STARE DECISIS IN IOWA

Tyler J. Buller & Kelli A. Huser***

ABSTRACT

The rate at which a court overrules its own precedent reflects its relationship with the concept of stare decisis. Existing research provides some insight into how the United States Supreme Court and some state courts of last resort overrule cases. This Article, however, provides the first empirical study focused on the Iowa Supreme Court's overruling decisions, providing quantitative information and descriptive statistics regarding the Iowa Supreme Court's relationship with precedent. The study finds, over the Iowa Supreme Court's lifespan, the court's precedent has been fairly stable, though the rate of overrulings in the late twentieth and early twenty-first centuries has exceeded most other courts of last resort. Additionally, the court has issued a disproportionately high number of statutory overrulings throughout its history. The study also finds the most recent incarnation of the Iowa Supreme Court—the "Cady Court"—overrules cases at a similar rate to its predecessors, but it overrules proportionally more criminal, constitutional, and statutory cases. The Article concludes with an analysis of the statistical data in light of the Authors' experience as litigators before the Iowa Supreme Court.

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* Assistant Attorney General, Iowa Department of Justice; B.A. Drake University; J.D., University of Iowa College of Law. The views expressed in this Article do not necessarily reflect the views of the State of Iowa, the Attorney General of Iowa, or the Iowa Department of Justice.

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** Adjunct Professor of Law, Creighton University; Associate Attorney, Skinner & Paschke PLLC.; B.A., B.S. Iowa State University; J.D., Creighton University School of Law. The views expressed in this Article do not necessarily reflect the views of Creighton University, Skinner & Paschke PLLC, or any agents or clients of the same.

I. INTRODUCTION

When faced with a new legal matter, one of a litigator's principal tasks is to predict how courts will rule on the disputed issues. For some matters, controlling case law suggests settlement or quick resolution. But for others, litigators may challenge precedent by attempting to persuade a court of last resort to overrule controlling cases and change the law. To date, Iowa practitioners have had no good source of information on the likelihood of persuading the Iowa Supreme Court to overrule its precedent, and legal scholars have had no baseline from which to analyze the Iowa Supreme Court's overruling decisions. This Article provides empirical data for understanding stare decisis in Iowa.

Part II provides a thumbnail sketch of stare decisis in the United States and supplies the vocabulary we will use to explore and document the concept in Iowa. We do not delve too far into the weeds of this topic, knowing others have had much to say about stare decisis over the centuries.

Part III surveys the existing literature regarding one measure of stare decisis—the rate of overruling decisions—both for the United States Supreme Court and for other state courts of last resort. No existing research comprehensively and empirically explores stare decisis at the Iowa Supreme Court, though studies of other states inform how we approach the topic in Iowa.

Part IV explains our original empirical study, which gathers multiple data points measuring stare decisis at the Iowa Supreme Court. Part IV.A lays out our purpose, including the hypotheses we formed before compiling and analyzing our data, and discloses how the Authors' work history might

have affected our preconceived notions. Part IV.B sets forth the methodology we followed to obtain, code, and measure data regarding overruling decisions issued by the Iowa Supreme Court from 1857 through the end of 2018. Part IV.C sets forth the results of our study, without commentary or analysis.

Part V discusses the data in depth, including whether the results supported our hypotheses and whether alternative explanations for the data's relationship to the court's practices may be valid. In a nutshell, the data shows the Iowa Supreme Court—throughout its history—has had relatively stable precedent, but the court overrules more statutory precedents than comparable courts. The data is a mixed bag regarding the accuracy of our hypotheses for the 2011–2018 incarnation of the Iowa Supreme Court: the "Cady Court" overrules precedent at roughly the same rate as its predecessors, but it deviates from historical practice in the types of cases it overrules. The Cady Court overrules proportionally more criminal cases than all of its predecessors except one, overrules proportionally more constitutional cases than all of its predecessors, and issues more divided overrulings than all of its predecessors. We wrap up Part V by discussing the limitations of our research and offering some directions that future researchers could take to build on or expand our study.

II. STARE DECISIS IN IOWA AND ELSEWHERE

> Stare decisis: [t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.[1]

For readers concerned they will be subjected to a deluge of theoretical debate over the rationales for stare decisis, fear not. Others have written much about stare decisis elsewhere, and we are satisfied to provide just an overview here—enough to use stare decisis as a lens through which we evaluate the Iowa Supreme Court in our original study.

The concept of stare decisis is baked into the Republic, somewhere in the batch of ingredients Americans imported directly from the English common law. William Blackstone instructed that judges must "abide by former precedents, where the same points come again in litigation."[2]

1. *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

2. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 51 (Wayne Morrison ed., 2001).

Similarly, the Federalist Papers observed, "[I]t is indispensable that [the courts] should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."[3] And the concept has lived on, with no shortage of academic commentary, into the modern era.

Mainstream scholars generally agree stare decisis fosters predictability, stability, and equality in the law over time.[4] Stare decisis affects actors external to the judicial branch by enabling citizens and the other branches of government to rely on judicial precedent.[5] The reach of stare decisis adds predictability to questions ranging from the mundane (such as the legality of paper tender)[6] to the more controversial (with abortion[7] providing an obvious example). If stare decisis were to vanish tomorrow, one scholar has argued, it is quite possible there would be a "massive destabilization" of the United States government.[8]

Stare decisis also has internal value to the judiciary. As one scholar puts it, "Stare decisis enables judges to leverage a single skill—the ability to tell when like cases are alike—into a facility for deciding a wide variety of cases that involve substantive legal issues about which the judges may know next to nothing."[9] In other words, when stare decisis functions well, it can be a mechanism for courts to trade information and rely on the expertise of other judicial actors.[10] This may be particularly important for a state like Iowa,

3. THE FEDERALIST NO. 78 (Alexander Hamilton).

4. *See, e.g.*, Steven J. Burton, *The Conflict Between Stare Decisis and Overruling in Constitutional Adjudication*, 35 CARDOZO L. REV. 1687, 1688 (2014); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1361–62 (1988); Brian C. Kalt, *Three Levels of* Stare Decisis*: Distinguishing Common-Law, Constitutional, and Statutory Cases*, 8 TEX. REV. L. & POL. 277, 277–81 (2004); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 645, 652–55 (1999); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 749–52 (1988); Lawrence M. Solan, *Precedent in Statutory Interpretation,* 94 N.C. L. REV. 1165, 1171 (2016); Jennifer K. Anderson, Comment, *The Minnesota Court of Appeals: A Court Without Precedent?*, 19 WM. MITCHELL L. REV. 743, 743–45 (1993).

5. *See* Kalt, *supra* note 4, at 280.

6. Knox v. Lee (*Legal Tender Cases*), 79 U.S. (12 Wall.) 457, 552 (1870).

7. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860–61 (1992); Roe v. Wade, 410 U.S. 113, 165–66 (1973).

8. Monaghan, *supra* note 4, at 750.

9. Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 95 (1989).

10. *See id.*

where nearly all courts are courts of general jurisdiction.[11] Finally, of intrinsic benefit to the courts, is that stare decisis reinforces the legitimacy of judicial review by definitively resolving at least some issues, so they "presumptively remain at rest."[12]

Stare decisis, however, "is not an inexorable command."[13] The approach a court or judge takes to stare decisis in any particular case falls on a spectrum from "strong" stare decisis to "weak" stare decisis. The mainstream view among scholars is that the type of issue presented informs how strictly a court ought to follow precedent:

- Constitutional cases tend to invoke a weak or less strict form of stare decisis, on the theory that only the courts can correct bad constitutional precedent, absent constitutional amendments.[14] In other words, courts must be free to correct their own mistakes when no one else can.
- Common law cases tend to invoke moderately flexible or somewhat weak stare decisis because "judges are more akin to lawmakers" in this context, deciding policy questions with limited or no legislative direction.[15] Common law cases are thought to be a "middle ground" between weak and strong stare decisis.[16]
- Statutory cases, on the other hand, invoke strict or strong stare decisis, with a "super-strong presumption of correctness."[17] This is because the political branches are "institutionally competent to act" if they disagree with the judicial interpretation of legislation.[18]

11. *See id.*; *In re* Guardianship of Matejski, 419 N.W.2d 576, 577 (Iowa 1988) ("Our district courts are courts of general jurisdiction.").

12. Monaghan, *supra* note 4, at 752.

13. Payne v. Tennessee, 501 U.S. 808, 828 (1991) (citing Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

14. Kalt, *supra* note 4, at 278; Solan, *supra* note 4, at 1176. Like virtually all else in the law, however, the notion that constitutional precedents are subject to weak stare decisis has important exceptions. *See* Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205 (2006) (discussing "super precedents"—precedents that possess extraordinary durability because "public institutions have heavily invested, repeatedly relied, and consistently supported [them] over a significant period of time").

15. Kalt, *supra* note 4, at 278.

16. Solan, *supra* note 4, at 1176.

17. Eskridge, Jr., *supra* note 4, at 1362; *see* Kalt, *supra* note 4, at 279; Solan, *supra* note 4, at 1176.

18. Eskridge, Jr., *supra* note 4, at 1366; *see* Kalt, *supra* note 4, at 279; Solan, *supra*

Yet there is no mechanical or talismanic way to apply stare decisis, even using the three-tiered rubric, without room for disagreement. Iowa courts are quick to venerate stare decisis when it furthers a desired outcome. As the court points out, "From the very beginnings . . . we have guarded the venerable doctrine of stare decisis and required the highest possible showing that a precedent should be overruled before taking such a step."[19] Yet, in Iowa (and we suspect elsewhere), overt references to stare decisis often come in the back-and-forth between majority and dissenting opinions. To provide just a few examples, one justice of the Iowa Supreme Court, then writing in dissent, claimed another member of the court, in his special concurrence, was "throw[ing] stones from a glass house by accusing the dissenters of infidelity to stare decisis."[20] Another justice, previously in the majority but then dissenting after an overruling, offered his view that "what the majority [did was] overrule a prior decision with which they disagree[d] in order to advance their own view of the law."[21] Still another dissent lamented, "I find it astounding that neither the majority nor the special concurrence ever mentions stare decisis, the doctrine that provides stability, predictability, and legitimacy to our law."[22] And a different majority author remonstrated, "[P]recedents should not be tossed aside lightly."[23] To judges, it seems stare decisis is (partially) in the eye of the beholder.

Case law aside, overrulings have value in political science because the rate at which a court overrules precedent is a useful barometer for the strength of stare decisis in a particular court. Overrulings also have undertones of "judicial activism" by giving the appearance of "legislating from the bench in that the court has chosen a new policy direction in the face of preexisting and otherwise constraining legal rules."[24] Overrulings can also "disrupt citizens' expectations and alter legal relationships,"[25] such as by changing civil rights or altering the scope of criminalization under a

note 4, at 1176–77.

19. McElroy v. State, 703 N.W.2d 385, 394 (Iowa 2005) (quoting Kiesau v. Bantz, 686 N.W.2d 164, 180 n.1 (Iowa 2004) (Cady, J., dissenting), *overruled on other grounds by* Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699 (Iowa 2016)).

20. State v. Gaskins, 866 N.W.2d 1, 41 (Iowa 2015) (Waterman, J., dissenting).

21. State v. Williams, 895 N.W.2d 856, 870 (Iowa 2017) (Wiggins, J., dissenting).

22. Schmidt v. State, 909 N.W.2d 778, 804 (Iowa 2018) (Waterman, J., dissenting).

23. Bierman v. Weier, 826 N.W. 2d 436, 459 (Iowa 2013) (Mansfield, J., writing for the court).

24. Stefanie A. Lindquist, *Judicial Activism in State Supreme Courts: Institutional Design and Judicial Behavior*, 28 STAN. L. & POL'Y REV. 61, 68 (2017).

25. *Id.* at 69.

particular statute. Overrulings can also "circumvent or replace legislative choices," particularly if the legislature has relied on existing precedent.[26]

No one seriously disputes that some overruling decisions are legitimate.[27] However, at least "some danger is inherent in almost every overruling decision, and each case that does emphasize the personal and temporary quality of a judicial rule further tarnishes the image that is necessary to maintain judicial review in a democracy."[28] Thus, even if one were to agree with many (or perhaps most) overruling decisions of a particular court, the rate of overrulings is still a valuable statistic for understanding stare decisis at a court of last resort.

For these reasons and with this backdrop, we consider stare decisis—and more particularly, the rate of overruling decisions and the type of decisions that are overruled—in an original study of the Iowa Supreme Court. But first, we provide a brief detour into the existing literature describing how courts of last resort interact with precedent.

III. EXISTING LITERATURE ON SUPREME COURTS AND STARE DECISIS

Writers have investigated stare decisis at both the United States Supreme Court and a handful of state supreme courts. Although none of these studies has a pinpoint focus on the Iowa Supreme Court, the data and observations made about other courts of last resort can help us understand the Iowa data in appropriate context.

Unsurprisingly, stare decisis at the United States Supreme Court has been a hot topic. The seminal modern research in this area is Saul Brenner and Harold J. Spaeth's book, *Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946–1992*. Brenner and Spaeth catalogued much of the research that predated their book[29] and conducted an original study centered on a list of cases that "formally alter[ed] precedent."[30] Their criteria for case-

26. *Id.* at 70 n.32.

27. *E.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution." (internal quotation marks omitted) (citations omitted)).

28. Jerold H. Israel, Gideon v. Wainwright*: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 218–19.

29. SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT: 1946–1992, at 10–17 (1995).

30. *Id.* at 18.

inclusion focused on whether the Court, in a majority or controlling-plurality opinion, said its own precedent was overturned.[31] The authors observed that the Court usually "speaks plainly when it overrules a precedent," but sometimes softer or more varied language is used.[32] Both types of overrulings were tabulated when arriving at their list of cases.[33] For the period of 1946 to 1992, Brenner and Spaeth identified 115 overruling decisions, which had the effect of altering 154 precedents.[34] The authors found variance in the rate of overrulings under the leadership of different Chief Justices: for example, the Rehnquist Court overturned 4.7 cases per term, while the Vinson Court overturned only 1.4 per term.[35] Brenner and Spaeth also found the age of precedent affected the likelihood it would be overruled: the most frequently overruled cases were 0–10 years old, followed by those 11–20 years old. Less than 10 percent of overruled cases were more than 90 years old.[36]

A survey of all published research into how the United States Supreme Court treats precedent falls beyond the scope of this Article, but a few other studies bear mentioning:

- S. Sidney Ulmer studied the overruling of precedent from the beginning of the Republic until 1957, crafting a list based on three criteria: whether justices referred to a case as overruled in opinions or other writings; whether the Court's official reporter summarized it as overruling another case; or whether *Shepard's Citations* listed the related case as overruled.[37] Some of Ulmer's key findings were that it was rare for the Court to overturn precedent: just 81 decisions overruled past precedent between 1790 and 1958, which was less than 0.1 percent of the Court's total caseload.[38] The most

31. *Id.* at 19.

32. *See id.* at 18–20.

33. In the end, Brenner and Spaeth catalogued a list of overruling cases using search terms that are generally similar to the list we deploy for our original study in Part IV. Brenner and Spaeth specifically referenced the following terms: "overruled," "disapproved," "no longer good law," "can no longer be considered controlling," "modified and narrowed," "we decline to follow," and "can no longer be regarded as the law." *Id.* at 20.

