DERELICT IN THE STREAM OF THE LAW

OVERRULING PRECEDENT: “A DERELICT IN THE STREAM OF THE LAW”

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Abstract

Will the Supreme Court overrule Hoffman Plastic Compounds v. N.L.R.B., 535 U.S. 137 (2002), its precedent that treats unlawful alien workers as criminals and denies them backpay for a violation of a labor law? More generally, what are the statistical indicators of a precedent that the Supreme Court overrules—and how well does Hoffman Plastic fit that profile? To answer these research questions, I analyze two unique databases—128 federal and state rulings from 2002-2012 that involved Hoffman Plastic’s remedy issue, and a sample of 154 Supreme Court pairings of an overruled precedent, and the decision that explicitly rejected it.

My study draws on a metaphor that the Supreme Court uses when they view a precedent as “a derelict in the stream of the law”—a reference to a stranded shipwreck. I adapt a concept from the science of rivers that compares sudden changes in a river’s course to a process for changing the stream of the Court’s precedents. The theory posits that closely decided cases are the most likely to be “derelicts.” Hoffman Plastic easily meets this threshold with its 5-4 ruling. While a close vote hardly means that a precedent will be overruled, the Supreme Court database shows that a case decided by one vote is more likely than others to be overruled.

A precedent can be overruled when adverse lower court rulings deposit downstream from the lead case. There is empirical evidence of this deposition process for Hoffman Plastic. Between 2002 and 2012, Keycite classified 64 cases as negative authority for this precedent. Hoffman Plastic compares, therefore, to New York v. Belton, 453 U.S. 454 (1981), a case that the Supreme Court implicitly overruled, and Booth v. Maryland, 482 U.S. 496 (1987), expressly overruled by the Court. Five federal circuit courts are part of the accumulation of negative precedent downstream from Hoffman Plastic.

Statistical evidence from the Hoffman Plastic database bolsters these Keycite comparisons. Among federal district courts, 68.9% of the cases said that their facts or legal circumstances were distinguishable from Hoffman Plastic, and only 13.3% of federal opinions and 25% of state opinions cited this precedent as positive authority. The possibility that Hoffman Plastic will be overruled is further suggested by the time analysis of Supreme Court precedents. Compared to these cases, Hoffman Plastic is still early in the timeline. An overruled precedent lasts, on average, 19.5 years; and the regression equation in this study predicts that 13.1 years pass before the Court overrules “derelicts” that were decided by one vote. Hoffman Plastic was decided only 11 years ago. A Senate bill to reform immigration law, which legitimizes employment of current unlawful aliens, may further erode judicial support for Hoffman Plastic.

These findings do not mean that the overruling of Hoffman Plastic is imminent or inevitable. This study suggests that a deposition of downstream cases correlates with overruling—but it does not prove that adverse lower court rulings cause the Court to overrule itself. Justices also manage bad precedents by marginalizing or ignoring them. This study shows, however, that when the Court overrules a precedent, this tends to happen (1) within 20 years of the ruling, and (2) in cases that are decided by a one vote margin. Hoffman Plastic has these two “overruling” traits. Hopefully, a richer model will analyze more variables associated with the overruling of precedents. In time, it may be possible to predict the likelihood that a precedent will be overruled, much like scientific models estimate the probability of natural cataclysms.
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If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.


Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice.


I. INTRODUCTION

A. Context for the Research Question

Will the Supreme Court overrule its precedent in Hoffman Plastic Compounds v. N.L.R.B.1 that treats unlawful alien workers as criminals and denies them backpay for a violation of a labor law? More generally, what are the statistical indicators of a precedent that the Supreme Court overrules—and how well does Hoffman Plastic fit that profile? To answer these research questions, my study uses two unique databases—128 federal and state rulings from 2002-2012 that involved the remedy issue in Hoffman Plastic, and a separate sample of 154 Supreme Court pairs of an overruled precedent, and the decision that explicitly rejected it.

But first, some background and context are helpful. Continuity for legal precedent is important because it promotes order and stability.2 But precedents cannot live forever. Some are simply wrong. Others become unworkable or obsolete as society changes.3 Often, a dead

2 Stare decisis is the doctrine of precedent, and means “to stand by things decided.” The Supreme Court has said that stare decisis “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” Payne v. Tennessee, 501 U.S. 808, 827 (1991). Also see Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) [citations omitted], stating that “no judicial system could do society’s work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”
3 See infra note 59. More generally, this idea reflects the adaptability of the law. See O. HOLMES, THE COMMON
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precedent is not overruled. Courts ignore it to the point of driving the opinion from the stream of cited authority. But a few precedents end more dramatically, when the Court explicitly overrules them. This kind of change in precedent is the subject of my empirical study.

The overruling of precedent helps to channel social, political, and economic change. When the Supreme Court considers the correctness, relevance, or vitality of a precedent, it weighs several factors. Still, the Court is loath to overrule its precedents. This is characteristically true of all courts. Perhaps this is because judges see their precedents as part of nature, or at least a natural ordering of human affairs. Interestingly, judges frequently relate their reasoning to rivers and streams, wellsprings, and watersheds.

LAW (1881), at 1, observing: “The life of the law has not been logic; it has been experience.” Also see Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) (“Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act’s prohibition on ‘restraint[s] of trade’ evolve to meet the dynamics of present economic conditions.”).

Montejo v. Louisiana, 556 U.S. 778, 792-793 (2009) (“Beyond workability, the relevant factors in deciding whether to adhere to the principle of stare decisis include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.”).

State v. Egan, 287 So.2d 1,7 (Fla. 1973) offers an elaborate stream metaphor that fits the approach in this study:

The common law has not become petrified; it does not stand still. It continues in a state of flux. And, its ever present fluidity enables it to meet and adjust itself to shifting conditions and new demands. It has been described as a leisurely stream that has not ceased to flow gently and continuously in its proper channel, at times gradually and imperceptibly eroding a bit of the soil from one of its banks and at other times getting rid of and depositing a bit of silt.

Federal courts have also invoked the “stream of precedent” analogy. See U.S. v. Hamilton, 2009 WL 4787539 (11th Cir. 2009), at *5 (“An unbroken stream of precedent in this Circuit holds that the uncorroborated testimony of a co-conspirator or accomplice is sufficient to prove guilt beyond a reasonable doubt [quotes and citations omitted].”); Williams v. Consolidated City of Jacksonville, 381 F.3d 1298, 1307 (11th Cir. 2004) (“If an unreasonably high ‘clearly established’ hurdle precludes many cases involving arguable constitutional violations from being brought, then the stream of precedents recognizing certain governmental acts as constitutional violations will dry up.”); Allen v. Thomas, 161 F.3d 667, 673 (11th Cir. 1998) (“But our formulation of the question is drawn from an unbroken stream of precedent spanning more than a half-century, from the Supreme Court’s decision in Johnson v. Zerbst to our own decision in Pardue v. Burton.”); Craig v. Singletary, 127 F.3d 1030, 1044 (11th Cir. 1997) (“For the past forty years, an unbroken stream of precedent in this circuit has established that the uncorroborated testimony of a co-conspirator or accomplice is sufficient to prove guilt beyond a reasonable doubt.”); Muir v. Alabama Educational Television Commission, 656 F.2d 1012, 1026 (11th Cir. 1981)(Clark, dissenting) (“By permitting the State of Alabama to deny a public viewing of a controversial program, our court swims against a stream of precedent and a philosophy that goes to the roots of one of our most cherished freedoms.”); and Committee for Industrial
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My study draws from a river analogy in several Supreme Court opinions that view a precedent as “a derelict in the stream of law.” In *Flood v. Kuhn*, Justice Douglas used this reference to a shipwreck that is stuck in the water to urge his brethren to overrule *Federal Base Ball Club v. National League*, a precedent based on a discredited view of interstate commerce.

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7 The Supreme Court used “watershed” (a high ridge of land that divides two areas that are drained by different river systems) in Planned Parenthood, *supra* note 2, at 867 (1992) (“to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question”). The watershed metaphor also appears in *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15 (Mo.App. W.D. 2008), at *22; Warga v. Palisades Baseball, 2009 WL 695438 (Ohio App. 2009), at *2; and *In re Episcopal Church Property*, 2008 WL 8649356 (Va. 2008), at *20.

8 “Derelict” has a legal usage, explained in *The Laura*, 81 U.S. 336 (1871), at *4, n.1, quoting *The Island City, 1 Black*, 128 (1861): “What constitutes a case of derelict has been authoritatively defined by this court: The abandonment must have been final, without hope of recovery, or intention to return.” The Supreme Court has used the “derelict in the stream of the law” metaphor in *North Dakota State Bd. of Pharmacy v. Snyder’s Drug Stores, Inc.*, 414 U.S. 156 (1973), at 166; *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451 (1962), at 455; *U.S. v. Rabinowitz*, 339 U.S. 56 (1950), at 86; and *MacGregor v. Westinghouse Elec. & Mfg. Co.*, 329 U.S. 402 (1947), at 426.


10 259 U.S. 200 (1922). What did Justice Douglas mean by “a derelict in the stream of the law?” Federal Base Ball Club held that professional baseball is not trade or commerce, and therefore the National League— not being engaged in interstate commerce— could not be found liable for violating federal antitrust law. A generation later, a second Supreme Court ruling on the same issue acknowledged that baseball was a commercial enterprise that stretched over state borders, but the strong current of precedent dictated repetition of the first ruling. *See Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), at 358, conceding that “professional baseball is composed of 380 baseball clubs, operating in 42 states.” *Flood, supra* note 9 (the third case in this series), reached the same result as
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Two different approaches have been used to explain how Supreme Court precedents are overruled. Some studies take a metaphorical approach, and equate this process to natural forces, including those associated with water.\(^\text{11}\) Other studies have used statistics, including charts.\(^\text{12}\) My study borrows from both approaches.

The metaphorical part uses a concept from the study of rivers. Picture a loop or bend in a meandering river. These turns can form cutoffs, akin to a fork in the road. A cutoff is a mechanism for changing the river’s path.\(^\text{13}\) Meandering rivers also carry sediment. This strong force is an important dynamic for changing a river’s course.\(^\text{14}\) In this study, I analogize

the first two, even though professional baseball was a larger commercial enterprise. An exasperated Justice Douglas protested: “This Court’s decision in Federal Baseball Club v. National League . . . is a derelict in the stream of the law that we, its creator, should remove. Only a romantic view of a rather dismal business account over the last 50 years would keep that derelict in midstream.” Flood, supra note 9, at 286.

11 My approach expands on the imagery of water currents, flow, erosion, and sound waves in scholarly publications, and offers a theory of water-borne change for Supreme Court precedents. I emphasize other examples of water metaphors and allusions in italics: See Frederick Schauer, Precedent, 39 STAN. L. REV. 571, 580, n.19 (1987) (“Expansion [of precedent] seems more defensible than contraction, and it is important to think about why expansion of a given decision seems to flow more easily than contraction.”); Bradley Scott Shannon Overruled by Implication, 33 SEATTLE U. L. REV. 151, 152 (2009) (“What if an apparently relevant precedent has been eroded by one or more later decisions?”); Brian P. Wilson, How Should States Treat Cruikshank Following Heller? An Analysis of a State Court’s Ability to Hold that Supreme Court Precedent is Dead, 40 SETON HALL L. REV. 371, 381 (2010) (“Where subsequent Supreme Court decisions erode the validity of prior decisions, uniformity is already offended.”); Donald H. Zeigler, Gazing Into the Crystal Ball: Reflections on the Standard State Judges Should Use to Ascertain Federal Law, 40 WM. & MARY L. REV. 1143, 1204 (1999) (“In United States v. White, however, the circuit court declined to follow a Supreme Court precedent because it was a five to four decision, its authority had been eroded by recent cases, and many of the current justices had explicitly criticized it.”); William N. Eskridge, Jr., Pluralism and Distrust: How Courts can Support Democracy by Lowering the Stakes of Politics, 114 YALE L.J. 1279 (2005), at 1305-08, describing how constitutional principles can “channel” both judicial and public policy thought; and Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 HARV. L. REV. 625, 625 (1984) (developing the concept of acoustic separation in law, based on the idea that courts address some rules to the general public and other rules to officials).


13 Jessica A. Zinger, Bruce L. Rhoads, & James L. Best, Extreme Sediment Pulses Generated by Bend Cutoffs Along a Large Meandering River, 4 NATURE GEOSCIENCE 675 (2011).

14 P.J. Wampler, Rivers and Streams — Water and Sediment in Motion, 3 NATURE EDUCATION
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precedents to rivers, and I compare the Supreme Court’s overruling of its precedents to a sedimentation process known as deposition (the depositing of sediment). I measure how often lower courts disregard a Supreme Court (upstream) precedent when these downstream tribunals believe the precedent is unworkable, irrelevant, or wrongly decided. Lower courts disregard precedent by disagreeing with, distinguishing, or ignoring it. When enough courts disregard a precedent, the flow of a lead case can be clogged by accumulating deposits. In other words, a growing body of adverse rulings by lower courts is like deposition in the stream of a precedent.15

The river bend, in my analogy, is a developing trend or change in society. In this study, the river bend is the growing disconnect between Hoffman Plastic’s harsh ruling to foreclose monetary remedies to unlawful aliens, and increasingly tolerant public opinion about millions of aliens who reside unlawfully in the U.S. If there is enough deposition of downstream rulings from a precedent, the Supreme Court can recognize this problem. This deposition process is precisely what I document in the Hoffman Plastic database.

If the Court overrules the precedent, and creates a new precedent, this is metaphorically

Knowledge 18 (2012).

