00	-0.33	-0.55
	Mean	-0.32	-0.25	-0.21	-0.47
Positive : Negative Supreme Court "Signals" ^c	Median	0.0 : 1.0	0.0 : 1.0	0.0 : 1.0	1.0 : 1.0
	Mean	0.4 : 1.6	0.3 : 1.3	0.5 : 3.6	1.3 : 1.0
Age of Overruled Precedent ^d	Median	31.0	25.0	12.0	17.0
	Mean	28.6	23.7	23.1	27.3

^a Percentage of the lower-court majority that is in ideological agreement with the direction of the lower-court decision.

^b Extent to which the ideological composition of the Supreme Court has changed since the establishment of the eventually overruled precedent; values may range from -2 to 2; negative values indicate that the Supreme Court has moved away ideologically from the direction of the precedent.

^c Ratio of the number of positive and negative Supreme Court treatments of the eventually overruled precedent.

^d In years.

^e N represents the number of abandoned or avoided precedents rather than the number of lower-court decisions.

sions. In the *prescience* and *avoidance* categories (the only categories for which we have ideological indicators for all judges), a majority of lower-court judges agreed ideologically with the outcome of the decisions. In other words, there are tentative indications that lower-court decisions in which existing Supreme Court doctrine was abandoned or distinguished were motivated by personal policy preferences.

The attitudes of Supreme Court justices seemed to influence lower-court judges as well. In all four categories, our summary measures show that the ideological composition of the Supreme Court had moved away from the eventually overruled precedent, as indicated by the negative values. However, it is interesting that the most substantial changes in the Court's ideological makeup are found in the *obedience* category. That is, even though there appeared to be little support on the current Court for a precedent, these lower courts applied the precedent nonetheless. Perhaps lower-court judges' own ideologies were at work here as well.

We also provide mean and median scores for the number of positive and negative signals that the Supreme Court provided to the lower courts regarding the continuing via-

bility of the eventually overruled precedent. It is noteworthy that for each of the categories where the soon-to-be overruled precedent was not applied (*prescience*, *defiance*, and *avoidance*), the number of negative treatments exceeds the number of positive treatments. On the other hand, where a questionable precedent was applied by the lower court (*obedience*), the number of positive treatments of that precedent is greater than the number of negative treatments. Thus, lower courts may in fact look to the high court for guidance in the application of the law, rather than complying unquestioningly with high-court prescriptions.

Finally, we compare the age of the precedents that were differentially treated by the lower courts. An interesting observation here is the difference in the ages of the precedents that are cited by “prescient” and “avoiding” lower courts. Lower courts applying an older precedent (thirty-one years) were more likely to anticipate a Supreme Court overruling and to project the Court’s intentions in their rulings, while lower courts applying a more recent precedent (twelve years) were more likely to acknowledge the high court’s authority but go on to distinguish the precedent on some basis.⁶⁴ This suggests that lower courts may be more reluctant to deviate from newer precedents, perhaps because they believe that disregard for such precedents is likely to attract the ire of the Supreme Court.

Conclusion

Overall, we find some intriguing relationships between the signals we posit as motivating lower-court responses to Supreme Court precedent and lower-court decisions to anticipate the overruling of precedent, to ignore a high-court prescription altogether, to distinguish a questionable ruling, or to follow a precedent in spite of its dubious status. Relying on a systematic, qualitative examination, we find striking patterns that are unlikely to have occurred by chance.

In cases where lower courts are coded as prescient in disregarding a precedent, where they avoid the application of a problematic doctrine, and where they ignore relevant case law, the Supreme Court seems to have indicated a change of heart. Similarly, the perceived vitality of precedent may condition lower-court actions, as these courts may prefer to distinguish recent precedents rather than forecast their overruling. Lower courts appear to pay attention to the opinions of the Court and to the authority of its decisions, basing their rulings upon both precedent *qua* precedent and precedent as it stands in current Supreme Court jurisprudence.

Ideology may be a motivating force as well. Lower courts appear to apply Supreme Court precedents to reach outcomes that comport with the judges’ own policy preferences. They also may be aware of the importance of ideology in Supreme Court decisions, seemingly paying heed to membership changes on the high court as they determine the most expedient interpretations of its precedents.

⁶⁴ The median is a more appropriate statistic here because of the substantial outlier in the *avoidance* category, where *Low v. Austin*, a 104-year-old decision, was overruled in *Michelin Tire v. Wages*.