34. *Id.* at 22.

35. *Id.*

36. *Id.* at 30.

37. S. Sidney Ulmer, *An Empirical Analysis of Selected Aspects of Lawmaking of the United States Supreme Court*, 8 J. PUB. L. 414, 416 (1959).

38. *Id.* at 417.

frequently overturned cases were 11–20 years old, followed by cases 0–10 years old,[39] and the most common legal areas for overruling cases were commerce and taxation.[40]

- Christopher Banks, relying primarily on the Congressional Research Service's published materials, compiled data regarding overruling cases from 1789 through 1991.[41] Banks found the Hughes, Warren, and Burger Courts were disproportionately responsible for 59 percent of all overruling cases in the Court's history.[42] He also found constitutional decisions were formally altered more than twice as often as statutory-construction decisions.[43]
- Lee Epstein, John Landes, and Adam Liptak compiled a list of all cases in which a party or amicus curiae asked the Court to depart from (or not depart from) precedent during the 2005–2013 terms of the Roberts Court.[44] They found 558 precedents came under attack in 288 different cases.[45] The Court explicitly or formally overruled precedent in 22 of those cases,[46] while 154 cases involved tacit overrulings or other "departures from precedent."[47] Epstein, Landes, and Liptak also challenged the conventional wisdom, finding, "[T]here is only a modicum of evidence suggesting that constitutional precedents are more vulnerable to departure [or overruling] than statutory ones."[48]

39. BRENNER & SPAETH, *supra* note 29, at 11 (analyzing the data presented in Ulmer's study).

40. Ulmer, *supra* note 37, at 425.

41. Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262, 263–268 (1992).

42. *Id.* at 264; BRENNER & SPAETH, *supra* note 29, at 16 (analyzing the data presented in Banks's study).

43. Banks, *supra* note 41, at 263 (finding 60.5 percent of overrulings were constitutional and 27 percent were statutory).

44. Lee Epstein, William M. Landes & Adam Liptak, *The Decision to Depart (Or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. REV. 1115, 1148–59 (2015).

45. *Id.* at 1130–31.

46. *Id.* at 1133.

47. *Id.* at 1134.

48. *Id.* at 1146.

A handful of pieces have explored stare decisis at state supreme courts, typically with a focus on one particular state court. Although court systems can vary significantly from state to state (in method of selection, case load, and more), studying these sister courts of last resort can inform our analysis—with the caveat that the research has to be viewed as anecdotal because there is no publicly available,[49] systematic 50-state survey of the rate at which state supreme courts overrule precedent. However, we still think there are insights to be found in these case studies.

In *Stare Decisis in Montana*, law professor Jeffrey T. Renz empirically demonstrated that the Montana Supreme Court was "overruling cases at a very high rate," and he argued it was doing so in a manner that "lacked a principled foundation."[50] Renz found the then-modern Montana Supreme Court expressly overruled case law in nearly 11 decisions per year—a rate ranging between double and seventeen times the rate of other comparable state supreme courts[51] and more than five times greater than the rate at which the Montana Supreme Court had overruled cases in the two previous decades.[52] He also found the then-modern Montana Supreme Court tacitly or indirectly overruled cases at a much higher rate than it had historically.[53] Finally, Renz explored the reasons offered for overruling cases, tabulating the rationales and subjectively indicating his agreement or disagreement with specific theories of stare decisis.[54]

Three different pieces have offered varying perspectives on the Michigan Supreme Court's relationship with precedent. A 2003 student note by Sarah K. Delaney studied a five-year period of Michigan decisions and found the then-modern court "overturn[ed] precedent at nearly twice the rate of the era before them"—overruling roughly five cases per year, compared to roughly two or three cases per year previously.[55] In a somewhat

49. As discussed later in this Article, there is a nonpublic database of state supreme court decisions for 1975 through 2005 that—among numerous other data points—tracks overruling decisions. For a comparison of the results from this study, as well as the other studies in Part III, see *infra* notes 112–13 and accompanying text.

50. Jeffrey T. Renz, *Stare Decisis in Montana*, 65 MONT. L. REV. 41, 43 (2004).

51. *Id.* at 54.

52. *Id.* at 53.

53. *Id.* at 61.

54. *See id.* at 63–90.

55. Sarah K. Delaney, Note, *Stare Decisis v. The "New Majority": The Michigan Supreme Court's Practice of Overruling Precedent, 1998–2002*, 66 ALB. L. REV. 871, 872 (2003); *see also* Sington v. Chrysler Corp., 648 N.W.2d 624, 643 (Mich. 2002) (Kelly, J., dissenting) (noting the Michigan court overturned 12 cases between 1993 and 1997

incendiary 2010 article, law professor Robert A. Sedler made the case that, from 1999 to 2008, "a majority of the justices on the Michigan Supreme Court overruled prior decisions with which they disagreed, in order to advance the majority's policy objectives."[56] Sedler found the Michigan court had overturned 38 cases in nine years,[57] 34 of which he believed were overturned on "ideological grounds . . . to bring about results that favored defendants in civil cases and prosecutors in criminal ones."[58] He also found the 1999–2008 court overturned cases at nearly five times the rate of the 1989–1998 court.[59] Sedler's piece provoked a response from two former Michigan Supreme Court law clerks, Trent B. Collier and Philip J. DeRosier, who argued Sedler's work was "deeply flawed," "superficial and slanted," and rested on a "flimsy foundation."[60] The law clerks' response generally argued that the overturning of decisions was not ideological and not out of line with the rate at which other state supreme courts overruled their decisions.[61]

A student note by Kimberly C. Petillo explored South Carolina's adoption of a partial merit-based system for selecting supreme court justices.[62] Coining the justices "untouchables," the student note opined that the adoption of partial merit-based selection made the court more independent, increased the rate at which it overturned its own precedent, and led the court to "def[y] the United States Supreme Court twice."[63] The note found the court had overruled its own precedent 36 times in seven years—an average of roughly five cases per year.[64]

compared to 22 cases between 1998 and June 2002).

56. Robert A. Sedler, *The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings*, 55 WAYNE L. REV. 1911, 1912 (2009).

57. *Id.* at 1929.

58. *Id.* at 1939.

59. *See id.* at 1939–40 (38 versus 8).

60. Trent B. Collier & Phillip J. DeRosier, *Understanding the Overrulings: A Response to Robert Sedler*, 56 WAYNE L. REV. 1761, 1763–64 (2010). This article also provides two data points for overrulings in other states: from 1999 to 2008, the Alabama Supreme Court overruled at least 63 cases (6.3 per year on average), and the California Supreme Court overruled at least 39 cases (3.9 per year). *Id.* at 1774.

61. *Id.* at 1773–1800.

62. Kimberly C. Petillo, Note, *The Untouchables: The Impact of South Carolina's New Judicial Selection System on the South Carolina Supreme Court, 1997–2003*, 67 ALB. L. REV. 937, 937–38 (2004).

63. *Id.* at 938.

64. *Id.*

A 1998 study by professor Stefanie Lindquist and graduate student Kevin Pybas aimed to compare the overruling decisions of four different state supreme courts—Alabama, Florida, New Jersey, and Pennsylvania—to look for similarities and differences among and between those courts and the United States Supreme Court.[65] This study's data set was developed by reviewing *Shepard's Citations* and selecting cases with an "overruled" notation.[66] The study found "relatively infrequent[]" overrulings among the four states, with means ranging from 1.06 to 3.13 overrulings per year.[67] They also found three of the state supreme courts (all but New Jersey) tended to overrule more recent cases than the United States Supreme Court.[68]

A later study by Lindquist built upon the four-state comparison with a more robust data set, exploring the different rates of overruling between elected and unelected state supreme courts.[69] The study ultimately found elected judges are more likely to overrule precedent and invalidate legislative enactments than unelected judges.[70] When it comes to overruling precedent, Lindquist found the courts most likely to overrule precedent were elected on partisan ballots, followed by nonpartisan elected courts, then courts governed by retention systems (like Iowa's) and other methods, and finally governor-appointed courts as the least likely to overrule precedent after controlling for other variables (like tenure on the court).[71]

A study by Allen Lanstra compared state supreme courts with initially elected judges versus courts with initially appointed judges, exploring whether different selection mechanisms lead to different rates of overruling.[72] Lanstra used a sample of data from six states that elect judges (Illinois, Michigan, Minnesota, North Dakota, Ohio, and Wisconsin) and six states that appoint judges (Indiana, Iowa, Massachusetts, Nebraska, New York, and South Dakota), categorizing all cases decided by these courts

65. Stefanie A. Lindquist & Kevin Pybas, *State Supreme Court Decisions to Overrule Precedent, 1965–1996*, 20 JUST. SYS. J. 17, 17 (1998).

66. *Id.* at 21.

67. *Id.* at 23–24.

68. *Id.* at 32.

69. Lindquist, *supra* note 24, at 65–66.

70. *Id.* at 86, 102.

71. *Id.* at 102.

72. *See generally* Allen Lanstra, Jr., *Does Judicial Selection Method Affect Volatility?: A Comparative Study of Precedent Adherence in Elected State Supreme Courts and Appointed State Supreme Courts*, 31 SW. U. L. REV. 35 (2001).

from 1995 to 1999.[73] Lanstra then used *Shepard's Citations* to create a list of overruling decisions to compare among groups.[74] The study found no statistically significant difference in the overall rate of overrulings between elected and appointed courts, the proportion of criminal versus civil overrulings, or the age of overruled cases.[75]

These studies provide a backdrop for understanding stare decisis at state supreme courts, at least in broad strokes. But they do not tell the story of how the Iowa Supreme Court's relationship with precedent has changed over time or how specific facets of Iowa's overruling cases compare with its sister courts. The original study contained in Part IV below supplies answers to some of those questions.

IV. AN ORIGINAL EMPIRICAL STUDY OF IOWA SUPREME COURT OVERRULING DECISIONS

Although neither of the Authors are empirical scientists by trade, we have set out to provide a reasonably objective and scientifically literate piece that provides descriptive statistics and fair analysis of data concerning the Iowa Supreme Court. Below, we first discuss our purpose in conducting this study, including a disclosure of our potential biases (such as our backgrounds as Iowa lawyers). We then provide a detailed description of our methodology, including a sufficient description of our coding rules to enable replication. Finally, we provide the results, in text and graphics, leaving our analysis for Part V.

A. *Purpose of Study*

Before delving into the hypotheses we formed as we mounted our study, some disclosures are warranted. The Authors are both Iowa litigators, and we have both argued multiple cases before the Iowa Supreme Court.[76] One of us is currently a prosecutor, and the other is a former prosecutor now in private practice. One of us clerked for the Iowa Supreme Court from 2013 to 2014. The other has previously published an empirical study addressing

73. *Id.* at 44–45.

74. *Id.*

75. *See id.* at 54–58.

76. In the interest of full disclosure, the Authors have briefed or orally argued some of the Iowa Supreme Court cases discussed in this Article or contained in the resulting data set, including *Allison v. State*, 914 N.W.2d 866 (Iowa 2018); *State v. Williams*, 895 N.W.2d 856 (Iowa 2017); and *State v. Gaskins*, 866 N.W.2d 1 (Iowa 2015).

criminal appeals in Iowa.[77] One is an adjunct professor at a law school, and the other chairs the Iowa State Bar Association's Appellate Practice Committee. These biographical details undoubtedly color our impressions of the Iowa Supreme Court, and when we set out to study the court's relationship with its precedent, we were hardly writing on a blank slate.

That said, we have done our best to approach this study with an open mind, following the data wherever it took us. Though we have refined some of our vocabulary through reading the literature discussed in Part III, and we have improved our labeling of items through collating the data discussed in Part IV.C, the hypotheses we list below are those we set out to investigate from the outset.

We formed two hypotheses about the Iowa Supreme Court in general, across different eras of chief justices:

1. Precedent has been fairly stable throughout the Iowa Supreme Court's history. We expected to find a comparatively low number of overrulings for the court overall, relative to other courts of last resort. We also expected to find the court tended to overrule relatively new precedent, rather than old precedent.
2. The Iowa Supreme Court, past and present, shows less deference to the elected branches than other courts of last resort. We expected to find a proportionally high number of statutory overrulings, compared to other supreme courts.

Our instincts also led us to a few hypotheses particular to the modern Iowa Supreme Court, which we call the Cady Court:[78]

1. The Cady Court, in general, follows a relatively weak form of stare decisis. We expected to find evidence the court overruled decisions at a higher rate than its predecessors.
2. The Cady Court overrules precedent more often in criminal cases than civil cases. We expected to find a comparatively higher number of overrulings in criminal cases than civil cases, compared to the court's predecessors.

77. Tyler J. Buller, *Public Defenders and Appointed Counsel in Criminal Appeals: The Iowa Experience*, 16 J. APP. PRAC. & PROCESS 183, 184–85 (2015).

78. By "the Cady Court," we mean all cases in which Mark Cady was the chief justice through the end of our study period. In other words, all decisions from January 1, 2011, through December 31, 2018.

3. The Cady Court follows a particularly weak form of stare decisis when it comes to constitutional decisions. We expected to find evidence the court overruled constitutional decisions comparatively frequently.
4. The Cady Court is fragmented on the issue of overruling precedent. We expected to find a comparatively high number of overrulings decided by a divided vote compared to the court's predecessors.

We provide our results in detail in Part IV.C below, but the short version is this: the Iowa Supreme Court has generally stable precedent with a high proportion of statutory overrulings. The Cady Court does not overrule precedent at a rate that deviates from its predecessors (at least in terms of raw numbers), but it does have a proportionally greater number of criminal, constitutional, and divided overrulings.

B. *Methodology*

To establish a universe of cases, we used the free public Westlaw access provided by the State of Iowa Law Library to generate lists of cases. Drawing on the search terms used in existing research,[79] as well as our personal experience as litigators before the Iowa Supreme Court, we generated lists of every Iowa Supreme Court decision from January 1, 1857,[80] through December 31, 2018, that contained the following search terms in the text of the opinion, a Westlaw Headnote, or the Westlaw Digest for the case:

- "Overrul!"
- "No longer good law"
- "Disapproved"
- "No longer controlling"
- "Decline to follow"
- "No longer be regarded as the law"
- "To its facts"

79. *See supra* Part III.

80. We selected 1857 as our starting point because that is when voters adopted the modern Iowa constitution, including a structure of the Iowa Supreme Court that generally resembles its current form. *See* IOWA CONST. art. V, § 3 (1857). Under the previous constitution, the Iowa General Assembly selected supreme court justices. IOWA CONST. art. V, § 3 (1846).

- "No longer the law"
- "Abrogat!"
- "Disavow!"
- "Overturn!"

This generated a list of around 10,450 cases, though some were duplicates (containing more than one of our identified search terms). We divided the cases roughly equally between the two of us for individual review and coding of each case.[81] Given our focus on how the Iowa Supreme Court interacts with its own precedent, we omitted cases in which the Iowa Supreme Court overruled a published or unpublished decision of the Iowa Court of Appeals and cases in which the Iowa Supreme Court recognized an overruling based on decisions of the United States Supreme Court or a change in statutes promulgated by the Iowa General Assembly. We also omitted cases in which only the dissent said precedent had been overruled—like Brenner and Spaeth observed in their book, relying on dissents would untenably require us to "pit[] our judgment against that of the Court's majority opinion writer."[82] Finally, we included cases even if the majority or plurality indicated they were only overruling "dicta" or "dictum,"[83] given our inability to objectively assess the credibility of those assertions. After removing duplicates and cases that were clearly not overruling cases,[84] our search terms ultimately yielded a data set of 246 cases.

