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Chief Justice Roberts and Precedent: A Preliminary Study

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CHIEF JUSTICE ROBERTS AND PRECEDENT: A PRELIMINARY STUDY*

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Chief Justice Roberts has professed a dedication to stare decisis, but the authenticity of his commitment has been challenged. This Article represents a preliminary attempt to assess the Chief Justice's view of precedent, examining the opinions he issued in his first Term. While citations are seldom studied quantitatively, they offer a tool for insight into judicial decisionmaking.

The study of Chief Justice Roberts's opinions reveals some distinct characteristics about his dedication to stare decisis. The Chief Justice tended to cite to more precedents than did other Justices, but he was also more likely to treat precedents negatively, by distinguishing or overruling them. He often reached out to address precedents not raised by the parties' briefs and ignored precedents that the parties believed to be relevant.

This brief study illuminates a richer and more sophisticated understanding of stare decisis. Precedent is not simply governing or irrelevant. Prior decisions represent a web into which current decisions are placed. The existing precedents may not dictate particular outcomes or opinions in the current decisions, but they influence those decisions. Likewise, the choices of which precedents to cite in the current decisions serve to shape the course of the law, and to influence future decisions. Chief Justice Roberts has an apparent commitment to stare decisis, not in the sense that he feels tightly bound by the directions of past cases, but in the sense that he is influenced by those cases and uses them to project his own influence on future decisions.

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INTRODUCTION

John Roberts's tenure as Chief Justice is too new to allow any firm conclusions about the behavior of the United States Supreme Court under his leadership. Nevertheless, its beginning warrants study. This Article examines the use of precedent in the Court, with a focus on Chief Justice Roberts. In addition to shedding some light on the nascent Court, I hope to illuminate new approaches to the study of precedent and the use of the legal model in quantitative empirical analyses.

I begin by reviewing the "conventional wisdom" regarding Chief Justice Roberts's fealty to stare decisis. This general perception is that he is a modest jurist who shows great respect for precedent, and his confirmation testimony generally affirmed this view, though with some qualifications.[1] The first two Terms of the Roberts Court have seen considerable controversy, with some commentators claiming that the Chief Justice has manipulated precedent.[2] Rather than taking any claims at face value, this Article will examine what the Roberts Court has done in actual practice. Before engaging in preliminary testing, though, I review the existing quantitative empirical research on the Court's use of precedent. While limited, these studies do offer illuminating insights on the Justices' ability to pick and choose the precedents they will follow or undermine.

Next, this Article reviews the use of precedent in the opinions authored by the Chief Justice in his first Term. This includes a simple count of the opinions cited as precedent by the Chief Justice, relative to the number of opinions cited by other Justices in the Term. In addition, I consider the treatment that the Chief Justice afforded those citations and whether it was positive or negative, as compared with the treatment of precedents by other Justices.

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1. *See infra* notes 10–32 and accompanying text.

2. *See, e.g.*, Edward M. Kennedy, *The Supreme Court's Wrong Turn—And How To Correct It*, AM. PROSPECT, Dec. 2, 2007, at 14, 16 (complaining that Roberts and Alito promised to respect precedent but voted so as to "essentially" reverse precedents).

I also consider the extent to which citation to precedent is discretionary, based upon a review of the briefs submitted to the Court. In any given case, a number of precedents are obviously relevant and cited by both the petitioners' and respondents' briefs. Nevertheless, many of these cases go uncited in the opinions of Chief Justice Roberts, which refer instead to many different precedents that went unmentioned in the briefs of the parties. I investigate the degree to which the Chief Justice relied on cases cited by both briefs or by one brief, and the extent to which the opinion introduced entirely distinct precedents that the briefs did not even mention.

This preliminary investigation provides some insight into Chief Justice Roberts's use of precedent and is designed as an introduction to future studies of the use of precedent by the Justices. This is a fruitful field of research that has seen relatively little investigation. Additional research could illuminate this aspect of the legal model of Court decisionmaking and possibly the degree to which stare decisis may be ideologically manipulated by the Court.

I. CHIEF JUSTICE ROBERTS ON PRECEDENT

It has become common to think of Chief Justice Roberts as a modest jurist who adheres strongly to precedent; however, firm conclusions on his devotion to and use of precedent are difficult to make.[3] The Chief Justice has established a general reputation of respect for judicial precedent.[4] He has "professed humility and respect for precedent."[5] Professor Jeffrey Rosen was "impressed with his reverence for the law."[6] Richard Dieter of the Death Penalty Information Center declared that Chief Justice Roberts had a " 'high respect' " for precedents in the capital punishment context, opining that he would not expand the reach of capital punishment.[7] Rosen, though, suggested that Roberts's devotion to precedent was uncertain and "his vision of the force of precedent might evolve and grow during decades on the Court."[8] His prior service differed from his

3. *See, e.g.*, Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1758 (2006) (discussing the potential impact of Chief Justice Roberts's modest judicial approach on the future of facial and as-applied constitutional challenges).

4. *See infra* notes 31–32 and accompanying text.

5. Richard W. Garnett & Michael Stokes Paulsen, *What Would Lincoln Do?*, WKLY. STANDARD, Oct. 16, 2006, at 16, 17.

6. Jeffrey Rosen, *In Search of John Roberts*, N.Y. TIMES, July 21, 2005, at A29.

7. Polly Ross Hughes, *Death Penalty for Sex Offenders May Be Hard Sell*, HOUS. CHRON., Mar. 10, 2007, at B1.

8. Jeffrey Rosen, *Bottoms Up*, NEW REPUBLIC, Aug. 1, 2005, at 12, 13.

role as a Supreme Court Justice, so he may not "have a well-thought-out theory of stare decisis."[9]

The Senate hearings on the nomination of John Roberts focused extensively on his views of precedent. The very first question asked of him, by Senator Specter, involved the role of stare decisis.[10] In his answer, Roberts agreed that the doctrine embodied an important goal and observed that "the Founders appreciated the role of precedent in promoting evenhandedness, predictability, stability, [and] the appearance of integrity in the judicial process."[11] In response to a questionnaire from the Senate Judiciary Committee, he declared that precedent "plays an important role in promoting stability of the legal system."[12] Roberts subsequently urged recognizing "the importance of settled expectations" in judicial decisions.[13] In responding to questions, Roberts elaborated:

> I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. . . . It is not enough that you may think the prior decision was wrongly decided. That really doesn't answer the question. It just poses the question. And you do look at these other factors, like settled expectations, like the legitimacy of the Court . . . .[14]

He emphasized that the doctrine of stare decisis "serves as an important check on judges."[15]

Roberts professed an intent to be "known as a modest judge," which involved "respect for precedent that forms part of the rule of law that the judge is obligated to apply under principles of stare decisis."[16] In deciding a case, he declared, "you begin obviously with the precedents before you."[17] Judges, in rendering decisions, "need to be bound down by rules and precedents."[18] Hence, he promised: "I

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9. Rosen, *supra* note 6, at A29.

10. *Confirmation Hearing on the Nomination of John G. Roberts, Jr., To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 141 (2005) [hereinafter *Roberts Confirmation Hearings*].

11. *Id.* at 142.

12. *Id.* at 179 (statement of Sen. Grassley, Member, S. Comm. on the Judiciary (quoting John G. Roberts, Jr.)).

13. *Id.* at 142.

14. *Id.* at 144.

15. *Id.* at 551.

16. *Id.* at 158.

