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THE APPLICABILITY OF LEGAL AND ATTITUDINAL MODELS TO THE TREATMENT OF PRECEDENT IN THE COURTS OF APPEALS

By

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ABSTRACT

THE APPLICABILITY OF LEGAL AND ATTITUDINAL MODELS
TO THE TREATMENT OF PRECEDENT IN THE COURTS OF APPEALS

By

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A great deal of research has been conducted regarding whether a legal or attitudinal model applies to Supreme Court decision making, but it is much less clear which model, if either, pertains to the U.S. Courts of Appeals. To address this question, I analyze the influence of attitudinal and nonattitudinal factors on the behavior of circuit court judges. Specifically, I utilize *Shepard's United States Supreme Court Citations* to ascertain the treatment afforded Supreme Court precedents by the Courts of Appeals, and I assess the extent to which characteristics of Supreme Court decisions and the ideological composition of appellate panels determine this treatment. I find that judicial preferences motivate circuit court decision making in some types of cases; however, they do not account for behavior across a wide range of issue areas. Legal considerations must also be incorporated into a comprehensive explanation of the decisions of the Courts of Appeals.

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INTRODUCTION

In his seminal study of the U.S. Courts of Appeals, Howard (1981, 8) described these courts as the "vital center of the federal judicial system." The Courts of Appeals merit such a description because they are the courts of last resort in the vast majority of federal cases. Ideally, it is the Supreme Court that oversees the judiciary and ensures the uniform application of national law, but in reality the high court exercises very little direct supervision over the lower courts (Murphy 1959). Even though the number of requests for Supreme Court review has gone up dramatically over the past several years, the number of cases accepted by the Court has declined. According to one study (Songer 1991), less than one-half of 1 percent of the decisions of the Courts of Appeals are reviewed by the Supreme Court. Since the 1960s, the subject matter of cases litigated in the federal courts has changed, so that today most of these cases deal with public, rather than private, law issues. Thus the bulk of the responsibility for interpreting and applying federal law, and for resolving important political and social questions, falls to the circuit courts.

Recognition of the policy making role of the Courts of Appeals raises two concerns. First, because of a lack of accountability to a higher court, appeals court judges are free to exercise a great deal of discretion in decision making. These judges may adhere to Supreme Court decisions with which they agree and avoid decisions with which they disagree. Second, the consequence of this independence may be the creation of policy on a regional,

rather than a national, basis. Most work on the circuit courts' application of Supreme Court precedent indicates that there is a great deal of variation in the extent to which they follow precedent and that much of this variation is a function of the circuit in which decisions are made. These products of limited Supreme Court oversight -- judicial independence in policy making and regional policy making -- foster questions about the legitimacy of the Courts of Appeals' capacity to create law. Therefore, the extent to which these concerns represent empirical reality should be established.

Do appeals court judges behave independently, or are they constrained by the norms and values of the legal profession; and, does this independence threaten the uniformity of national law? These questions will be addressed here through the testing of two models of judicial decision making. A legal model of decision making holds that judges are bound by precedent set by higher courts, while an attitudinal model posits that judges act according to their own attitudes and policy goals. In this study, components of both explanations of judicial behavior are incorporated into models of the Courts of Appeals' treatment of Supreme Court precedent, in order to determine which explanation provides a better account of decision making on the Courts of Appeals.

CHAPTER 1

LOWER COURT TREATMENT OF PRECEDENT: A REVIEW

The judiciary in the United States is organized hierarchically, with the Supreme Court at the apex and several layers of federal and state courts below. Although the framework of the court system is undisputed, very different accounts are offered in the judicial politics literature of the implications such a structure has for the behavior of its components. These descriptions differ from one another with respect to the degree of control each allows the Supreme Court over lower courts and the resulting policy making power each attributes to lower courts.

One explanation of the relationship between the Supreme Court and lower courts is hierarchical theory, where lower courts within the system are responsible for enforcing the policy directives of higher courts, and a lower court's interpretation of a higher court's decision is subject to review by the higher court (Baum 1976). According to this view, Supreme Court policies are routinely and obediently complied with in the lower courts. Taking this approach, early legal scholars subscribed to what has been termed an "upper-court myth" (Frank 1963) and focused almost exclusively on Supreme Court decision making, as that was where authoritative policy making occurred.

More recent studies of the relationship among the courts in the judicial system have suggested that "the work on the lower courts seems less dependent on the Supreme

Court...than [hierarchical theory] would indicate" (Richardson and Vines 1970, 144). A second theory is advanced which compares the decision making freedom that subordinates in the judicial hierarchy have to that of civil servants in administrative agencies (Murphy 1959). This bureaucratic model[1] likens the inefficiency and recalcitrance which the President encounters in getting bureaucrats to execute his policies to the constraints imposed upon the Supreme Court by lower courts (Gruhl 1980). Accordingly, lower court judges are depicted as "independent actors who will not follow the lead of higher courts unless conditions are favorable for their doing so" (Baum 1976, 91).

Some scholars remain dissatisfied with the eminence ascribed to the Supreme Court by the bureaucratic model and have proposed a third theory of inter-court relationships (Vines 1963; Richardson and Vines 1970; Howard 1981). Interaction theory[2] presumes that relationships among the different levels of courts are more complicated than either a hierarchical or bureaucratic model would allow (Vines 1963). This approach recognizes that, while the Supreme Court formulates policy, it does not dominate decision making on the lower courts (Richardson and Vines 1970); and, because of the selective nature of Supreme Court review, the potential exists for important policies to be made throughout the court system.

In support of this emphasis on the high degree of discretion available to lower courts, proponents of an interaction model point to the lack of accountability of subordinate judges

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[1]Baum (1976) proposed a similar heuristic, which he termed an organizational model.

[2]This nomenclature originated with Vines (1963), and the work of other scholars has endorsed his approach.

to their superiors. Federal judges are appointed for life and are rarely subject to disciplinary measures or impeachment; likewise, state judges do not depend upon the appellate courts in their system to maintain their positions. Lower court judges thus have a good deal of freedom to make their own decisions and to respond to higher court decisions as they see fit.