15 For a glimpse of how this theory can be applied, consider the following anatomy of a precedent that accumulates so much “deposition” by downstream courts that the precedent is overruled. Liggett Co. v. Baldridge, 278 U.S. 105 (1928), struck down a state law that required a pharmacy to be owned by entirely owned by pharmacists. Much later, North Dakota State Bd. of Pharmacy, supra note 8, observed that Liggett “belongs to that vintage of decisions which exalted substantive due process by striking down state legislation which a majority of the Court deemed unwise.” Id. at 164. North Dakota State Bd. also recalled that “[w]e commented on it [Liggett] disparagingly, . . . in Daniel v. Family Security Life Ins. Co. [336 U.S. 220].” Looking back, North Dakota State Bd. also remembered that Daniel “stated that a pronounced shift of emphasis since the Liggett case had deprived the words ‘unreasonable’ and ‘arbitrary’ of the meaning which Liggett ascribed to them.” Id. at 164. Concluding with the river metaphor that is the title of this Article, North Dakota State Bd. declared: “The Liggett case, being a derelict in the stream of the law, is hereby overruled.” Id. at 167. For an abbreviated version of this process, see overruled by Collins v. Youngblood, 497 U.S. 37, 50 (1990), overruling Kring v. Missouri, 107 U.S. 221 (1883), reasoning: “We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases [emphasis added]. We accordingly overrule Kring.”
like a river forming a cut off in the bend and moving in a new direction. This aspect of river science relates to my second database, a comprehensive sample of Supreme Court pairings (called dyads) of an overruled precedent, and the decision that explicitly rejected it. This part of my study draws from empirical analyses that examine how the Court overrules itself.\textsuperscript{16} This study uses statistics to (1) estimate how long it takes for the Supreme Court to overrule a precedent, and (2) correlate the voting margin in overruled cases with the number of years that elapse until a new precedent emerges. My study also specifies a preliminary regression model to predict when the Supreme Court overrules one of its precedents. In sum, I translate a recurring metaphor that indicates precedential deposition—“a derelict in the stream of the law”—into empirical research questions that provide answers about how the Supreme Court alters the course of its precedents.

This study concludes that: (1) most lower courts disregard \textit{Hoffman Plastic}, leading to the inference that these adverse rulings are clogging the precedential of this case, and (2) \textit{Hoffman Plastic} is a good candidate for being overturned, even though it was decided only 11 years ago, because (a) the average age of an overturned Supreme Court ruling is 19.5 years, (b) the most-frequently overruled precedent in my study was decided by a one-vote margin, as in the case of \textit{Hoffman Plastic}, and (c) the deposition process occurring in lower court rulings involving \textit{Hoffman Plastic} may come to the Court’s attention and result in overruling of the case.

\textsuperscript{16} For a similar though less systematic use of the case-accumulation concept, see Earl M. Maltz, \textit{Some Thoughts on the Death of Stare Decisis in Constitutional Law}, 1980 Wis.L.Rev. 467 (1980), at 383:

\begin{quote}
In situations in which the relevant doctrine is vague, early interpretations of that doctrine are likely to generate somewhat inconsistent results. As the number of interpretations \textit{accumulates}, however, a clearer picture of the dominant approach should emerge. By overruling earlier cases inconsistent with this dominant approach, the court can eliminate confusion in the law [emphasis added].
\end{quote}
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B. Organization and Overview of This Article

Part II explains the various ways that the Supreme Court overrules its precedents.\textsuperscript{17} Part II.A analyzes why Supreme Court precedents are durable, even when they are flawed or problematical.\textsuperscript{18} However, when certain problems with a precedent become apparent, the Court overrules the case.\textsuperscript{19} Part II.A also examines external influences, such as change in judicial philosophy, that lead to overruling a precedent.\textsuperscript{20} Part II.B explains the origins of the “derelict in the stream of the law metaphor.”\textsuperscript{21} This part articulates two key aspects of my theory: (1) cases that are decided by a close margin are more likely than other precedents to be derelicts because dissenting opinions can introduce theories and rationales that compete with the precedent’s justification,\textsuperscript{22} and (2) as strong deposition of downstream cases accumulate, this can lead the Court to reconsider its precedent and overrule it.\textsuperscript{23}

Part III discusses research methods and data.\textsuperscript{24} Part III.A presents research questions for the Hoffman Plastic database, and explains why that case is a potential “derelict.”\textsuperscript{25} Part III.B explains how the Hoffman Plastic and Supreme Court were independently developed.\textsuperscript{26} Part III.C reports findings from the statistical analyses. It presents four data tables for the Hoffman Plastic database.

\textsuperscript{17} \textit{Infra} notes 35-123.
\textsuperscript{18} \textit{Infra} notes 35-81.
\textsuperscript{19} \textit{Infra} notes 47-54; and 58-74.
\textsuperscript{20} \textit{Infra} notes 75-77.
\textsuperscript{21} \textit{Infra} notes 82-123.
\textsuperscript{22} \textit{Infra} notes 82-89.
\textsuperscript{23} \textit{Infra} notes 90-109.
\textsuperscript{24} \textit{Infra} notes 124-161.
\textsuperscript{25} \textit{Infra} notes 124-126.
\textsuperscript{26} \textit{Infra} notes 126-150.
Part IV discusses how the findings from the Hoffman Plastic and Supreme Court databases are interrelated. Part IV.A makes connections between the statistical results. Part IV.B draws on the discussion in Part II.A, which describes various reasons that the Court overrules a precedent, and finds similar reasoning in Hoffman Plastic’s downstream opinions for disregarding that precedent. These downstream courts appear to signal Hoffman Plastic’s significant problems to the Supreme Court—a behavior that is part of the overruling process.

Part V presents conclusions. By examining the negative Keycite trend for Hoffman Plastic, I suggest this precedent could be implicitly overruled, such as the New York v. Belton precedent, or explicitly overruled, like the Booth v. Maryland case. Hoffman Plastic is also a good candidate for overruling due to passage of S.744, a Senate bill that legalizes the employment of currently unlawful aliens; but the NLRB’s tarnished status due to the disputed recess appointments of its Members is a potential obstacle to reviving the practice of awarding backpay to unlawful aliens who would might acquire provisional status under immigration reform. Thus, there is an open question as to whether the Court will be presented with a direct opportunity to revisit the Hoffman Plastic precedent.

II. OVERRULING PRECEDENT: A THEORY OF HOW THE SUPREME COURT OVERRULES PRECEDENT

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27 *Infra* notes 151-161.
28 *Infra* notes 162-213.
29 *Infra* notes 162-178.
30 *Infra* notes 179-213.
31 *Infra* notes 214-240.
32 *Infra* notes 223-224.
33 *Infra* notes 225-226.
34 *Infra* note 238.
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A. How the Supreme Court Changes Precedential Currents

The Supreme Court invalidates its precedents in many ways—often by nuance or deflection, as when it narrows the application of a precedent—and on rare occasions, by overt statements that overrule the case. Of course, the Court prefers to uphold the principle of *stare decisis.*\(^{35}\) This norm separates a court from a legislature, where the latter can overturn a law because lawmakers disagree with it.\(^{36}\)

Some precedents are virtually immutable. Their potency can be measured statistically.\(^{37}\) These so-called “super precedents” are like mighty rivers.\(^{38}\) Other precedents deter downstream courts from limiting or overruling the opinion by prospectively declaring the operation of a new rule or principle.\(^{39}\)

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\(^{35}\) A classic exposition of this doctrine appears in *Galvan v. Press*, 347 U.S. 522 (1954), a deportation case, referring to the Court’s earlier rulings that Congress had authority to exclude aliens (e.g., *The Chinese Exclusion Case*, 130 U.S. 581 (1889), and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)). In *Galvan*, a Mexican immigrant was deported based on specious evidence that he was a member of the Communist Party. Affirming the deportation order, Justice Frankfurter wrote:

> [M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . . But the slate is not clean. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation.


> If the Justices were to adopt a low level of deference to precedent (for example, overruling a precedent merely deemed erroneously reasoned), then they will have increased the chances that a subsequent Court will take the same route. Future Justices could rely on past decisions as expressing a theory of precedent that supports them in overruling precedent based solely on disagreement with the underlying reasoning of those precedents.


\(^{38}\) Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363 (2007). Sinclair defines super-precedent as an opinion that is “so effective in defining the requirements of the law that it prevents legal disputes from arising in the first place, or, if they do arise, induces them to be settled without litigation.” *Id.* at 364.

\(^{39}\) Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79
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Often, the Supreme Court does not need to overrule a precedent directly to change the law. The stream of precedent can be shifted by milder measures. A subtle course change occurs when an obsolete precedent is severely limited by later decisions.40 Beyond neglecting a precedent over time, the Court may use “piecemeal” or “implicit” overruling.41 And there are times when the Court is confused as to whether a current decision does, or does not, overrule a prior decision.42 A precedent may be treated with such lack of respect that some justices consider it impliedly overruled.43 Sometimes the Court disapproves a precedent but stops short of

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41 Some Justices, when annoyed by this approach, call out their brethren. See Justice Frankfurter’s dissenting opinion in Darr v. Burford, 339 U.S. 200 (1950), at 221:

The real question before us in this case is whether Wade v. Mayo (citation omitted) should be overruled. Whether this overruling is to be done forthrightly by two words saying the case ‘is overruled’ or the overruling is euphemistically done by fifteen words hardly changes the fact.

An academic perspective appears in William N. Eskridge, Jr., Overruling Statutory Precedents, 76 GEO. L.J. 1361 (1988), at 1392-93, noting that in the previous fifteen years “fewer statutory precedents [were] openly overruled, and then only after a lengthy battle over procedural and historical arcana, but more of them are overruled implicitly or piecemeal.” The classification of these cases is, to a degree, subjective. Eskridge controls for this problem by explaining that in an implicitly overruled decision, “the Court does not actually state that it is overruling the precedent,” but “there is evidence within the Court’s opinion, and/or concurring or dissenting opinions, for the proposition that the precedent is overruled, and when subsequent citations of the ‘overruled’ precedent support the categorization.” Id. at 1430.

42 See the intense disagreement in Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984), at 126-139, revealed in a lengthy dissent as to whether cases cited by the majority opinion were already overruled. Justice Stevens asserted:

None of these cases contain only ‘implicit’ or sub silentio holdings; all of them explicitly consider and reject the claim that the Eleventh Amendment prohibits federal courts from issuing injunctive relief based on state law. There is therefore no basis for the majority’s assertion that the issue presented by this case is an open one.

Id. at 137. The dissent expounded on this view, noting: “The majority incredibly claims that Greene contains only an implicit holding on the Eleventh Amendment question the Court decides today. . . . In plain words, the Greene Court held that the Eleventh Amendment did not bar consideration of the pendent state-law claims advanced in that case.” Id. at n. 14.

43 E.g., Justice Black’s dissenting opinion in Morgantown v. Royal Ins. Co., 337 U.S. 254 (1949), at 261:

“I think it an undesirable practice for this Court to overrule past cases without saying so. The effect of the Court’s holding here is to overrule Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188, . . . decided by a unanimous Court in 1942.”
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overruling it.\textsuperscript{44}

Maintenance of a precedent is not, however, an ironclad law of nature.\textsuperscript{45} Lower courts play a role in maintaining the vitality of a precedent, or prompting reconsideration of it. At times, the Supreme Court treats inferior tribunals like voters who participate in a referendum of the precedent.\textsuperscript{46} Just as rivers change course, so do Supreme Court precedents— but only rarely, and with reluctance.\textsuperscript{47} The judiciary’s ability to alter these currents is a byproduct of \textit{Marbury v. Madison},\textsuperscript{48} where the Supreme Court declared its authority to say what the law is. In cases and controversies that arise under the Constitution, the Supreme Court has said that \textit{stare decisis} is neither an “inexorable command,”\textsuperscript{49} nor “a mechanical formula of adherence to the latest decision.”\textsuperscript{50} Indeed, the Court has preserved its role to overrule precedents, as necessary.\textsuperscript{51} Using this authority, the Court has overruled landmark precedents that legalized racial segregation.\textsuperscript{52}

\begin{itemize}
\item \textsuperscript{44} \textit{E.g.}, \textit{U.S. v. One Assortment of 89 Firearms}, 465 U.S. 354 (1984), at 355, declaring: “To the extent that \textit{Coffey v. United States} [116 U.S. 436 (1886)] suggests that collateral estoppel or double jeopardy automatically bars a civil, remedial forfeiture proceeding following an acquittal on related criminal charges, it is disapproved.”
\item \textsuperscript{45} \textit{U.S. v. Barnett}, 376 U.S. 681, 699 (1964), explained: “It is true that adherence to prior decisions in constitutional adjudication is not a blind or inflexible rule. This Court has shown a readiness to correct its errors even though of long standing.”
\item \textsuperscript{46} \textit{Id.}, reasoning that “where so many cases in both federal and state jurisdictions by such a constellation of eminent jurists over a century and a half’s span teach us a principle which is without contradiction in our case law, we cannot overrule it.”
\item \textsuperscript{47} \textit{Garcia v. San Antonio Metropolitan Transit Authority}, 469 U.S. 528, 557 (1985), overruling \textit{National League of Cities v. Usery}, 426 U.S. 833 (1976), explaining: “We do not lightly overrule recent precedent.” \textit{Also see American Trucking Associations, Inc. v. Smith}, 496 U.S. 167, 197 (1990), stating that there are “relatively rare circumstances where established precedent is overruled.”
\item \textsuperscript{48} \textit{1 Cranch 137, 177 (1803)}, declaring that the judicial branch has the power “to say what the law is,” but not the power to change the law.
\item \textsuperscript{49} \textit{Lawrence v. Texas}, 539 U.S. 558, 577 (2003).
\item \textsuperscript{50} \textit{Helvering v. Hallock}, 309 U.S. 106, 119 (1940).
\item \textsuperscript{51} \textit{Mitchell v. W.T. Grant Co.}, 416 U.S. 600 (1974), at 627-628 (J. Powell, Concurring) (“It is thus not only our prerogative but also our duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question.”).
\end{itemize}
barred a minimum wage law, and allowed law enforcement to use wiretaps without a warrant.