This study offers initial evidence that subordinate courts look to the high court in their decision making, either ideologically or jurisprudentially. The results here warrant additional consideration as this type of examination leads to fruitful hypotheses about the way lower courts relate to the Supreme Court or, in the rubric of principal-agent theory, how well these agents comply with their principal. We have a situation, when discussing the relationship between the Supreme Court and the lower courts, wherein the principal rarely supervises the agent but still, for the most part, manages to induce compliance. Here we offer the possibility of signals—that while the Supreme Court does not review every lower-court decision that goes against its jurisprudence, it does indicate to the lower courts the conditions under which it is apt to do so. And it seems that lower courts respond to these cues and decide cases so that the likelihood of high-court reversal is minimized, or, perhaps, so that the likelihood of being affirmed in an overruling is maximized.

Our examination provides a framework for future research. To test the hypotheses we have developed, we must now compare lower-court decisions that are affirmed in Supreme Court overrulings with those that are reversed. Such a study will allow us to determine whether lower-court judges do indeed engage in strategic decision making as they apply Supreme Court precedent, as we have suggested, or whether they were simply serendipitous in these instances in gaining Supreme Court approval for their failure to follow existing precedent. *jsj*

REFERENCES

- BAUM, L. (1997). *The Puzzle of Judicial Behavior*. Ann Arbor: University of Michigan Press.
- (1978). “Lower-Court Response to Supreme Court Decisions: Reconsidering a Negative Picture,” 3 *Justice System Journal* 208.
- (1976). “Implementation of Judicial Decisions: An Organizational Analysis,” 4 *American Politics Quarterly* 86.
- BRENNER, S., and H. J. SPAETH (1995). *Stare Indecisus: The Alteration of Precedent on the Supreme Court, 1946-1992*. Cambridge: Cambridge University Press.
- CARP, R. A., and R. STIDHAM (1998). *Judicial Process in America*, 4th ed. Washington, DC: Congressional Quarterly Press.
- GOLDMAN, S. (1975). “Voting Behavior on the United States Courts of Appeals Revisited,” 69 *American Political Science Review* 491.
- (1966). “Voting Behavior on the United States Courts of Appeals, 1961-1964,” 60 *American Political Science Review* 374.

- GRUHL, J. (1980). "The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts," 33 *Western Political Quarterly* 502.
- HALL, M. G., and P. BRACE (1992). "Toward an Integrated Model of Judicial Voting Behavior," 20 *American Politics Quarterly* 147.
- HOWARD, J. W. JR. (1981). *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Courts*. Princeton, NJ: Princeton University Press.
- JOHNSON, C. A., and B. C. CANON (1999). *Judicial Policies: Implementation and Impact*, 2nd ed. Washington, DC: Congressional Quarterly Press.
- KLEIN, D. E. (1998). "Anticipatory Decision Making in the U.S. Courts of Appeals." Presented at the Annual Meeting of the Midwest Political Science Association, April 23-25, Chicago.
- MURPHY, W. F. (1959). "Lower Court Checks on Supreme Court Power," 53 *American Political Science Review* 1017.
- SEGAL, J. A., and A. D. COVER (1989). "Ideological Values and the Votes of U.S. Supreme Court Justices," 83 *American Political Science Review* 557.
- SEGAL, J. A., L. EPSTEIN, C. M. CAMERON, and H. J. SPAETH (1995). "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited," 57 *Journal of Politics* 812.
- SHELLEY, M. C. II (1983). *The Permanent Majority: The Conservative Coalition in the United States Congress*. Tuscaloosa: University of Alabama Press.
- SONGER, D. R., and S. HAIRE (1992). "Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals," 36 *American Journal of Political Science* 963.
- SONGER, D. R., J. A. SEGAL, and C. M. CAMERON (1994). "The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions," 38 *American Journal of Political Science* 673.
- SPAETH, H. J. (1998). *Expanded United States Supreme Court Judicial Database: 1946-1968 Terms*. ICPSR 6557. Ann Arbor, MI: Inter-university Consortium for Political and Social Research
- (1998). *United States Supreme Court Judicial Database: 1953-1997 Terms*. ICPSR 9422. Ann Arbor, MI: Inter-university Consortium for Political and Social Research.

SPRIGGS, J. F. II, and T. G. HANSFORD (1998). "Explaining the Overturning of U.S. Supreme Court Precedent." Presented at the Annual Meeting of the Midwest Political Science Association, April 23-25, Chicago.

STIDHAM, R., and R. A. CARP (1982). "Trial Courts' Responses to Supreme Court Policy Changes," 4 *Law and Policy Quarterly* 215.

TATE, C. N. (1981). "Personal Attributes Models of Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions," 75 *American Political Science Review* 355.

WASBY, S. L. (1970). *The Impact of the United States Supreme Court: Some Perspectives*. Homewood, IL: Dorsey Press.