17. *Id.* at 159.

18. *Id.* at 177–78.

will follow the Supreme Court's precedents consistent with the principles of stare decisis."[19]

While Roberts expressed the importance of stare decisis, he indicated that he did not feel absolutely bound by past decisions. He reported that "stare decisis is not an inexorable command"[20] or an "absolute rule,"[21] and stated that the Supreme Court had explained "the circumstances under which you should revisit a prior precedent that you think may be flawed and when you shouldn't."[22] He noted that some precedents may prove to be "unworkable"[23] and observed that the precedent may "have been eroded by subsequent developments."[24] Roberts also distinguished among types of precedents, suggesting that those involving property or statutory interpretation might be given relatively greater strength.[25] Among the other bases he referenced for rejecting precedents was that "they don't lead to predictable results, they're difficult to apply."[26] He cited the overruling of *Plessy* and "*Lochner*-era decisions" as proper rejections of stare decisis.[27] The testimony indicated that Roberts recognized that the theory was not totally controlling of the Court's decisions.

The comments by Chief Justice Roberts in his confirmation hearings might be viewed as nothing more than pablum, and he broke no new theoretical ground on the bases for reliance on precedent.[28] Perhaps he was merely engaged in a "confirmation dance," declaring whatever was necessary to receive the Senate's approval.[29] His comments might be taken with a grain of salt as a necessary and insincere homage to stare decisis.[30] Nevertheless, there was a general

19. *Id.* at 293.
20. *Id.* at 180.
21. *Id.* at 270.
22. *Id.* at 270.
23. *Id.* at 142, 144.
24. *Id.* at 142.
25. *Id.* at 181.
26. *Id.* at 180.
27. *Id.* at 144.
28. There are different "theories of precedent" that "vary among judges and over time." ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 143 (2006). Roberts's testimony consisted mostly of affirming broad and uncontroversial principles and did not clearly identify his theory of precedent.
29. *See Roberts Rope-a-Dopes Liberals*, HUMAN EVENTS, Sept. 19, 2005, at 1 (suggesting, from a conservative viewpoint, that the hearing testimony was potentially manipulative).
30. Linda Greenhouse, *Precedents Begin Falling for Roberts Court*, N.Y. TIMES, June 21, 2007, at A21.

sense that he was by nature especially respectful of precedent.[31] The most frequent reason he gave for rejecting a precedent was that it had proved unworkable, which is a fairly limiting rationale. Others who testified at the hearings spoke of his " 'deepest respect for legal principles and legal precedent.' "[32]

The initial Terms of the Roberts Court, though, created considerable controversy about its fealty to precedent. It seemed to some as if the Chief Justice were forcing his preferred results into the body of precedent in an artificial, Procrustean manner. Ralph Neas of People for the American Way declared that the Court had " 'shown the same respect for precedent that a wrecking ball shows for a plate-glass window.' "[33] The ACLU's legal director declared: " 'Having begun with a promise to respect precedent and seek consensus, the Roberts court has so far done neither.' "[34] Edward Lazarus declared that the "Roberts court also showed little regard for the court's own precedents, overruling or eviscerating a slew of past decisions that did not conform to conservative principles."[35] Professor Ronald Dworkin described Chief Justice Roberts and Justice Alito as leading a "revolution Jacobin in its disdain for tradition and precedent"[36] that demonstrated that Chief Justice Roberts's "Senate testimony was actually a coded script for the continuing subversion of the American constitution."[37]

In *Parents Involved in Community Schools v. Seattle School District No. 1*,[38] the prominent recent decision on race-based school assignments, a liberal minority charged that the majority opinion of

31. *See* Diane S. Sykes, *"Of a Judiciary Nature": Observations on Chief Justice's First Opinions*, 34 PEPP. L. REV. 1027, 1031 (2007) (suggesting that what emerged from the hearing testimony was that Chief Justice Roberts would be "attentive to the discretion-limiting force of decisional rules and precedent").

32. *Roberts Confirmation Hearings*, *supra* note 10, at 476 (statement of Maureen E. Mahoney, Partner, Latham & Watkins, L.L.P., Washington, D.C. (quoting Letter from the Office of the Solicitor Gen. to S. Comm. on the Judiciary)).

33. Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1 (quoting Ralph G. Neas).

34. David G. Savage, *High Court Has Entered a New Era; The Chief Justice, with Help from Fellow Bush Appointee Alito, Carries Big Ruling to the Right—A Generational Shift*, L.A. TIMES, July 1, 2007, at A1 (quoting Steven R. Shapiro).

35. Edward Lazarus, Editorial, *Under John Roberts, Court Re-Rights Itself*, WASH. POST, July 1, 2007, at B1.

36. Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. BOOKS, Sept. 27, 2007, at 92, 92.

37. *Id.* at 101.

38. 551 U.S. __, 127 S. Ct. 2738 (2007).

Chief Justice Roberts "distorts precedent."[39] Perhaps the more remarkable critique came from Justice Scalia, who indicted the Chief Justice's majority opinion in *FEC v. Wisconsin Right to Life*,[40] limiting the scope of the Bipartisan Campaign Reform Act,[41] as the "judicial obfuscation" of "faux judicial restraint."[42] Chief Justice Roberts maintained, though, that his conservative decisions were in fact grounded in precedent, and he avoided the overrulings favored by Justice Scalia.[43]

Professors Mary Ann Glendon and Douglas Kmiec applauded the Court:

> Despite some ideological carping from those who lost cases that depended upon the extension of past decisions, Roberts and Alito have also shown themselves to be strongly respectful of precedent. Advocates this term urged overturning previous abortion decisions, a Warren Court ruling allowing taxpayers to sue in religion cases, and campaign spending limits. The new justices left those precedents in place, often resisting both their unwarranted extension to new facts and the urging of Justices Antonin Scalia and Clarence Thomas to overrule them.[44]

This may be excessive praise, as the Court majority certainly limited the scope of equal protection and privacy precedents.[45] It is significant, though, that Chief Justice Roberts at most bent, and did not break, precedents. He did not vote to overrule *Grutter v. Bollinger*,[46] though his opinion clearly hints that this would have been his ideological desire.[47] There is some indication that Chief Justice Roberts is devoted to "incremental change" in precedent, rather than

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39. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. __, __, 127 S. Ct. 2738, 2800 (2007) (Breyer, J., dissenting). For an editorialist, Chief Justice Roberts "pretended to follow the earlier ruling while ripping its guts out." E.J. Dionne, Jr., Op-Ed., *Not One More Roberts or Alito*, WASH. POST, June 29, 2007, at A21.

40. 551 U.S. __, 127 S. Ct. 2652 (2007).

41. Bipartisan Campaign Reform Act of 2001, Pub. L. No. 107-155, 116 Stat. 81 (2002).

42. FEC v. Wis. Right to Life, Inc., 551 U.S. __, __ n.7, 127 S. Ct. 2652, 2684 n.7 (2007) (Scalia, J., concurring in part and concurring in the judgment).

43. *Id.* at __, 127 S. Ct. at 2664–65.

44. Mary Ann Glendon & Douglas W. Kmiec, *The Best Kind of Justices*, 30 LEGAL TIMES, July 2, 2007, at 54.

45. *See* Gonzales v. Carhart (*Carhart II*), 550 U.S. __, __, 127 S. Ct. 1610, 1630–38 (2007); *supra* note 39. In both cases, Chief Justice Roberts stopped short of Scalia's desires to reverse precedents but reached the same result. *See Parents Involved*, 551 U.S. at __, 127 S. Ct. at 2767–68; *Carhart II*, 550 U.S. at __, 127 S. Ct. at 1639.