Lower court disrespect for a precedent can signal the Supreme Court to overrule the case. This communication takes several forms. In extreme cases, an inferior court opinion mocks a precedent for being outside the mainstream of law. This process is revealed in Judge Jerome Frank’s insulting reference to Federal Base Ball Club as an “impotent zombi” (sic).

Similarly, state courts engage in open defiance when they “underrule” the Supreme Court—a term that connotes the overruling of precedent by an inferior court. The more common Supreme Court response to deposition in a precedential stream is an order that grants certiorari petitions to resolve circuit splits. Circuit splits are like river bends that create conditions for a cut-off and new direction for the river. Judicial and scientific terms for these change agents are strikingly similar, referring respectively to “splits” and “cut-offs.”

While the Court hesitates to overrule a precedent, several factors clear a path to this point of capitulation. When Justices confront a constitutional issue, they feel less beholden to stare decisis. More generally, the Court overrules a precedent when a rule or doctrine becomes unworkable, or impractical. Experience with a precedent may cause the Court to overrule it.

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55 For a Supreme Court opinion that worried in these terms, see U.S. v. Dixon, 509 U.S. 688 (1993), at 711: “We would mock stare decisis and only add chaos to our Double Jeopardy jurisprudence by pretending that Grady survives when it does not (referring to Grady v. Corbin, 495 U.S. 508 (1990)).”
57 This concept is explained in Frederic M. Bloom, State Courts Unbound, 93 Cornell L. Rev. 501 (2008), at 503-504, observing that “[e]very so often . . . state courts actively disregard binding Supreme Court precedent—sometimes through clever bits of judicial ‘subterfuge’ and sometimes in a far less timid fashion.”
58 Edelman v. Jordan, 415 U.S. 651 (1974), at 671 (“Since we deal with a constitutional question, we are less constrained by the principle of stare decisis than we are in other areas of the law.”).
59 Swift & Co. v. Wickham, 382 U.S. 111 (1965), overruling Kesler v. Dep’t of Public Safety, Fin.
When there are profound changes in the conditions that led to a precedent, the new reality may cause the Court to discard it. In milder forms of this change process, a case is overruled if it outlives its usefulness, or other precedents intervene to limit its vitality.

There are tradeoffs between *stare decisis* and overruling precedent. A case may be overruled if a new rule or principle is better than an old one. On rare occasions, the Court realizes that the precedent it overruled is better than the one that replaced it. Or, a new line of...
authority may undermine a precedent so much that the Court feels compelled to overrule it.67

In some cases, getting the law right is more important than reaffirming a faulty principle.68 These “do-over” cases occur when justices believe that a recent case was wrongly decided.69 The Court may overrule a decision that “lacks constitutional roots,”70 causes

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It matters not that some Members of the Court may continue to believe that the Logan Valley case was rightly decided. Our institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be. And in the performance of that duty we make clear now, if it was not clear before, that the rationale of Logan Valley did not survive the Court’s decision in the Lloyd case.

68 This type of reasoning originated in the early years of the Court, when Louisville, Cincinnati & Charleston R. Co. v. Letson, 2 How. 497 (1844), at 555, overruled Commercial & Rail Road Bank v. Slocomb, 14 Pet. 60 (1840) (“After mature deliberation, we feel free to say that the cases of Strawbridge and Curtiss and that of the Bank and Deveaux were carried too far, and that consequences and inferences have been argumentatively drawn from the reasoning employed in the latter which ought not to be followed.”). A more recent example is Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204 (1930), at 209, overruling Blackstone v. Miller, 188 U.S. 189 (1903), stating: “Blackstone v. Miller no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled.” The most apologetic version of this rationale appears in Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970), partially overruling Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962). Justice Stewart’s confessional concurrence is especially revealing:

When Sinclair Refining Co. v. Atkinson [citation omitted] was decided in 1962, I subscribed to the opinion of the Court. . . . Today I join the Court in concluding ‘that Sinclair was erroneously decided and that subsequent events have undermined its continuing validity.’ In these circumstances the temptation is strong to embark upon a lengthy personal apologia. . . . An aphorism of Mr. Justice Frankfurter provides me refuge: ‘Wisdom too often never comes, and so one ought not to reject it merely because it comes late.’ Henslee v. Union Planters Bank, 335 U.S. 595 (1949) (dissenting opinion).

69 Wisconsin Right to Life, 551 U.S. 449, 501 (2007) (“[o]verruling a constitutional case decided just a few years earlier is far from unprecedented”); and Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977), at 382, overruling Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) (“Since one system of resolution of property disputes has been adhered to from 1845 until 1973, and the other only for the past three years, a return to the former would more closely conform to the expectations of property owners than would adherence to the latter.”).

70 U.S. v. Dixon, 509 U.S. 688 (1993), at 689, overruling Grady, supra note 55, because Grady “lack[ed] constitutional roots” and was “wholly inconsistent with earlier Supreme Court precedent.” The Court bluntly stated: “[W]e think it time to acknowledge what is now, three years after Grady, compellingly clear: the case was a mistake.”
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“confusion” by overturning a long line of precedents, 71 signifies “an abrupt and largely unexplained departure” from precedent, 72 or contradicts or ignores the original intent of a law. 73 When a precedent proves to be impractical or harmful in its application, the Court may overrule it. 74 Broad societal change, 75 or enactment of a conflicting law after the precedent, 76 may cause the Court to overrule a precedent. In other cases, a fundamental change in judicial philosophy causes the Court to overrule a precedent. 77 Some cases are overruled because they have


73 Daniels v. Williams, 474 U.S. 327 (1986), at 332, overruling Parratt v. Taylor, 451 U.S. 527 (1981), “to the extent that it states that mere lack of due care by a state official may ‘deprive’ an individual of life, liberty, or property under the Fourteenth Amendment” when prison custodians “leav[e] a pillow on the prison stairs, or mislay[ ] an inmate’s property...” Also see Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967), at 532, overruling Frank v. State of Md., 359 U.S. 360 (1959), disagreeing with the reasoning of the Frank majority: “In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment.”

74 See U.S. v. Scott, 437 U.S. 82 (1978), at 86-87, overruling U. S. v. Jenkins, 420 U.S. 358 (1975): “[T]hough our assessment of the history and meaning of the Double Jeopardy Clause in... Jenkins... occurred only three Terms ago, our vastly increased exposure to the various facets of the Double Jeopardy Clause has now convinced us that Jenkins was wrongly decided.”

75 Taylor v. Louisiana, 419 U.S. 522 (1975), at 534-35, overruling Hoyt v. Florida, 368 U.S. 57 (1961), involving a state law that precluded women from compulsory jury duty because women played a distinctive role in society. Rejecting argument, and overruling Hoyt, the Taylor Court reasoned: “A system excluding all women, however, is a wholly different matter. It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare any women from their present duties.”

76 Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917), overruling Henry v. A.B. Dick Co., 224 U.S. 1 (1912), where the latter decision was spurred by passage of a new patent law. The Court explained that “it must be accepted by us as a most persuasive expression of the public policy of our country with respect to the question before us...[T]he decision in Henry v. A. B. Dick Co. ... must be regarded as overruled.” 243 U.S. at 517-18.

77 This theme is explored at length and erudition in Amy Coney Barret, Precedent and Jurisprudential Disagreement, 91 Tex. L. Rev. 1711 (2013). Also see Lee J. Strang & Bryce G. Poole, The Historical Inaccuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents, 86 N.C. L. Rev. 969 (2008), showing that in Justice Brandeis’s approach to applying the doctrine of stare decisis in cases involving constitutional interpretation was not the product of historical practice, but instead, reflected his own legal realist jurisprudence.
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“repugnant reasoning.”78 A case may be overruled because it declares a principle that is no longer “authoritative,”79 promotes an “aberrational doctrine,”80 or relies on a flawed understanding of the Constitution.81

B. How the Supreme Court Overrules a Derelict in the Stream of Law

A derelict often begins with a closely decided Supreme Court ruling that is meant to serve as a precedent.82 The primary definition of “derelict” relates not only to water-borne transport, but connotes disruptive change in a large body of water: “Forsaken, abandoned, left by the possessor or guardian; esp. of a vessel abandoned at sea; *transf.* said of land left dry by the recession of the sea [emphasis added].”83 A derelict precedent can begin with a closely decided Supreme Court ruling. A derelict is not simply a wrongly decided case. It is so problematical that

78 Madden v. Commonwealth of Kentucky, 309 U.S. 83 (1940), at 411, overruling Colgate v. Harvey, 296 U.S. 404 (1935), explaining: “Appellant relies upon Colgate v. Harvey . . . to support his argument that the present statute . . . violates the privileges and immunities clause . . . [W]e look upon the decision in that case as repugnant to the line of reasoning adopted here . . . Colgate v. Harvey . . . is overruled.”
80 When Perez v. Campbell, 402 U.S. 637 (1971), overruled Kesler v. Dep’t of Public Safety, 369 U.S. 153 (1962), the Court said: “We can no longer adhere to the aberrational doctrine of Kesler and Reitz that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration.” The opinion elaborated by explaining that Kesler’s approach “is at odds with the approach taken in nearly all our Supremacy Clause cases.” Perez, 402 U.S. 652.
81 Afroyim v. Rusk, 387 U.S. 253 (1967), at 267, overruling Perez v. Brownell, 365 U.S. 44 (1958), noting that: “Our holding . . . is the only one that can stand in view of the language and the purpose of the Fourteenth Amendment, and our construction of that Amendment . . . comports more nearly than Perez with the principles . . . that the entire Fourteenth Amendment was adopted to guarantee.” The Court concluded: “Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship. Perez v. Brownell is overruled.” Afroyim, 387 U.S. at 268.
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the Court is compelled to retreat from it. Thus, the voting margin for a Supreme Court opinion is likely to be correlated with a derelict. A unanimous opinion, decided by a 9-0 vote, is less likely to produce a cardinal error in the law. Nine Justices are less likely to produce a bad precedent than five. Also, in a closely decided case, there is usually a dissenting opinion. This increases the chance that a derelict will be overruled because downstream judges, and future Justices, are shown pathways to correct the stream of law.

Alternatively, a derelict may occur as economic conditions, or judicial philosophy, transform. This appears to be the case for Federal Base Club, the 1922 opinion that prompted Justice Douglas, in Flood, to declare it “a derelict in the stream of the law that we, its creator, should remove.” His point was that by 1970 the Supreme Court had long since abandoned its narrow conception of the interstate commerce clause — the reasoning that led the Federal Base Ball majority to conclude that professional baseball was not in interstate commerce.

While more than one process leads the Supreme Court to overrule a precedent, my theory focuses on a cumulative phenomenon. This process begins with an accretion of lower court rulings that break from the precedent. These opinions openly question the case, disagree with

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84 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 66, overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), stating: “We feel bound to conclude that Union Gas was wrongly decided and that it should be, and now is, overruled.”
85 See Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. REV. 651 91995), at 661-662, detailing how Judge Parker, in Barnette at infra note 142, made a “prescient” prediction by noticing the rapidly declining margin of apparent voting support for Gobitis by reading the growing number of Gobitis detractors in Jones v. City of Opelika, 316 U.S. 584 (1942).
86 Supra note 9.
87 Id. at 286 (citing overruled or discredited cases that the narrow and parochial view of commerce in 1922).
88 This idea is embodied in Pearson v. Callahan, 555 U.S. 223 (2009), at 233 (“Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the
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it, distinguish it, cite a stronger or more apt precedent, or ignore it altogether.

This cumulative process advances when the Supreme Court recognizes this deposition effect over time. In a narrowly decided case, the deposition process starts with sharply critical dissenting opinions. In some cases, Justices have long memories of these disagreements. They cite the narrow margin of support as justification for overruling the precedent.\textsuperscript{89}

In another overruling process, the Supreme Court openly recognizes the growing deposition of lower court opinions that disregard and disrespect the precedent.\textsuperscript{90} The Court may reaffirm the precedent and narrow the precedential stream to a trickle by confining the questionable ruling to a special situation (as \textit{Flood} did for major league baseball). On the other hand, the Court may be more likely to overrule a precedent when “deposits” of adverse treatment

\textsuperscript{89} The Court articulated the reasoning of this theory in Payne, \textit{supra} note 2, at 828-829: “Booth and Gathers were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions.” \textit{Also see} the reasoning in Chief Justice Chase’s dissent in \textit{Legal Tender Cases}, 79 U.S. 457 (1870), overruling Hepburn \textit{v. Griswold}, 8 Wall. 603 (1869). Chief Justice Chase was part of a 4-3 majority opinion that ruled that a statute creating paper money violated the Fifth Amendment. Due to a change in the composition of the Supreme Court, brought about by legislation to increase the size of the Court, and also due to turnover in the Court’s membership, Chief Justice Chase reasoned that too few votes existed to overrule Hepburn:

\begin{quote}
By law the Supreme Court at that time consisted of the Chief Justice and seven associate justices, the act of Congress having provided that no vacancy in the office of associate justice should be filled until the number should be reduced to six. Five of the number, including the Chief Justice, concurred in the opinion in that case, and the judgment of the State court was affirmed, three of the associate justices dissenting. Since that time one of the justices who concurred in that opinion of the court has resigned, and Congress having increased the number of the associate justices to eight, the two cases before the court have been argued, and the result is that the opinion delivered in the former case is overruled, five justices concurring in the present opinion and four dissenting. Five justices concurred in the first opinion, and five have overruled it. Persuaded that the first opinion was right, for the reasons already assigned, it is not possible that I should concur in the second. . . .
\end{quote}

79 U.S. at 91 (C.J. Chase, dissenting). The possible effect that turnover on the Court can have on a fragile precedent is discussed in U.S. \textit{v. Rabinowitz}, \textit{supra} note 8, at 86 (J. Frankfurter, dissenting)(“Especially ought the Court not re-enforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the Court’s composition and the contingencies in the choice of successors.”).