81. We attempted to access the full text of the cases through a combination of Google Scholar and Fastcase. A handful of opinions could not be accessed through Google Scholar or Fastcase and were instead accessed through other means.

82. BRENNER & SPAETH, *supra* note 29, at 20.

83. *See, e.g.*, State v. Musser, 721 N.W.2d 734, 743 n.5 (Iowa 2006) ("This court opined in *State v. Keene* . . . that section 709C.1 'does not implicate the First Amendment.' Our observation was dicta, and we now disavow it." (citation omitted)).

84. For example, in earlier decisions, courts frequently reviewed the "overruling" of a demurrer. *See, e.g.*, Smith v. Comstock, 29 Iowa 596, 597 (1870) ("[T]here being no answer after the overruling of the demurrer, the court rendered judgment for this amount for plaintiffs, which is [a]ffirmed."). Later decisions discussed the "overruling" of certain pretrial motions, like a motion to dismiss. *See, e.g.*, Pettit v. Iowa Dep't of Corr., 891 N.W.2d 189, 191 (Iowa 2017) ("The district court overruled the motion to dismiss, and on the merits, the court determined the inmate was entitled to counsel."). These were not included in our data set.

After generating the list of cases, we again reviewed the full text of each case and collected data for inclusion in an Excel spreadsheet. For each case, we coded the following items:

- Case name
- Decision year
- Chief justice
- Overruling type
- Language used to overrule
- Vote
- Case type
- Issue type
- Case overruled
- Age of case overruled.

A few notes on coding are worth discussing here to give readers an understanding of the resulting data.

Chief justice. When indicated in the opinion, we coded the chief justice based on in-text identification. When that was not possible, we relied on other documentation for each chief justice's term in office.[85] Prior to 1959, the office of chief justice rotated among the members of the court—every two years before the adoption of the 1857 constitution, and every six months between 1857 and the adoption of Amendment 21 in 1962.[86] Robert L. Larson was elected as the first permanent chief justice, serving from 1959 to 1961.[87] We use Larson's election as chief as the starting point for coding cases based on chief justice. We assigned all pre-1959 decisions as "rotating chief" (rather than identifying the rotating chief justice) because our aim in coding this item was to measure changes in different eras of the court, and we tend to agree with the view that "[n]o one justice had real primary responsibility for leading the court" under the rotating-justice system.[88]

85. These other sources can be found in the footnotes for Appendix A.

86. IOWA CONST. art. V, § 3 (1857).

87. F. H. Becker, *Judicial Evolution: The C. Edwin Moore Years*, 38 DRAKE L. REV. 729, 731 (1988–1989). However, Amendment 21 was not yet in effect when the court began complying with its change to chief justice terms.

88. *Id.*

Case type. We coded this item using a relatively simple criminal-versus-civil distinction. We coded postconviction cases as criminal, unless they solely concerned a prison-discipline challenge, which we coded as civil.[89]

Overruling type. We coded this item based on the language used in the text of the court's opinion, using the same language as our search terms discussed above. We also carefully reviewed the cases where one of our search terms was included in the Westlaw Headnote or Digest but not in the text of the opinion. In the end, we included eight of these cases, believing they were clear examples of the court overruling its own precedent and not subject to reasonable disagreement among lawyers.[90] Finally, for cases that included more than one of our search terms, we coded only the first term we searched for, based on the order of search terms listed above.

89. This coding decision was undoubtedly colored by our litigation experience. In Iowa, postconviction cases related to prison discipline are handled by civil litigators in the Iowa Department of Justice's Special Litigation Division. Postconviction cases that challenge criminal convictions, on the other hand, are generally handled by county attorneys at trial and assistant attorneys general from the Department's Criminal Appeals Division on appeal.

90. State v. Williams, 895 N.W.2d 856, 867 (Iowa 2017) ("[W]e do not take a different course from the past out of dislike for the course taken, but to correct an incorrect analysis that sent us down the wrong path."); State v. Hicks, 791 N.W.2d 89, 96 (Iowa 2010) ("We now abandon the good-faith requirement our prior cases had engrafted onto this statutory right."); Koenig v. Koenig, 766 N.W.2d 635, 645 (Iowa 2009) ("As the reasons supporting the common-law distinction between invitees and licensees no longer exist, we now abandon the distinction." (footnote omitted)); Rants v. Vilsack, 684 N.W.2d 193, 210 (Iowa 2004) ("To the extent we misstated these constitutional principles in *Turner* or our other item veto cases, our misstatements in those cases are disregarded."); State v. Barnes, 652 N.W.2d 466, 468 (Iowa 2002) ("[F]urther reflection on our part suggests that this interpretation of rule 2.8(2)(d) would unduly restrict the written plea process . . . ."); State v. Heminover, 619 N.W.2d 353, 358 (Iowa 2000) ("These subsequent cases were relying on the pretextual analysis in *Cooley*, but we think they were incorrect . . . ."); State v. Schutz, 579 N.W.2d 317, 320 (Iowa 1998) ("We conclude the per se rule adopted by *Galloway* must be reversed."); Loyd v. Fed. Kemper Life Assurance Co., 518 N.W.2d 374, 376 (Iowa 1994) ("We choose to abandon this case as it conflicts with modern rules of insurance contract construction.").

We could have post hoc added the search term "abandon" to capture around half of these cases, but we thought it more honest to leave our original search terms intact and disclose our subjective inclusion of these cases. We also note, in part to satisfy a reader's healthy skepticism, that nearly all of the "empirical" studies of stare decisis include some judgment calls to depart from formalistic criteria. For example, Brenner and Spaeth relied on dissents (rather than solely majority and plurality opinions) in a small number of cases when the authors thought the majority "ha[d] seen fit to obfuscate" its treatment of precedent. BRENNER & SPAETH, *supra* note 29, at 20.

Vote. We coded whether an opinion was unanimous or divided on the issue of overruling a case, ignoring division on other questions presented in an appeal. We did not record the breakdown of the split vote (e.g., 7–1 or 5–4) because the number of justices on the Iowa Supreme Court has varied over time and the court previously decided some cases in panels and some en banc.[91] If the court divided on an issue other than whether to overrule a case but all justices concurred with the portion of the court's opinion that overruled a case, we coded the case as "unanimous."

Issue type. We think this coding piece was the most subjective.[92] We coded each case for whether the issue related to the overruling was constitutional, statutory, or related to the common law. Constitutional cases are those involving interpretation of a provision of the Iowa constitution or the United States Constitution. Statutory cases involve interpretation of the Iowa Code or a state rule (like a rule of evidence or appellate procedure).[93] Common law cases involve all other issues, predominantly those related to torts, contracts, and the supervisory function of the courts.

Case overruled. We also identified the case overruled by each of these overruling decisions. If more than one case was overruled, we selected the oldest to record in our spreadsheet. If reasonable lawyers could disagree about which specific cases, if any, were overruled, we did not code for this item. For example, we did not code specific cases when the opinion included broad language that could not be linked to any case, such as assertions that "[o]ur holdings which are to the contrary to this view are overruled";[94] "[w]e

91. Originally, the Iowa Supreme Court under the 1857 constitution consisted of three elected members. *See Iowa Courts History*, IOWA JUDICIAL BRANCH, https://www.iowacourts.gov/for-the-public/iowa-courts-history/ (last visited Feb. 3, 2019). By 1983, the supreme court consisted of nine justices. *Id.* In 1998, the Iowa General Assembly reduced the number of justices from nine to seven by attrition—meaning that there were nine, then eight, then seven justices in the following years. *See* 1998 IOWA ACTS 509, ch. 1184, § 1. The change was contingent on appropriations permitting the expansion of the Iowa Court of Appeals from six judges to nine. *See id.* § 4.

92. As discussed below, the Authors of this study agreed on this item 88 percent of the time, and we agreed with the author of another study on this item (for the same cases) 94 percent of the time.

93. The coding used by writers studying some other state supreme courts—including Lindquist and Pybas—separated statutory cases from cases that involved interpretation of a court rule. *See infra* notes 139, 167. We did not take this approach because effectively all court rules in Iowa are subject to review by the Iowa General Assembly. *See* IOWA CODE §§ 602.4201(3), 604.4202 (2017).

94. *See, e.g.*, Dyer v. Nat'l By-Prods., Inc., 380 N.W.2d 732, 735 (Iowa 1986).

disavow any suggestions to the contrary in our prior cases";[95] or "[t]o the extent our prior cases state otherwise, they are overruled."[96] In the end, we did not feel we could objectively code the overruled case for 18 of our overruling cases, so we left those cases uncoded for this item and the next item.[97]

Age of case overruled. For this coding item, we subtracted the decision year for the overruled case from the decision year for the overruling case. We did not track months or the court's term system.

To evaluate the reliability of our coding, we randomly selected 25 cases from our initial data set of 246 and compared the Authors' respective coding for those items. We tracked agreement on overruling type, vote, case type, issue type, and case overruled—125 different coding items. Upon comparing our coding, we agreed on 122 items, disagreeing only on the issue type (statutory versus common law) for three cases.[98] In other words, we had 97.6 percent overall coder agreement: 100 percent on overruling type, vote, and case overruled, but only 88 percent agreement on issue type.

We also evaluated our reliability by cross-checking some of our data with an outside source: Lanstra's article comparing the rate of overrulings between certain elected and selected state supreme courts.[99] Lanstra's article happens to include some Iowa overrulings, based on his review of *Shepard's*

95. Hawkeye Bank v. State, 515 N.W.2d 348, 351 (Iowa 1994).

96. Wesley Ret. Servs., Inc. v. Hansen Lind Meyer, Inc., 594 N.W.2d 22, 29 (Iowa 1999).

97. These uncodable cases stretched from 1956 to 2014, and we did not observe any particular pattern to these cases.

98. The cases we disagreed on were Molo Oil Co. v. City of Dubuque, 692 N.W.2d 686 (Iowa 2005) (overruling the use of a balancing test when reviewing zoning ordinances and ultimately coded as statutory); Steinbeck v. Iowa Dist. Court, 224 N.W.2d 469 (Iowa 1974) (overruling cases prohibiting certiorari review of pretrial rulings in criminal cases and ultimately coded as statutory); Jones v. Iowa State Highway Comm'n, 157 N.W.2d 86 (Iowa 1968) (overruling cases interpreting the rules of civil procedure and ultimately coded as statutory). After rereading the cases, we ultimately coded the view that one of us took for two cases and the view of the other for the third.

99. Although the published version of Lanstra's article does not include a table of the specific cases he included in his study, a manuscript does. *See* Allen Lanstra, *Does Judicial Selection Method Affect Volatility?: A Comparative Study of Precedent Adherence in Elected State Supreme Courts and Appointed State Supreme Courts* 17–23 (Jan. 1, 2001) (manuscript) [hereinafter "Lanstra manuscript"], http://digitalcommons.law.msu.edu/king/9. We relied on the manuscript, finding no change in the tabulated numbers between it and the published version.

Citations, for 1995 to 1999.[100] Our data set includes slightly more overrulings for the same period as Lanstra's study, mostly because we include tacit rulings (like disapprovals, disavowals, and when the court declines to follow past cases or indicates cases are no longer controlling) and Lanstra did not.[101] On the cases we shared, we agreed with Lanstra's characterization of case type in 17 out of 18 cases, for a rate of 94 percent agreement on the case-type item. Our only point of disagreement was over whether *James v. State*,[102] a prison-discipline case, was a criminal or civil overruling: Lanstra's study says criminal (presumably because the case involved a prisoner) while ours says civil (consistent with the coding rules discussed above). Given our coding rules, we believe a comparison to Lanstra's data set reinforces the reliability of our study.

Finally, the data we provide in Part IV.C also involved some secondary calculations. For each era demarcated by chief justice, we calculated the rate at which the court overruled decisions by dividing the number of overruling cases by the number of months the chief justice held office, then multiplying by 12 to arrive at a per-year figure. We rounded all partial months up to a full month in order to be consistent and account for periods in which the specific date a chief justice assumed office was not available in public records.[103] The dates and months we used for this calculation are included in Appendix A.

C. *Results*

The results of the study are presented below for both the Iowa Supreme Court across eras and for the Cady Court in particular. Where useful, we have provided results in a graphic format. Tabular results can be found at the end of the Article in Appendix B.

1. *Iowa Supreme Court Data from 1857 to 2018*

Since 1857, our data shows the Iowa Supreme Court has overruled its own precedent 246 times. Some characteristics of the data set in its entirety include the following:

100. Lanstra, Jr., *supra* note 72, at 45.

101. Specifically, our data set included 25 overrulings for 1995–1999, while Lanstra's study found 18 overrulings. Lanstra, Jr., *supra* note 72, at 54 tbl.7.

102. James v. State, 541 N.W.2d 864 (Iowa 1995).

103. *See* Appendix A and accompanying footnotes.

- *Case type.* Roughly one-third of the overruling cases were criminal, and two-thirds were civil.[104]
- *Overruling type.* More than half (156) of the overruling cases involved the court expressly using the word "overrule" or some variation thereof. The next most common language used by the court was "disavow(ing)" its prior precedents, at around 13 percent (31) of the total overruling cases. The remaining language was scattered, with no other search term accounting for more than 7 percent of the total.
- *Issue type.* Just over half of the cases involved questions of statutory interpretation, about one-third involved common law issues, and the remaining 15 percent involved constitutional questions.[105]
- *Vote.* In about 75 percent of the overruling cases since 1857, the court voted unanimously to overturn precedent; in around 25 percent, the court was divided.
- *Age of case overruled.* The average age of an overruled case for the data set was 29.8 years, while the median was 19 years.[106]

The results that pertain to our hypotheses about the Iowa Supreme Court across eras concern the overall rate of overrulings and the proportion of statutory overrulings.

104. Specifically, 87 cases were criminal and 159 cases were civil.

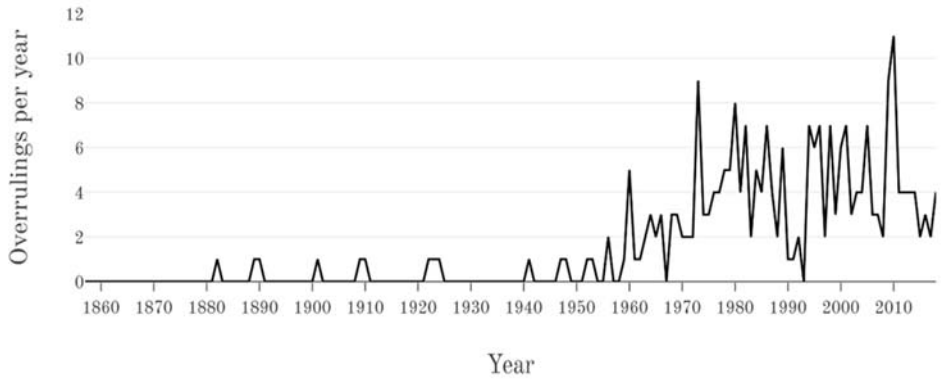
105. Specifically, out of 246 total cases, 81 overrulings were common law (32.92 percent), 36 were constitutional (14.63 percent), and 129 were statutory (52.44 percent).