46. 539 U.S. 306 (2003).

47. *Parents Involved*, 551 U.S. at __, 127 S. Ct. at 2768 ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

dramatic reversals.[48] Professor Jack Balkin described the difference between Justice Scalia and Chief Justice Roberts as "the difference between bomb throwing and dismantling."[49] This, of course, is a difference, and a potentially material one. Any conclusions about the Roberts Court and precedent, though, could be improved by consideration of more rigorous study.

II. THE EMPIRICAL STUDY OF PRECEDENT

Historically, quantitative empirical study of the judiciary did not attend much to the role of precedent in judicial decisionmaking. The early research of this type was conducted by political scientists and primarily analyzed the extent to which judicial decisions appeared ideological in outcome.[50] This yielded the "attitudinal model" associated with Professors Segal and Spaeth, which suggested that the Justices' decisions were governed, not by the law, but by their personal ideological preferences, much as legal realism had long professed.[51] Considerable empirical evidence was amassed by political scientists to demonstrate the association between ideology and Justice-votes.[52] It is said to be the "common sense of the discipline that Supreme Court justices ... should be viewed as promoters of their personal policy preferences rather than as interpreters of law."[53]

The attitudinal model fell well short of explaining all the Court's decisions, though, and it suffered criticism for ignoring legal variables that could explain those decisions.[54] The Justices' heavy reliance on precedent in their opinions facially indicated that they were basing their judgments on this legal measure and not simply on their ideological preferences. For the attitudinalists, though, these references were merely a means of cloaking the true basis for the

48. Robert Barnes, *Roberts Court Moves Right, But With a Measured Step*, WASH. POST, Apr. 20, 2007, at A3.

49. Linda Greenhouse, *Even in Agreement, Scalia Puts Roberts to Lash*, N.Y. TIMES, June 28, 2007, at A1.

50. For a review of this research, see Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 275–79 (1997).

51. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 64–72 (1993); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86–97 (2002).

52. Some of this research is summarized in Cross, *supra* note 50, at 275–80.

53. Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 466 (2001).

54. *See* Cross, *supra* note 50, at 285–311 (critiquing the limited empirical approach of behavioralists and their reliance on the attitudinal model of judicial decisionmaking).

Justices' decisions in legal parlance, in order to maintain the legitimacy of the Court as a legal body.[55] Some maintained that the corpus of available precedents was so extensive as to support any predetermined conclusion of the Justices.[56] This dispute over the role of precedent required closer examination. One strain of research examined the Court's choices in overruling precedents, but such overruling is a very rare event.[57]

The foundational quantitative study of precedent was conducted in the 1970s by Professors Landes and Posner.[58] They examined citation rates in different areas of the law, and the average age of precedents utilized by the Supreme Court and federal circuit courts.[59] Landes and Posner conceived of precedents as "legal capital" that depreciated and was periodically produced in response to needs.[60] They also considered the possibility that judges would disregard precedents in pursuit of their preferred policy ends.[61] They hypothesized that Warren Court-era "judicial activism" would appear in the expedited depreciation of older precedents, but found little evidence of such an effect.[62] The research considered only absolute numbers of citations, though, and not treatment of particular decisions.

A 1986 study considered the Court's citation patterns.[63] It examined the pattern of citations for a random sample of twenty-seven decisions issued between 1947 and 1974.[64] The author found

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55. *See* HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL 287–315 (1999) (presenting empirical evidence that the Justices most commonly vote their preferences rather than the governing precedents).

56. Thus, the claim that "the Supreme Court has generated so much precedent that it is usually possible to find support for any conclusion." LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 21 (1995). Even traditional legal scholars have recognized this principle, acknowledging that stare decisis presents "*choice* of precedents." HENRY J. ABRAHAM, THE JUDICIAL PROCESS 325 (6th ed. 1993). Judge Easterbrook bluntly declared that "precedent doesn't govern." Linda Greenhouse, *Precedent for Lower Courts, Tyrant or Teacher?*, N.Y. TIMES, Jan. 29, 1988, at B7.

57. *See* SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992, at 22–23 (1995) (noting that the Court quite infrequently overrules precedent).

58. William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 250–52 (1976).

59. *Id.* at 251–61.

60. *Id.* at 262.

61. *See id.* at 274–75.

62. *Id.* at 290–92.

63. Charles A. Johnson, *Follow-Up Citations in the U.S. Supreme Court*, 39 W. POL. Q. 538, 538 (1986).

64. *Id.* at 540.

that most citations were not substantive, but instead were often contained in string citations.[65] Ideology did not appear to have a significant effect on choice of citations, while the legal model appeared to have more influence.[66] A book-length examination of reproductive rights and death penalty cases concluded that the Justices' ideology did not rule their interpretation of precedents.[67]

Segal and Spaeth themselves proceeded to conduct the largest study on the interaction of ideology and precedent in the Court.[68] They took certain major or "landmark" decisions issued by the Court that were accompanied by dissent and then identified progeny cases governed by the landmark precedent.[69] They examined the voting behavior of the dissenting Justices in the subsequent progeny cases.[70] The hypothesis was that if precedent governed them, they would change the direction of their votes, while if they were ruled by their ideological preferences, their votes would not change.[71] The results differed by Justice but were generally consistent over time and throughout the Court—the vast majority of Justices did not let the intervening precedent alter their votes.[72] In the progeny cases, dissenting Justices continued to vote their preferences ninety percent of the time, notwithstanding the precedent from which they dissented.[73] This study called into serious question the significance of precedent as a determinant of Supreme Court decisions.

This analysis did not close the issue. Some questioned whether the methodology effectively tested for adherence to precedent. The Supreme Court controls its docket and takes very few of the cases offered it on appeal. The Court is unlikely to grant certiorari on a case that is uncontroversial and falls squarely under its preexisting precedent.[74] Many of the cases the Court selects are chosen "precisely because they raise issues about the interpretation of

65. *Id.* at 542–43, 546.

66. *Id.* at 546.

67. LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 302 (1992).

68. SPAETH & SEGAL, *supra* note 55, at 287–88.

69. *Id.* at 24.

70. *Id.* at 33–34.

71. *Id.* at 35–40.

72. *Id.* at 309.

73. *Id.* The authors also studied less significant cases and found that the dissenting Justices followed their preferences in 82.4% of these as well. *Id.*

74. *See* SUP. CT. R. 10 (setting out standards for making certiorari decisions and noting the significance of the legal importance of case).

landmark precedent that have no clear answers."[75] Thus, a continued dissent need not represent any sort of repudiation of the precedent, but may simply demonstrate a reluctance to expand its scope beyond that set out in the initial holding.[76] Insofar as the principle of stare decisis does not normally "mean that dissenting justices gravitate toward the position held by the majority of their colleagues," the research did not test all its potential effects.[77]

Segal and Spaeth did not analyze summary dispositions of the Court, which are those where the law is considered so clear that an explanatory opinion is deemed unnecessary. But, these may actually provide the best evidence of the effect of precedent, because they could involve cases where a precedent was plainly controlling.[78] Professors Songer and Lindquist later examined these summary dispositions, and they revealed that the Justices "cast more than three-fourths of their votes in favor of precedent" rather than ideological preference.[79] Segal and Spaeth have argued in response that these are not tantamount to merits decisions and may not yield dissents, even when Justices disagreed with the outcome.[80]

The particular coding conventions of the study might also be challenged. For example, when a Justice dissented from a precedent and then joined a majority in a later decision that limited the potential scope of that precedent, Segal and Spaeth considered that to be an attitudinal vote.[81] While this is plausibly ideological, the outcome in no way shows disrespect for the precedent. The progeny opinion may have expressly accepted the validity of the prior precedent while confining its scope. The refusal to expand the importance of a precedent is in no way a rejection of the governing significance of precedent. A reexamination of the cases found that in most of the progeny, "the Court's opinion . . . explicitly reaffirms the

75. Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1049, 1050 (1996).