\textsuperscript{90} At times, the Court cites the accumulation of lower court rulings and criticism as a reason for overruling a precedent. \textit{E.g.}, Pearson, \textit{infra} note 94, discussing how trial courts criticized the Saucier rule.
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by lower courts rapidly accumulate downstream. The Court is more likely to perceive this developing situation as a problem that needs urgent attention.

This study focuses on a particular process for overruling a precedent: Cumulative disregard and disrespect by downstream courts causes the Court to reverse itself. It should be noted that a strong deposition of cases does not necessarily result in overruling. Justices often ignore this problem; or, they take a less disruptive course by implicitly overruling the case.

The dyad of Saucier v. Katz, overruled by Pearson v. Callahan, offers a recent example of implicit overruling in response to deposition of adverse rulings by lower courts. From 2001 through 2009, Saucier was widely disregarded by lower courts, with numerous decisions disagreeing with it, calling it into doubt, declining to extend it, distinguishing it,

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91 See Scott, supra note 74.
92 Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978), at 695, partially overruling Monroe v. Pape, 365 U.S. 167 (1961), because the latter was a “departure from prior practice.”
96 Nader v. Blackwell, 545 F.3d 459, 473 (6th Cir. 2008), and Viilo v. Eyre, 547 F.3d 707, 709 (7th Cir. 2008).
and stating reservations about it. The Pearson Court explained that “[l]ower court judges, who have had the task of applying the Saucier rule on a regular basis for the past eight years, have not been reticent in their criticism of Saucier’s ‘rigid order of battle.’” While Pearson responded to the growing deposition of adverse rulings, it did not expressly overrule Saucier. To the contrary, the opinion carefully stated: “Although we now hold that the Saucier protocol should not be regarded as mandatory in all cases, we continue to recognize that it is often beneficial.” KeyCite reports, however, that over 700 downstream courts regard Saucier as an overruled precedent, even though Pearson’s only express mention of “overrule” is at the beginning of the opinion, where the Court stated that the parties were directed “to address the question whether Saucier should be overruled.” After that one mention, the Court never used that word.

But there are occasions when the adverse reactions by lower courts appear to cause the Supreme Court to expressly overrule it. The combination of Booth v. Maryland, and South Carolina v. Gathers, both overruled by Payne v. Tennessee, is a recent example. In deciding

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99 Purtell v. Mason, 527 F.3d 615, 621 (7th Cir. 2008); Clement v. City of Glendale, 518 F.3d 1090, 1093, (9th Cir. 2008); and Wysong v. City of Heath, 260 Fed.Appx. 848, 854 (6th Cir. 2008).

100 Pearson, supra note 94, at 234.

101 Id. at 236.

102 Federal appellate courts also regard Saucier as an overruled precedent. E.g., Barnard v. Theobald, __ F.3d __. 2013 WL 3285286 (9th Cir. 2013), at *8; Williams v. Ozmin, 716 F.3d 801, 805 (4th Cir. 2013); Ellins v. City of Sierra Madre, 710 F.3d 1049, 1064 (9th Cir. 2013); Bergdoll v. City of York, __ Fed.Appx. __. 2013 WL 1010593 (3d Cir. 2013), at *5; Mazzeo v. Young, 510 Fed.Appx. 646, 647 (9th Cir. 2013); Santiago v. Blair, 707 F.3d 984, 989 (8th Cir. 2013); and Bailey v. Pataki, 708 F.3d 391, 404 (2d 2013).

103 Pearson, supra note 94, at 231.


that the Eighth Amendment does not bar a capital sentencing jury from considering certain types of victim impact evidence, Payne expressly overruled Booth and Gathers, stating: “To the extent that this Court held to the contrary in Booth and Gathers those cases are overruled.”\(^{107}\) In taking this action, the Court said that Booth and Gathers “have defied consistent application by the lower courts.”\(^{108}\) In the short time prior to Payne, Booth had undergone a smaller but still noticeable deposition of adverse rulings similar to Saucier.\(^{109}\)

**C. Is Hoffman Plastic a “Derelict in the Stream of the Law?”**

A Supreme Court case from 2002, Hoffman Plastic Compounds v. N.L.R.B.,\(^{110}\) provides a natural experiment for this study. The National Labor Relations Board charged an employer with discriminating against Jose Castro, an unlawful alien, by firing him in retaliation for supporting a union organizing effort.\(^{111}\) During lengthy litigation of this unfair labor practice complaint, the employer discovered that Castro presented fraudulent immigration documents, hiding the fact that he was an unlawful alien who was ineligible to work under IRCA (Immigration Reform and Control Act of 1986).\(^{112}\) The Board ordered backpay for the three years that this fraud was

\(^{106}\) Supra note 2.

\(^{107}\) Id. at 829.

\(^{108}\) Id. at 830.


\(^{110}\) Hoffman Plastic, supra note 1.

\(^{111}\) Id. at 141.

\(^{112}\) Id.
concealed, but also refused to order reinstatement. 113

The D.C. Circuit Court of Appeals, sitting en banc, upheld the NLRB’s award of backpay to Castro, 114 but in a 5-4 ruling, the Supreme Court said that the Board’s monetary remedy “unduly trench[ed] upon” IRCA, because the employee violated that law’s premise that no unlawful alien be employed in the U.S. 115 Chief Justice Rehnquist equated this worker’s fraudulent tendering of employment verification documents with NLRB cases involving a violent mob engaged in a sit-down strike, and mutiny on a U.S. flagged ship. 116 Specifically, his opinion said that IRCA “makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents, § 1324c(a), an offense that Castro committed when obtaining employment with petitioner.” 117 The holding not only deprived the NLRB of authority to order backpay for any unlawful alien, 118 but its broad language also implied that unlawful aliens should not receive a monetary remedy in any other work related action because this would reward a worker’s illegal presence in the U.S. 119 Hoffman Plastic invited lower courts to extend this principle to other employment disputes, without being specific.

Justice Breyer’s dissenting opinion was starkly oppositional: “Without the possibility of

113 Id. at 141-142.
114 Id. at 142.
115 Id. at 152.
116 Id. at 143-144.
117 Id. at 148.
118 Id. at 151.
119 Id. at 150, stating “awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations.” The opinion noted: “It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.” Id.
the deterrence that backpay provides, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal.”

Worrying that the majority opinion lowered the cost to employers for violating the rights of their employees, he added that the majority opinion “increases the employer’s incentive to find and to hire illegal-alien employees.”

What makes *Hoffman Plastic Compounds* a possible derelict? Ultimately, that is an empirical question—a matter that I investigate in Parts III and IV of this Article. But there are initial indications of its dereliction. For one, the case was not only decided in a close vote, but there was sharp disagreement in the majority and dissenting opinions. During the relatively short time that elapsed since *Hoffman Plastic* was decided, academic studies have drawn attention to downstream cases that did not extend the reasoning and ruling of this precedent to cases involving unlawful aliens who sued over wage-and-hour issues and other work-related complaints. In other words, this research gave a qualitative impression of accumulating

120 See the invitation to lower courts to extend the holding in this case, when Chief Justice Rehnquist wrote: “Indeed, awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations” Id. at 150. In fact, nearly all of the cases in the Hoffman Plastic database in this study were cases like Hoffman Plastic. The point is that the Hoffman Plastic opinion made no effort to limit its holding to NLRB cases.

121 Id. at 154.

122 Id. at 155.

deposition. This was the jumping off point for my analysis. How much deposition is occurring? Is it declining, holding steady, or growing? Is the adverse deposition limited to high-visibility cases reported in earlier studies, or is it a broad process? I take up these questions in Part III.

### III. Research Methods and Data

**A. Why Hoffman Plastic Is a Test Case**

My first database is comprised of published federal and state court opinions that were decided from 2002-2012, in which an employer asked a court to apply Hoffman Plastic. Typically, employers wanted a court to deny a monetary remedy to a known or suspected unlawful alien. My earlier study using this database focused on the success rate of unauthorized aliens in work-related actions against employers. The study concluded that these plaintiffs won between 60% of cases involving complaints about working conditions (e.g., discrimination) and 77.5% concerning pay (e.g., minimum wage or overtime). As to the type of law under which aliens filed a legal complaint, these plaintiffs won between 53.3% (for scaffolding law cases) and 77.1% (Fair Labor Standards Act cases) of the rulings.\(^{124}\)

The main finding of the research was that unlawful aliens had more success in a legal proceeding against an employer than Jose Castro, the worker who was denied backpay by the majority ruling in *Hoffman Plastic*. That finding prompted the new research question in this study, namely, what was the legal reasoning behind the rulings in these cases? Specifically, this

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study asks: Between 2002 and 2012, how often did courts (a) apply the Hoffman Plastic precedent, (b) apply the precedent with limitations, (c) distinguish the precedent, or (d) not cite the precedent when a party argued for its application? To answer this question, I created and analyzed a database of federal and state court cases involving an employer argument to apply Hoffman Plastic.125

This study also examines the element of time by asking whether judicial disregard for Hoffman Plastic has changed or been constant over two periods—2002-2006, and 2007-2012. Relating this question to the river metaphor, its purpose is to look for a possible trend in the deposition of adverse cases in Hoffman Plastic’s precedential stream. Specifically, I analyze data to answer these questions:

(1) For the full observation period (2002-2012), how did trial courts at the federal and state level use the Hoffman Plastic precedent? Did they apply it, distinguish it, partly apply it, or not cite it?

(2) For the full observation period (2002-2012), how did appellate courts at the federal and state level use the Hoffman Plastic precedent? Did they apply it, distinguish it, partly apply it, or not cite it?

(3) Dividing the sample into early cases (decided 2002-2006) and more recent cases (decided 2007-2012), did trial courts at the federal and state level use the Hoffman Plastic precedent less often over time?

(4) Dividing the sample into early cases (decided 2002-2006) and more recent cases

125 There were 128 first-level rulings by a court or administrative tribunal, such as a worker’s compensation board; 78 appellate court rulings; and 5 rulings by a state supreme court or similarly situated appellate body. Altogether, the database had 211 court or administrative tribunal rulings.
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(decided 2007-2012), did appellate courts at the federal and state level use the *Hoffman Plastic* precedent less often over time?

B. Empirical Research Methods

I created two separate databases for this study.

**The Hoffman Plastic Database:** This is a comprehensive collection of 128 published federal and state court opinions in which an employer, or employer proxy (e.g., an insurance company in a worker’s compensation or wrongful death case) argued to a court that the *Hoffman Plastic* precedent precludes a monetary award to a worker (or legal surrogate, such as a surviving spouse), who was known or suspected to be an unlawful alien.

To qualify for inclusion, a case met three criteria. First, each one involved an alien who was known or suspected to be unlawfully employed in the U.S.\(^{126}\) Second, the plaintiff-worker alleged that the employer (or its party in interest, e.g., insurance company in a workplace injury case) violated a work-related law (e.g., minimum wage) or was obligated by such a law to pay for a work related entitlement (e.g., income and expenses in worker’s compensation law).\(^{127}\) Third, a case involved a court ruling, after *Hoffman Plastic*, on the availability of a monetary remedy or a procedural motion regarding the relevance of an alien’s immigration status for the remedy issue.

Using these criteria, I developed a comprehensive sample of cases. Derived from

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\(^{126}\) The sample also included employees who were authorized to work in the U.S., and remained unlawfully employed after their permits expired. *E.g.*, Chopra v. U.S. Professionals, LLC, 2005 WL 280346 (Tenn. 2005). Chopra entered the U.S. legally under an H-1B visa obtained by his employer, but when the latter failed to fulfill its obligations to pay Chopra at the prevailing wage rate under 8 U.S.C. § 1182, his legal employment status was nullified.

\(^{127}\) I use the term “worker,” rather than employee, because in some cases an unlawful alien performed work for one employer (e.g., a construction sub-contractor), and sued a different employer (a general contractor), or premises-owner, for negligently maintaining a work site.
Westlaw’s internet service, the sample began with all federal and state rulings that were indicated in Westlaw’s KeyCite feature for *Hoffman Plastic* through December 2012. I read each case on this list to determine if it met the criteria for this analysis. When a case met all three conditions, it was added to a roster of decisions (*see* Part VI.A, Appendix).

I followed up by reading the case to extract data for variables on the survey. For example, the form listed a variable for the general type of complaint (e.g., injury, pay, working conditions, termination, and others); type of court (federal or state for one question, and trial or appellate for another item), the party who won at trial or on appeal (plaintiff, defendant, or partly both). Key to this study, a variable measured how trial and appellate courts used *Hoffman Plastic* as a precedent (by citing it, partially citing it, distinguishing it, or not discussing it). All variables were assigned numerical values so that they could be coded to an SPSS database for analysis.