106. As discussed in Part IV.B, we were unable to calculate the age of case overruled for 18 overruling cases. The mean and median age figures do not include the cases we could not code for those items.

a. *The Iowa Supreme Court has overruled an average of less than two cases per year over its history but almost four cases per year since the first permanent chief justice in 1959.*

Since the 1857 constitution, the Iowa Supreme Court has issued a mean of 1.52 overrulings per year; however, this calculation is affected by an inconsistent distribution over the years. For example, the court hardly overruled any cases in its first century: only 16 of the 246 overrulings considered in this study were issued between 1857 and 1957. To put it mildly, the court's overrulings are not equally divided among eras.

IOWA SUPREME COURT OVERRULINGS OVER TIME



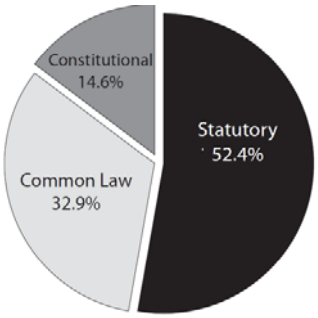
For at least some purposes, a useful statistical point of reference is the rate of overrulings from the first permanent chief justice (1959) onward (until 2018).[107] During this modern period, the Iowa Supreme Court had a mean rate of overruling 3.8 cases per year and a median rate of 3 cases per year.

107. We do not mean to suggest a causal relationship between adopting permanent chief justices and the increased rate of overrulings. Rather, this is a logical measuring point for a comparison between the Cady Court and other state supreme courts during a similar timeframe.

b. *More than half of the Iowa Supreme Court's overruling cases involve statutory interpretation.*

From 1857 to present, 52.4 percent of the Iowa Supreme Court's overrulings were statutory, 32.9 percent were based on common law issues, and 14.6 percent were constitutional.

PROPORTION OF OVERRULINGS BY ISSUE TYPE (1857–2018)



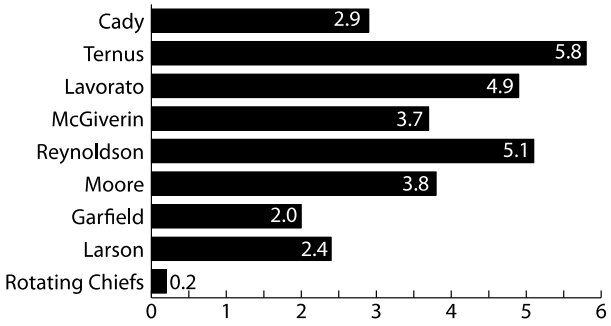
2. *Data for the Cady Court (2011–2018)*

The results of our study find the Cady Court is similar to its predecessors on some of the measures we can empirically validate, but not all. In short, the Cady Court overrules precedent similarly to its predecessors but deviates with a higher proportion of criminal, constitutional, and divided overrulings.

a. *The Cady Court overruled cases at a similar rate to its predecessors, and the overruled cases are of a similar age.*

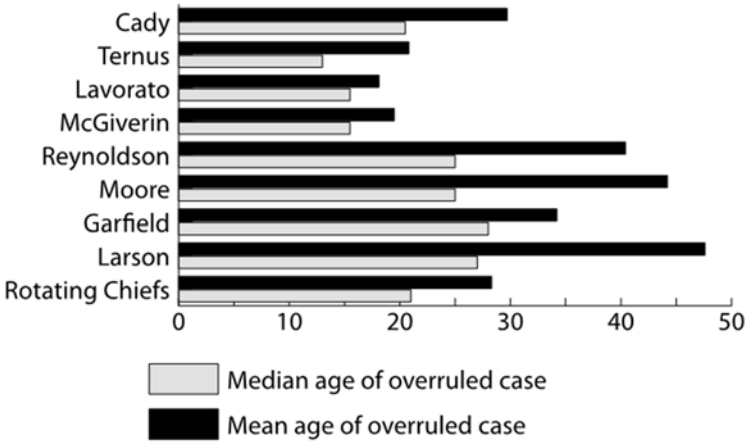
The Cady Court, on average, has overruled precedent in 2.9 cases per year, which falls roughly in the middle compared to other eras.

MEAN OVERRUINGS PER YEAR BY CHIEF JUSTICE



The age of cases overruled by the Cady Court (mean of 29.7 years and median of 20.5 years) is also quite close to the age of cases overruled across all eras of the court (mean of 29.8 years and median of 19 years).[108]

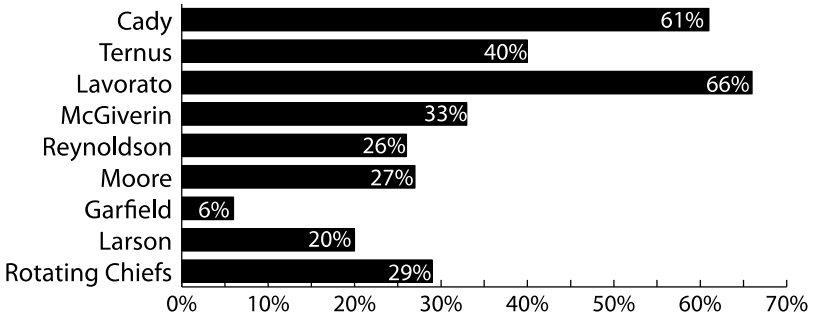
AGE OF OVERRULED CASES BY CHIEF JUSTICE



b. *The Cady Court overruled proportionally more criminal decisions than all but one of its predecessors.*

Although the Cady Court did not overrule the highest percentage of criminal (rather than civil) cases, 61 percent of its overrulings were in criminal cases, which is nearly double the mean of 35 percent across all eras.

PROPORTION OF CRIMINAL OVERRULINGS BY CHIEF JUSTICE



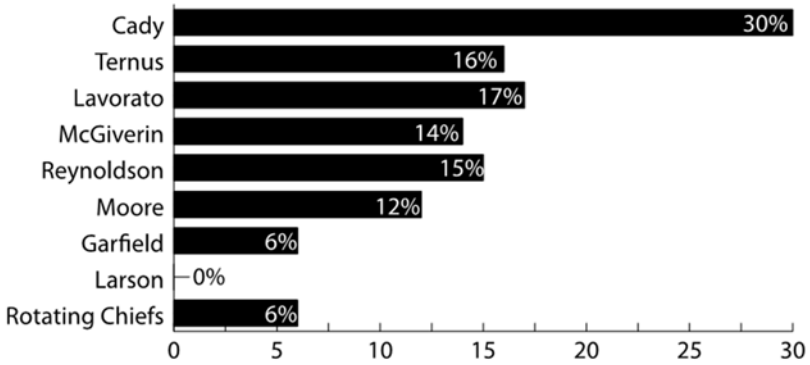
108. As with *supra* note 106, this calculation does not address the overruling cases for which we could not code the overruled case.

The Lavorato Court, which stretched from November of 2000 to September of 2006, had the highest rate of criminal overrulings—5 percent higher than the Cady Court.

c. *The Cady Court overruled proportionally more constitutional decisions than its predecessors, double the average.*

The Cady Court overruled comparatively more constitutional decisions than any other era of the court, with 30 percent of the Cady Court's overruling decisions relating to constitutional questions, compared to a mean of 15 percent across all eras of the court.

PROPORTION OF CONSTITUTIONAL OVERRULINGS BY CHIEF JUSTICE

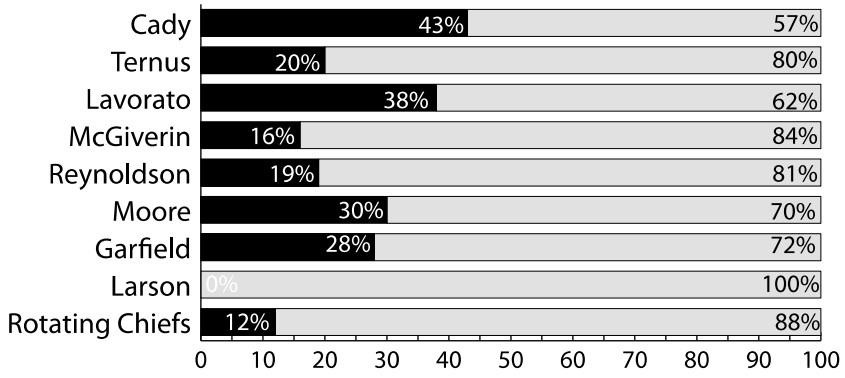


d. *The Cady Court overruled proportionally more decisions by a divided vote than any of its predecessors.*

The Cady Court overruled cases when its members were divided more often than any other period in the court's history: 43 percent of the Cady Court's overrulings were by a divided vote, compared to an average of 24 percent over the court's history.[109]

109. Ten of the Cady Court's 23 overruling decisions were divided, while 60 of the 246 overruling decisions were divided in the entire data set.

PROPORTION OF DIVIDED VS. UNANIMOUS OVERRULINGS BY CHIEF JUSTICE



V. DISCUSSION

From a research perspective, some of our hypotheses about the Iowa Supreme Court were correct and some were wrong (or at least not overtly supported by the data). The data generally supported our hypotheses that the Iowa Supreme Court has fairly stable precedent and a comparatively high number of statutory overrulings. The data did not support our hypothesis that the Cady Court overruled cases at an unusually high rate, but the data did show that the Cady Court has an unusually high proportion of criminal, constitutional, and divided overrulings.

A. *The Data Supported Hypotheses About Historical Traits of the Iowa Supreme Court*

For the most part, our hypotheses concerning the Iowa Supreme Court (admittedly informed by our work experience) were supported by the data. As discussed below, the court has generally had fairly stable precedent throughout its history, and the trend of disproportionately overruling statutory decisions has been consistent throughout the court's history.

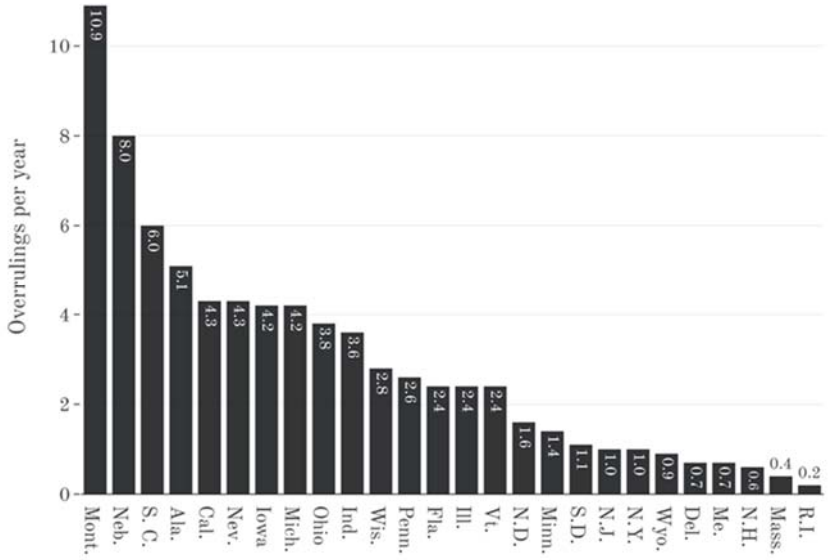
1. *Precedent Has Been Relatively Stable over the Iowa Supreme Court's History; However, the Rate of Overrulings in the Twentieth and Early Twenty-First Century Is Slightly Higher than Other Courts of Last Resort*

On its own, the statistics about the Iowa Supreme Court's rate of overruling cases—1.52 cases per year over its entire history and 3.8 cases per year from 1959 through 2018—do not tell us much. Nor does the age of cases overruled—a median overruled-case age of 19 years and a mean of 29.8 years over the court's history. To understand the meaning of these numbers, we need a point of reference. Because we lack the resources to conduct a study

of all (or any) other states mirroring this empirical study of the Iowa Supreme Court, we have to look elsewhere for comparative data with which to assess the stability of Iowa Supreme Court precedent.

Although a mathematically precise comparison is difficult, an informal comparison can be made to other states using data from the studies discussed in Part III. These data sets from other states generally cover the 1990s and 2000s, so for purposes of comparing them to our data, we will use the rate of overrulings per year by the Iowa Supreme Court from 1990 through 2018: a mean of 4.2 overrulings per year and a median of 4 overrulings per year. Although the methodology in other studies does not align perfectly with our own, we can compare the 1990–2018 numbers for the Iowa Supreme Court with those available for other states during similar (but not identical) periods,[110] with the caveat that varied methodologies likely render the comparison somewhat imprecise.[111]

MEAN OVERRULINES PER YEAR BY STATE (MIXED 1990S AND 2000S DATA SETS)



110. For example, the Lindquist and Pybas study, *supra* note 65, spanned 31 years, while the Lanstra study, *supra* note 72, only covered five years.

111. The source and calculations for numbers included in this graph are reproduced in Appendix B, table 6. Some numbers are averaged results, calculated when we had access to more than one study offering a rate of overrulings for that particular state.

As the chart demonstrates, Iowa's rate of overruling cases is above most other states for which we have data, but it falls short of being the most extreme. A similar comparison can be drawn by looking at the data underlying Lindquist's 2017 Stanford Law & Policy Review article. In her methodology,[112] the Iowa Supreme Court overruled a mean of 4.87 cases per year and ranked 15th out of the 50 states—in the top third but not the most extreme.[113]

Another metric to evaluate this hypothesis could be to compare the rate of Iowa Supreme Court overrulings to that of the United States Supreme Court. Brenner and Spaeth's study found the United States Supreme Court averaged 2.6 overrulings per year (with a median of 2 overrulings per year) between 1949 and 1992.[114] The Iowa Supreme Court issued an average of 3.34 overrulings (with a median of 3 overrulings per year) over the same period—again a higher rate, but not dramatically.

Finally, we can measure the stability of precedent by looking at the age of precedents overturned. A court that overturns much older cases arguably undermines the predictability and stability of the law more than a court that overturns primarily newer cases because litigants and citizens have come to rely on the long-standing decisions.[115] On this front, the Iowa Supreme Court

112. Lindquist relied on Westlaw's "red flag" system to generate her list of overruling decisions between 1974 and 2005, including all cases that overruled another decision in whole or in part. Lindquist, *supra* note 24, at 100 n.110. Having spent a great deal of our work experience using Westlaw for legal research, we have some concern that Lindquist's study may be affected by inaccuracies in the Westlaw "flag" system.

113. Although the database underlying Lindquist's article is not publicly available, she generously shared the Stata file with us, so we could offer some additional interstate context for our study of stare decisis in Iowa. *See* Stefanie A. Lindquist Database (on file with authors). After comparing our data set with Lindquist's, we found our study was somewhat narrower than Lindquist's when it came to selecting cases, though the results do not differ much. Lindquist's Westlaw collation found 146 overrulings in Iowa between 1975 and 2005, while we found 137. For that period, we found the Iowa Supreme Court issued a mean of 4.56 overruling decisions per year, while Lindquist's data shows a mean of 4.87.