76. *See* Saul Brenner & Marc Stier, *Retesting Segal and Spaeth's Stare Decisis Model*, 96 AM. J. POL. SCI. 1036, 1039 (1996) (noting how the pattern of ideological voting could be explained because the progeny cases were "dissimilar").

77. Gillman, *supra* note 53, at 483.

78. Brenner & Stier, *supra* note 76, at 1042 (noting that summary disposition cases must be studied to provide a "complete picture" of the role of precedent at the court); *see also* Songer & Lindquist, *supra* note 75, at 1057 (noting that these are the cases providing error correction for lower court failure to adhere to clear precedent).

79. Songer & Lindquist, *supra* note 75, at 1061.

80. Jeffrey A. Segal & Harold J. Spaeth, *Norms, Dragons, and* Stare Decisis: *A Response*, 40 AM. J. POL. SCI. 1064, 1079 (1996).

81. Songer & Lindquist, *supra* note 75, at 1051–54.

doctrine announced in the landmark case."[82] Some discretion was required in coding, and Professor Barry Friedman has analyzed the coding of one particular decision as incorrect.[83]

A recoding of the cases showed the sensitivity to the ultimate findings. In this analysis, Professors Songer and Lindquist examined whether the dissenter's opinion in the progeny appeared to show adherence to the landmark precedent, such as the joining of a majority opinion that reaffirmed the precedent's validity.[84] They found that this reduced the proportion of votes attributable to Justice ideology from ninety percent to seventy percent.[85] Segal and Spaeth have responded in detail to this coding dispute, and the resolution involves a detailed, case-by-case analysis.[86]

Moreover, attempts to replicate the results using somewhat different approaches have generally not confirmed the findings of the study. One study compared "institutional" stare decisis (following the majority opinion in a case) with "individual" stare decisis (following the individual justice's vote in that case), much like the Segal and Spaeth design.[87] The study showed significant variation among the Justices, but concluded that institutional stare decisis was overall a powerful determinant.[88] A recent, yet-unpublished study altered the Segal and Spaeth approach to measure new Justices' decisions in progeny cases when their ideological beliefs would appear to call for a deviation from the precedent set in the initial landmark opinion.[89] It found that the landmark precedent had a powerful effect on the Justices' decisions.[90]

Without entering the coding and replication thicket, the main shortcoming of the study's approach was the failure to recognize the endogeneity of the progeny cases. The research did not consider the "possible effects of precedent on the Court's agenda and litigation environment."[91] Cases do not reach the Supreme Court docket randomly, and the landmark precedent itself may shape which

82. *Id.* at 1054.

83. Barry Friedman, *Taking Law Seriously*, PERSP. POL., June 2006, at 266–67.

84. Songer & Lindquist, *supra* note 75, at 1055.

85. *Id.* at 1055.

86. Segal & Spaeth, *supra* note 80, at 1067–73.

87. Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decision Making*, 29 J. LEGAL STUD. 721, 723 (2000).

88. *Id.* at 747–48.

89. Linda M. Merola, The Influence of Stare Decisis on the Votes of United Supreme Court Justices: A Second Look 13–14 (2006) (unpublished manuscript, on file with the North Carolina Law Review).

90. *Id.* at 18.

91. Gillman, *supra* note 53, at 481.

progeny cases reach the Court. The Court will not take new cases that are plainly governed by the landmark precedent.[92] Consequently, looking at decisions in progeny cases simply does not test whether a governing precedent would control the Justices' votes. The examination simply shows that Justice ideology matters when it comes to deciding whether a precedent should be expanded or distinguished.

Indeed, the nature of certiorari largely dooms any effort to study the binding power of precedent. Suppose that, out of one thousand cases presented to the Court for review, nine hundred were clearly governed by prior Court precedent and that precedent-respectful Justices would follow the precedent, contrary to their preferences. Suppose also that such Justices have no incentive to take certiorari on these nine hundred cases, both because they are relatively uncontroversial as a legal matter and because the Justices might be compelled to vote against their preferences. As a result, the Justices take the one hundred cases that are not clearly governed by existing precedent. Given the lack of clear direction in these cases, the Justices vote ideologically in all of them. Given these suppositions, we have a case in which a study of opinions would show the Justices to be 100% ideological in the decided opinions, when in fact they were only 10% ideological for the full body of cases comprising the cert pool, and were 0% ideological for cases plainly governed by precedent. Given docket control, examinations of the results of decided cases cannot capture the significance of precedent, as they consider but the tip of the iceberg and may, therefore, mislead.

Professors Richards and Kritzer sought to address this effect, to some degree, in their study of "jurisprudential regimes."[93] They suggest that the Court does not create precedents "that define or predict outcomes of future Supreme Court cases," but instead establish rules that structure the analysis of those future cases.[94] They studied the jurisprudential regime of content-neutrality in freedom of expression cases, established by the Court in 1972. They found a statistically significant effect of the legal variables associated with the regime in Court decisions rendered after that date.[95] Before the regime's creation, content-neutrality was not such a significant determinant, but after its creation, the variable became a significant

92. *See supra* text accompanying notes 74–75.

93. Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002).

94. *Id.* at 306.

95. *Id.* at 314.

determinant of the Justices' decisions.[96] This methodology accounted, in part, for the case selection process and demonstrated that a precedent—at least a powerful regime-creating precedent—has a significant effect on future votes.[97] It still underestimated the potential effect of Supreme Court precedent, however, by examining only the cases that the Court chose to analyze, which presumably excludes those most plainly governed by a precedent. An unpublished study of First Amendment decisions between 1974 and 1996 found mixed effects.[98] The authors considered the Court's choice to cite precedents, considering the ideological position of the potential citers and the mean ideological position of the coalition that produced the precedential opinion. They found that a Court was more likely to cite a precedent on the governing law while the ideology of the precedent had but a trivial effect on citation probability,[99] though the effect was somewhat greater for significant treatment of a precedent, such as "following" it.[100] The authors concluded that "the Supreme Court makes an effort to follow legally relevant precedents, quite apart from ideological considerations."[101]

A new, yet-unpublished study examines the precedents mentioned in the syllabus of the Supreme Court opinion (as a proxy for the important cases) and how they were treated in that opinion.[102] The authors integrated the ideological direction of the precedent with the ideological preferences of the contemporaneous Supreme Court, President, and both Houses of Congress as independent variables that might determine the outcome of a set of civil rights, civil liberties, and economic cases.[103] While the Justices' ideologies were significant, precedent was a much more powerful determinant of the case outcome than even ideology.[104] However, because the majority opinion author controls the cases cited in the syllabus, this apparent

96. *Id.*

97. *Id.* at 315–16.