Determinants of Lower Court Treatment of Precedent

In light of the discretion available to lower court judges, scholars have sought to identify the circumstances under which lower court judges will defer to higher courts and those under which they will behave independently. A number of factors have been hypothesized to influence the extent to which lower courts comply with the mandates of higher courts. One limitation on the adherence of lower courts to precedent is that there is no systematic method through which lower courts are informed of higher court decisions (Wasby 1970, 47; Baum 1976; Johnson and Canon 1984, 54-56). In addition, a higher court decision may be unclear or ambiguous, due to the complexity of the subject matter, the majority opinion writer's accommodation of the views of several judges, or the publication of a number of separate opinions (Wasby 1970, 44-46; Johnson and Canon 1984, 48-59). There is also evidence, both systematic and anecdotal, suggesting that judges do not wish to see their decisions reversed (Murphy 1959; Schick 1970, 145; Baum 1978). Thus the likelihood of reversal will be a consideration in the treatment of precedent. And, of course, judges have their own interests and policy goals which they may wish to see advanced. These, too, may influence the extent to which they follow a higher court decision (Baum 1978; Johnson and Canon 1984, 68-70).

As in any hierarchical organization, the authority that lower courts ascribe to higher courts provides an important reason to adopt the higher court policy, where "'authority' refers to a belief by subordinates that they have an obligation to implement directives handed down from above" (Baum 1978, 511). Judges frequently express their acceptance of the authority of the Supreme Court.[3] Such behavior may be attributed to a widespread norm within the legal community of deference to the decisions of higher courts. Judges are said to have assimilated this norm of deference to higher courts through their socialization in the legal profession (Howard 1981, 121-124; Johnson and Canon 1984, 35-37; Baum 1994). Judges themselves may benefit from the principle of hierarchical authority in the legal system, as it lends legitimacy to their decisions (Johnson and Canon 1984, 37-38).

Judges are thought to be further motivated to adhere to *stare decisis* by a reluctance to see their decisions reversed (Caminker 1994). Reversal of a judge's decision may be viewed as failure to interpret the law correctly and may negatively affect perceptions of the judge's effectiveness within the legal community (Baum 1978). As one scholar stated, "Judges, no more than other men, enjoy the prospect of public correction and reprimand" (Murphy 1959, 1030). Some studies have described lower court judges as attempting to anticipate the reaction of the Supreme Court to their decisions and adjusting their behavior accordingly in order to avoid reversal (Murphy 1959; Schick 1970, 148-150).

However, reversal has more symbolic than practical effects (Baum 1978). Reversal is not always a meaningful sanction for deviation from a higher court's ruling because review

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[3]As one example, note Judge Learned Hand's statement: "I have always felt that it was the duty of an inferior court to suppress its own opinions and...to try to prophesy what the appellate courts would do" (Quoted in Schick 1970, 167).

by the higher court is not automatic. This is especially true for Supreme Court review of lower court decisions. The Supreme Court exercises very little direct supervision over lower courts (Howard 1981, 57).[4] Even though the number of requests for Supreme Court review of lower court decisions has increased dramatically over the past several years, the number of cases accepted by the Court has declined.[5] The Court formally decides only about two percent of the cases in which petitions for review are filed (Carp and Stidham 1996, 132).

Individuals in any organization will be willing to adopt policies with which they agree, while strong disagreement with a particular policy provides incentive to resist it (Baum 1978). Most studies of lower court treatment of higher court decisions have recognized that, in spite of their positions as subordinates in the judicial hierarchy, lower court judges are inclined to evaluate higher court policy in terms of their personal policy preferences (*see, e.g.,* Songer, Segal, and Cameron 1994; Segal, Songer, and Cameron 1995). Judges who are already committed to their own policies will be reluctant to accept a dissimilar policy (Baum 1976). However, judges who are favorably predisposed toward the higher court policy will attempt to expand its application into other policy areas and into situations where its coverage seems ambiguous (Johnson and Canon 1984, 46-47).

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[4]Murphy (1959) suggested that the possibility of Supreme Court review is greater for federal courts than for state courts. The inferior position of federal district and appellate courts in the hierarchy of national authority is said to make them subject to more strict Supreme Court surveillance.

[5]According to data provided in Carp and Stidham (1996), the number of cases filed in the Supreme Court increased almost 43% from 1982 to 1992. The Court handed down full opinions in approximately 150 cases per term during the 1980s, but in the 1993 term it issued only 84 full opinions.

Even if lower court judges are socialized to follow precedent and to avoid reversal by a higher court, and even if they agree ideologically with a higher court ruling, they cannot follow decisions of which they are unaware. The communication of judicial decisions represents a potential problem in their implementation (Wasby 1970, 47; Baum 1976; Johnson and Canon 1984, 55). There are no formal efforts made within the system to inform other courts of a decision or to ensure that judges have copies of an opinion. Baum (1976) reported that judges on the U.S. Courts of Appeals seldom read Supreme Court decisions as they are issued. Many judges rely on the lawyers who argue cases before them or on their law clerks to keep them abreast of decisions from higher courts.

Congruence between the policies established by higher courts and the decisions of lower courts also depends to a great extent upon the effectiveness with which the policy is communicated.[6] Much of the discretion exercised by lower court judges may be a product of the higher court decision which they are interpreting (Romans 1974; Combs 1982; Johnson and Canon 1984, 49; Marshall 1989). One scholar has said of the Supreme Court: "[The Court] contributes to this practice when it hands down decisions that are plainly compromises of competing doctrines advanced by the justices constituting the majority or which are quite ambiguous" (Schick 1970, 147). Lower court judges may resolve ambiguity in favor of their own preferences (Peltason 1961, 13; Carp and Rowland 1983, ch. 2).

An unclear decision may result from a lack of consensus on the higher court regarding its opinion (Atkins 1972). While the judges may agree on whether a lower court

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[6]According to a former Supreme Court justice (Douglas 1949, 739), "it is vital to the integrity of the judicial process" that the Court's audience "understand why it did what it did."

decision should be affirmed or reversed, they may disagree over the legal and constitutional principles upon which the decision should rest and thus the precedent that should be established. When a court is divided in its reasoning, one of two things may occur. In an effort to craft an opinion to which all of the judges can agree, the language of the majority opinion may be weakened;[7] alternatively, several opinions may be written, so that each opinion expresses the views of an individual judge and no opinion has majority support. So while multiple opinions may cloud the expectations of the court issuing the decision, unanimous decisions may be vague and confusing to lower courts (Johnson and Canon 1984, 49-50). Clarity may also be lacking in decisions which deal with complex issues or technical subject matter (Wasby 1970, 250; Johnson and Canon 1984, 49; Johnson 1987).