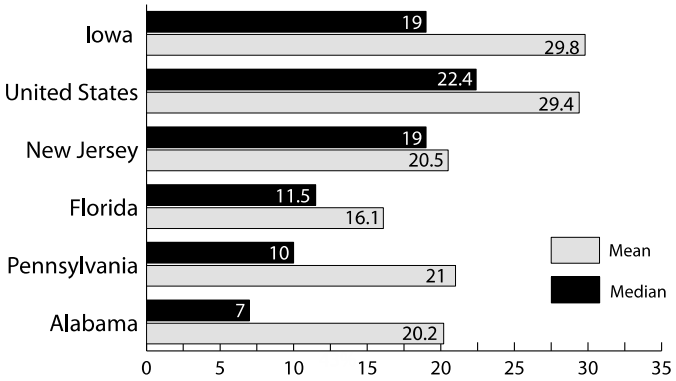
Lindquist's Westlaw-based data set also includes overrulings per year from other states, for 1975 through 2005. After combining the rate of overrulings for the Texas and Oklahoma supreme courts and courts of criminal appeals, Lindquist's data shows South Carolina had the highest rate of overrulings at 13.03 per year, while Illinois had the lowest at 0.5 per year.

114. BRENNER & SPAETH, *supra* note 29, at 23 (154 overrulings in 46 years).

115. As a counterpoint, one might argue that overturning older (and potentially outdated) cases could foster stability over the long run. Given our inability to predict

is more similar to the United States Supreme Court than it is to other state supreme courts (at least based on the limited available data).[116]

MEAN AND MEDIAN AGE OF OVERRULED DECISIONS BY SUPREME COURT



From these data points, we believe we can fairly say three things: First, the Iowa Supreme Court's historical rate of overruling cases is relatively low, though it has increased since the nineteenth century;[117] second, Iowa's rate of overruling cases is slightly higher than some other states and the United States Supreme Court, but not extremely different; and third, Iowa overturns somewhat older cases, rather than younger cases. This generally suggests that precedent in Iowa has been stable, though the overruling of older precedent can be problematic when citizens rely on the court's precedent to make decisions in life and business.

future developments in the law, we are concerned more with the impact overturning older cases has on the present.

116. The data used for Iowa is based on our own analysis. The data used to measure the mean and median of United State Supreme Court jurisprudence is limited to the Brenner and Spaeth data, *supra* note 29, which measures the number of cases overruled from 1946 through 1990. The data for New Jersey, Florida, Pennsylvania, and Alabama includes overruled precedents from 1965 through 1996, as studied by Lindquist and Pybas, *supra* note 65.

117. The largest spike seems to roughly correspond to the adoption of the Missouri Plan in Iowa, which moved the state's judicial selection process from elections to a merit-based selection and retention system. *See* IOWA CONST. amend. XXI. We suspect this correlation does not have a causal connection—that is, we do not believe that having merit-selected judges necessarily caused the increase in overrulings, but it is a confounding variable worth noting.

2. *The Iowa Supreme Court's Overrulings Occur in a Comparatively High Proportion of Statutory Interpretation Opinions, Suggesting Low Deference to the Elected Branches*

One statistically deviant feature of how the Iowa Supreme Court approaches precedent stretches across all eras: its treatment of statutory decisions. Compared to its federal counterpart, the Iowa Supreme Court overrules significantly more of its own statutory precedent (as compared to constitutional precedent). Banks's study, discussed in Part III above, found the United States Supreme Court overruled constitutional decisions at more than twice the rate it overruled statutory decisions.[118] Brenner and Spaeth found an even higher comparative difference: 64 percent of federal overrulings were constitutional, compared to 20 percent statutory.[119] The Iowa data shows the opposite: the Iowa Supreme Court overruled more than three times the number of statutory decisions than it did constitutional decisions.[120] This is the inverse of what we would expect from a court with high deference to the legislative branch, and it reflects a high level of interference with statutory precedent.[121]

As briefly discussed in Part II, statutory precedents—on a spectrum of strong-to-weak stare decisis—are thought to "enjoy a super-strong presumption of correctness," only subject to overruling "under the most compelling circumstances."[122] The rationale for strong statutory stare decisis derives from fundamental separation-of-powers principles, which differently animate questions of constitutional versus statutory interpretation. Constitutional decisions are subject to a relatively weak form of stare decisis, as "the difficulty of amending the Constitution makes the Court the only effective resort for changing obsolete constitutional doctrine."[123] Statutory decisions, on the other hand, warrant strong stare decisis because they can directly prompt corrective action from the legislature.[124] If, after a period of time, the legislature has not acted, it has approved of or acquiesced to the court's interpretation, and that precedent ought to remain undisturbed.[125] In

118. Banks, *supra* note 41, at 263.

119. BRENNER & SPAETH, *supra* note 29, at 47.

120. Statutory decisions made up 52.44 percent of the total, while constitutional decisions only made up 14.6 percent.

121. *See, e.g.*, Eskridge, Jr., *supra* note 4, at 1362–63.

122. *Id.* at 1362.

123. *Id.*

124. *See id.* at 1366–67.

125. *Id.*

other words, these principles tend to give "cases interpreting statutes special protection from overruling."[126] Iowa cases echo these sentiments,[127] though the results of this study suggest the Iowa Supreme Court may not always feel bound to its pronouncements.

While the data alone does not offer an explanation for the comparatively high rate of statutory overrulings, an obvious inference in light of the literature might be that the Iowa Supreme Court defers less to the Iowa General Assembly than the United States Supreme Court defers to Congress. Although anecdotal, there is some support for this in the cases, and we can offer two well-known examples from criminal law:

- *The battle over mens rea for statutory assault.* For decades, Iowa courts had consistently interpreted the state's assault statute as creating a general-intent crime.[128] In 2001, the Iowa Supreme Court changed course and held assault was now a specific-intent crime, even though the statute had not changed in the intervening years.[129] Four months later, the Iowa General Assembly amended the assault statute, adding the sentence: "An assault as defined in this section is a general intent crime."[130] On multiple occasions since

126. Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 317 (2005). Critics of super strong statutory stare decisis, however, argue that "legislatures do all sorts of things for all sorts of reasons" and question the reliability of legislative acquiescence. Kalt, *supra* note 4, at 280.

127. *See, e.g.*, Papillon v. Jones, 892 N.W.2d 763, 773 (Iowa 2017) ("The Iowa legislature, however, has not amended section 808B.8 to abrogate [*Iowa Beta Chapter of Phi Delta Theta Fraternity v. State*], and we decline to overrule our precedent given the tacit legislative acceptance of our interpretation."); *In re* Vajgrt, 801 N.W.2d 570, 574 (Iowa 2011) ("The rule of stare decisis 'is especially applicable where the construction placed on a statute by previous decisions has been long acquiesced in by the legislature . . . .'" (quoting Iowa Dep't of Transp. v. Soward, 650 N.W.2d 569, 574 (Iowa 2002)); Cover v. Craemer, 137 N.W.2d 595, 599 (Iowa 1965) ("The rule of stare decisis is controlling here. We decline to change the meaning given the statute for almost 60 years."); Trinity Lutheran Church of Des Moines v. Browner, 121 N.W.2d 131, 203 (Iowa 1963) ("We think the rule of stare decisis is controlling here. The legislature having accepted an interpretation of its own intent for over 85 years it is not now appropriate for us to attribute to the statute a different meaning.").

128. *See, e.g.*, State v. Ogan, 497 N.W.2d 902, 903 (Iowa 1993), *overruled by* State v. Heard, 636 N.W.2d 227 (Iowa 2001); State v. Brown, 376 N.W.2d 910 (Iowa Ct. App. 1985).

129. *Heard*, 636 N.W.2d at 231.

130. 2002 IOWA ACTS ch. 1094, § 1 (codified at IOWA CODE § 708.1); H.F. 2546, 79th Gen. Assemb., Reg. Sess. (Iowa 2001).

the 2002 amendment, the Iowa Supreme Court continued to hold that assault is a specific-intent crime, despite this legislative abrogation.[131] Even the Iowa Court of Appeals has recognized that the 2002 amendment reflected "the legislature's clear intent to abrogate" the Iowa Supreme Court's decisions in this area.[132] However, the decisions of the Iowa Supreme Court remain binding on the intermediate appellate court unless and until they are overruled.

- *The* Heemstra *case and felony murder.* Another writer—Karen Wallace—has flagged, we think appropriately, the problematic nature of the Iowa Supreme Court's statutory overruling decision in *State v. Heemstra*, concerning the felony-murder rule.[133] Wallace, who is a professor of law librarianship, noted that the court in *Heemstra* "chose not to apply—nor even directly acknowledge—two of its own rules of statutory interpretation."[134] She noted that the court also "sidestepped a discussion of legislative acquiescence" and ignored "the presumption that the legislature is aware of the state of the law when it enacts a statute."[135]

These decisions, at least arguably, suggest that the Iowa Supreme Court tends to diverge from the norm under which the judicial branch aims to interpret legislation, not craft it. This suggests less deference to the elected branches, at least compared to the norms recognized in federal case law and academic commentary.

However, a lack of deference to the legislature is not the only conclusion that could be drawn from the data. It may be that all state

131. *See* State v. Fountain, 786 N.W.2d 260, 264–66 (Iowa 2010); Wyatt v. Iowa Dep't of Human Servs., 744 N.W.2d 89, 94 (Iowa 2008); State v. Keeton, 710 N.W.2d 531, 531–33 (Iowa 2006); State v. Bedard, 668 N.W.2d 598, 600–01 (Iowa 2003). In these cases, the court has claimed that the legislature did not alter the "substantive content of the statute," yet the explanatory text included with the introduced bill reinforces that it was specifically passed in response to the case law. *Compare Bedard*, 668 N.W.2d at 601, *with* H.F. 2546 (specifically citing *Heard* and discussing the judicial classification of assault as a specific-intent offense).

132. State v. Beck, 854 N.W.2d 56, 63 (Iowa Ct. App. 2014).

133. Karen L. Wallace, *Does the Past Predict the Future?: An Empirical Analysis of Recent Iowa Supreme Court Use of Legislative History as a Window into Statutory Construction in Iowa*, 63 DRAKE. L. REV. 239, 274 (2015).

134. *Id.*

135. *Id.* at 274, 278.

supreme courts overrule statutory precedents more frequently than the federal Supreme Court, due to some institutional feature of state court versus federal court litigation. Some support for this explanation might be found in the Michigan research, which shows that 26 out of 38 cases (68 percent) overruled in a nine-year span were statutory, though that study does not offer a comprehensive breakdown of whether the remaining cases concerned constitutional or common law issues.[136] The Montana research might also support this point, finding 48 overruling cases related to statutory construction and just 12 concerned with constitutional law.[137] On the other hand, perhaps neither Michigan nor Montana should be seen as role models in this area; both articles containing the aforementioned data about overrulings condemn their courts as activist, overtly partisan, or both, claiming they overrule far more cases than they should.[138] As yet another counterpoint, the data compiled by Lindquist and Pybas concerning Pennsylvania and New Jersey showed those states do not overrule a disproportionate number of statutory overrulings: only 18 percent of New Jersey's overrulings were statutory and 35 percent of Pennsylvania's overrulings were statutory.[139]

B. *The Data Is a Mixed Bag for Our Hypotheses About the Cady Court*

While some data points we gathered for this Article suggest the Cady Court is in the middle of the pack for treatment of precedent, there are three areas in which it stands decidedly apart from its predecessors: the proportion of criminal overrulings, the proportion of constitutional overrulings, and the proportion of divided overrulings. In other words, while the Cady Court's overall rate of overruling precedent is in line with its predecessors, the type of overrulings is not.

1. *The Cady Court Overrules Precedent at Roughly the Same Rate as Its Predecessors and Overrules Similarly Aged Precedent*

As laid out in Part IV.C.2.a above, the Cady Court does not overrule cases at a significantly different rate from its predecessors—falling roughly

136. Sedler, *supra* note 56, at 1933.

137. Renz, *supra* note 50, at 64.

138. *See generally* Renz, *supra* note 50; Sedler, *supra* note 56.

139. *See* Lindquist & Pybas, *supra* note 65, at 29. Although the published article does not contain the underlying data or figures for the type of issues addressed in overruling decisions, Lindquist was able to locate and generously provided us with the original data sets for Pennsylvania and New Jersey. A chart detailing the type of overruling based on issue type is included in Part V.B.3 *infra*.

in the middle of the pack. Even if we limit our study to the first permanent chief justice onward (1959–2018), the Cady Court overrules cases at a comparable rate: the Cady Court overruled a mean of 2.9 cases per year (less than the 1959–2018 mean of 3.8) and a median of 3 cases per year (identical to the 1959–2018 median of 3 cases per year). Our first hypothesis about the Cady Court's rate of overrulings was not borne out by the data. Rather than diverging from previous eras, the Cady Court's numerical rate of overruling cases is consistent with the court's past. In other words, if "the rate at which a state court overrules precedent . . . provide[s] a measure of the level of judicial activism within a given court,"[140] then the Cady Court's level of activism is no greater than its predecessors.

As to the second piece of our first hypothesis—that the Cady Court overruled older precedent—the data again shows conformity to past practice, not deviation. Across all eras, the average age of an overruled case was 29.8 years,[141] and the Cady Court was within 0.1 years of that figure. The median age across all eras was 19 years, while the Cady Court's median was 20.5 years. In short, this hypothesis (about the age of overruled precedent) was also refuted.

Although we did not set out to study this particular statistic, another measurement that can be used to compare stare decisis under the Cady Court to other eras is the percentage of overruling decisions out of the total population of cases decided by the court per year. The number of decisions published by the Iowa Supreme Court has declined since the era of the first chief justice, averaging 100.25 published decisions per year under the Cady Court, compared to 237.54 per year for the other 1959–2010 courts and 412.09 published decisions per year from 1857 to 1958.[142] During those same time frames, the percentage of overruling decisions did not correlate to caseload. Of the Cady Court's published decisions, 1.85 percent were overrulings, compared to 1.77 percent for the other 1959–2010 chiefs and 2.02 percent for 1857–1958.[143] Consistent with other data we have reported,

140. Lindquist & Pybas, *supra* note 65, at 19.

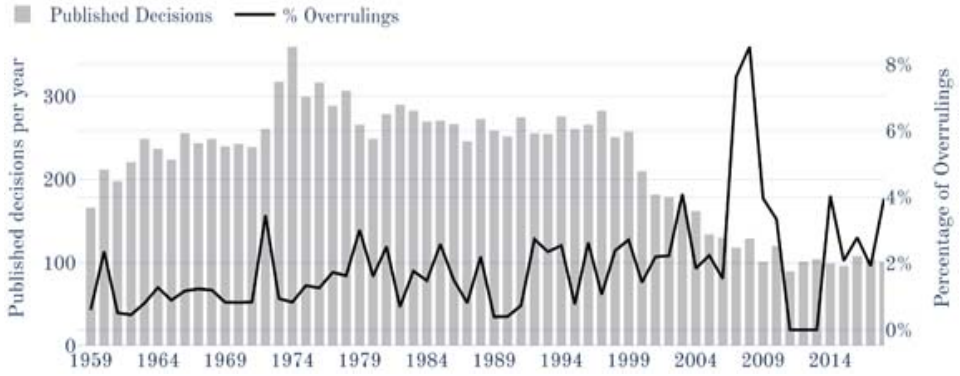
141. Of note for the reliability of our study, this 29.8-year statistic for the mean age of an overruled case is very close to the mean age of overruled cases reported by Lanstra for Iowa (1995–1999) in his study, which was 31. Lanstra, Jr., *supra* note 72, at 56.