98. Kevin T. McGuire & Michael MacKuen, Precedent and Preferences on the U.S. Supreme Court, 11, 26–28 (unpublished manuscript, on file with the North Carolina Law Review).

99. *Id.* at 19.

100. *Id.* at 22–23.

101. *Id.* at 25.

102. Richard L. Pacelle, Jr. et al., Of Opportunities and Constraints: Decision Making in the Modern Supreme Court (2007) (unpublished manuscript, on file with the North Carolina Law Review).

103. *Id.* at 33 tbl.3 (Integrated Model of Supreme Court Decision Making: Civil Rights and Civil Liberties v. Economic Cases).

104. *Id.*

reliance on precedent could reflect strategic ideological citing of past opinions in the syllabus.

Another very elaborate study of the Supreme Court's use of precedent was recently published by Hansford and Spriggs.[105] Rather than focusing on the effect of precedent on Court outcomes, this study examined the Justices' decisions to use a particular precedent or not, though it was limited to the most prominent citations, such as "followed" or "distinguished."[106] They hypothesized that precedents have different levels of "legal vitality," which is a proxy for their influence.[107] When the Court positively interprets a precedent, "it takes on greater authority," while a negative interpretation means that the "precedent's legal authority is diminished."[108] The book tested multiple propositions about precedent citation, but essentially the authors argued that the nature of a citation to a precedent was based on its existing vitality and its ideological distance from the current Court.[109] Hansford and Spriggs found that both precedent vitality and ideological distance were significant determinants of the interpretation of precedents.[110] Interestingly, a key determinant of a negative interpretation of precedent was a combination of vitality *and* ideological distance, suggesting that the Court might go out of its way to cite, in order to negatively treat, a vital opinion that it ideologically disfavors.[111] The authors proceeded to demonstrate the practical significance of the Supreme Court's citation of a precedent by showing that the negative treatment had a substantial effect on subsequent citations to the negatively treated case.[112]

This seminal research is very informative about the Court's strategic invocation of precedent in molding the law, but it may presume an exaggerated ability of the Justices to choose their citations. The use of a precedent in a Court decision may be unavoidable because of its obvious relevance to the case. It is relatively common for the parties for both sides of a case to cite many of the same precedents in their briefs.[113] This signals that the parties consider this precedent to be of unavoidable relevance for the Court,

105. THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT (2006).

106. *Id.* at 58.

107. *Id.* at 23.

108. *Id.* at 25.

109. *Id.* at 32–37.

110. *Id.* at 64.

111. *Id.* at 64, 71.

112. *Id.* at 109–23.

113. *See infra* tbl.3.

possibly requiring a citation. In such circumstances, the choice is not *whether* to cite a case but *how* to cite it. Hansford and Spriggs sought to control for this effect, but their controls were very rough.[114]

This background shows how research on the Supreme Court's use of precedent is now growing, but the recent studies have only scratched the surface of the topic.[115] The Hansford and Spriggs study is enormously significant but fails to consider fully the application of precedent and the legal variables that may constrain choice. Much additional research can better reveal the use of stare decisis at the Court, and the following discussion begins this analysis with a review of the first Term of the Roberts Court.

III. CITATION TO PRECEDENT IN THE ROBERTS COURT

The relative use of precedent can be readily examined by looking at the content of Supreme Court opinions: one can simply count the precedents cited by an opinion. This, of course, is a very rough test for fealty to precedent; citing *more* precedents might be a sign of infidelity to a few governing precedents. One can go beyond counting and examine the nature of an opinion's use of precedents. For example, the express overruling of a precedent requires a citation to the precedential decision. Yet such a citation is hardly evidence of respect for the power of precedent. Precedent is said to be "a fairly plastic substance that can be used in a variety of ways to support and challenge a variety of positions."[116]

This Article provides a small preliminary step toward the analysis of Justices' use of precedent. I first examined the use of precedent in opinions authored by Chief Justice Roberts during his first year on the job. Citation frequency was my first consideration. One might anticipate that a Justice who placed particular importance on stare decisis would cite a larger number of precedents to support

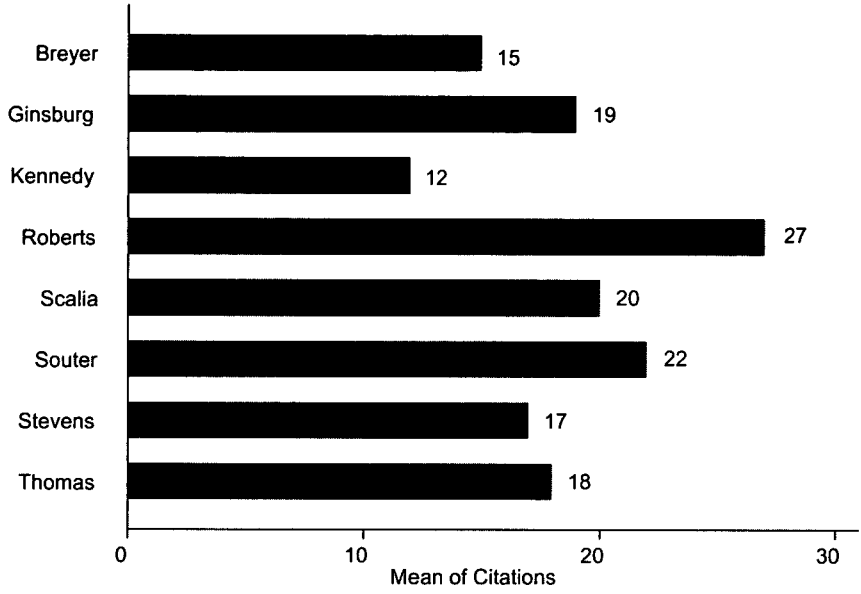
114. HANSFORD & SPRIGGS, *supra* note 105, at 62. They had a control for "court agenda" but it involved only a broad definition of the case's issue area (e.g., economic regulation) and no more precise control for relevance of particular precedents.

115. The above literature review focuses on the intersection of ideology and stare decisis and does not cover all the empirical studies of citation practices. One excellent study of state courts examined the development of wrongful discharge rules and found that citations were used to legitimate doctrinal advances. David J. Walsh, *On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases*, 31 LAW & SOC'Y REV. 337, 350–57 (1997). Others have examined the communication of precedents among the courts of the states. *See, e.g.*, Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 188–92 (1985); Peter Harris, *Ecology and Culture in the Communication of Precedent Among State Supreme Courts, 1870–1970*, 19 LAW & SOC'Y REV. 449, 465–75 (1985).

116. T.R. VAN GEEL, UNDERSTANDING SUPREME COURT OPINIONS 115 (1991).

his or her judgment. I measured the number of separate case citations in the majority or plurality opinions authored by each of the Justices in the initial Term of the Roberts Court.[117] The results are displayed in the following figure.

Figure 1. Citations by Opinion Author.



Considerable caution must be used in drawing conclusions from these results. The sample size per Justice was quite small, averaging only around eight opinions. These opinions are assigned intentionally, not randomly. Chief Justice Roberts controlled the assignment of many of these cases, and of all those cases in which he drafted the opinion of the Court.[118] It appears that different types of

117. Whether this is the best coding convention is debatable. By my approach, I counted a citation to a case only once, even if the same case was cited again later in the opinion. Arguably, each subsequent citation should also be counted. Nor did I distinguish whether the cited case was issued by the Supreme Court or a different court or whether it was to a majority or separate opinion. The Justices have different conventions for citing the history of the case at hand, and I counted citations to its history only once (though some opinions cited all the prior decisions and the grant of certiorari).