According to one comprehensive analysis of the interpretation of judicial decisions (Johnson and Canon 1984, 56-57), "while the clarity and communication of the policy may affect the range of interpretations accorded to a decision, the direction of those interpretations (positive or negative) may be substantially influenced by the perceived legitimacy of the policy." The level of support a decision has on the higher court may serve as an indication to lower courts of the authority with which the decision was rendered (Rohde 1972; Marshall 1989). A divided Court or the publication of dissenting opinions

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[7]One legal commentator (Hutchinson 1979) has analyzed the role of unanimity in influencing lower court responses to *Brown v. Board of Education* (1954). He reasoned that the Court strove to present a united front in *Brown* in order to enhance the acceptability of the decision, to withstand criticisms of the Court's expansive civil liberties decisions, and to mask uncertainty on the Court as to the precise meaning of the decision. He concluded that "unanimity...operated in time to obscure rather than enhance the Court's decisions in the area [of desegregation]. Indeed, the Court's continuing desire to be united outweighed its responsibility to be persuasive..." (Hutchinson 1979, 87).

may raise questions about the legal correctness of the higher court's decision, as a sizeable faction of the Court favored a different outcome (Johnson and Canon 1984, 58). Lower court judges may be reluctant to comply with policies that lack majority support since such policies could be altered with a change in Court membership (Marshall 1989; Pacelle and Baum 1992).

Judicial scholars have sought to operationalize some of the factors which determine the effectiveness with which a higher court policy is communicated to the lower courts. A variety of measures have been used in past studies to capture the ambiguity and/or complexity of a particular Supreme Court decision and the authority of that decision in terms of Court support. Examples of widely used measures in compliance studies include vote margin, size of the opinion majority, number of concurring and dissenting opinions written, and number of issues raised and legal provisions cited.[8]

Approaches to Studying the Treatment of Precedent

Prior to the behavioral revolution, studies of compliance with Supreme Court decisions were virtually nonexistent; almost no attention was given to what happened after Court decisions were rendered. Canon (1991) attributed the surge of interest in the impact of judicial decisions which occurred during the 1950s to two factors: the behavioralists' admonition that analysis of actual behavior should be used to explain events, and the lower courts' overt resistance to the Court's decision in *Brown v. Board of Education* (1954). Canon (1991) termed the period from 1960-75 the golden age of impact research due to the

[8]For examples of studies which have incorporated these measures, see Johnson (1979), Johnson (1987), and Pacelle and Baum (1992).

large number of impact studies which were conducted during this time. However, while Wasby's (1970) overview of judicial impact research culled over 100 hypotheses from the literature, few of the studies that he examined were related to general theories of impact.

One of the first theories of the implementation and impact of Supreme Court decisions was developed by Johnson and Canon (1984). The authors stressed that judicial decisions are not self-implementing, and that courts must frequently rely on other courts or on nonjudicial actors in the political system to turn law into action. They developed a heuristic model of four impact populations which were made up of the actors who respond to judicial decisions. Lower courts, charged with determining the meaning of policy and developing rules for matters not addressed in the original decision, were the interpreting population. This population provided "official" interpretations of Court policies, which were applicable to the other populations under their jurisdiction (Johnson and Canon 1984, 16).

Judges may employ several strategies to avoid faithful application of higher court decisions.[9] An obvious approach is simply to ignore the decision. Another tactic is to dispose of the case on technical or procedural grounds. A judge may find that one of the parties does not have standing to bring the case or that the issue is moot. In addition, a judge may assert that portions of the higher court's opinion are *dicta* rather than binding precedent. Finally, to avoid adherence to precedent, a judge may give the precedent a narrow application. The judge may argue that the facts of the case before him are distinguishable

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[9]Johnson and Canon (1984) viewed a judge's acceptance of higher court policy as lying on a continuum from "refusal to accept" to "enthusiastic acceptance," with many reactions falling in a "zone of indifference." Although evidence of noncompliance abounds in early studies, outright defiance of higher court decisions is rare. At the other end of the continuum, a judge who agrees with the decision of a higher court may attempt to expand upon its intended scope.

from the facts of the higher court case, so that the precedent established in that case is not controlling.

Songer observed that there are numerous differences in the way Supreme Court impact on the decisions of lower courts has been conceptualized, and he described four such approaches (Songer 1988a). A *defiance* approach examines whether a lower court formally accepted or openly repudiated the authority of the Court. No systematic defiance studies exist; only anecdotal evidence has been presented.[10] The most frequently adopted approach is a *noncompliance* one, which determines whether lower courts adhere to Supreme Court precedent in their decisions.[11] Such an approach requires traditional legal analysis and is therefore somewhat subjective. A *legal impact* approach takes a broader perspective, recognizing that lower courts may fail to support the basic policy of the Supreme Court without being overtly noncompliant.[12] This approach requires scholars to read lower court opinions to determine whether broad or narrow construction is given to Supreme Court precedent. Finally, an *outcomes* approach focuses on general decisional trends in lower court decision making in order to determine whether these courts are responding to changes in Supreme Court doctrine.[13]

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[10]Many studies of lower court defiance have focused on the school desegregation decisions. *See, e.g.,* Peltason (1961).

[11]Studies which have taken a noncompliance approach include Manwaring (1968), Tarr (1977), and Gruhl (1980).

[12]The work of Canon (1973) and Romans (1974) examines the application of legal rules in lower court decision making.

[13]Baum (1977) has stressed the importance of focusing on patterns of actual outcomes. Studies that consider outcomes in the Courts of Appeals include Songer (1987) and Songer and Sheehan (1990).