Each valid case was KeyCited to see if it was cited in a downstream decision that raised a *Hoffman Plastic* issue. Sometimes, these downstream cases made no mention of *Hoffman Plastic*, even though they dealt with a monetary remedy issue for an unlawful alien. These cases were treated as an indirect tributary of *Hoffman Plastic*, and were added to the sample if they met all the inclusion criteria.


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128 845 N.E.2d 1246 (N.Y. 2006), at 1250-52, 1254, 1256, & 1258-60. This Balbuena opinion followed a complex litigation trail. For an earlier Balbuena decision, *see infra* note 182.

involved a *Hoffman Plastic* issue,\textsuperscript{130} *Ramroof* is an indirect tributary of *Hoffman Plastic*. Therefore, it was included in the sample. Data were collected for these indirect downstream cases. These cases were also KeyCited to discover more cases that met the inclusion criteria.

**Supreme Court Database:** I developed this database to be the most comprehensive set of U.S. Supreme Court decisions that overruled another Supreme Court decision. I began with keyword searches, such as “overruled by,” “we overrule,” “overruling,” “is overruled,” and similar in Westlaw’s Supreme Court database. These searches produced a mix of valid and invalid cases. When reading decisions, and concluding that one case appeared to overrule an earlier Supreme Court decision, I confirmed this impression by checking the “Full History” and “Citation References” for the earlier (i.e., overruled) decision.

Over time, I generated a growing roster of pairings (also called dyads) of Supreme Court cases, comprised of precedents that were overruled, and newly created precedents that overruled an earlier case. They are listed as matched pairs in the Appendix (Part VI.B, infra). In my pursuit of an exhaustive sample, I contacted a Westlaw reference librarian to see if there is an advanced search method to discover all Supreme Court cases that have been overruled. After some investigation, Westlaw reported back that it has no such search feature.

I also researched law review articles by subject and keyword searches, and found published lists of Supreme Court cases that were (a) overruled decisions, and (b) overruling

\textsuperscript{130} While employed as a printer, Ramroop severely crushed his hand in a workplace accident. Although he received a worker’s compensation award, his case was re-opened after he was interviewed and evaluated by the worker’s compensation board for rehabilitation services. *Id.* at 70-71. When that agency ruled that he was ineligible for services due to his unlawful status, Ramroop moved to receive additional compensation. *Id.* at 70. The employer’s insurance carrier intervened to oppose to his application. *Id.* While the Hoffman Plastic precedent was never argued to the Ramroop court, the case clearly involved the type of monetary relief issue in Hoffman Plastic.
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decisions. I compared these lists to mine, and read the cases to make sure that they met my strict
criteria for inclusion to the sample. I added unduplicated cases to the roster.131

Finally, while reading two Supreme Court opinions that overruled a precedent, I found
passages that contained more cases for the database.132 Again, I checked that list against my
roster, read those cases to ensure that they matched my inclusion criteria, and added unduplicated
cases.

Important to note, I did not include borderline cases— sometimes treated as cases that are
implicitly overruled.133 For example, the Supreme Court has numerous precedents that later
courts have abrogated, criticized, disagreed with, and called into doubt— terms that KeyCite
uses. The point is illustrated with U.S. v. E. C. Knight Co.134 No Supreme Court decision
expressly overruled Knight. The precedent is no longer valid, however. At various times, the
Supreme Court has criticized it,135 or disagreed with it.136 According to KeyCite, the Eleventh
Circuit Court of Appeals treated Knight as an abrogated case.137

This discussion emphasizes the strict criteria I applied to the database of Supreme Court

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131 Maltz, supra note 16, at 467; and William N. Eskridge, Jr., supra note 41, at 1362. The Maltz study
found that before 1959 the Court was reluctant to reverse itself (doing so in only 60 cases), but thereafter, the Court
adopted a more activist approach and overturned its own cases 47 times in the 1960s and 1970s. I also added what
appears to be the earliest Supreme Court decision overruling its precedent, reported in Amy L. Padden, Note,
Overruling Decisions in the Supreme Court: The Roles of a Decision’s Vote, Age, and Subject Matter in the
WL 1911 (1808), overruled by Hudson v. Guestier, 6 Cranch 281 (1810)).

132 Payne, supra note 2, at 829, n.1, listed 33 overruling opinions. Burnet, supra note 61, at 410, n.1 & n2,
listed 27 cases that the Court overruled.

133 See Eskridge, supra note 41, at 1392-93.

134 156 U.S. 1 (1895).

U.S. 1 (1937), at 39.


137 U.S. v. Ballinger, 312 F.3d 1264 (11th Cir. 2002), at 1269.
cases. The dyads created by these methods were like the pairs reported in previous studies,\textsuperscript{138} with the main difference that my sample was larger. In several cases, a published study treated a Supreme Court ruling as an overruled precedent, but my own reading did not confirm this conclusion.\textsuperscript{139} I did not take on faith that a published study’s treatment of a case as being overruled meant that the case met the strict standards for this sample. Also, the sample did not include Supreme Court precedents that were overruled by statute. \textit{Dred Scott v. Sandford},\textsuperscript{140} which was overturned by the Fourteenth Amendment,\textsuperscript{141} is such a case.

I read the overruled decision to determine its voting pattern—specifically, the number of justices who were part of the majority or concurring opinion. The theory for this approach is that precedents decided by a fractured majority are more likely to be overruled in the near-term, while those that are unanimously decided are more likely to endure. Occasionally, judges have used this reasoning in deciding whether a precedent is still valid. Consider Judge Parker’s reasoning in \textit{Barnette v. West Virginia State Board of Education},\textsuperscript{142} involving a First

\textsuperscript{138} A similar approach appears in Padden, \textit{supra} note 131, at 1725 (Appendix).

\textsuperscript{139} Cage v. Louisiana, 498 U.S. 39 (1990), overruled by Estelle v. McGuire, 502 U.S. 62 (1991), is a borderline that was excluded from the sample. The case was reported as overruled in Padden, \textit{id}. A KeyCite check of Cage shows a red flag, indicating overruling. But a close reading of Estelle shows that the Court did not expressly overrule Cage. Instead, the Estelle Court said:

\begin{quote}
We acknowledge that language in the later cases of Cage v. Louisiana . . . might be read as endorsing a different standard of review for jury instructions. . . . So that we may once again speak with one voice on this issue, we now \textit{disapprove} the standard of review language in Cage and Yates, and reaffirm the standard set out in Boyde [emphasis added to indicate the difference between disapproval and overruling]."
\end{quote}

502 U.S. at 73, n.4. Similarly, it appears that Robbins v. California, 453 U.S. 420 (1981) was overruled by U.S. v. Ross, 456 U.S. 798 (1982), at 824. But the majority opinion in Ross never used the term “overrule,” and the dissenting opinion of Justice White stated: “the Court unambiguously overrules ‘the disposition’ of Robbins though it gingerly avoids stating that it is overruling the case itself [citation omitted].” \textit{id}. at 843.

\textsuperscript{140} Dred Scott v. Sandford, 19 How. 393 (1857).

\textsuperscript{141} For elaboration, see Saenz v. Roe, 526 U.S. 489 (1999), at 503, n.15. \textit{Also see} State v. Dearmas, 841 A.2d 659 (R.I. 2004), at 663.

\textsuperscript{142} 47 F.Supp. 251 (S.D. W. Va. 1942).
Amendment challenge by a Jehovah’s Witness to a school requirement that children salute the flag. Two years before this case was brought before a panel of federal judges, the U.S. Supreme Court upheld a nearly identical requirement in *Minersville School District v. Gobitis*. Nonetheless, as a result of turnover on the Court, Judge Parker counted the likely votes to reaffirm *Gobitis*, and predicted that the Court would overrule this precedent. Judge Parker ruled, therefore, in anticipation of this outcome. He was correct. The Supreme Court, with a somewhat different group of Justices, overruled *Gobitis*.

Returning to this study’s methodology, I counted votes in the majority and concurring opinions as positive votes of equal value for a precedent. Next, I counted the number of justices who dissented, in whole or in part. These were counted as negative votes of equal value for the precedent. In addition, cases were read to see if one or more justice did not participate in a decision. This was not a rare situation. Finally, I consulted the Supreme Court’s website that

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143 310 U.S. 586 (1940).
144 Barnette, *supra* note 142, at 252-53, reasoning as follows:

Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not. . . . The developments with respect to the Gobitis case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered therein and three other justices in a special dissenting opinion in Jones v. City of Opelika (citation omitted).

145 West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), at 642 (“The decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few per curiam decisions which preceded and foreshadowed it are overruled.”).

146 To be clear, I counted a vote in the majority, plurality, and concurrence as one vote per Justice. Research that replicates the approach in this study might give less weight to a concurring opinion, counting it as a mild form of “depositing” downstream obstruction to the precedent insofar as the concurrence introduces a different and possibly competing basis for deciding a legal issue. Perhaps a concurrence would be valued as a half-vote or three-quarters vote because it lays the ground for a divergent approach to an issue. The reason I gave the same weight to concurring and majority votes is that both votes contributed equally to the outcome in the precedent.
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summarized the Court’s history since its inception under the Federal Judiciary Act. This summary provided accurate information about the number of justices for particular years in which a decision was made.

To demonstrate this counting process, consider the earliest dyad, *Wilson v. Daniel* and its overruling decision, *Gordon v. Ogden*. In establishing a Supreme Court, the Judiciary Act of 1789 provided one chief justice and five associate justices. *Wilson* was decided by six justices. Justice Iredell was a solitary dissenter. Thus, *Wilson* was scored as a 5-1 decision. This meant that the *Wilson-Gordon* dyad scored a “4” for the variable labeled “Vote Margin.” The variable recorded the difference between positive and negative votes for the overruled opinion. The second variable was “Years Passed,” indicating the number of years that elapsed from the first opinion to its overruling decision. In all, the *Wilson-Gordon* dyad was scored as a 4 for “Vote Margin,” and 32 for “Years Passed” between the first and second decision.

C. Empirical Results and Findings

The *Hoffman Plastic* and Supreme Court database are comprised, respectively, of 128 and 154 cases. The *Hoffman Plastic* sample has no U.S. Supreme Court cases, while the other sample is strictly comprised of cases from the highest court. The roster of cases (Appendix, Part VI.A and VI.B, *infra*) shows that there were no duplicated cases in the two samples. Both samples are small, but this is not unusual for statistical studies on the use of precedents.

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148 3 U.S. 401 (1798).
149 28 U.S. 33 (1830).
150 The Supreme Court of the United States, *supra* note 147.
151 *E.g.*, Anthony Niblett, *Do Judges Cherry-Pick Precedents to Justify Extra-Legal Decisions? A
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1. The Hoffman Plastic Database

Trials: For the full observation period (2002-2012), did trial courts at the federal and state level (a) apply Hoffman Plastic, (b) partly apply it, (c) distinguish it, or (d) not cite it?

The main finding is that trial courts and administrative tribunals disregarded Hoffman Plastic when the case was argued by an employer as a controlling precedent. The level of disregard was highest in federal district courts, where 68.9% of the opinions said that the facts or circumstances were distinguishable from Hoffman Plastic. Fifty percent (50%) of state courts or tribunals, such as worker compensation boards, distinguished Hoffman Plastic. In contrast, very few trial courts and tribunals cited Hoffman Plastic as positive authority—only 13.3% of cases.

Table 1.1

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Statistical Examination, 70 Md. L. Rev. 234 (2010), using a dataset of 72 reported California Courts of Appeal cases and 7 California Supreme Court cases. Similar to my research, this study asked questions relating to a specific issue in litigation: Do judges cherry pick precedents to justify “extra-legal” decisions? Answering no, the study concluded that the research literature overstates the degree to which judges manipulate precedent and misuse judicial discretion. For a study that employed a similar method of using keyword searches to identify cases that are used for data collection, see Anthony Niblett et al., The Evolution of a Legal Rule, 39 J. LEGAL STUD. 325 (2010), at 355-56.
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for federal courts, and 25% for state courts and tribunals. Partial support for Hoffman Plastic was also rare, occurring in 4.4% of federal and 12.5% of state cases.

Another small group of decisions did not cite Hoffman Plastic at all—13.3% of federal and 12.5% of state cases. These cases had all the primary attributes of Hoffman Plastic, and were the progeny of previous cases that cited Hoffman Plastic, where an employer argued for application of the Supreme Court precedent. Interpretation of the “not cited” statistic for Hoffman Plastic is ambiguous because these were situations where downstream courts could have relied on Hoffman Plastic, if so inclined. On the other hand, while these indirect cases presented a Hoffman Plastic remedy issue, it is possible that no one brought that lead-precedent to the attention of the court. These statistics were included, even though their interpretation is ambiguous, because non-citing of a case may be indicate a precedent’s declining influence.

Appeals: For the full observation period (2002-2012), did appellate courts at the federal and state level (a) apply Hoffman Plastic, (b) partly apply it, (c) distinguish it, or (d) not cite it?
Compared to trial courts, federal appeals courts showed more deference to *Hoffman Plastic*, citing it as positive authority in 42.9% of their cases. State courts did not follow this trend. Only 10.8% of these cases cited *Hoffman Plastic* with approval. Meanwhile, a majority of federal (57.1%) and state (59.5%) appellate courts distinguished *Hoffman Plastic*.