142. We gathered these figures using a series of Westlaw searches for the number of reported opinions per year. We conducted the searches in January of 2019 using the State Law Library's Westlaw terminal. Our search parameters were limited to "reported" Iowa Supreme Court decisions from January 1 to December 31 of a given year.

143. Relying on the methodology described in note 142 *supra*, we calculated the

the Cady Court's percentage of overruling cases was generally similar to or (at most) slightly higher than other eras.[144]

PUBLISHED DECISIONS & PERCENTAGE OF OVERRULING DECISIONS (1959–2018)



In light of this data and in hindsight, we wonder whether a purely numerical breakdown of the "number of overrulings" is a sufficiently precise barometer for a supreme court's relationship with its own precedent. It is fair to speculate whether we are playing Monday-morning quarterback—trying to defend our hypothesis—but it is difficult to know whether measuring stare decisis is best understood as a qualitative rather than quantitative exercise. One qualitative observation, which we make in our personal rather than empirical judgment, is that not all overrulings are created equal. Some of the Cady Court's overruling decisions upended precedent and significantly altered the legal landscape. For example, *Schmidt v. State* overruled decades of case law to allow criminal defendants to pursue freestanding actual-innocence claims under the Iowa constitution (even if they pled guilty in open court),[145] and *State v. Young* overruled existing case law and found misdemeanants facing the possibility of

percentage of overruling decisions by dividing the number of overruling decisions from our original study by the total number of reported decisions in the corresponding year.

144. The spike in the chart is for calendar years 2007 and 2008 under the Ternus Court. In 2008, 11 of the Ternus Court's 129 published decisions were overruling decisions, for a rate of 8.53 percent. In 2007, 9 out of 118 decisions were overruling decisions, for a rate of 7.63 percent. In comparison, the highest rate for the Cady Court was in 2014, with 4 out of 99 opinions, or a rate of 4.04 percent.

145. Schmidt v. State, 909 N.W.2d 778, 781 (Iowa 2018).

imprisonment had a state constitutional right to counsel.[146] Other overruling decisions were quite narrow, like *Krupp Place 1 Co-op, Inc. v. Board of Review of Jasper County*, which overruled a single prior case regarding the appropriate standard of review for stipulated facts—an overruling so nondramatic it was relegated to a footnote.[147]

We also wonder to what extent the court has avoided expressly stating that it is overruling its past case law. One example might be *Allison v. State*, a case in which the supreme court materially undermined the statute of limitations for postconviction actions.[148] In *Dible v. State*, the 1996 Iowa Supreme Court surveyed the history of the postconviction-relief statute and concluded that ineffective assistance of counsel claims do not pierce the statute of limitations.[149] The 2018 Iowa Supreme Court came to the opposite conclusion in *Allison*, finding these claims now do pierce the statute of limitations.[150] But the court did not "overrule" *Dible*; it chose to "qualify" *Dible*.[151] Furthering the confusion, the current Westlaw Keycite flag for *Dible* says that its "holding [was] modified by" *Allison*. There is little doubt that *Allison* functionally overruled *Dible*, at least in part. Yet, no one plainly says that. We suggest that using euphemisms for tacit overrulings is unhelpful not only because cases then evade detection for purposes of our study but also because tacit overrulings lead to confusion among lower courts and practitioners. We do not know of an empirical way to measure the prevalence of this issue in decisions issued by the Cady Court (or courts of other eras),[152] but we doubt *Allison* is the only example.

146. State v. Young, 863 N.W.2d 249, 250 (Iowa 2015).

147. Krupp Place 1 Co-op, Inc. v. Bd. of Review of Jasper Cty., 801 N.W.2d 9, 13 n.1 (Iowa 2011).

148. Allison v. State, 914 N.W.2d 866, 867–68 (Iowa 2018).

149. Dible v. State, 557 N.W.2d 881, 886 (Iowa 1996), *abrogated by* Harrington v. State, 659 N.W.2d 509 (Iowa 2003).

150. *Allison*, 914 N.W.2d at 890–91.

151. *Id.* at 890.

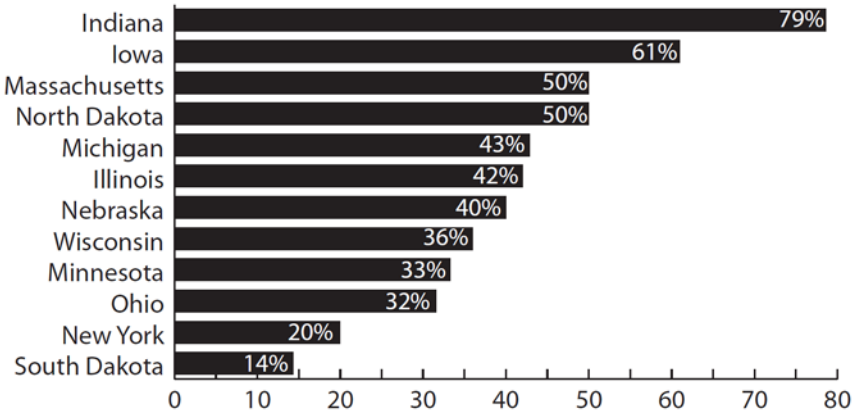
152. We think our list of search terms for finding overruling cases is adequate but not perfect. We share the view expressed by Lindquist and Cross in their book that it may be an "insurmountable . . . empirical task" to identify all cases where supreme courts "undermine" precedent without formally overruling it. STEFANIE A. LINDQUIST & FRANK B. CROSS, MEASURING JUDICIAL ACTIVISM 36 (2009). On the other hand, we are also sensitive to Epstein, Landes, and Liptak's criticism that limiting a study to formal overrulings is too narrow and "sets the bar too high." Epstein, Landes & Liptak, *supra* note 44, at 1126. We have tried to strike a balance between the two.

2. *The Cady Court Overrules Almost Double the Proportion of Criminal Cases Compared to Most, but Not All, of Its Predecessors*

Our hypothesis that the Cady Court was more active in overruling criminal than civil cases—a hypothesis admittedly biased by our litigation experience—was supported by the data. The Cady Court's overrulings were 61 percent criminal, compared to an average of 35 percent across the court's history—not quite double. Interestingly, the Cady Court's proportion of criminal overrulings was not the highest of any era. That award is taken by the Lavorato Court, at 66 percent. This comparison holds true for the raw (rather than proportional) rate of criminal overrulings per year as well: the Cady Court had 1.75 criminal overrulings per year, compared to 3.2 for the Lavorato Court.

The Cady Court's proportion of criminal overrulings is out of line with data available from other state supreme courts. As reported in Lanstra's article, originally discussed in Part III, all but one of the state supreme courts he studied had a proportion of criminal overrulings at 50 percent or less.[153]

PROPORTION OF CRIMINAL OVERRULINGS BY STATE



This would suggest that the Cady Court is overactive in the area of criminal overrulings, both compared to its predecessors and its sister courts of last resort.[154]

153. This chart uses the Cady Court figure of 61 percent criminal overrulings for Iowa rather than Lanstra's 1995–1999 rate of 50 percent, which would have only evaluated cases that fell outside the Cady Court era.

154. One potential limitation on this comparison is that the years studied differ: 2011–2018 for the Cady Court and 1995–1999 for Lanstra's data set. For example, it is

3. *The Cady Court Overturns Proportionally More Constitutional Decisions than Any of Its Predecessors*

The data regarding our third era-specific hypothesis—the Cady Court's weak stare decisis on constitutional questions—also tells a story of divergence, rather than adherence, to the Iowa Supreme Court's historical practice. As discussed in Part IV.C.2.c, the Cady Court has overruled comparatively more constitutional decisions than any other period in the history of the Iowa Supreme Court since 1857. Nearly a third of the Cady Court's overrulings are constitutional, compared to 15 percent of overrulings in the preceding eras. This suggests comparatively weak constitutional stare decisis by the Cady Court, at least compared to its predecessors.

Of note, the Cady Court's high proportion of constitutional overrulings seems to intersect with, and is perhaps magnified by, the point raised in Part V.B.2 above (a high rate of criminal overrulings) and Part V.B.4 below (a high rate of divided overruling decisions). Eighty-five percent of the Cady Court's constitutional overruling decisions—six out of seven—were by a divided court.[155] Five were criminal, and one was civil. Five were 4–3 splits

possible that the states studied by Lanstra might have had comparably high proportions of criminal overrulings from 2011 through 2018, but the data is not publicly available.

155. Schmidt v. State, 909 N.W.2d 778, 781 (Iowa 2018) ("[W]e overrule our cases holding that defendants may only attack the intrinsic nature—the voluntary and intelligent character—of their pleas. We now hold the Iowa Constitution allows freestanding claims of actual innocence, so applicants may bring such claims to attack their pleas even though they entered their pleas knowingly and voluntarily."); State v. Coleman, 890 N.W.2d 284, 301 (Iowa 2017) ("[T]o the extent that *Jackson* is inconsistent with our holding today, we overrule it. We conclude that when the reason for a traffic stop is resolved and there is no other basis for reasonable suspicion, article I, section 8 of the Iowa Constitution requires that the driver must be allowed to go his or her way without further ado."); State v. Gaskins, 866 N.W.2d 1, 16 (Iowa 2015) ("[W]e overrule *Sanders* because we conclude *Belton* no longer sets forth the proper scope of the [search incident to arrest] exception under the Iowa Constitution."); State v. Young, 863 N.W.2d 249, 281 (Iowa 2015) ("[W]e overrule *Allen.* We conclude that under article I, section 10 of the Iowa Constitution, an accused in a misdemeanor criminal prosecution who faces the possibility of imprisonment under the applicable criminal statute has a right to counsel."); State v. Short, 851 N.W.2d 474, 492 (Iowa 2014) ("Our recent cases . . . outline our approach to independent state constitutional law under article I, section 8 of the Iowa Constitution . . . . To the extent our cases can be read as having implications contrary to the above approach, they are specifically overruled."); Chiodo v. Section 43.24 Panel, 846 N.W.2d 845, 852 (Iowa 2014) ("We conclude *Blodgett* was clearly erroneous and now overrule it. We also disapprove of any suggestion in *Flannagan* or *Haubrich* that the mere fact that a crime is punishable by confinement in a penitentiary disqualifies the offender from exercising the privilege of an elector.").

along the court's ideological divide,[156] while one was a 3–2–1 split with one justice recused.[157] In other words, a divided Cady Court overrules constitutional law in criminal cases in a way that is substantially out of line with past eras for the Iowa Supreme Court.

One way to understand this high proportion of constitutional overrulings might be to look at the academic commentary regarding the Cady Court. There has been, to put it mildly, some criticism of the court's approach to interpreting the Iowa constitution. One student note describes the Cady Court's approach to state constitutional interpretation as "less than principled," "neither consistent nor predictable," and "foster[ing] uncertainty and frustration."[158] Colorfully, this same note observes, "[S]ometimes the court uses the Iowa Constitution as a sword—one it picks up without prompting from either party."[159] Another student note describes the court's constitutional decisions regarding cruel and unusual punishment as "standardless" and criticizes the court's "empty and conclusive" assertions regarding the Iowa constitution.[160] Finally, the dissenters in these 4–3 cases have hardly been quiet. One of them referred to the court granting "illegitimate pleas for result-oriented departures from federal law" and

Of note, we categorize *Young* as a divided decision, even though all justices concurred in the judgment. *Young*, 863 N.W.2d at 281–86. The three specially concurring justices specifically declined to join the Iowa constitution holding, which was the topic that involved overruling *State v. Allen*, 690 N.W.2d 684 (2005) . *See Young*, 863 N.W.2d at 281–86.

156. See *infra* note 186 and accompanying text for a discussion of the ideological breakdown of the Iowa Supreme Court during the study period.

157. The oddly divided case was *Chiodo*, 846 N.W.2d 845. Although the court does not announce reasons for an individual justice's recusal, Justice Appel was likely recused because his wife was a candidate in the Democratic primary for Iowa's Third Congressional District. *See Iowa to Bar All Felons from Voting*, NEWTON DAILY NEWS (Apr. 17, 2014), https://www.newtondailynews.com/2014/04/17/iowa-to-bar-all-felons-from-voting/agw01ft/.

158. Eric M. Hartmann, Note, *Preservation, Primacy, and Process: A More Consistent Approach to State Constitutional Interpretation in Iowa*, 102 IOWA L. REV. 2265, 2267, 2290 (2017). Notably, two of the overruling decisions in our data set (*Short* and *Gaskins*) are discussed in the note—*Gaskins* in some detail. *Id.* at 2279.

159. *Id.* at 2289.

160. Elisabeth A. Archer, Note, *Establishing Principled Interpretation Standards in Iowa's Cruel and Unusual Punishment Jurisprudence*, 100 IOWA L. REV. 323, 325, 346 (2014).

a "result-oriented approach of playing 'gotcha' with the State"—and those quotes are both from a single dissent.[161] For our purposes, we have not set out to prove these criticisms are legitimate or illegitimate, but we believe they provide a qualitative context for the quantitative results that show more constitutional overrulings by a divided vote than in any other era.

Another comparison point that highlights the Cady Court's divergence in this area is the proportion of constitutional rulings that postdate the federal Warren Court (which revolutionized federal constitutional law). In Iowa, we can measure post-Warren Court decisions by looking at cases from the term of Iowa Chief Justice C. Edwin Moore (who was selected as chief in 1970) onward. The Cady Court's proportion of constitutional overrulings is particularly striking when measured during this limited era: for all courts other than the Cady Court, between 12 percent and 17 percent of overruling cases were constitutional. The Cady Court is about double that.

A contrary perspective might be that, setting specific numbers aside, we should not be too concerned about a state supreme court overruling a high proportion of constitutional decisions. Multiple justices of the United States Supreme Court have, throughout their history and across ideological lines, recognized that stare decisis plays a lessened or weaker role in questions of constitutional law.[162] And some scholars have expressed a

161. State v. Gaskins, 866 N.W.2d 1, 42, 52 (Iowa 2015) (Waterman, J., dissenting).

162. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 908–09 (2007) (Breyer, J., dissenting); Agostini v. Felton, 521 U.S. 203, 235 (1997) (O'Connor, J., writing for the Court); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 954–55 (1992) (Rehnquist, C.J., concurring in part and dissenting in part); Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (Scalia, J., writing for the Court); Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962) (Harlan, J., writing for the Court); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 94 (1936) (Cardozo & Stone, JJ., concurring); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1923) (Brandeis, J., dissenting). This approach to stare decisis—in which constitutional decisions are thought more subject to overruling than other decisions—has been criticized in part as ahistorical. *See generally* Lee J. Strang & Bryce G. Poole, *Historical (In)Accuracy 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). For more discussion and examples, see Epstein, Landes & Liptak, *supra* note 44, at 1118–22.

similar view.[163] Yet, on the other hand, it cannot be that constitutional precedents have "a mortality rate almost as high as their authors."[164] There must be a happy medium. The difficult question is whether the Cady Court falls in that appropriate middle realm, or if instead—as a historical comparison suggests—the Cady Court has overruled a far greater proportion of constitutional precedents than it should.[165]

Finally, we can draw some comparisons to the decisions of other state supreme courts. As part of their 1998 study, Lindquist and Pybas compiled data concerning the type of issues decided by state supreme courts.[166] Although their methodology does not align perfectly with ours,[167] we can use the Lindquist and Pybas data set to compare the types of issues addressed in Iowa's overrulings versus overrulings in New Jersey and Pennsylvania.