Songer (1988a) utilized each of these approaches in assessing state court compliance with *Miranda v. Arizona* (1966), and he found significant differences in the depictions of Supreme Court impact provided by the different approaches. He encouraged scholars to employ all of these approaches simultaneously to achieve an accurate assessment of Supreme Court impact.

Empirical Evidence of Lower Court Treatment of Precedent

Few comprehensive impact studies have been conducted since Johnson and Canon's work, while the undertaking of more narrow analyses is evidenced by the steady production of journal articles (Canon 1991). These projects have focused on lower court compliance in specific issue areas or with particular decisions, and a number of them have reported high levels of congruence between Supreme Court policy and lower court decisions.

Gruhl (1980) examined libel cases in the Courts of Appeals following *New York Times v. Sullivan* (1964) to determine these courts' application of the actual malice test developed by the High Court in that decision. He found that these courts consistently complied with the new precedent and, in some instances, even anticipated the direction of Supreme Court policy. Songer and Sheehan (1990) replicated Gruhl's (1980) study of compliance with *New York Times* and compared their findings to those from a similar analysis of the *Miranda* decision. For both cases, they discovered high levels of compliance. However, when an alternative approach to impact was employed, as advocated by Songer (1988a), their conclusions were modified. While they found significant changes in circuit

court outcomes in response to Supreme Court libel policy, there was no such evidence of shifting trends in response to decisions involving the admissibility of confessions.

Songer (1987) also utilized an outcomes approach in studying appeals court decision making in labor and antitrust cases. As with libel policy, he reported meaningful shifts in decisional trends in the Courts of Appeals following alterations of Supreme Court policy, even after controls were introduced for circuit court composition. Likewise, in analyzing district court responses to *Brown v. Board of Education*, Sanders (1995, 744) found that this decision was "clearly and significantly taken into account" in subsequent decisions in all areas of the country.

In contrast to these examples of lower court compliance, several researchers have recounted evidence of large-scale noncompliance with Supreme Court decisions. These studies have typically examined school desegregation or other controversial civil liberties decisions of the Warren Court (Segal, Songer, and Cameron 1995). In one of the first in-depth studies of the policy making role of lower federal courts, Peltason (1961) explored the application of the *Brown* decision. He highlighted the limited acceptance of desegregation by district and circuit court judges as they encountered the political and social forces that impinged upon this issue. Other studies have documented widespread opposition in the lower courts to the Warren Court's criminal procedure jurisprudence (*see, e.g.,* Manwaring 1968; Canon and Kolson 1971; Romans 1974). In analyzing state supreme court compliance with the U.S. Supreme Court's establishment clause decisions, Tarr (1977) also presented evidence of refusal to follow Supreme Court precedent.

Some of these studies have emphasized the importance of authoritative, unambiguous Supreme Court precedent in ensuring lower court compliance. Romans (1974) explored the interaction of the personal preferences of judges with the clarity of Supreme Court decisions. He found that, when presented with a vague precedent, most state courts followed their own ideological values; when dealing with an unequivocal precedent, they followed the precedent but refused to extend its application beyond the boundaries established by the Court. In examining northern school desegregation cases, Combs (1980) suggested that the Courts of Appeals had taken advantage of the discretion allowed them by the Court's decisions in this area. He reported that various circuits had enacted different legal standards to determine constitutional violations. As these tests varied in terms of rigor, the choice of which test to apply had important ramifications for the litigants.

One work (Songer, Segal, and Cameron 1994) took an entirely different approach than the studies discussed here, explicitly testing the nature of the interaction between the Supreme Court and the Courts of Appeals. Borrowing from economic agency theory, the authors loosely modeled the interaction between higher and lower courts as a principal-agent relationship. They looked for evidence of such behaviors as congruence, responsiveness, and shirking, and they applied fact-pattern models developed for the Supreme Court's search and seizure decisions to such decisions in the Courts of Appeals in order to test their hypotheses. The authors reported a high level of responsiveness in the Courts of Appeals to Supreme Court search and seizure policy. At the same time, the ideologies of the judges motivated them to find opportunities to "shirk" their responsibilities and pursue their own policy goals.

A number of scholars have lamented the dearth of comprehensive models of lower court responses to Supreme Court decisions (Baum 1978; Songer 1987; Reid 1988; Songer, Segal, and Cameron 1994). The study presented here is an effort to remedy this shortcoming with respect to the Courts of Appeals. Before discussing the different approaches that I take in addressing this question, however, I provide an overview of decision making in these courts.

Decision Making on the Courts of Appeals

The Courts of Appeals were created by the Evarts Act of 1891 as the intermediate courts of the federal judicial system, located between the federal district courts and the Supreme Court. In the federal system, the district courts have original jurisdiction in most cases, the Courts of Appeals have initial appellate review,[14] and the Supreme Court has final, discretionary review. The Courts of Appeals were created to alleviate the ever-increasing workload of the Supreme Court and to permit the High Court to concentrate on politically significant or controversial cases. The Judiciary Act of 1925 provided the Supreme Court with even greater control over its docket, so that the Courts of Appeals became the final arbiter in a substantial proportion of federal cases. According to data presented in the *Supreme Court Compendium* (Epstein *et. al.* 1996), the Court granted review to 20% of the petitions for review in the period immediately following the passage of the 1925 Act; this number fell to 11% in the 1960s and to 4% in 1995.

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[14]The Courts of Appeals also have original jurisdiction to review the decisions of certain administrative agencies.

There are currently twelve regional Courts of Appeals, referred to colloquially as circuit courts. Most appeals court cases are decided by three-judge panels rather than all of the judges in the circuit. Each circuit determines its own panel assignment procedures, but the process of selection is random.[15] The composition of appellate panels changes frequently so that the same judges do not sit together permanently. To deal with a heavy caseload, the chief judge of the circuit may assign other federal judges to decision making panels. These judges may include retired Supreme Court justices, senior (semi-retired) circuit judges, judges from other circuits, and senior and active district judges. Because of the manner in which appellate panels are formed, the decision of a given panel will not necessarily reflect the views of a majority of the judges in the circuit.