**Trials Shortly After *Hoffman Plastic* (2002-2006) and More Recently (2007-2012):** Comparing early cases (decided 2002-2006) and more recent ones (decided 2007-2012), did trial courts at the federal and state level use the *Hoffman Plastic* precedent more, less, or the same?
The early period is denoted in solid bars (darker bar shows federal cases), while more recent cases are shown in hashed bars. Over time, federal district court approval of *Hoffman Plastic* rose from 9.5% to 16.7% (indicated by “1” arrow at left) but this support was consistently weak. Most federal courts distinguished *Hoffman Plastic*, and the trend rose from 66.7% to 70.8% (indicated by “3” arrow, middle-right). State courts and administrative tribunals were even less supportive for *Hoffman Plastic*. Their positive citations fell from 30% to 16.7% (indicated by “2” arrow, left). Meanwhile, state cases that distinguished *Hoffman Plastic* rose from 40% to 66.7% (indicated by “4” arrow, middle-right).

**Appeals Shortly After *Hoffman Plastic* (2002-2006) and More Recently (2007-2012):** Comparing early case (decided 2002-2006) and more recent ones (decided 2007-2012), did appellate courts at the federal and state level use the *Hoffman Plastic* precedent more, less or the same over time?
In 2002-2006, the sample had only one federal appeals case. That case approvingly cited *Hoffman Plastic*. But it would be misleading to represent a single case as 100% support for *Hoffman Plastic*. Therefore, no federal cases are shown in Table 1.4. Parenthetically, in the recent period (2007-2012) two federal cases approved of *Hoffman Plastic* (33.3%), and four distinguished it (66.7%). Table 1.4 shows results for state appellate cases, with 19 decisions in the early period and 18 in the recent group. State appellate court support for *Hoffman Plastic* was low in both periods, but increased from 5.3% in 2002-2006 to 16.7% in 2007-2012 (indicated by “1” arrow at left). Most courts distinguished *Hoffman Plastic*, with this trend decreasing over time (from 73.7% to 44.4%, indicated by “2” arrow at middle-right). But state appeals courts that did not cite *Hoffman Plastic* rose from 15.8% to 38.9% (indicated by “3” arrow at right).

2. The *Supreme Court* Database

**Passage of Years to Overrule a Precedent**: How many years pass before the Supreme
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Court overrules its precedents? There were 154 dyads consisting of an earlier case that was overruled by a more recent case. The range was 1-138 years. On average, a mean of 30.24 years and a median of 20 years passed before the Court overruled its own precedent.

Table 2.1

<table>
<thead>
<tr>
<th>Years between Original and Overruling Case</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>10 Years Since <em>Hoffman Plastic</em> was Decided</td>
<td>4 Precedents Lasted 109 -136 Years</td>
</tr>
<tr>
<td>Median of 20 Years Passed Before Supreme Court Overruled Its Precedent</td>
<td></td>
</tr>
</tbody>
</table>

Table 2.1 uses median years for passage of time to overrule a Supreme Court precedent (see middle arrow) because a mean average tends to be distorted in a small sample with outliers (see the widely dispersed cases after 50 years). Twenty-five percent (25%) of cases were overruled in 9.75 years, 50% were overruled in 20 years, and 75% were overruled in 40.25 years. By 2012, 10 years had passed since the Supreme Court decided *Hoffman Plastic* (see left arrow). Time will tell if *Hoffman Plastic* is overruled, but it has survived about as long as 25% of the precedents that have been overruled.

**Vote Margin in Cases That Are Overruled:** How many years pass before the Supreme Court overrules one of its precedents? This question was expressed as a linear regression model,
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using this simple equation: Years Elapsed = 8.663 (Constant) plus 4.436 (Vote Margin). In other words, the equation predicts that the number of years before the Court overrules a rejected precedent is 4.436 multiplied by each marginal vote in the overruled case, plus a constant of 8.663 years.\textsuperscript{152} Consider a closely decided precedent that is overruled, with a vote margin of 1 (a case decided by a 5-4 vote). For this case, the regression predicts that that 13 years passes before a precedent is overruled.\textsuperscript{153} Compare this to a 9-0 precedent that is overruled, where the regression equation predicts that this type of case takes 47.09 years to overrule.\textsuperscript{154}

\textsuperscript{152} The t-statistic for Vote Margin is 6.529, with 1 degree of freedom, resulting in significance at p < .000.
\textsuperscript{153} This figure is the sum of the coefficient for each marginal vote in the majority (1 vote multiplied by 4.436, or 4.436) plus the constant (8.663), adding to 13.10 years.
\textsuperscript{154} For this statistic, the coefficient is 9 votes multiplied by 4.436 (38.43 years), plus the constant (8.663 years), summing to 47.09 years.
Table 2.2 is a scatterplot that shows each dyad as a dot. Each dot has a coordinate for the Y-axis (Vote Margin), and X-axis (Years Elapsed). There are two strong concentrations of dyads, one at the far lower left (Cluster 1), and the other slightly above and to the right (Cluster 2). These show many one-vote margin dyads that were densely concentrated between 0 and 25 years, and another concentration of dyads that were decided by three-vote margins and overturned within 25 years. Cases that were overruled extraordinarily early, within 1-3 years,
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There were fewer dyads with two vote margins. These close cases were overruled between 0 and 25 years. Just above that line, there were many cases decided by three votes (Cluster 2). Most were overruled within 25 years. In contrast, the lines that indicate cases decided by 7, 8, or 9 vote margins do not show a clear cluster or pattern.

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159 334 U.S. 699 (1948).
160 *Supra* note 8.
Table 2.3 (infra) represents another view of the data. It ranks Vote Margin by its strength of correlation to Years Elapsed. Cases decided by 1 and 2 votes were clustered in the period between 0 and 25 years (see top two lines). But the pattern was interrupted by cases decided by 9 votes, which had a large cluster of dyads with 25 years or less. Table 2.3 shows a more random scattering of years-elapsed data points for overruled precedents that were decided by four, five, six, seven, and eight votes. The R-square value for the regression equation was .218, meaning that Vote Margin explained 21.8% of the variance in Years Elapsed. Thus, a close vote for a
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precedent had a significant connection to a later decision to overrule it, but the model was limited in its ability to explain why these cases take between 1 and 138 years to overrule. The fairly low R-square value implies that other variables not tested in this equation could account for additional variance in years elapsed before a case is overruled (e.g., the type of issue decided in the overruled precedent, be it constitutional, or maritime, or other).

IV. HOW DO THE EMPIRICAL FINDINGS INTERRELATE?

A. The Statistical Connection between the Hoffman Plastic and Supreme Court Databases

Are the findings from the Hoffman Plastic and Supreme Court databases connected? The Hoffman Plastic data show that most federal and state courts disregard this Supreme Court precedent. Most courts view Hoffman Plastic as an inapplicable precedent. This tendency does not mean, however, that the Supreme Court is likely to overrule Hoffman Plastic. As discussed in Part II.B, lower courts can largely disregard a precedent, and the Supreme Court can respond by implicitly overruling itself. The emerging pattern for Hoffman Plastic is similar, for example, to the Supreme Court’s opinion in New York v. Belton. Dozens of lower courts minimized the precedential value of Belton by distinguishing it on state law grounds, calling it into doubt, citing disagreement with it, and declining to extend it. Compared to Hoffman Plastic, fewer

162 See Saucier, supra notes 93-94.
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courts positively cited the Belton precedent. After witnessing this decline over 28 years, the Supreme Court reconsidered Belton in Arizona v. Gant. While the Gant majority opinion acknowledged weak support for its precedent, the opinion stopped short of overruling Belton in a nuanced footnote.

This could well be the fate of Hoffman Plastic. On the other hand, Hoffman Plastic’s harsh treatment of unlawful aliens runs against the current stream of political values. More tolerant treatment of these individuals by the Congress may spur the Supreme Court to


556 U.S. 332, 342, n.8.

Cases that followed Belton with reservations were State v. Smith, 662 So.2d 725, 726 (Fla. 1995); U.S. v. McKibben, 928 F.Supp. 1479, 1480 (D.S.D. 1996); Donaldson v. State, 2003 WL 22220364, at *1 (Tex.App.-El Paso 2003); and U.S. v. Weaver, 433 F.3d 1104, 1106 (9th Cir. 2006).


Id. at 342, n.8.

Id. at 348, n.9, stating: “Justice Alito’s dissenting opinion also accuses us of ‘overruling’ Belton . . . even though respondent Gant has not asked us to do so. Contrary to that claim, the narrow reading of Belton we adopt today is precisely the result Gant has urged (internal quotes and citations omitted).”

A similar idea is expressed in Gerhardt, supra note 36, at 71 (1991): If the Justices were to adopt a low level of deference to precedent (for example, overruling a precedent merely deemed erroneously reasoned), then they will have increased the chances that a subsequent Court will take the same route. Future Justices could rely on past decisions as expressing a theory of precedent that supports them in overruling precedent based solely on disagreement with the underlying reasoning of those precedents. The inevitable consequence of all this would be chaos, lack of certainty regarding the durability of a number of individual freedoms, and/or proof positive that constitutional law is nothing more than politics carried on in a different forum.
reconsider this precedent. In 2013, the Senate passed a major bill to reform immigration law. The Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744)\textsuperscript{173} would legitimize the residency and workforce participation of these aliens by allowing most of them to register for provisional immigration status.\textsuperscript{174} Ironically, instead of treating employment as a crime, the bill would allow aliens to show proof of employment to adjust their provisional status for permanent residence.\textsuperscript{175} The proposed bill also incorporates the DREAM Act, which legalizes the presence of young adults who were brought to the U.S. illegally by alien parents,\textsuperscript{176} and provides a path for citizenship to most unlawful aliens.\textsuperscript{177} These reforms imply that the Hoffman Plastic majority opinion is out of step with reform of immigration laws.

But again, this does not mean that the overruling of Hoffman Plastic is imminent, inevitable, or even probable. The small size of the Supreme Court database cautions against jumping to this conclusion. And key to note, this study suggests that a deposition of downstream

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\textsuperscript{174} Id. at Section 2101, proposing to amend 8 U.S.C. 1255 et seq. by inserting Section 245B, “Adjustment of Status of Eligible Entrants before December 31, 2011 to that of Registered Provisional Immigrant.”

\textsuperscript{175} Id. at Section 2101, proposing to amend 8 U.S.C. 1255 et seq. by inserting Section 245C, “Adjustment of Status of Registered Provisional Immigrants.” By “adjustment of status,” this part of the law refers to a process of elevating provisional immigrants to Lawful Permanent Residents—a milestone to achieving naturalized citizenship. Practically speaking, the formerly unlawful alien would need to show that he or she would not become “a public charge.” See Section 245C(b)(3)(A)(i)(II). Under Section 245C(b)(3)(A)(i)(I), applicants would be required to prove that they were “regularly employed throughout the period of admission as a registered provisional immigrant, allowing for brief periods lasting not more than 60 days. . . .”

\textsuperscript{176} Id. at Section 2103 (The DREAM Act), proposing to amend 8 U.S.C. 1255 et seq. by inserting Section 245D, “Adjustment of Status for Certain Aliens Who Entered the United States as Children.”

\textsuperscript{177} Id. at Section 2511, proposing to rename the Office of Citizenship in U.S. Citizenship and Immigration Services as the Office of Citizenship and New Americans. The goal of the new office would be to “promote institutions and provide training on citizenship responsibilities for aliens interested in becoming naturalized citizens of the United States, . . .” Id. at 2511(b)(2).
cases correlates with overruling—but it does not prove that adverse lower court rulings cause the Court to overrule itself. Justices also manage bad precedents by marginalizing or ignoring them. This study shows, however, that when the Court overrules a precedent, this tends to happen (1) within 20 years of the ruling, and (2) in cases that are decided by a one vote margin. *Hoffman Plastic* has these two “overruling” traits.

### B. The Textual Connection between the Hoffman Plastic and Supreme Court Databases

The Court sometimes cites negative treatment of the precedent by lower courts as a reason to overrule a precedent. This section considers the possibility that inferior courts channel adverse rulings upward, as a result of a derelict clogging the downstream flow of precedent. The following headings reflect themes that the Court has used when overruling a precedent. Text and rulings from the *Hoffman Plastic* database are presented to show how a future Supreme Court might use these principles or examples to overrule this derelict.

1. **A new line of authority may undermine a precedent to such a degree that the**

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178 E.g., Planned Parenthood, *supra* note 2: “Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived . . . as . . . a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts.” More generally, see Pintip Hompluem Dunn, *Note, How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*, 113 YALE L.J. 493 (2003), at 520-23 (discussing how the Court implicitly overrules a precedent); Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1142-43 (1994); Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1120, n.75 (1995); and Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 756-63 (1988).