118. The significance of self-assignment is unclear. While some Chief Justices, such as Warren, have tended to keep especially important cases for themselves, Chief Justice Rehnquist did not display this tendency to self-assign important opinions. *See* Forest

cases tended to yield more citations; in particular, constitutional criminal decisions appear to have relied more heavily on a greater number of precedents than did other case types. Some cases simply have more relevant precedents and would be expected to yield more citations.[119] Opinions with dissents tend to have more citations, perhaps because of the nature of the case or perhaps because of the presence of the challenge raised by the dissent.[120] Finally, the implication of citing more cases is unclear—it may be that Justices cite cases more frequently to shore up otherwise questionable conclusions.[121] Some research indicates that Supreme Court opinions that contain more citations produce closer adherence by lower courts, so this citation choice may reflect an intent to give the opinion greater doctrinal power.[122] Recent network research indicates that Supreme Court opinions that contain more citations also *receive* more subsequent citations, further suggesting the importance of this measure.[123]

Notwithstanding all these caveats, the results are somewhat revealing. Chief Justice Roberts cited more precedents in his average opinion (twenty-seven) than did any other Justice during this Term. His average opinion cited over twice as many cases as did an average opinion written by Justice Kennedy (twelve). His average citation rate was roughly twenty percent greater than that of the next highest Justice (twenty-two). The first Term citation rate thus provides some

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Maltzman & Paul J. Wahlbeck, *May It Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AM. J. POL. SCI. 421, 435 (1996).

119. *See infra* tbl.3.

120. Social scientists have theorized that a reason for reliance on precedential citations is the legitimation of judicial authority. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 45 (1998) (suggesting that the Justices must "make accommodations over the interpretation of precedent because they believe that doing so enhances the probability that society will consider the resulting decision legitimate"). Justice Stevens has observed that following precedent "obviously enhances the institutional strength of the judiciary." John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 2 (1983).

121. *See* Walsh, *supra* note 115, at 340 ("[C]ourts faced with uncertainty surrounding the adoption of new legal doctrines and motivated by the desire to win acceptance for their decisions can be expected to employ citations most intensively when, in fact, acceptance is most problematic."); *see also* Lawrence A. Friedman, et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 815 (1981) (claiming that a "change in the law . . . calls for a broad search for authority").

122. *See* Charles A. Johnson, *Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions*, 21 LAW & SOC'Y REV. 325, 332 tbl.2 (1987) (finding a positive association for all measures of compliance and statistical significance for lower court reasoning).

123. *See* James H. Fowler et al., *Network Analysis and the Law: Measuring the Legal Importance of Supreme Court Precedents*, 15 POL. ANALYSIS 324, 335 (2007).

indication of the importance that Chief Justice Roberts places on the role of precedent.

Simple citation frequency provides a very limited test of a Justice's commitment to precedent, though. At the extreme, it is clearly relevant—a Justice who cited zero precedents cannot be said to be using the rule of stare decisis. However, it is not clear that citing twenty-five precedents, as opposed to fifteen, demonstrates greater respect for stare decisis. The larger number of citations may simply reflect the nature of the case at hand or reveal a tendency to fill opinions with string citations that carry little weight.[124]

More significantly, the simple counting of precedents does not consider the manner in which the opinion treated them. An opinion might cite many cases yet call for them to be overturned, which would not demonstrate fealty to the rule of precedent. Short of overturning, precedents may be treated in differing ways. A court may limit the power of a precedent by interpreting it narrowly, such as distinguishing its application to the case before the Court. For example, after the Court in *Wisconsin v. Constantineau*[125] had held generally that the government had to provide a party a due process hearing before taking a certain stigmatizing action,[126] the Court in *Paul v. Davis*[127] cited *Constantineau* but narrowed its scope by finding that stigmatization alone did not demand a hearing, noting that the earlier case also involved a tangible detriment (loss of right to purchase alcohol).[128] This substantially narrowed the apparent requirements of the *Constantineau* precedent.

Alternatively, a decision may take a precedent and expand its scope, perhaps ignoring limitations implicit or explicit in the earlier case. This application may be illustrated by the opinion in *Bowen v. Kendrick*,[129] which held that the government could constitutionally make grants to religious institutions for sexual counseling.[130] The Court relied on *Tilton v. Richardson*,[131] which had authorized

124. *See* Walsh, *supra* note 115, at 337 ("Even researchers who study citations express reservations about their meaningfulness, particularly in light of the large proportion of citations that are of the nonsubstantive 'string' variety.").

125. 400 U.S. 433 (1971).

126. *Id.* at 437.

127. 424 U.S. 693 (1976).

128. *Id.* at 707. In dissent, Justice Brennan maintained that the decision marked a "clear retreat" from the Court's prior decisions on the right to a hearing. *Id.* at 724 (Brennan, J., dissenting).

129. 487 U.S. 589 (1988).

130. *Id.* at 622.

131. 403 U.S. 672 (1971).

government construction grants to religious colleges. In a dissent, Justice Blackmun contended that this reliance had "skew[ed] the Establishment Clause analysis" by ignoring the sectarian purposes of the use of the funds and suggested that *Tilton* was inapposite because it involved largely secular instruction.[132] He also noted that *Tilton* relied on the "skepticism of the college student," while *Bowen* extended the case to services for adolescents, which he found "simply not comparable."[133] The Court in *Bowen* thus considerably expanded the legal scope of its earlier decision.

Hansford and Spriggs considered these differences in their distinction of negative and positive treatment of precedents.[134] While Chief Justice Roberts cited many precedents, it is important to consider the treatment he afforded them. I examined his use of precedent through what might be called "reverse Shepardizing" his citations. This involved taking his citations and examining how the Shepard's service evaluated his treatment of those precedents.[135] This data was compiled for three Justices during Chief Justice Roberts's first Term, and the relative rates of their respective treatments of precedents are displayed in Table 1. These are percentages of their total citations, and because Chief Justice Roberts had many more citations, he had the highest absolute number for each of the treatments of precedent.

Table 1. Treatment by Opinion Author.

	Roberts	Kennedy	Stevens
Followed	11.3%	12.1%	9.6%
Explained	12.0%	0.01%	13.2%
Distinguished	22.7%	7.7%	4.8%
Overruled in Part	8.7%	0.01%	10.8%

The results reveal some interesting differences in the treatment of precedent. While all the Justices were comparable in probability of following precedent, Justice Kennedy was much less likely to explain

132. *Bowen*, 487 U.S. at 631 (Blackmun, J., dissenting).

133. *Id.* at 637–38.

134. *See* HANSFORD & SPRIGGS, *supra* note 105, at 43–54.

135. The Shepard's service coding system has been used in empirical analysis and found to be sufficiently reliable and valid for such studies. *See id.*, *supra* note 105, at 44–54.

or overrule a precedent in part. The "overruled in part" cases were primarily state or circuit court decisions, which is not such an aggressive action as if they were prior Supreme Court decisions. Chief Justice Roberts also was much more likely to distinguish a past precedent in his opinions. The higher citation rate of Chief Justice Roberts was accompanied by a disproportionately higher negative treatment rate for precedents. The results for this one Term suggest that Chief Justice Roberts is aggressive in giving negative treatment to prior cases.