Occasionally, a case may be heard *en banc*, where all of the circuit's active judges participate in the decision.[16] *En banc* proceedings may be granted for both administrative and political reasons (Atkins 1972). The Uniform Rules for Appellate Procedure stipulate that an *en banc* hearing is "not favored" and should be granted only when consideration by the full court is necessary to maintain decisional uniformity and when the case involves a question of "exceptional importance." Some scholars have suggested that *en banc* proceedings send a signal of unity to the Supreme Court and minimize the likelihood of Supreme Court review (Atkins 1972; Richardson and Vines 1970, 125).

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[15]In the past, panel assignments were made by the chief judge of the circuit, a procedure which, as will be discussed in subsequent chapters, was the subject of some criticism.

[16]A senior circuit judge who was a member of the original panel, if one was convened, will also participate in the *en banc* decision.

The Courts of Appeals hear cases which involve both routine and highly controversial questions. Most decision making consists of review of lower court outcomes under highly deferential standards of review (George 1997), which is evidenced by the fact that these courts reverse only about 20% of the cases they decide (Davis and Songer 1988-9). In addition to resolving these ordinary matters, however, the circuit courts also hear a number of cases which deal with major issues of public policy and which evoke strong disagreement. They have an opportunity to sort out and develop the legal issues in such cases, and to shape those claims which they consider to be worthy of Supreme Court review (Carp and Stidham 1996, 41). In analyzing decision making in the Courts of Appeals, then, it is crucial to determine the extent to which judges have opportunities to behave independently. As Songer (1991, 41) reminded students of judicial behavior, "Judges cannot be said to be significant policy makers unless they have substantial discretion to choose among a range of options when deciding their cases."

Howard (1981) has conducted the most systematic examination to date of the motivations of circuit court judges. He interviewed thirty-five judges from three circuits and questioned them as to their views of the permissible range of lawmaking discretion (Howard 1981, 164). While almost all of the judges (32 of 35) reported that "clear and relevant" precedent was "very important" in reaching their decisions, most also agreed that lawmaking was inherent in the judicial role. Forty-eight percent considered their personal views on justice to be "very important," and another 40% said such values were "moderately important."

While Howard (1981) estimated that appeals court judges were able to act according to their personal preferences in only 10% of their cases, Songer (1982) reported that these

judges were free to pursue their policy goals in one-fifth to one-third of their cases. He analyzed unanimous decisions in the Courts of Appeals to determine what proportion of these decisions were truly consensual in that their outcomes were determined by precedent or other constraints. He concluded that consensual decisions in unanimous cases were far less prevalent than most studies have assumed, and that the outcomes of a substantial proportion of unanimous decisions were influenced by the ideological perspectives of the judges. Songer (1982) suggested that circuit court judges feel free to avoid the application of precedent in a much larger subset of their decisions than they are willing to admit.

It appears that judges on the Courts of Appeals are able to consider their own attitudes and values in at least a substantial minority of their decisions. A systematic examination of the situations in which these judges perceive that they have such latitude, and the implications that this independence has for judicial policy, is thus warranted.

CHAPTER 2

RESEARCH DESIGN AND METHODOLOGY

Two models of judicial behavior are offered by students of the courts. One model takes a legal perspective, asserting that judges make decisions based upon legal factors such as the intent of the Constitution's framers and precedent. A second model provides that judges act in accordance with their personal values and policy preferences. There has been a great deal of research regarding whether a legal or attitudinal model applies to the Supreme Court, but it is much less clear which model, if either, pertains to the U.S. Courts of Appeals. There have also been numerous studies conducted which seek to explain lower court compliance with Supreme Court precedent. These studies are limited, however, in that they consider only one, or a few, landmark decisions and they fail to provide systematic tests of the explanations that are offered. I address these weaknesses here by specifying multivariate models of the Courts of Appeals treatment of precedent across a broad spectrum of issues. I also assess the degree of inter- and intra- circuit conflict in the application of Supreme Court precedent.

I utilize *Shepard's United States Supreme Court Citations* to measure the adherence of the Courts of Appeals to Supreme Court precedent. I code a Court of Appeals case which *Shepard's* indicates "followed" or "harmonized" a Supreme Court decision as *followed*, while I code a case which "distinguished" or "limited" a Supreme Court decision as *not*

followed. As for decisions which are classified as "questioned" or "criticized," I examine the actual opinion to determine the treatment the lower court provided the precedent.

I expect that both legal and attitudinal factors will influence the circuit courts' treatment of Supreme Court decisions. I include as legal variables measures of the clarity of the precedent set by a Supreme Court decision and the support on the Court for its decision. I also identify those cases that are highly significant in terms of their policy implications, as the probability of Supreme Court review should be greater in such cases. My attitudinal measures are the percentage of the appellate panel that is in line ideologically with the direction of the Supreme Court decision and the ideological change in the composition of the Supreme Court since a decision was handed down. In addition, since some types of cases are more likely than others to generate intense political beliefs among judges, I assess differences among issue areas in the factors which influence the adherence of circuit court judges to precedent. I also examine whether Supreme Court precedents grow more persuasive with the passage of time or whether the authority of these decisions is eroded by subsequent Court rulings.

I take three different approaches to answering the question regarding the determinants of appeals court behavior. First, I examine four major Supreme Court decisions (Chapter 3). I study these cases in order to derive measures which capture accurately the strength and clarity of the precedent established by a particular Supreme Court decision, and thus the amount of discretion that lower court judges perceive they have. Once I have developed these measures, I analyze the Courts of Appeals' treatment of these four decisions in light of these factors. Second, in order to gain insight into decision making on the Courts of Appeals in a wide range of contemporary issues, and to test the utility of my measures, I

analyze the treatment of all Supreme Court decisions of a particular term (Chapter 4). I include a variable for the salience of the Supreme Court case in order to assess whether lower court judges behave differently in cases which have important political or social consequences. Third, I analyze the circuit courts' application of civil rights and liberties decisions of the Supreme Court from a ten-year period (Chapter 5). This approach enables me to assess variation in the adherence to a particular precedent over time, and to examine differences in the treatment of precedent among, and within, the circuits.