179 See Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L.REV. 933 (2013), at 938, stating that an examination of the “cases in which the Court actually interprets its own plurality decisions suggests that precedent in this realm actually flows upward— that is, the Supreme Court’s plurality decisions signal a willingness . . . to tolerate lower court experimentation and development as to the critical questions that divided the Supreme Court.” In a related vein, consider the concept of “anticipatory overruling,” explained by C. Steven Bradford, *Following Dead Precedent: The Supreme Court’s Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 41 (1990): “According to this view, lower courts should disregard Supreme Court decisions when they are reasonably sure that the Supreme Court would overrule them given the opportunity. This rejection of doubtful precedent by lower courts has been termed anticipatory overruling.” Examples appear in United States v. City of Phila., 644 F.2d 187, 192 (3d Cir. 1980); Andrews v. Louisville & Nashville R.R., 441 F.2d 1222, 1224 (5th Cir. 1971); and Hobbs v. Thompson, 448 F.2d 456, 472-74 (5th Cir. 1971).
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Court feels compelled to overrule it. 180 Some Hoffman Plastic cases involved aliens who were seriously injured or killed. 181 Citing Hoffman Plastic, early appellate court rulings in New York vacated awards for lost earnings in a personal injury lawsuit. 182 This stream of precedent shifted when Jallow v. Kew Gardens Hills Apartments Owners allowed a limited recovery for damages. 183 The stream continued to move in favor of alien workers when an appeals court in Balbuena v. IDR Realty LLC reversed lower court rulings, and held that undocumented aliens may recover damages. 184 Balbuena differentiated the case of an injured alien from Hoffman Plastic, observing that the state’s labor law had a goal of protecting workers, regardless of alienage. 185 Hernandez v. 151 Sullivan Tenant Corp. followed this new precedent, when it awarded an undocumented worker over $7 million in past and future damages stemming from his fall of more than fifty feet from a roof construction site. 186 More recently, this precedential stream split in New York, as some courts allowed a recovery to an unlawful alien, 187 while others

180 See supra note 67.
181 E.g., Ambrosi v. 1085 Park Ave. LLC, 2008 WL 4386751, *1, n.1 (plaintiff, an undocumented alien from Ecuador, suffered permanent injuries after falling on a construction site).
183 2005 WL 1712206 (N.Y.Sup. 2005), citing Hoffman Plastic, granted an employer’s and property owner’s motion to deny an injured alien’s loss of past and future earnings in the U.S., but allowed the plaintiff to pursue past and future earnings he could have earned in his home country. Id. at *4.
184 Supra note 128, at 1257. Reversing lower court rulings, the court of appeals held that undocumented aliens may recover damages because the state’s labor law places unqualified responsibility for safe building practices on property owners and contractors. Id.
185 The court reasoned that the state labor law “applies to all workers in qualifying employment situations—regardless of immigration status—and nothing in the relevant statutes or our decisions negates the universal applicability of this principle.” Id.
opposed this trend. This latest turn implies that the Supreme Court could cite confusion or inconsistency among lower courts as a justification for overruling *Hoffman Plastic*.

2. The philosophy of judges is an important influence in changing the course of precedent. In contrast to the majority opinion in *Hoffman Plastic*, many courts viewed a plaintiff’s immigration status as irrelevant or prejudicial. They blocked employers from inquiring into the immigration status of plaintiffs to prevent intimidation, or disallowed this prejudicial evidence at trial. *Cano v. Mallory Management* took a different tone and approach than *Hoffman Plastic* when, in the course of denying the employer’s discovery motion, the court said that aliens, “like citizens, contribute to our economy, serve in the Armed Forces and pay employment verification requirement under the law. *Also see Carroll v. 1156 APF LLC*, 2011 WL 4443507 (N.Y. 2011), denying motion to dismiss plaintiff’s claim for lost wages.

For some courts, an alien’s eligibility for a recovery depends on whether the worker tendered false documents. *Coque v. Wildflower Estates Devs.*, Inc., 58 A.D.3d 44, 53 (2008) said that IRCA does not criminalize working without documentation, but the law prohibits tendering of false documents. New York courts have not broken completely from with *Hoffman Plastic*. Some have cited it with approval to limit an unlawful alien’s recovery. *Maliqi v. 17 East 89th Street Tenants, Inc.*, 880 N.Y.S.2d 917 (N.Y.Sup. 2009), involving an injured worker who was subject to deportation proceedings, allowed the jury to base its measurement of lost earnings on wages that could be earned in the U.S. Thus, the jury could consider the likelihood that the plaintiff would be returned to his native country.

See *supra* note 77.

760 N.Y.S.2d 816 (N.Y.Sup. 2003). *Also see Gabriel v. Johnston’s L.P. Gas Service, Inc.*, 947 N.Y.S.2d 716 (N.Y.A.D. 2012), involving migrant farm workers who filed a personal injury lawsuit against their employer and others after they were injured in a propane explosion at their New York labor camp. *Gomez v. F & T Int’l*, 842 N.Y.S.2d 298 (N.Y. Sup. 2007), granted the workers a protective order directing that their depositions be taken by video conference in Guatemala and Mexico.

E.g., *Salas v. Hi-Tech Erectors*, 230 P.3d 583, 585 (Wash. 2010) (statistics show that illegal aliens faced a one percent chance of being deported in 2009).

Gomez, *supra* note 190, explained why the employer could not use the plaintiff’s immigration status to thwart a recovery: “Indeed, what is really happening under the guise of litigating lost wages is that undocumented workers are being intimidated with the prospect of being deported and having their families and lives torn apart after providing their services for dangerous work.” *Id.* at 303.

E.g., *Republic Waste Services, Ltd. v. Martinez*, 335 S.W.3d 401 (Tex. 2011), explaining that the “probative value of evidence showing only that the plaintiff is an illegal immigrant, who could possibly be deported, is slight because of the highly speculative nature of such evidence.” *Id.* at 409.
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taxes. 194 While Hoffman Plastic viewed unlawful aliens as criminals, Cano treated them as civic-minded taxpayers. Yong Pyo Hong v. Life University, ruling that that IRCA did not preclude a claim for wrongful termination, said that evidence of the plaintiff’s immigration status would be “highly inflammatory” and “prejudicial.” 195 This outlook conflicted with Hoffman Plastic’s sense that Jose Castro’s alienage was probative in determining whether the NLRB could order backpay. Even small turnover on the Supreme Court could tilt the philosophical pivot that produced the Hoffman Plastic precedent.

3. A precedent is overruled when it contradicts or ignores the original intent of a law. 196 Many cases in this study distinguished Hoffman Plastic because the statute they applied or interpreted differed from IRCA. 197 The trend was particularly evident in worker compensation cases. In Bollinger Shipyards, Inc. v. Director, Office of Worker’s Compensation Programs, the Fifth Circuit Court of Appeals determined that Hoffman Plastic was inapposite to an alien’s claim for benefits under the Longshore and Harbor Workers’ Compensation Act. Vargas v. Kiewit Louisiana Co. denied the employer’s motion to apply the Hoffman Plastic precedent in a matter involving the fatal fall of a construction worker. 199 The unlawful alien in Singh v. Jutla &

196 See supra note 73.
197 The Ninth Circuit Court of Appeals believed that Hoffman Plastic was “unlikely” to apply to discrimination cases that arise under Title VII. See Rivera v. Nibco, Inc., 364 F.3d 1057 (9th Cir. 2004), emphasizing differences between the NLRA and Title VII. Id. at 1067–69. The appellate court concluded that “the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases.” Id. at 1069.
198 604 F.3d 864 (5th Cir. 2010), reasoning that “awarding benefits to an undocumented worker under the LHWCA does not appear to ‘unduly trench upon explicit statutory prohibitions critical to federal immigration policy.’ This is because the LHWCA expressly provides for the award of benefits to nonresident aliens.” Id. at 877.
199 2012 WL 2952171 (S.D.Tex. 2012), at *5, stating that “this Court does not find the same danger of motivating immigration policy violations to be present in this case, as immigrants will not be motivated to violate
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C.D. & R’s Oil, Inc. worked nearly three years without pay in exchange for tuition and a place to live, but was threatened with deportation by his employer after he sued for backpay and overtime. Rejecting the employer’s use of Hoffman Plastic to preclude a monetary remedy under federal and state wage laws, the court reasoned that “[p]rohibiting plaintiff from bringing this claim under the FLSA would provide a perverse economic incentive to employers to seek out and knowingly hire illegal workers, as defendant did here, in direct contravention of immigration laws.” Allowing an alien a recovery under Kentucky worker’s compensation law, Abel Verdon Const. v. Rivera found that the purpose of that law differed from the immigration law in Hoffman Plastic. An Illinois court used similar reasoning. Rodriguez v. Integrity Contracting concluded: “While Hoffman contains a wealth of information regarding immigration policy, its reach does not include language indicating that a matter of state workers’ compensation coverage, such as this, is preempted by this policy.” In sum, these worker’s

IRCA in order to obtain additional U.S. wages after suffering fatal injuries.”

201 Id.
202 The court reasoned that “[p]rohibiting plaintiff from bringing this claim under the FLSA would provide a perverse economic incentive to employers to seek out and knowingly hire illegal workers, as defendant did here, in direct contravention of immigration laws.” Id. at 1062. For a similar case of coercion of an unlawful alien, see Amoah v. Mallah Management, LLC, 866 N.Y.S.2d 797 (N.Y.A.D. 2008) (alien’s fraudulent use of documents did not bar recoveries for work-related injuries).
203 348 S.W.3d 749 (Ky. 2011), at 1060-1062, explaining: “we view a decision to exclude unauthorized aliens from . . . Chapter 342 as contravening the purpose of the IRCA by providing a financial incentive for unscrupulous employers to hire unauthorized workers and engage in unsafe practices, leaving the burden of caring for injured workers and their dependents to . . . the Commonwealth.” The court explained that “[p]rohibiting plaintiff from bringing this claim under the FLSA would provide a perverse economic incentive to employers to seek out and knowingly hire illegal workers, as defendant did here, in direct contravention of immigration laws.” Id. at 1062.
204 Economy Packing Co. v. Illinois Workers’ Comp. Com’n, 901 N.E.2d 915 (Ill.App. 2008), at 923 (“excluding undocumented aliens from receiving certain workers’ compensation benefits would relieve employers from providing benefits to such employees, thereby contravening the purpose of the IRCA by creating a financial incentive for employers to hire undocumented workers”).
205 38 So.3d 511 (La. 2010), at 520.
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compensation and contract cases distinguished *Hoffman Plastic* by focusing on the purposes behind these laws. A future Supreme Court, wishing to revisit to *Hoffman Plastic*, could examine the main purpose for enacting the NLRA— which the majority failed to do in 2002— and conclude that the precedent should be overturned.  

4. When a precedent proves to be impractical or harmful in its application, the Court may overrule it.  

This principle was evident in wage and hour cases, where an unlawful alien sued employers for failing to pay minimum wages and overtime. Employers urged courts to extend *Hoffman Plastic* by denying claims for unpaid wages. The Eleventh Circuit Court of Appeals rejected this argument in *Galdames v. N & D Inv. Corp.*  

*Zavala v. Wal-Mart Stores, Inc.*, explained why *Hoffman Plastic* does not apply when unlawful aliens seek backpay for labor already performed. In another pay case, *Pineda v. Kel-Tech Const., Inc.* said that the employers’ argument “fails as a matter of law as it relies solely on the severe misapplication of the holding of *Hoffman.*”  

*Majlinger v. Cassino Contracting Corp.* warned that

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206 See Phelps Dodge Corp. v. Labor Board, 313 U.S. 177 (1941), at 182, stating that “Congress explicitly disclosed its purposes [in the NLRA by] declaring [in §1] the policy which underlies the Act,” and concluded that Congress’s “ultimate concern . . . was ‘to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association (quoting 29 U.S.C. § 151).’” In this vein, Congress enacted the NLRA’s § 10(c) to ensure that the “Board ‘to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.’” *Id.* at 187-188.

207 See supra note 74.

208 432 Fed.Appx. 801 (11th Cir. 2011). The appellate court concluded that “Hoffman Plastic is not ‘clearly on point’ with Patel,” a pre-Hoffman decision by the Eleventh Circuit. *Id.* at 802. Patel involved an unlawful alien who was attempting to recover wages for work already performed, however, the unlawful alien in Hoffman Plastic sought backpay for the lost opportunity to continue to be employed. The Galdames court “reiterate[d] that illegal aliens are ‘employees’ covered by the FLSA.” *Id.* at 804.

209 393 F.Supp.2d 295 (D.N.J.2005), explaining that the plaintiffs were seeking unpaid wages for work already performed, unlike the plaintiffs in Hoffman Plastic. Also, the statutory text of the FLSA does not qualify that minimum wages and overtime are required only for authorized workers. See *id.* at 321-23.

210 832 N.Y.S.2d 386 (N.Y.Sup. 2007), at 394.

misapplication of *Hoffman Plastic* “would also compel the conclusion that any sort of employment-related payment to an undocumented alien violates federal immigration policy.”\(^{212}\) *Majlinger* cautioned that employers of undocumented aliens “would be free to ignore New York law governing workplace safety, labor relations, and the furnishing of workers’ compensation coverage, to retaliate against workers who asserted any of their rights by reporting them to federal immigration authorities, . . . and, indeed, to withhold wages from employees altogether, with impunity.”\(^ {213}\)

In sum, these examples show that *Hoffman Plastic*’s elevation of immigration law over the NLRA is problematical in other situations. Most lower courts are unwilling to allow employers to pay unlawful aliens under minimum wage, or avoid liability for injuries—and have therefore granted backpay or worker’s compensation, regardless of immigration status.

**V. Conclusion**

This study presents statistical evidence that *Hoffman Plastic* is a good candidate for overruling by the Supreme Court. In other words, the precedent appears to be a derelict in the stream of the law that could produce a cut-off—a new precedential stream. A derelict can begin with a closely decided Supreme Court ruling.\(^ {214}\) *Hoffman Plastic* easily meets this threshold with its 5-4 ruling. While a close vote hardly means that a precedent will be overruled, the evidence shows that this type of case is more likely than others to be overruled.\(^ {215}\)

My theory also posits that a precedent can be overruled when there is an accumulating

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\(^{212}\) *Id.* at 63.
\(^{213}\) *Id.* at 64.
\(^{214}\) *Supra* notes 82-85.
\(^{215}\) *Supra* Table 2.2.
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deposit of adverse rulings from lower court downstream from the lead case. This study presents an empirical picture of this deposition process for Hoffman Plastic. In the first ten years that Hoffman Plastic has been a precedent, Keycite classified 64 cases as negative authority by declining to extend this precedent, distinguishing it, limiting its holding, and deciding a


219 Abel Verdon Const. v. Rivera, 2010 WL 4108551, *3 (Ky. 2010); and Avila-Blum v. Casa de Cambio
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matter on state law grounds. But some of the remaining 154 cases in Hoffman Plastic’s KeyCite involved the NLRB, where lower courts adhered to the precedent. But other “positive” cases had nothing to do with the remedy issue in Hoffman Plastic, meaning that these positive indications give a misleading impression of support. Hoffman Plastic compares to New York v. Belton, implicitly overruled by Arizona v. Gant, and to Booth v. Maryland, expressly overruled by Payne v. Tennessee.