For context, the same analysis was performed for the majority opinions of the final Term of the Rehnquist Court, for the Chief Justice and the same two Associate Justices, with results reported in Table 2.

Table 2. Treatment by Opinion Author.

	Rehnquist	Kennedy	Stevens
Followed	15.8%	0%	9.7%
Explained	6.7%	3.5%	4.4%
Distinguished	4.5%	3.5%	4.4%
Overruled in Part	0.5%	4.9%	1.8%

This amplifies the finding that Chief Justice Roberts was relatively aggressive in his negative treatment of precedents, as his rates for distinguishing and overruling precedents were distinctly higher than those of the other Justices studied.

The implications of Roberts's negative treatment of precedent are not entirely clear. One might view such negative citations as disrespectful of stare decisis by undermining the corpus of existing cases. But a negative treatment might well be perfectly respectful of precedent. It cites the apparently contrary case, rather than ignoring it. Moreover, a negative treatment may be a perfectly appropriate application of a cited case. When a precedent is distinguished, for example, that may be entirely correct and consistent with the underlying cited decision; that is the rationale behind distinguishing prior opinions. The choice to follow such a precedent in a later opinion may be an expansion beyond its intended bounds, and the original author may have intended a result much like that of the subsequent distinguishing decision. Thus, the decision in *Bowen* was arguably an overextension of the *Tilton* precedent and not truly

grounded in stare decisis, notwithstanding its apparent reliance on precedent.[136] Consequently, the meaning of the higher negative treatment of precedents by Chief Justice Roberts is uncertain. His opinions clearly show respect for stare decisis in their frequency of citations, but his relatively high negative treatment rate suggests that he is not tightly bound by precedent.

The Hansford and Spriggs study suggests that Justices choose which precedents to treat favorably or unfavorably. Chief Justice Roberts's opinion in *Brigham City, Utah v. Stuart*[137] found that police officers were justified in entering a home without a warrant under exigent circumstances, regardless of the officer's state of mind, and that the entry at issue was reasonable.[138] Four of its citations were coded as "followed," for the proposition that the officer's state of mind was irrelevant.[139] Of these cases, three were authored by Rehnquist, and one was written by Scalia. Two of the cases followed actually produced liberal results, but Chief Justice Roberts followed them on the more conservative proposition regarding the officer's state of mind.[140] This shows, to a degree, the importance of opinion content, rather than outcome.[141] In addition to the choice of precedent treatment, Justices may exercise choice in the precedents they mention in the opinion, which is examined in the following Part.

IV. CHOICES OF PRECEDENT IN THE ROBERTS COURT

The study of precedent must confront the different circumstances in which cases are cited. This analysis can take advantage of a heretofore underutilized tool of empirical research: the briefs presented to the Court by the parties.[142] Because precedent is a

136. *See, e.g.*, Tracy Sullivan Prewitt, Bowen v. Kendrick*: The Constitutionality of the Adolescent Family Life Act—Has the Court Given Us a Lemon?*, 28 J. FAM. L. 87, 103–13 (1990) (suggesting that the Supreme Court's analysis in *Bowen* marked a significant departure from prior cases and that its reliance on *Tilton* was misplaced).

137. 547 U.S. 398 (2006).

138. *Id.* at 406–07.

139. The cases are *Bond v. United States*, 529 U.S. 334 (2000); *Whren v. United States*, 517 U.S. 806 (1996); *Graham v. Connor*, 490 U.S. 386 (1989); and *Scott v. United States*, 436 U.S. 128 (1978).

140. *Stuart*, 547 U.S. at 404 (citing *Whren*, 517 U.S. at 813, and *Graham*, 490 U.S. at 397).

141. In one of the liberal outcomes, *Graham*, Justices Blackmun, Brennan, and Marshall filed a separate concurring opinion, suggesting that the content of Chief Justice Rehnquist's majority opinion was not so liberal. *Graham*, 490 U.S. at 399–400 (Blackmun, Brennan, and Marshall, JJ., concurring in part and concurring in the judgment).

142. One study did examine the reliance on precedent in briefs of the parties. It examined the number of citations to precedent in the briefs' tables of authorities as a percentage of all sources cited in thirteen cases. Relative use of precedent varied from

persuasive tool, the briefs cite numerous precedents.[143] Often, both sides cite a case as governing precedent, though sometimes a case will be cited by only the petitioner or only the respondent.

Hansford and Spriggs contended that "there is often decisional leeway in determining whether a precedent governs a case," and they structured their research around this choice.[144] Justices, however, do not have a completely free hand in citing precedents. Some are surely unavoidable—a case disputing the proper application of the *Miranda* rights surely has to cite to *Miranda v. Arizona*.[145] One may distinguish discretionary Supreme Court behavior by examining the opinion's relative citation of cases presented by both parties, by one party (and if that party prevailed at the Court), or by neither party. One might think that if both parties relied on the case, it would be an unavoidable citation for the Court's opinion. The Supreme Court opinion may also introduce new citations, the relevance of which was unforeseen in the briefs. Alternatively, it may entirely ignore precedents that one or both of the parties considered relevant to the action. This is where one finds the discretionary citation patterns.

To assess the choice of citations, I examined the cases cited in the petitioners' briefs, the respondents' briefs, and the opinions authored by Chief Justice Roberts in his first Term. The following table displays the degree to which the opinion citations corresponded with the cases used in the parties' opening briefs. For each decision, I show the number of common cases in the petitioner's and respondent's opening brief, how many of those cases appeared in the opinion drafted by Roberts, how many cases cited in the opinion were unique to one party's brief, the number of cases introduced in the opinion found in neither brief, and the prevailing party in the case. Results are displayed in Table 3.

around a third of citations to over four-fifths of sources of authority and averaged around sixty percent. Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1025 (1996). This suggests that the Supreme Court treats its prior decisions as a very important, if not the primary, source of law to be applied in its opinions.

143. *See* tbl.3 *infra*.

144. HANSFORD & SPRIGGS, *supra* note 105, at 22.

145. 384 U.S. 436 (1966).

Table 3. Opinion Citations Compared with Briefs.

Case	Common Cases in Briefs	Common Cases in Opinion	Unique to Petitioner Brief	Unique to Respondent Brief	Unique to Opinion	Prevailing Party
Martin v. Franklin Capital Corp.[146]	10	7	0	5	4	Respondent
Rumsfeld v. FAIR[147]	22	13	5	6	7	Petitioner
Jones v. Flowers[148]	3	3	10	0	24	Petitioner
DaimlerChrysler Corp. v. Cuno[149]	22	6	7	12	24	Petitioner
Sereboff v. Mid Atlantic Medical Services, Inc.[150]	9	4	3	5	8	Respondent
House v. Bell[151]	13	10	1	5	4	Petitioner
Sanchez-Llamas v. Oregon[152]	52	21	9	15	35	Respondent
Gonzalez v. UDV[153]	31	9	6	1	8	Respondent
Brigham City v. Stuart[154]	6	5	10	3	10	Petitioner

Initially, the results of the investigation of these Roberts opinions and the parties' briefs suggest that precedent is not highly binding on the Court but is a very discretionary choice. The opinions cited, on average, less than half the cases found in both the petitioners' and respondents' briefs. While both parties believed these cases to be relevant, the opinion ignored them. Moreover, the opinion introduced more cases, not found in either brief, than the number of cited cases found in both briefs. Given the caliber of representation at the Supreme Court level, this is surely surprising. It seems plain that Justice Roberts exercised considerable discretion in choosing which precedents to cite.