Shepard's United States Supreme Court Citations

This study takes what Songer (1988a) would term a noncompliance approach, in that it is an examination of whether "lower courts consistently exhibit a fidelity to precedent in their decisions" (Songer 1988a, 426). Songer asserted that a determination of whether a given decision is in compliance requires traditional legal analysis, but an alternative to traditional legal analysis is the use of *Shepard's Citations*. *Shepard's* is a legal research tool which provides a listing of published opinions in which a particular decision is cited and categorizes the substantive treatment of each decision. It is utilized by members of the legal community on a daily basis to ascertain the status of existing precedents. Though designed for use in the legal profession, *Shepard's* has also been widely employed by judicial behavior scholars, primarily to identify cases for analysis (*see, e.g.,* Romans 1974; Gruhl 1980; Combs 1982; Johnson 1987; Songer and Sheehan 1990; Pacelle and Baum 1992). Some researchers have looked to *Shepard's* for purposes similar to the research objective here, i.e., to measure the deference afforded Supreme Court precedent by the Courts of Appeals (*see, e.g.,* Johnson 1979).

Songer (1988b) cautioned researchers in the use of *Shepard's* for this purpose, as well as for the selection of cases for judicial impact studies. *Shepard's* covers only published opinions[1] and, according to Songer (1988b), will list only those cases for which full citations or case names are provided in the opinions. Songer (1988b) illustrated this assertion, suggesting that a lower court opinion referring to "the *Miranda* decision" or the rule of law announced in *Miranda* would not be included in the *Shepard's* compilation for *Miranda v. Arizona*, as an explicit citation is not given. However, in my reading of a number of Courts of Appeals decisions in conducting this study, I found no such abbreviated references to decisions which were not cited fully elsewhere in the text of the opinion.

Songer's (1988b) *caveat* regarding the use of *Shepard's* which has the most serious implications for this analysis is that lower court decisions which ignore precedent, whether intentionally or unintentionally, will not be included. He recognized that noncompliance is not limited to situations in which a court announces that it is not bound by a Supreme Court decision, but that it may also occur when a lower court "ignores a ruling of the High Court which should be a controlling precedent" (Songer 1988b, 570). We evaluated this concern in coding the treatment of decisions from the 1987 Term (Hurwitz and Reddick 1996) by examining those appeals court dissenting opinions in which a Supreme Court decision was

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[1] *Shepard's* inclusion of only published opinions is problematic. The rules regulating publication stipulate that unpublished opinions should be characterized by the "straightforward application of clear, binding precedent" (Songer 1991, 43); however, some research suggests that descriptions of appeals court decision making which are based solely upon an analysis of published opinions represent an inaccurate picture of the behavior of these courts (Davis and Songer 1988-9). Thus any conclusions which may be drawn from this study should be limited appropriately.

cited.[2] Our goal was to ascertain whether judges in the minority were calling to task their colleagues in the majority for ignoring or avoiding an applicable precedent. We found that such behavior occurred only rarely,[3] and that inclusion in the analysis of those cases where it did occur had only a slight impact on the results. Appendix A provides a comparison of these results. I concluded on the basis of this examination of decisions from the 1987 Term that coding circuit court dissenting opinions which cited Supreme Court decisions was unwarranted for future analyses.

A second reason that Songer's (1988b) concerns may be unjustified regarding *Shepard's* inability to account for the avoidance of precedent resides in our system of legal advocacy and the nature of legal argument. One legal commentator provides the following description of the composition of judicial opinions:

> [A] well-crafted opinion usually contains numerous citations to past cases that build and interlock with one another toward justifying an overall conclusion. Two lawyers representing opposite sides of a dispute may thus cite two different lines of precedents. A judge then evaluates the two proposed lines of [precedents] to arrive at a final decision (Heiner 1986, 228).

This quotation indicates that it is a judge's responsibility to listen to both sides of an issue and consider all relevant case law, and to justify his ultimate decision by indicating why

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[2]Johnson (1979, 795) dealt with this concern by making the "major assumption that intentional and unintentional omissions are randomly distributed across all Supreme Court decisions." While such a judgment may be appropriate for unintentional omissions (i.e., clerical errors), we were not comfortable with presupposing the randomness of intentional omissions. We conducted this examination of citations in dissenting opinions to ensure the validity of our measurement.

[3]The decisions of the 1987 Term were cited in over 300 dissenting opinions. Of these 300+ citations, only 19 fit the criteria for inclusion in our analysis.

particular precedents are controlling and why others are inapposite.[4] If a Supreme Court precedent is truly relevant to the case at bar, attorneys on one side or the other will rely on that precedent in making their argument, and an appeals court judge will be obliged to address the applicability of that precedent in his opinion. Thus it is unlikely that a judge who is attentive to his reputation in the legal community will wholly ignore a precedent that is on point.[5]

As I have stated, I code a Court of Appeals case which *Shepard's* indicates "followed" or "harmonized" a Supreme Court decision as *followed.* In the context of this study, a *Shepard's* classification of "followed" signifies that an appeals court referred to the Supreme Court decision as controlling, and a classification of "harmonized" denotes that an apparent inconsistency between an appeals court case and a Supreme Court case is explained and shown not to exist. I code a case which "distinguished" or "limited" a Supreme Court decision as *not followed.* An appeals court which distinguishes a Supreme Court ruling finds the case before it to be different in law or fact from the Supreme Court decision, and a

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[4]As Sanders (1995, 733) points out, "cases to which clear precedents apply will be unlikely to move on to the appellate level."

[5]Johnson and Canon (1984, 35) describe a judge's consideration of his perception among his colleagues:

> [J]udges become concerned about their evaluation as professionals -- about the respect of lawyers and other judges with whom they interact. Moreover, when the decisions are published, the judge knows that his or her interpretation of relevant precedents will be subject to scrutiny from distant fellow judges as well as from lawyers and commentators in legal journals around the nation.

limiting circuit court decision refuses to extend the holding of the Supreme Court ruling beyond the precise issues involved.