APPENDIX A

The Supreme Court Cases

Overruled Decision(s)	Overruling Decision	Lower Court Affirmed in Overruling Decision
<i>In re Ross</i> , 140 U.S. 453 (1891)	<i>Reid v. Covert</i> , 354 U.S. 1 (1957)	D.C. District Court
<i>Kinsella v. Krueger</i> , 351 U.S. 1 470 (1956)		
<i>Reid v. Covert</i> , 351 U.S. 487 (1956)		
<i>Thompson v. Thompson</i> , 226 U.S. 551 (1913)	<i>Vanderbilt v. Vanderbilt</i> , 354 U.S. 416 (1957)	Court of Appeals of New York
<i>Darr v. Burford</i> , 339 U.S. 200 (1950)	<i>Fay v. Noia</i> , 372 U.S. 391 (1963)	Second Circuit
<i>McNally v. Hill</i> , 293 U.S. 131 (1934)	<i>Peyton v. Rowe</i> , 391 U.S. 54 (1968)	Fourth Circuit
<i>Moore v. Illinois Central R. Co.</i> , 312 U.S. 630 (1941)	<i>Andrews v. L & N R. Co.</i> , 406 U.S. 320 (1972)	Fifth Circuit
<i>Low v. Austin</i> , 13 Wallace 29 (1871)	<i>Michelin Tire v. Wages</i> , 423 U.S. 276 (1976)	Supreme Court of Georgia
<i>Valentine v. Chrestensen</i> , 316 U.S. 52 (1942)	<i>Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council</i> , 425 U.S. 748 (1976)	Eastern District of Virginia
<i>McGautha v. California</i> , 402 U.S. 183 (1971)	<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	Supreme Court of Georgia
<i>Spector Motor Service v. O'Connor</i> , 340 U.S. 602 (1951)	<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977)	Supreme Court of Mississippi
<i>United States v. Arnold, Schwinn & Co.</i> , 388 U.S. 365 (1967)	<i>Continental T.V., Inc. v. GTE Sylvania Inc.</i> , 433 U.S. 36 (1977)	Ninth Circuit
<i>Hawkins v. United States</i> , 358 U.S. 74 (1958)	<i>Trammel v. United States</i> , 445 U.S. 40 (1980)	Tenth Circuit
<i>Heisler v. Thomas Colliery Co.</i> , 260 U.S. 245 (1922)	<i>Commonwealth Edison Co. v. Montana</i> , 453 U.S. 609 (1981)	Supreme Court of Montana
<i>Parratt v. Taylor</i> , 451 U.S. 527 (1981)	<i>Daniels v. Williams</i> , 474 U.S. 327 (1986)	Fourth Circuit
<i>O'Callahan v. Parker</i> , 395 U.S. 258 (1969)	<i>Solorio v. United States</i> , 483 U.S. 435 (1987)	Court of Military Appeals
<i>Parden v. Terminal Railway of Alabama</i> , 377 U.S. 184 (1964)	<i>Welch v. Texas Dept. of Highways</i> , 483 U.S. 468 (1987)	Fifth Circuit

Overruled Decision(s)	Overruling Decision	Lower Court Affirmed in Overruling Decision
<i>Enelow v. New York Life Insurance Co.</i> , 293 U.S. 379 (1935)	<i>Gulfstream Aerospace Corp. v. Mayacamas Corp.</i> , 485 U.S. 271 (1988)	Ninth Circuit
<i>Ettelson v. Metropolitan Life Insurance Co.</i> , 317 U.S. 188 (1942)		
<i>Wilko v. Swan</i> , 346 U.S. 427 (1953)	<i>Rodriguez de Quijas v. Shearson/American Express, Inc.</i> , 490 U.S. 477 (1989)	Fifth Circuit
<i>Joseph E. Seagram & Sons v. Hostetter</i> , 384 U.S. 35 (1966)	<i>Healy v. The Beer Institute</i> , 491 U.S. 324 (1989)	Fifth Circuit
<i>Fay v. Noia</i> , 372 U.S. 391 (1963)	<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991)	Fourth Circuit
<i>Booth v. Maryland</i> , 482 U.S. 496 (1987)	<i>Payne v. Tennessee</i> , 501 U.S. 808 (1991)	Supreme Court of Tennessee
<i>South Carolina v. Gathers</i> , 490 U.S. 805 (1989)		
<i>Akron v. Akron Center for Reproductive Health, Inc.</i> , 462 U.S. 416 (1983)	<i>Planned Parenthood v. Casey</i> , 505 U.S. 833 (1992)	Third Circuit
<i>Thornburgh v. American College of Obstetricians and Gynecologists</i> , 476 U.S. 747 (1986)		
<i>Baldasar v. Illinois</i> , 446 U.S. 222 (1980)	<i>Nichols v. United States</i> , 511 U.S. 738 (1994)	Sixth Circuit
<i>NLRB v. Transportation Management</i> , 462 U.S. 393 (1983)	<i>Dept. of Labor v. Greenwich Collieries/Maher Terminals Inc.</i> , 512 U.S. 267 (1994)	Third Circuit
<i>Sinclair v. United States</i> , 279 U.S. 263 (1929)	<i>United States v. Gaudin</i> , 515 U.S. 506 (1995)	Ninth Circuit
<i>Pennsylvania v. Union Gas Co.</i> , 491 U.S. 1 (1989)	<i>Seminole Tribe of Florida v. Florida</i> , 517 U.S. 44 (1996)	Eleventh Circuit
<i>United States v. Halper</i> , 490 U.S. 435 (1989)	<i>Hudson, et al. v. United States</i> , 522 U.S. 93 (1997)	Tenth Circuit