146. 546 U.S. 132 (2005).
147. 547 U.S. 47 (2006).
148. 547 U.S. 220 (2006).
149. 547 U.S. 332 (2006).
150. 547 U.S. 356 (2006).
151. 547 U.S. 518 (2006).
152. 548 U.S. 331 (2006).
153. 546 U.S. 418 (2006).
154. 547 U.S. 398 (2006).

Of the four cases "followed" in *Brigham*, as discussed above, one was cited in both briefs, while three were found only in the petitioner's brief.[155] All four stood for roughly the same proposition.[156] This appears to be a case where Chief Justice Roberts cited more authority than the minimum the respondent thought necessary. Perhaps this was to demonstrate the consistency of the principle in the Court, though it may have reflected his desire to add "vitality" to certain past opinions, as suggested by Hansford and Spriggs.[157] This decision also "overruled in part" three opinions, one from a circuit court and two from state courts. Of these, one was common to both briefs and two were unique to the opinion. All three stood for the proposition that the officer's subjective intent was a relevant consideration.[158] Here, the opinion seemingly went out of its way to undermine contrary authority. The significance of these citations may not be great, though, as the effect of the opinion on their continued vitality was clear and independent of the treatment. For this case, the citation choices may only have reflected thoroughness of research at the Court.

The decision in *Rumsfeld v. Forum for Academics and Institutional Rights, Inc.*[159] provides another interesting study of choice of precedent. In this opinion, Chief Justice Roberts distinguished ten prior Supreme Court opinions, which indicates a distinct attempt to shape the law.[160] Of these ten, eight were found in both parties' briefs, which suggest that he may have had little discretion in dealing with them.[161] One was found in the losing party's brief, but one case (*Healy v. James*[162]) was raised ab initio, implying some affirmative intent to minimize its influence. The commonality of most of the distinguished decisions, however, colors the Hansford

155. The cases cited in the Petitioner's brief were *Whren*, *Scott*, *Bond*, and *Graham*, while, of the four, respondent only cited *Whren*.

156. *See* Bond v. United States, 529 U.S. 334 (2000) (excluding evidence of searched bag based on objective expectations); Whren v. United States, 517 U.S. 806 (1996) (holding that the constitutional reasonableness of traffic stops does not depend on officers' motivations); Graham v. Connor, 490 U.S. 386 (1989) (applying the objective reasonableness standard to Fourth Amendment investigatory stop); Scott v. United States, 436 U.S. 128 (1975) (holding that courts should provide objective assessment of officer action under the Omnibus Crime Control and Safe Streets Act).

157. *See supra* note 107 and accompanying text.

158. *See* United States v. Cervantes, 219 F.3d 882 (9th Cir. 2000); People v. Mitchell, 347 N.E.2d 607 (N.Y. 1976); State v. Mountford, 769 A.2d 639 (Vt. 2000).

159. 547 U.S. 47 (2006).

160. Tbl.3 *supra*.

161. *Id.*

162. 408 U.S. 169 (1972).

and Spriggs findings and suggests that the Justices' discretion in applying negative treatment may be limited.

Another interesting evaluation involves the prior opinions ignored by the Supreme Court's opinion. One might assume that cases cited by the briefs of both parties, but ignored by the Court's opinion, might imply some affirmative avoidance of the decision. Examination of additional cases and contrast with dissenting or concurring opinions might reveal more about the strategic discretion that may be used in citation practices.

CONCLUSION

This study does not resolve the dispute over the Roberts Court and precedent. Its results suggest that Chief Justice Roberts is quite committed to precedent but not only as a restraint; he sometimes alters the law by applying stare decisis in a variety of ways. He did not ignore or overrule precedent, so much as he sought to shape its directions. As a dismantler rather than a bomb-thrower,[163] his approach is more modest and subject to reversal. Nonetheless, it may be equally powerful, or even more powerful in advancing a legal or ideological agenda, because Chief Justice Roberts is building an edifice of precedent that may someday be quite solid.[164]

The tentative data suggest that Chief Justice Roberts puts great importance on precedent, but not in the precise sense that was commonly invoked. He appears to view stare decisis as an evolving process, in which prior opinions are not straightjackets that dictate his decisions but are instead boundaries that shape the nature of his opinions. The Chief Justice also appears dedicated to creating a new path of stare decisis that will direct the course of future rulings. This is a more sophisticated understanding of the legal process, escaping the binary "precedent governs/precedent doesn't matter" false

163. *See supra* note 49 and accompanying text.

164. Dworkin suggested that the recent opinions of the Roberts Court were "part of a strategy" to enable the eventual overruling of liberal precedents. Dworkin, *supra* note 36, at 101. Perhaps, but the truth may be more complicated. In some ways, the strategy may be more threatening to liberal opinions than one of overruling. Rather than overrule a liberal precedent, the strategy may provide for the cooption of liberal precedents for conservative ends (as in Roberts's reference to *Brown* on affirmative action). *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. __, 127 S. Ct. 2738, 2767–68 (2007). However, the strategy may be less threatening in the sense that the original opinions remain valid and, if the ideological judicial winds change, they may still form the basis of a future liberal jurisprudence. Thus, the approach is somewhat modest, like planting a seed that may grow, but only if nurtured by future courts.

dichotomy. Legal researchers need to develop a better understanding of this process.

My empirical findings are very tentative and preliminary because they involve only one Term of the Court. A rough comparison of each Justice's citations for the immediately prior Term showed some variance in citation rates by Justice.[165] The sample is even smaller for the closer analyses of treatment of precedents and comparison to the briefs of the parties. Consequently, the results should be considered as intriguing observations, rather than reliable bases for confident conclusions.

These findings also suggest follow-up research to be done on the seminal Hansford and Spriggs study. The significant differences among Justices in their citation rates and their types of citations suggest that their results could possibly be driven, or at least influenced, by opinion authors. Some Justices may be more strategic with their citations than others. Moreover, analysis of the parties' briefs could provide a better control on citation choices. For example, it would be interesting to find if the use of negative citations was associated with unavoidable citations, or if the Justices affirmatively chose cases unreferenced by the briefs to treat negatively. The latter discovery would truly exemplify strategic political citation practices.

My primary hope for this Article is to give ideas to future researchers about new ways in which the legal model of judicial decisionmaking might be analyzed. A Justice's use of a particular precedent and treatment of that precedent apparently involves considerable discretion. Identifying the extent of such discretion and how it is used requires further research. I hope to highlight the tools that might be used in such a study, and particularly the value of examining the briefs of the parties as a cue for evaluating the Court's citation practices. With more resources, a researcher might examine not just the presence of citations in the briefs, but also the relative weight the counsel for the litigants afforded them. Such an approach

165. In the final Term of the Rehnquist Court, Justice Stevens cited an average of fourteen cases per opinion (versus seventeen in the first Term of the Roberts Court), and Justice Kennedy cited an average of seventeen cases per opinion (versus twelve in the first Term of the Roberts Court). While this intra-Justice variance is relatively small compared to the inter-Justice variation in Table 1, *supra*, a broader sample is necessary to draw confident conclusions. Chief Justice Rehnquist in this Term cited an average of nine cases per opinion, a low figure that suggests that opinion assignment authority may not explain higher citation rates by Chief Justices.

could better identify the unavoidable citations and perhaps find evidence of affirmative avoidance of precedent by the Justices.