Decisions which are classified as "questioned" indicate that the soundness of the reasoning in the Supreme Court decision is questioned, while those which are categorized as "criticized" denote that the Supreme Court decision disagrees with the appellate court's reasoning. I examine the Court of Appeals opinion to code the treatment of Supreme Court decisions which are "criticized" or "questioned." I do this to determine the actual treatment of the precedent, as a decision may question or criticize a precedent but still follow that precedent.[6]

This utilization of *Shepard's* categorizations is justified in the compliance literature. Judges who support a precedent on the basis of their personal ideology may apply that precedent to circumstances where its relevance is questionable, or they may apply it to an entirely different policy area (Johnson and Canon 1984). At the other end of the compliance spectrum, a common technique employed by lower court judges to avoid the application of a decision with which they disagree is distinguishing that precedent, emphasizing factual differences between the decision of the higher court and the case at bar (Douglas 1949; Baum 1978; Johnson and Canon 1984; Songer and Sheehan 1990; Caminker 1994). Another oft-used method of avoidance is to give a higher court decision a narrow, situational interpretation (Murphy 1959; Johnson and Canon 1984).

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[6]Wasby (1970, 29) notes that "compliance may exist even when disrespect for the law or the Court being expressed."

COURTS OF APPEALS' TREATMENT OF FOUR SUPREME COURT DECISIONS: AN EXPLORATION

Here I utilize *Shepard's Citations* to analyze the Courts of Appeals' treatment of four major Supreme Court decisions: *U.S. v. Wade, Griggs v. Duke Power Co., Lemon v. Kurtzman,* and *Terry v. Ohio*. The rationale for studying these highly visible cases is twofold. First, lower court judges should be aware of existing precedent in these cases; and, second, mistreatment of precedent in these cases should come to the attention of the Supreme Court. Thus circuit court judges should be particularly conscious of the amount of discretion they have in applying these decisions.

I explore two cases where the *ratio decedendi* is definitive and unambiguous (*U.S. v. Wade* and *Griggs v. Duke Power Co.*) and two cases where the Court's application of law to facts is less straightforward (*Terry v. Ohio* and *Lemon v. Kurtzman*). I examine each decision to determine the aspects that contribute to the effectiveness of its communication, and I assess the extent to which each decision is followed in the Courts of Appeals. A secondary goal in analyzing these cases is to derive measures which capture accurately the strength and clarity of the precedent established by a particular Supreme Court decision. Descriptive analyses such as this are useful in developing hypotheses to be tested in subsequent, more comprehensive studies.

I study these particular cases for several reasons. These cases are included in Congressional Quarterly's listing of important decisions for each term of the Supreme Court, which is found in CQ's *Guide to the United States Supreme Court*. With the exception of *U.S. v. Wade*, these cases are also identified in the *Supreme Court Compendium* (Epstein *et. al.* 1996), compiled by noted scholars of the Court, as landmark decisions in their respective

policy areas.[7] Cases having important policy implications provide interesting subjects for compliance research. As Baum (1978, 215) noted, the policies that "elicit widespread non-adoption are likely to be significant ones, as minor policies generally lack the capacity to motivate strong opposition." An alternative viewpoint is that cases with widespread ramifications will receive more favorable treatment in the lower courts, as divergent decisions in such cases are more likely to be reviewed.

Focusing on these salient cases also allows controlling for other elements which may influence the amount of discretion lower court judges exercise, and isolating the factors which I am interested in exploring here -- the effects of the strength and clarity of Supreme Court precedent on lower court decisions. The selection of highly visible cases is likely to overcome the problem of the Courts of Appeals being unaware of the Supreme Court's decision. These are also cases in which Supreme Court justices are likely to be concerned about the interpretations of their policies; thus reversal should be a more significant consideration in a lower court judge's decision making calculus. Finally, if lower court judges are motivated by their own policy preferences, these are the types of cases in which they should have policy goals which they wish to advance.

COURTS OF APPEALS' TREATMENT OF THE DECISIONS OF THE 1987 TERM: A MULTIVARIATE ANALYSIS

In testing the utility of legal and attitudinal models of the Courts of Appeals' treatment of Supreme Court precedent, I begin by examining the decisions of the Supreme

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[7]The authors recognized that any list of the Court's landmark decisions is a subjective venture. They emphasized in their listing topics and cases of current interest.

Court's 1987 term. Such an approach permits the development of a general explanation of the circuit courts' allegiance, or lack thereof, to the High Court in the wide range of cases which come before them. The model that is specified incorporates aspects of both the legal and attitudinal accounts of judicial behavior, in order to ascertain which is more instructive in understanding decision making on the Courts of Appeals. Specifically, variables are included in the model which capture the strength and clarity of the Supreme Court's decision, the policy significance of that decision, the ideological composition of the appellate panel which is asked to apply the decision, and the change in the composition of the Supreme Court since its decision was handed down.

To test hypotheses regarding the legal and attitudinal motivations for circuit court judges' behavior, I utilize a dichotomous dependent variable that identifies whether the Courts of Appeals followed or did not follow legal precedent established by the Supreme Court in its decisions of the 1987 Term.[8] Using *Shepard's United States Supreme Court Citations*, I ascertain the treatment accorded these decisions by the circuit courts in cases in which the decisions have been applied, so that the unit of analysis is the circuit court decision. The dependent variable is regressed on a number of legal and attitudinal variables.

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[8]The 1987 Term was selected for analysis for reasons that do not reflect on the substance of the decisions. First, there is a sufficient time period following this term in which to trace the Courts of Appeals' treatment of the decisions. Second, there is variation in the composition of the circuit courts during this period, as the courts were staffed by both Carter-Clinton and Reagan-Bush appointees. Finally, the Supreme Court during this term was ideologically balanced, as it was composed of Associate Justices Marshall, Brennan, White, Blackmun, Stevens, O'Connor, and Scalia and Chief Justice Rehnquist; Justice Kennedy joined the Court in early 1988. Although proponents of a legal model would argue that the composition of a court has no bearing on the decisions that are reached, it would be imprudent to "stack the deck" in favor of an attitudinal explanation.

Because the dependent variable is dichotomous, a logistic regression model is estimated (Aldrich and Nelson 1984; King 1989).