163. *See, e.g.*, James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 349 (1986). However, scholars are not uniform in their acceptance of claims that constitutional precedents are weaker. Epstein, Landes, and Liptak's empirical study found that, for the Roberts Court, "whether a precedent is constitutional plays only a small role (if that) in the Court's decision to disavow it, despite longstanding Court policy to the contrary." Epstein, Landes & Liptak, *supra* note 44, at 1118.

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

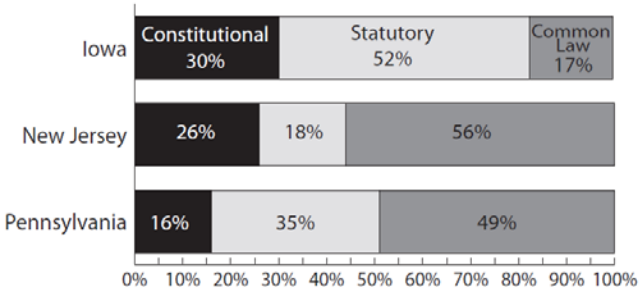
165. Though we try to ground our conclusions here in the data we gather, it would be remiss for us not to point out the language used by the Cady Court to describe the role of stare decisis. In *State v. Short*, the court relegated stare decisis to just "a factor to consider" when deciding present controversies. 851 N.W.2d 474, 500 (Iowa 2014). Additionally, in *State v. Ochoa*, the court essentially announced it was not bound by anything other than its view of what is most "persuasive." 792 N.W.2d 260, 267 (Iowa 2010).

166. As discussed in note 136, Lindquist was able to locate the underlying data sets for Pennsylvania and New Jersey and shared them with us for purposes of a comparative analysis.

167. For the item comparable to our evaluation of issue type, Lindquist coded "authority for decision." *See* Stefanie A. Lindquist Database (on file with authors). Our "constitutional coding" is generally analogous to Lindquist's coding for "U.S. constitution or other federal law" and "state constitution," though our data set does not track or involve any interpretations of federal statutes in the modern era. *Id.* Our "statutory" coding is generally analogous to Lindquist's coding for "state statute" and "state administrative rule or regulation," while our "common law" coding is generally analogous to "common law" and "other authority." *Id.*

Compared to the other two states, the Cady Court overrules proportionally more constitutional and statutory decisions.

PROPORTION OF OVERRULINGS BY ISSUE TYPE



The high rate of statutory overrulings is consistent with the data reported in Part IV.C.1.b and discussed in Part V.A.2 above. The high rate of constitutional overrulings also provides independent corroboration for the notion that the Cady Court has been overactive in the area of constitutional overrulings—both compared to its predecessors and compared to other state supreme courts.

4. *The Rate at Which the Iowa Supreme Court Overrules Precedent Based on a Divided Vote May Damage Perceptions of Legitimacy and Raise Questions About the Vitality of Overruling Decisions*

It is striking that almost half of the Cady Court's decisions that overrule precedent are issued by a divided court, a rate nearly double the average of its predecessors. The only court to come close to the Cady Court's proportion of divided overrulings (43 percent) is the Lavorato Court (38 percent), which was also the only court to outpace the Cady Court's criminal overrulings, as discussed in Part V.B.2 above. Our hypothesis that the Cady Court is fragmented is supported by the data, and in the context of the available literature, this high rate of divided overrulings may undermine the perceived legitimacy of the Iowa Supreme Court, as well as the longevity of the court's decisions.

The impact of divided overrulings on the court's legitimacy is the kind of intangible measure that is difficult to assess and often discussed.[168] The

168. The impact of overruling decisions, divided or otherwise, is "hard to adduce," and some critics question the validity of the few surveys that attempt to measure the

conventional wisdom is that unanimous decisions boost legitimacy while divided decisions undermine it.[169] Consider the oft-cited example of Chief Justice Earl Warren working tirelessly to negotiate the votes for a unanimous opinion in *Brown v. Board of Education*. The unspoken assumption was that a unanimous decision would be more legitimate and that obtaining a unanimous decision was worth a herculean effort in drafting an opinion that could satisfy all nine members of the court.[170] This conventional wisdom finds support everywhere from academics, to judges, to newspaper columnists.[171] But the best experimental exploration of the public's perception of this question—relying on survey data—found "no evidence that majority size affects individuals' level of agreement with Court decisions" and "no evidence that those who already agree with the ultimate outcome of the decision can be moved by the number of justices casting

legitimacy of the federal Supreme Court vis-à-vis overrulings. *See* Rehnquist, *supra* note 163, at 354–55. Professors James Gibson and Michael Nelson have observed that "empirical support" proving divided decisions undermine legitimacy "is limited." James L. Gibson & Michael J. Nelson, *Change in Institutional Support for the U.S. Supreme Court: Is the Court's Legitimacy Imperiled by the Decisions It Makes?*, 80 PUB. OPINION Q. 622, 626 (2016).

169. Michael F. Salamone, *Judicial Consensus and Public Opinion: Conditional Response to Supreme Court*, 67 POL. RES. Q. 320, 320 (2013).

170. *Id.* at 320–21.

171. *Id.* at 321–22 (collecting sources); Shawn C. Fettig & Sara C. Benesh, *Be Careful with My Court: Legitimacy, Public Opinion, and the Chief Justices*, *in* THE CHIEF JUSTICE: APPOINTMENT AND INFLUENCE 374, 374–94 (David J. Danelski & Artemis Ward eds., 2016) (discussing various chief justices' views on unanimity and legitimacy); Thomas R. Hensley & Scott P. Johnson, *Unanimity on the Rehnquist Court*, 31 AKRON L. REV. 387, 403–04 (1998) (reviewing the literature, noting that "division might weaken the authority and legitimacy of the Court's ruling"); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1 *passim* (1979) (discussing the importance of unanimity in the so-called Segregation Cases); Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769 *passim* (2015) (collecting sources, discussing the transformation from unanimity to disagreement on the United States Supreme Court, and discussing the relationship between unanimity and legitimacy); Adam Liptak, *On Supreme Court, Does 9–0 Add Up to More than 5–4?*, N.Y. TIMES (Apr. 11, 2014), https://www.nytimes.com/2014/08/12/us/politics/when-justices-disagree-public-may-not-care.html (collecting sources). *But see* Laurence H. Tribe, *How Much Should We Read into the 9-0 Supreme Court Decisions Coming Down*?, SLATE (June 26, 2014), https://slate.com/news-and-politics/2014/06/how-much-should-we-read-into-the-9-0-supreme-court-decisions-coming-down.html (discussing "the peril of counting votes rather than reading opinions," suggesting that unanimity may be overvalued when legal reasoning divides sharply).

dissenting votes."[172] However, the study did find some evidence that, if the issue under consideration is limited to an issue of low salience (contract disputes rather than same-sex marriage), "unanimity and near unanimity are associated with higher acceptance rates of [court] decisions."[173] Put differently, whether the court is divided seems to sway public opinion little on controversial decisions, but unanimity and near-unanimity do bolster support for noncontroversial decisions. Though this survey data is hard to directly analogize to our study here, it provides some support for the notion that the public may see the Cady Court's high proportion of divided overrulings as less legitimate than if they were unanimous.[174]

This matters because, for a court, legitimacy is the coin of the realm, and there is no distinction between legitimacy and perceived legitimacy.[175] Courts lack "the power of the purse or sword."[176] Damage to the perceived legitimacy of a court, then, is damage to its power. Given that the act of overruling, even by a unanimous court, can be perceived as "judicial activism,"[177] it is plausible that each overruling carries some indefinable risk of damaging legitimacy in an unquantifiable way.

There is also research about the relationship between the vote in a case and its weight as precedent going forward. At the federal level, former Chief Justice William Rehnquist has suggested decisions "decided by the narrowest of margins" may be of less precedential weight.[178] Chief Justice

172. Salamone, *supra* note 169, at 331–32.

173. *Id.* at 332.

174. Unsurprisingly, there is no polling that specifically addresses Iowans' views of divided overrulings by the Iowa Supreme Court. However, the Iowa Poll released as we edited the final draft of this Article indicates a relatively high level of support for the Iowa Supreme Court among Iowans: 59 percent approve, 14 percent disapprove, and 27 percent are not sure. *See* Stephen Gruber-Miller, *Iowa Poll: Majority of Iowans Say the Current System for Picking Judges Is Just Fine*, DES MOINES REG. (Feb. 20, 2019), https://www.desmoinesregister.com/story/news/politics/iowa-poll/2019/02/20/iowa-poll-supreme-court-selection-nomination-abortion-legislature-republican-governor-lawyers/2904644002/. If information about divided overrulings is baked into the views captured by this poll, it may be that Iowans approve of the supreme court in spite (or even because) of its rate of divided overrulings. On the other hand, if Iowans do not know or understand the frequency of the court's divided overrulings, the polling number does little to inform our inquiry here. We suspect the latter to be somewhat more likely.

175. *See* LINDQUIST & CROSS, *supra* note 152, at 124.

176. *Id.*

177. Lindquist, *supra* note 24, at 68–69.

178. *See* Payne v. Tennessee, 501 U.S. 808, 809–10 (1991). The Iowa Supreme Court has also pointed out the narrow vote in previous cases when overruling or revisiting prior

John Roberts has expressly stated the converse, noting that "[u]nanimous, or nearly unanimous decisions are hard to overturn," unlike "closely divided" decisions.[179] One empirical study offers partial corroboration for Rehnquist's and Roberts's claims, finding cases with "unanimous decision coalitions" (rather than "minimum winning coalitions") were at "smaller risk of being rejected by future Courts."[180] Another study, this one focused on state supreme courts, found "opinions resulting from closely-divided Courts are indeed more vulnerable to subsequent attack," though "unanimity is not a guarantee that precedent is sacrosanct."[181] In other words, nonunanimous decisions likely have a shorter shelf life than unanimous decisions.[182] This may suggest that the Cady Court's overruling decisions—nearly half of which were by a divided vote—will not last.

On the other hand, critics of the claim that a divided vote weakens precedent note that many of the United States Supreme Court's notable decisions were 5–4, including but not limited to *Miranda v. Arizona*, and many of these decisions have stood the test of time.[183] Also, there is some debate regarding whether the data supports Rehnquist's suggestion that a divided vote preordains a shorter lifespan for the decision.[184] Whatever the data for public opinion, however, we have no doubt practitioners will seize on the closely divided nature of the Cady Court's overrulings when parties challenge those decisions in the future.

decisions. *See, e.g.*, Allison v. State, 914 N.W.2d 866, 871 (Iowa 2018) ("In *Dible,* a narrow majority of this court held . . . ."); Ackelson v. Manley Toy Direct, L.L.C., 832 N.W.2d 678, 689 (Iowa 2013) ("Yet, *Smith* was a very narrow majority decision and preceded *McElroy* by just fifteen years."); McElroy v. State, 703 N.W.2d 385, 393 (Iowa 2005) ("In *Smith,* a sharply divided court held there was no right to a jury trial under the ICRA. The case at bar apparently presents the first opportunity to reexamine *Smith.* ").

179. Jeffrey Rosen, *Roberts's Rules*, ATLANTIC, Jan./Feb. 2007, at 104, 105.

180. James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1104–05 (2001).

181. Christopher P. Banks, *Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, 32 AKRON L. REV. 233, 241 (1999).

182. *See id.*

183. Amy L. Padden, Note, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After* Payne v. Tennessee, 82 GEO. L.J. 1689, 1710 (1994) (citing Miranda v. Arizona, 384 U.S. 436, 444 (1966)).

184. One student note found, at least surrounding the Rehnquist era, "As an empirical matter, 5–4 decisions do not constitute a significant percentage of the Court's precedents that have been overruled." *Id.* at 1711–12.

Though a detailed breakdown of the Cady Court's 2011–2018 voting blocs would take us beyond the scope of this Article, we can offer some explanation for the court's fractured decision-making. In 2010, Chief Justice Marsha Ternus and Justices Michael Streit and David Baker were ousted by voters in a contentious retention election, due at least in part to the justices' decision to legalize same-sex marriage.[185] After the election, Governor Terry Branstad appointed Justices Edward Mansfield, Thomas Waterman, and Bruce Zager to the bench. The three remaining pre-2011 associate justices voted rather consistently as a bloc, as did the three Branstad appointees, with the chief justice sometimes floating between the two camps.[186] This voting configuration was comparatively stable from its inception until the retirement of Justice Zager in the fall of 2018.[187]

185. Tyler J. Buller, Note, *Framing the Debate: Understanding Iowa's 2010 Judicial-Retention Election Through a Content Analysis of Letters to the Editor*, 97 IOWA L. REV. 1745, 1750–54 (2012).

186. *See, e.g.*, Rox Laird, *The 2017–18 Term Marked the End of an Era for the Iowa Supreme Court*, ON BRIEF (Sept. 19, 2018, 2:45 PM), https://www.iowaappeals.com/the-2017-18-term-marked-the-end-of-an-era-for-the-iowa-supreme-court/ ("Looking at the cases decided by a non-unanimous vote, the seven-member Court followed its consistent pattern of splitting into two camps: Appel, Wiggins and Hecht typically were in one camp; Mansfield, Waterman and Zager were in another camp; and Chief Justice Cady typically cast the deciding vote."); Rox Laird, *Statistical Review of the Iowa Supreme Court's 2016–17 Term: Hints at What to Expect This Term*, ON BRIEF (Sept. 11, 2017, 2:47 PM), https://www.iowaappeals.com/statistical-review-of-the-iowa-supreme-courts-2016-17-term-hints-at-what-to-expect-this-term/ (describing the chief justice as providing the swing vote for all 4–3 rulings during the 2016–2017 term, with two clear camps: Appel, Wiggins, and Hecht on the left; Mansfield, Waterman, and Zager on the right).

Earlier in the Cady Court's history, Justice Zager was a swing vote, but that had changed by the end of his time on the court in 2018. *See* Ryan Koopmans, *Voting Alignment on the Iowa Supreme Court*, ON BRIEF (July 16, 2012), https://www.iowaappeals.com/voting-alignment-on-the-iowa-supreme-court/ ("Two voting blocs have emerged on the Court: Chief Justice Cady and Justices Waterman and Mansfield on one end, and Justices Wiggins, Appel, and Hecht on the other. These justices agreed with the others in their group most of the time, and they agreed every time the Court split 4-3 (which has happened ten times).").