APPENDIX B

**Negative Treatment by the Supreme Court of the
Eventually Overruled Decision—Potential Signals**

- Thompson v. Thompson* 226 U.S. 551
293 U.S. 96, followed
350 U.S. 568, criticized
- Darr v. Burford* 339 U.S. 200
369 U.S. 656, distinguished
- McNally v. Hill* 293 U.S. 131
No substantive treatment
- Moore v. Illinois Central R. Co.* 312 U.S. 630
339 U.S. 239, harmonized
360 U.S. 548, harmonized
373 U.S. 690, dissenting
379 U.S. 650, dissenting
385 U.S. 196, dissenting
386 U.S. 171, dissenting
- Low v. Austin* 80 U.S. 29
358 U.S. 534, dissenting
- Valentine v. Chrestensen* 316 U.S. 52
358 U.S. 498, criticized
404 U.S. 898, dissenting
413 U.S. 376, dissenting
418 U.S. 298, dissenting
421 U.S. 809, harmonized
- McGautha v. California* 402 U.S. 183
408 U.S. 238, questioned, criticized,
dissenting
- Spector Motor v. O'Conner* 340 U.S. 602
347 U.S. 359, dissenting
421 U.S. 100, criticized, dissenting
- United States v. Arnold, Schwinn & Co.*
388 U.S. 365
No substantive treatment
- Hawkins v. United States* 358 U.S. 74
362 U.S. 525, explained
- Heisler v. Thomas Colliery Co.* 260 U.S. 245
266 U.S. 588, followed
271 U.S. 577, followed
273 U.S. 669, followed
- Parratt v. Taylor* 451 U.S. 527
No substantive treatment
- O'Callahan v. Parker* 395 U.S. 258
401 U.S. 355, harmonized
413 U.S. 665, dissenting
420 U.S. 738, dissenting
- Parden v. Terminal Railway of Alabama*
377 U.S. 184
411 U.S. 279, dissenting
415 U.S. 651, distinguished, dissenting
423 U.S. 983, dissenting
- Enelow v. New York Life Insurance Co.*
293 U.S. 379
317 U.S. 188, followed
337 U.S. 254, distinguished
348 U.S. 176, explained
437 U.S. 478, distinguished
- Ettelson v. Metropolitan Life Insurance Co.* 317 U.S. 188
337 U.S. 254, distinguished
348 U.S. 176, explained
437 U.S. 478, distinguished
- Wilko v. Swan* 346 U.S. 427
417 U.S. 506, dissenting
482 U.S. 220, limited, dissenting
- Joseph E. Seagram & Sons v. Hostetter*
384 U.S. 35
476 U.S. 573, distinguished, ques-
tioned, dissenting

Booth v. Maryland 482 U.S. 496
486 U.S. 367, dissenting
490 U.S. 805, followed, dissenting

South Carolina v. Gathers 490 U.S. 805
No substantive treatment

Akron v. Akron Center for Reproductive Health, Inc. 462 U.S. 416
No substantive treatment

Thornburgh v. American College of Obstetricians and Gynecologists 476 U.S. 747
No substantive treatment

Baldasar v. Illinois 446 U.S. 222
484 U.S. 904, dissenting

NLRB v. Transportation Management 462 U.S. 393
No substantive treatment

Sinclair v. United States 279 U.S. 263
No substantive treatment

Pennsylvania v. Union Gas Co. 491 U.S. 1
491 U.S. 223, dissenting
492 U.S. 96, explained

U.S. v. Halper 490 U.S. 435
128 L.Ed.2d 767, dissenting

Fay v. Noia 372 U.S. 391*
477 U.S. 478, questioned, explained
489 U.S. 288, dissenting
494 U.S. 407, dissenting
497 U.S. 227, dissenting
499 U.S. 467, dissenting

* Fay was cited in dissent in thirty-five other cases as well, but as the message was quite clear, we used those listed to determine that a signal was surely being sent to the lower courts regarding its reversal.