Federal circuit court opinions also provide clues that Hoffman Plastic is a derelict in the stream of the law. The Second, Fifth, Ninth, Eleventh, and D.C. circuits have


N.L.R.B. v. Domsey Trading Corp., 636 F.3d 33, 34 (2d Cir. 2011); N.L.R.B. v. Velocity Exp., Inc., 434 F.3d 1198, 1206 (10th Cir. 2006); San Manuel Indian Bingo and Casino v. N.L.R.B., 475 F.3d 1306, 1312 (D.C.Cir. 2007); and United Food and Commercial Workers Union Local 204 v. N.L.R.B., 506 F.3d 1078, 1084 (D.C.Cir. 2007).


See supra note 163.

See supra note 169.

See supra note 104.

See supra note 106.

Madeira v. Affordable Housing Foundation, Inc., 469 F.3d 219 (2d Cir. 2006), at 254 (“we hold that IRCA does not preempt . . . a compensatory damages award to an undocumented worker for personal injury under New York Labor Law § 240(1). . . Hoffman Plastic Compounds, Inc. v. NLRB . . . does not dictate a different result. . .”).

Bollinger Shipyards, supra note 198, at 879 (distinguishing Hoffman Plastic by reasoning that “awarding benefits to an undocumented worker under the LHWCA does not appear to unduly trench upon explicit statutory prohibitions critical to federal immigration policy [internal quotes omitted]).”)

In two cases, the Ninth Circuit declined to extend Hoffman Plastic. See Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004), at 1067 (“We seriously doubt that Hoffman is as broadly applicable as NIBCO contends, and specifically believe it unlikely that it applies in Title VII cases.”); and Incalza v. Fendi North America, Inc., 479 F.3d 1005 (9th Cir. 2007), at 1012 (“Hoffman did not consider the question whether employees who are able to
declined to extend or distinguished this precedent. *Hoffman Plastic* has been applied with approval in only one appellate case, involving a union organizing campaign similar to the one in that precedent. Moreover, in cases that were decided after data collection for this study ended in December 2012, the trend continued for judicial disregard for *Hoffman Plastic*.

Statistical evidence in this study bolsters these Keycite comparisons. The fact that lower courts seriously question *Hoffman Plastic* as a precedent is underlined by the finding that among federal district courts, 68.9% of the cases said that their facts or legal circumstances were distinguishable from *Hoffman Plastic*, and only 13.3% of federal opinions and 25% of state opinions cited *Hoffman Plastic* as positive authority.

The possibility that *Hoffman Plastic* will be overruled is further strengthened by the time-
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analysis of Supreme Court precedents that are overruled. Compared to these cases, *Hoffman Plastic* is still early in the timeline. This study shows that among these cases, an overruled precedent lasts, on average, 19.5 years.\(^{236}\) In decisions that the Supreme Court overrules, the regression equation in this study predicts that cases decided by one vote last 13.1 years.\(^{237}\) *Hoffman Plastic* was decided only 11 years ago. The broad effort to reform immigration law, with proposals to legitimize the employment of currently unlawful aliens, may further erode judicial support for *Hoffman Plastic*.

All of these elements seem to work against the vitality of *Hoffman Plastic* as a precedent. However, there is no inevitability that *Hoffman Plastic* will be overruled. Indeed, the precedent may survive only because the NLRB itself has recently been diminished by intense controversy surrounding hundreds of cases decided by Board Members who had recess appointments.\(^{238}\) If broad immigration reform occurs soon, would the NLRB be able to reassert itself to the point of ordering backpay for a “provisional” alien who is working under the employment provisions of S.744, and who is fired, like Jose Castro, for supporting a union? Such a scenario might be necessary to present the Supreme Court with an opportunity to revisit *Hoffman Plastic*.

Only time can tell whether *Hoffman Plastic* is a derelict in the stream of the law. Regardless, the metaphor will likely be used again by Justices. Like the Army Corps of Engineers, Justices are in a position to watch the current of precedent rush and swirl by; and if

\(^{236}\) *Supra*, Table 2.1.
\(^{237}\) *Supra* note 153.
\(^{238}\) In the 2013-14 Term, the Supreme Court will consider whether recess appointees to the Board had legal authority to rule on cases. See *Noel Canning v. N.L.R.B.*, 705 F.3d 490 (D.C. Cir. 2013) (finding the recess appointments of Members Sharon Block and Richard Griffin were unconstitutional and invalid), *cert. granted*, 81 U.S.L.W. 3695 (U.S. June 24, 2013) (No. 12-1281).
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they conclude that a derelict is an obstruction, they can complete the process of changing the river’s course by overruling the precedent. There is nothing novel or absurd about the use of natural metaphors to explain how the law changes. Indeed, Justices sometimes think in terms of water and flow when they overrule a precedent.239 When Justice Douglas—an outdoorsman,240 and a Justice for almost 36 years—described Federal Base Ball Club as a derelict in the stream of law, he made an intellectual connection between two forces in his vast experience, nature and precedent. The river analogy that is modeled here shows promise for explaining whether a precedent is a derelict, and if so, how long the derelict can be expected to continue before it is overruled. Hopefully, a richer model can go beyond this approach by analyzing more variables associated with the overruling of precedents. In time, it may be possible to predict the likelihood that a precedent will be overruled, much like scientific models estimate the probability of natural cataclysms.

239 A prime example appears in U.S. v. Rabinowitz, supra note 8, overruling Trupiano v. U.S., supra note 159, where Justice Frankfurter’s dissenting opinion used this riparian imagery:

In overruling Trupiano we overrule the underlying principle of a whole series of recent cases (citations omitted), based on the earlier cases. For these cases ought not to be allowed to remain as derelicts on the stream of the law, if we overrule Trupiano. These are not outmoded decisions eroded by time. Even under normal circumstances, the Court ought not to overrule such a series of decisions where no mischief flowing from them has been made manifest.

339 U.S. at 85–86.

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VI. APPENDIX

A. HOFFMAN PLASTIC DATABASE

Abel Verdon Const. v. Rivera, 348 S.W.3d 749 (Ky. 2011)
Ambrosi v. 1085 Park Ave. LLC, 2008 WL 4386751 (S.D.N.Y. 2008)
Bailon v. Seok AM No. 1 Corp., 2009 WL 4884340 (W.D.Wash. 2009)
Balbuena v. IDR Realty LLC, 787 N.Y.S.2d 35 (N.Y. 2004) [I]
Balbuena v. IDR Realty LLC, 845 N.E.2d 1246 (N.Y. 2006) [II]
Barahona v. Trustees of Columbia Univ. in City of N.Y., 816 N.Y.S.2d 851(N.Y. 2006)
Becerra v. All Janitorial, LLC, 2011 WL 8000547 (Wash. 2011)
Bollinger Shipyards, Inc. v. Director, Office of Worker’s Comp., 604 F.3d 864 (5th Cir. 2010)
Cabrera v. Ekema, 695 N.W.2d 78 (Mich. 2005)
Carroll v. 1156 APF LLC, 2011 WL 4443507 (N.Y. 2011)
Coma Corp. v. Kansas Dept. of Labor, 154 P.3d 1080 (Kan. 2007)
Correa v. Waymouth Farms, Inc., 664 N.W.2d 324 (Minn. 2003)
Design Kitchen and Baths v. Lagos, 388 Md. 718 (Md. 2005)
Diaz v. Washington State Migrant Council, 265 P.3d 956 (Wash. 2011)
Economy Packing Co. v. III. Workers’ Comp. Com’n, 901 N.E.2d 915 (Ill.App. 2008)
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Gamez v. Industrial Com’n of Arizona, 141 P.3d 794 (Az. 2006)
Gomez v. F & T Int’l LLC, 842 N.Y.S.2d 298 (N.Y.Sup. 2007)
Gonzalez v. Performance Painting, Inc., 258 P.3d 1098 (N.M. 2011)
Humala v. City of New York, 862 N.Y.S.2d 808 (N.Y.Sup. 2005)
Incalza v. Fendi North America, Inc., 479 F.3d 1005 (9th Cir. 2007)
Maliqi v. 17 East 89th Street Tenants, Inc., 880 N.Y.S.2d 917 (N.Y.Sup. 2009)
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N.L.R.B. v. Domsey Trading Corp., 636 F.3d 33 (2d Cir. 2011)
Oro v. 23 East 79th Street Corp., 810 N.Y.S.2d 779 (N.Y. 2005)
Rajeh v. Steel City Corp., 813 N.E.2d 697 (Oh. 2004)
Republic Waste Services, Ltd. v. Martinez, 335 S.W.3d 401 (Tex.App. 2011)
Reyes v. Van Elk, Ltd., 56 Cal.Rptr.3d 68 (Cal.App. 2007)
Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004)
Rodriguez v. ACL Farms, Inc., 2010 WL 4683743 (E.D.Wash. 2010)
Rodriguez v. Integrity Contracting, 38 So.3d 511 (La.App. 2010)
Safeharbor Employer Services I v. Velazquez, 860 So.2d 984 (Fla.App. 2003)
Salas v. Sierra Chemical Co., 129 Cal.Rptr.3d 263 (Cal.App. 2011)
Salas v. Hi-Tech Erectors, 177 P.3d 769 (Wash. 2008) [I]
Salas v. Hi-Tech Erectors, 230 P.3d 583 (Wash. 2010) [II]
Salas v. Sierra Chemical Co., 129 Cal.Rptr.3d 263 (Cal. 2011)
Ulin v. Lovell’s Antique Gallery, 2010 WL 3768012 (N.D.Cal. 2010)
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Villareal v. El Chile, Inc., 266 F.R.D. 207 (N.D. Ill. 2010)
Wet Walls, Inc. v. Ledezma, 598 S.E.2d 60 (Ga. 2004)
Yong Pyo Hong v. Life University, 2012 WL 882518 (Cal.App. 2012)
Yu Hui Chen v. Chen Li Zhi, 916 N.Y.S.2d 525 (N.Y.A.D. 2011)

B. SUPREME COURT DATABASE

Adams v. Tanner, 244 U.S. 590 (1917), overruled by Ferguson v. Skrupa, 372 U.S. 726 (1963)
Adkins v. Children’s Hospital of D.C., 261 U.S. 525 (1923), overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)
Baltic Mining Co. v. Massachusetts, 231 U. S. 68 (1913), overruled by Alpha Portland Cement Co. v. Com. of Massachusetts, 268 U. S. 203 (1925)
Blackstone v. Miller, 188 U. S. 189 (1903), overruled by Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930)
Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), overruled by Oregon ex rel. State Land Bd.
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v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977), 7-1
Clarke v. Deckebach, 274 U.S. 392 (1927), overruled by In re Griffiths, 413 U.S. 717 (1973)
Commercial & Rail Road Bank v. Slocomb, 14 Pet. 60 (1840), overruled by Louisville, Cincinnati & Charleston R. Co. v. Letson, 2 How. 497 (1844)
Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902), overruled by Tigner v. Texas, 310 U.S. 141 (1940)
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325 (1976)
Hammer v. Dagenhart, 247 U.S. 251 (1918), U.S. v. Darby, 312 U.S. 100 (1941)
Harshman v. Bates County, 92 U.S. 569 (1875), overruled by Cass County v. Johnston, 95 U.S. 360 (1877)
Hepburn v. Griswold, 8 Wall. 603 (1869), overruled by Legal Tender Cases, 12 Wall. 457 (1870)
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by Brady v. Roosevelt S.S. Co., 317 U.S. 575 (1943)
Kansas Pac. R. Co. v. Prescott, 83 U.S. 603 (1872), overruled by Union Pac. R. Co. v. McShane, 89 U.S. 444 (1874)
McNally v. Hill, 293 U.S. 131 (1934), overruled by Peyton v. Rowe, 391 U.S. 54, 67 (1968)
Montgomery Bldg. Trades Council v. Ledbetter Erection Co., 344 U.S. 178 (1952), overruled by
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Osborne v. Mobile, 16 Wall. 479 (1872), overruled by Leloup v. Port of Mobile, 127 U. S. 640 (1888)
Parker v. Ellis, 362 U.S. 574 (1960), overruled by Carafas v. LaVallee, 391 U.S. 234 (1968)
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Rose v. Himely, Bee 327, 1808 WL 1911 (1808), overruled by Hudson v. Guestier, 6 Cranch 281 (1810)


Texas v. White, 7 Wall. 700 (1868), overruled by Morgan v. United States, 113 U. S. 476 (1885)


The Thomas Jefferson, 10 Wheat. 428 (1825), overruled by The Genesee Chief v. Fitzhugh, 12 How. 443 (1851)


Thurlow v. Massachusetts, 5 How. 504 (1847), overruled by Leisy v. Hardin, 135 U. S. 100 (1890)


U.S. v. Allegheny County, Pa., 322 U.S. 174 (1944), overruled by U.S. v. City of Detroit, 355
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U.S. 466 (1958)
West v. Louisiana, 194 U.S. 258 (1904), overruled by Pointer v. Texas, 380 U.S. 400 (1965)
Wilson v. Daniel, 3 U.S. 401 (1798), overruled by Gordon v. Ogden, 28 U.S. 33 (1830)