187. See *supra* note 186 and accompanying text for a discussion of the durability of the voting blocs. The fall of 2018 is identified above because Justice Susan Christensen joined the court following the retirement of Justice Zager. *See* Stephen Gruber-Miller, *Gov. Kim Reynolds Names District Court Judge to Iowa Supreme Court*, DES MOINES REG. (Aug. 1, 2018), https://www.desmoinesregister.com/story/news/2018/08/01/iowa-supreme-court-justice-susan-christensen-kim-reynolds-appointment-fourth-judicial-district/882466002/. When this Article was submitted, no data was available regarding whether Justice Christensen had appreciably altered the voting blocs of the Iowa Supreme Court.

While the foregoing discussion highlights the intrastate comparison of how the Cady Court deviates from its predecessors, looking outside the confines of Iowa precedent may tell a different story. Unfortunately, no good data exists for the overall rate of divided overrulings by other state supreme courts; however, some data does exist for divided overrulings by the United States Supreme Court. One study, reviewing United States Supreme Court decisions from 1946 to 2009, found that 76.3 percent of overrulings were divided.[188] Brenner and Spaeth's study similarly found that 71.3 percent of overrulings were divided.[189] The Cady Court's proportion of divided overrulings is about half these amounts, potentially suggesting that what passes for highly divisive in Iowa would not be viewed the same elsewhere. On the other hand, any comparison to the United States Supreme Court is tempered by data showing that unanimous opinions are—generally speaking—more common in state supreme courts than their federal counterparts.[190] In light of these competing considerations, it is unclear whether comparing Iowa data to federal numbers suggests judicial activism or restraint.

Finally, we considered (and ultimately rejected) an alternative explanation for the Cady Court's high proportion of divided overrulings, which was that the Iowa Supreme Court had moved from a low rate of dissent to a high rate of dissent somewhere over the course of 150 years. There is no comprehensive measure for the rate of dissent on the Iowa Supreme Court, but we would expect a fairly linear increase in the number of divided decisions over time if that were true. That is not what the

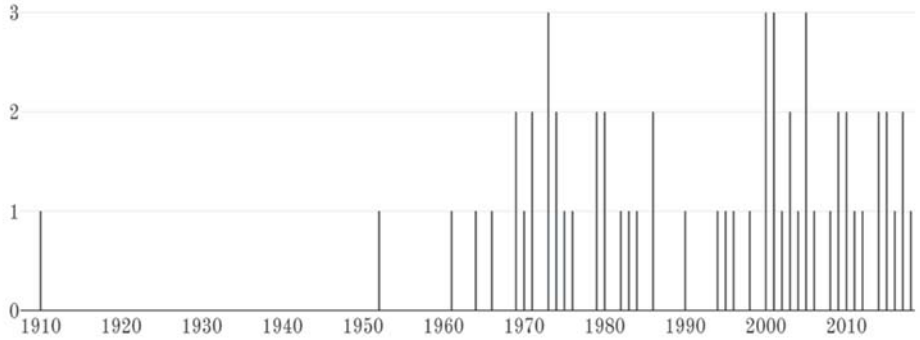
188. Lee Epstein, William M. Landes & Richard A. Posner, *Are Even Unanimous Decisions in the United States Supreme Court Ideological?*, 106 NW. U. L. REV. 699, 703 (2012). This study uses terms somewhat differently than our Article, but cases that "formally alter[] precedent" are generally analogous to our definition of "overruling cases," while "non-unanimous" is analogous to our definition of "divided." *Id.* at 700.

189. BRENNER & SPAETH, *supra* note 29, at 46.

190. Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 786–87 (1981). Candidly, we note that a study similar to Friedman's might yield different numbers in the modern era, given the slow upward trajectory of the dissent rate. *See id.* at 787.

data shows. Instead, there were no divided overrulings before 1910, and the rate did not increase appreciably until the 1970s.

DIVIDED IOWA SUPREME COURT OVERRULINGS PER YEAR



Based on this historical data, there is little reason to think the high rate of divided overrulings by the Cady Court is part of any natural progression. Instead, given the available data and that we have ruled out at least some alternative explanations, this intrastate comparison suggests that the Cady Court's unusually high proportion of divided overruling opinions may undermine either the court's perceived legitimacy today or the staying power of its decisions tomorrow.

C. *Limits and Suggestions for Further Research*

Knowing we have made a number of claims regarding stare decisis at the Iowa Supreme Court, it is worth discussing the limitations of our data and, relatedly, the limitations of our conclusions. Throughout this Article, we have tried to highlight the weaknesses or limits on our study. In the interests of transparency, we thought it worthwhile to highlight and revisit the most salient ones here.

First, our data set is imperfect. We think it is undoubtedly underinclusive, missing numerous examples of the Iowa Supreme Court overruling cases *sub silentio*, making the conscious choice to not use overruling terminology, or otherwise dealing with "unloved" precedent in tacit ways.[191] This means our data does not tell the whole story, though we

191. *See* RICHARD A. POSNER, HOW JUDGES THINK 277 (2008) (discussing "unloved precedents"). We are also cognizant of the fact that, at least in the decisions of Iowa's intermediate appellate court, there are cases that have been functionally but not formally overruled. *See* Tyler J. Buller, State v. Smith *Perpetuates Rape Myths and Should Be*

doubt the missing cases disproportionately skew the data in any particular direction.

Second, we intentionally limited our study to provide descriptive statistics concerning the court's precedent. We have given some consideration to different regressions that might be run using certain coding items we tracked, and we ultimately decided that kind of analysis falls outside the scope of this Article, which is already more bloated with charts and graphs than we intended. Going beyond descriptive statistics would have likely involved coding more subjective items than we were comfortable with (like reviewing briefs to track whether parties asked the court to depart from precedent or tracking whether the dissents of overruled cases provided the basis for an overruling case). Our goal has always been to provide reasonably objective information useful to a combination of the public, practitioners, and academics—and adding more statistical freight to this Article would undermine that purpose.

Third, our comparisons to other state supreme courts required comparing data collected with different methodologies, sometimes from different eras. We have underscored significant differences throughout the text and footnotes above, but it is worth repeating that these interstate comparisons may not be mathematically valid due to inconsistent methodologies. Nonetheless, we do think they offer some important context for understanding our findings.

All this being said, we think the results and discussion we offer in this Article are reasonably sound. There are many further avenues to explore, and we hope law students, professors, practitioners, or judges will respond to, develop, or even criticize our work to develop more study surrounding precedent at the Iowa Supreme Court. We intend to make our data set available to other researchers,[192] so others might consider coding additional items and developing a regression analysis to determine what makes the court more or less likely to overturn precedent. Possible considerations might be whether it matters if a party asks the court to depart from precedent in the briefing, whether individual justices are more likely to overrule cases,

Formally Disavowed, 102 IOWA L. REV. BULL. 185, 195 (2017) (describing an Iowa Court of Appeals opinion as "rape culture masquerading as legal analysis," noting that opinion has been cited more than 60 times but never followed). Our data set does not account for functional overrulings that are not covered by our search terms, as we did not think there was any way to objectively code functional overrulings.

192. The data set is available online at https://lawreviewdrake.files.wordpress.com/2019/05/stare-decises-original-study-data.xlsx.

and how screening decisions (whether a case is initially transferred to the court of appeals or retained by the Iowa Supreme Court) affect overrulings.

VI. CONCLUSION

The data collected here imparts at least some understanding of how the Iowa Supreme Court interacts with its own precedent and principles of stare decisis. The data shows that, throughout the court's history, precedent has been relatively stable and the court has shown less deference to legislative enactments than its state and federal counterparts. The Cady Court (2011–2018) shares some similarities with its predecessors, particularly in the rate and age of overrulings, but deviates significantly with its proportion of criminal, constitutional, and divided overrulings. For a practitioner, this Article offers some empirical evidence that can be used to evaluate whether it makes sense to take on precedent in litigation. And for scholars, we hope this Article marks the beginning, rather than the end, of empirically studying the Iowa Supreme Court.

APPENDIX A: TERMS OF CHIEF JUSTICES

Chief Justice	Duration of Term	Months
Cady[193]	January 2011 – present	101
Ternus[194]	September 2006 – December 2010	52
Lavorato[195]	November 2000 – September 2006	71
McGiverin[196]	October 1987 – November 2000	157
Reynoldson[197]	August 1978 – October 1987	110
Moore[198]	November 1969 – August 1978	105
Garfield[199]	January 1961 – November 1969	107

193. Rod Boshart, *Justice Cady Named Chief Justice of Iowa Supreme Court*, WATERLOO–CEDAR FALLS COURIER (Dec. 2, 2010), https://wcfcourier.com/news/local/govt-and-politics/justice-cady-named-chief-justice-of-iowa-supreme-court/article_f1e59f4e-fe4b-11df-a6f9-001cc4c03286.html.

194. *Iowa Supreme Court Elects Marsha Ternus New Chief Justice*, WATERLOO–CEDAR FALLS COURIER (Sept. 6, 2006), https://wcfcourier.com/news/breaking_news/iowa-supreme-court-elects-marsha-ternus-new-chief-justice/article_635d0fab-158e-5d0c-88a7-a2a5d6f7da3e.html.

195. We calculated Lavorato's term in office based on the end point of McGiverin's term and the starting point of Ternus's term.

196. McGiverin was elected as chief justice on October 1, 1987, and his term expired on November 10, 2000. 68 IOWA SECRETARY OF STATE, IOWA OFFICIAL REGISTER: 1999–2000, at 97 (1999).

197. Reynoldson was elected chief justice on August 3, 1978, and served as chief until his retirement on October 1, 1987. *W. Ward Reynoldson (1971–1987)*, IOWA JUDICIAL BRANCH, https://www.iowacourts.gov/for-the-public/iowa-courts-history/past-justices/w-ward-reynoldson/ (last visited Mar. 27, 2019).

198. Becker, *supra* note 87, at 731 ("Justice Moore was elected Chief Justice on November 13, 1969.").

199. Garfield was elected chief justice for a four-year term beginning January 10, 1961. 49 IOWA SECRETARY OF STATE, IOWA OFFICIAL REGISTER: 1961–1962, at 108 (1961). He served "until his retirement on November 11, 1969." Becker, *supra* note 87, at 731.

APPENDIX B: TABULAR SUMMARY OF DATA PRESENTED IN GRAPHS

Table 1: *Mean Overrulings by Eras*

Chief Justice	Mean Overruling Cases Per Year
Ternus	5.8
Reynoldson	5.1
Lavorato	4.9
Moore	3.8
McGiverin	3.7
Cady	2.9
Larson	2.4
Garfield	2.0
Rotating Chiefs	0.2

Table 2: *Mean & Median Age of Overruled Cases by Era*

Chief Justice	Mean Age of Overruled Case	Median Age of Overruled Case
Larson	47.6	27
Moore	44.2	25
Reynoldson	40.4	25
Garfield	34.2	28
Cady	29.7	20.5
Rotating Chiefs	28.3	21
Ternus	20.8	13
McGiverin	19.5	15.5
Lavorato	18.1	15.5

Table 3: *Proportion of Criminal Overrulings by Era*

Chief Justice	Proportion of Criminal Overruling Cases
Lavorato	66%
Cady	61%
Ternus	40%
McGiverin	33%
Rotating Chiefs	29%
Moore	27%
Reynoldson	26%
Larson	20%
Garfield	6%

Table 4: ***Proportion of Constitutional Overrulings by Era***

Chief Justice	Proportion of Constitutional Overruling Cases
Cady	30%
Lavorato	17%
Ternus	16%
Reynoldson	15%
McGiverin	14%
Moore	12%
Rotating Chiefs	6%
Garfield	6%
Larson	0%

Table 5: ***Proportion of Divided Overrulings by Era***

Chief Justice	Proportion of Divided Overrulings
Cady	43%
Lavorato	38%
Moore	30%
Garfield	28%
Ternus	20%
Reynoldson	19%
McGiverin	16%
Rotating Chiefs	12%
Larson	0%

Table 6: ***Mean & Median Age of Overruled Precedent by State***

Supreme Court	Mean Age of Overruled Precedent	Median Age of Overruled Precedent
Iowa	29.8	19
United States[200]	29.4	22.4
New Jersey[201]	20.5	19
Florida	16.1	11.5
Pennsylvania	21.0	10
Alabama	20.2	7

200. We calculated this statistic by determining the mean and median for all cases studied by BRENNER & SPAETH, *supra* note 29, at 112 app. I.

201. The New Jersey, Florida, Pennsylvania, and Alabama data all come from Lindquist & Pybas, *supra* note 65, at 32.

Table 7: *Mean Overrulings Per Year by State*

State	Mean Overrulings Per Year[202]
Montana[203]	10.1
Nebraska[204]	8
South Carolina[205]	5.1
Alabama[206]	5.1
California[207]	4.3
Nevada[208]	4.3
Iowa[209]	4.2
Michigan[210]	4.2
Ohio[211]	3.8
Indiana[212]	3.6
Wisconsin[213]	2.8
Pennsylvania[214]	2.6
Florida[215]	2.4
Illinois[216]	2.4
Vermont[217]	2.4
North Dakota[218]	1.6

202. All values are rounded to the nearest one-hundredth.

203. Renz, *supra* note 50, at 54 (noting 109 overrulings in ten years).

204. Lanstra, Jr., *supra* note 72, at 54 tbl.7 (noting 40 overrulings in five years).

205. Petillo, *supra* note 62, at 961–62 app. A (noting 36 overrulings in seven years).

206. This number is an average of seven from Collier & DeRosier, *supra* note 60, at 1774 (noting 63 overrulings in nine years) and 3.13 from Lindquist & Pybas, *supra* note 65, at 24.

207. Collier & DeRosier, *supra* note 60, at 1774 (noting 39 overrulings in nine years).

208. Renz, *supra* note 50, at 54 (noting 43 overrulings in 10 years).

209. This number is from the Article's empirical data.

210. This number is an average of 4.22 from Sedler, *supra* note 56, at 1911, and 4.2 from Lanstra, Jr., *supra* note 72, at 54 tbl.7.

211. Lanstra, Jr., *supra* note 72, at 54 tbl.7 (noting 19 rulings over five years).

212. *Id.*

213. *Id.*

214. Lindquist & Pybas, *supra* note 65, at 24.

215. *Id.*

216. Lanstra, Jr., *supra* note 72, at 54 tbl.7.

217. Renz, *supra* note 50, at 54 (noting 24 overrulings in 10 years).

218. An average of 1.9 from Renz, *supra* note 50, at 54, and 1.2 from Lanstra, Jr.,

Minnesota[219]	1.4
South Dakota[220]	1.1
New Jersey[221]	1.0
New York[222]	1.0
Wyoming[223]	0.9
Delaware[224]	0.7
Maine[225]	0.7
New Hampshire[226]	0.6
Massachusetts[227]	0.4
Rhode Island[228]	0.2

supra note 72, at 54 tbl.7.

219. Lanstra, Jr., *supra* note 72, at 54 tbl.7.

220. An average of 0.8 from Renz, *supra* note 50, at 54, and 1.4 from Lanstra, Jr., *supra* note 72, at 54 tbl.7.

221. Lindquist & Pybas, *supra* note 65, at 24.

222. Lanstra, Jr., *supra* note 72, at 54 tbl.7.

223. Renz, *supra* note 50, at 54.

224. *Id.*

225. *Id.*

226. *Id.*

227. Lanstra, Jr., *supra* note 72, at 54 tbl.7.

228. Renz, *supra* note 50, at 54.