I include in the analysis only those cases which were orally argued before the Court (DEC_TYPEs 1, 6, and 7 in the Spaeth Supreme Court Judicial Database). Memorandum decisions, decrees, and cases decided by an equally divided vote are excluded, so that I trace the treatment of 127 Supreme Court decisions from the 1987 Term. The resulting data set includes 1467 instances in which an appeals court decision treats a Supreme Court decision.[9]

As stated, I predict that both legal and attitudinal factors will influence the circuit courts' treatment of Supreme Court decisions. The following is a description of the operationalization of these factors. All variables regarding characteristics of Supreme Court decisions were created from data contained in the Spaeth Supreme Court Judicial Database. With the assistance of my co-author in a previous version of this analysis (Hurwitz and Reddick 1996), I collected all data relating to Courts of Appeals decisions.

Legal Factors

Vote Margin. The greater the vote margin in the Supreme Court decision, the higher the level of agreement among the justices as to the disposition of the case. I hypothesize that precedent established in cases where the vote margin is large should appear more authoritative to lower courts, while divisiveness on the Court may indicate a weak precedent (Wasby 1970).

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[9]Similar treatment of the same Supreme Court decision within the same appeals court decision is counted only once.

The influence of the degree of Supreme Court consensus on the circuit courts' behavior is likely to be greatest at the extremes. I create two variables from the vote margin: *Unanimous*, where all of the justices agreed with the disposition of the case (e.g., a 9-0 decision); and *One-Vote Margin*, where only one vote separated the majority and minority voting blocs (e.g., a 5-4 decision). The circuit courts should be less likely to follow a Supreme Court decision in which a bare majority of the justices agreed on the outcome, while they should be more likely to follow a decision supported by all of the justices.

Concurring Opinions. The more concurring opinions the justices write, the more ambiguous the decision will appear to lower court judges. I expect that unclear decisions will not be followed consistently in the lower courts. Johnson (1979) relied upon the number of dissenting opinions while he disregarded concurring opinions. However, as it is concurring, rather than dissenting, opinions which should weaken the majority opinion, I examine the number of concurrences in this study, and I count both regular and special concurrences. While the Spaeth Database differentiates between regular and special concurrences according to whether the justices indicate that they are "concurring" or "concurring in the judgment," I suggest that this is a distinction of semantics rather than substance.[10]

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[10]I cite the following examples in support of this assertion:

In the landmark case *Terry v. Ohio*, 392 U.S. 1 (1968), Justice Harlan concurred in the opinion of the Court. He began his concurring opinion by stating, "While I agree with the Court's ultimate holding in this case, I am constrained to fill in a few gaps, as I see them, in its opinion." *Id.* at 31. Justice Black also wrote a concurring opinion, though only one sentence in length, where he "concurred in the judgment and the opinion except where the opinion quotes from and relies upon [the] Court's opinion in *Katz v. United States* and the concurring opinion in *Warden v. Hayden*." *Id.* at 31. In the Spaeth

Complexity. A clear precedent will be difficult to achieve in cases that interpret many legal provisions and that involve multiple issues. I expect that appeals court judges will be less likely to follow decisions that deal with complex subject matter. As an indicator of complexity, I count the number of legal provisions relied upon and the number of additional issues raised in each Supreme Court case (Johnson 1987). I then calculate the mean number of legal provisions and additional issues per case. Any case where the number of legal provisions and additional issues is 1.65 standard deviations above the mean is coded as a complex case.[11]

Legal Provisions. Constitutional provisions by nature are somewhat ambiguous and open to many different interpretations. Accordingly, I expect that Supreme Court decisions which apply constitutional provisions will be vague as well and that, as a result, such

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Database, Justice Black's concurrence is coded as "special," while Justice Harlan's concurrence is coded as "regular."

In another oft-cited case, *U.S. v. Wade*, 388 U.S. 218 (1967), Chief Justice Warren and Justice Douglas joined the opinion of Justice Fortas, in which Justice Fortas concurred in part and dissented in part. The opinion expressed disagreement with Part I of the Court's opinion, which held that compelling a criminal defendant to utter certain words at a lineup did not violate his privilege against self-incrimination. In the Spaeth Database, this concurrence is classified as "regular."

These examples serve to illustrate my point. The "regular" concurrences that I have highlighted here raise just those issues that might foster ambiguity or confusion in the decision making calculus of lower courts. They might also serve as bases for avoiding application of these decisions. For these reasons, making a distinction in this study between regular and special concurrences is not warranted.

[11] 1.65 is the critical value for a one-tailed test of statistical significance at $\alpha=0.05$. The mean number of legal provisions and additional issues per case was 1.28, with a standard deviation of 0.81. Thus any case which dealt with three or more legal provisions and additional issues was coded as complex. Nine of the 127 Supreme Court cases in this study were coded as complex cases.

decisions will receive disparate treatment in the lower courts. I include a dummy variable for whether the Court relied on a constitutional provision in reaching it decision.

Salience. In cases that have important policy implications, avoidance of precedent on the part of lower courts is more likely to come to the attention of the Supreme Court. If lower court judges are reluctant to be reversed on appeal, they should be more likely to follow precedent in highly salient cases. Since salience is defined here in terms of policy implications, an appropriate measure of salience may be derived from the number of amicus briefs that are filed in the case by parties who have a stake in the outcome.[12] I count the number of amicus briefs that were filed in each case. Any case where the number of amicus briefs filed is 1.65 standard deviations above the mean is coded as a salient case.[13]

Attitudinal Factors

Ideological Consistency. I expect that when the personal policy preferences of the members of an appellate panel are in accord with a Supreme Court decision, the panel is more likely to follow that decision. Ideological consistency is measured as the percentage

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[12]Maltzman and Wahlbeck (1996) developed this measure of case importance. I originally considered as an indicator of salience the measure recommended by Cook (1993) and Brenner and Spaeth (1995). These authors utilized Congressional Quarterly's listing of important decisions for each term of the Court, which is found in CQ's *Guide to the United States Supreme Court*. Of the 127 Supreme Court cases traced in this data set, only four were dubbed important by CQ. These cases were treated less than 20 times by the Courts of Appeals. As there are almost 1,500 Courts of Appeals cases in the data set, the number of salient cases was too minuscule to capture any statistical effects. In addition, the indicator used here better measures the importance of a decision in terms of political and social policy implications.

[13]The mean number of amicus briefs filed per case was 3.55, with a standard deviation of 3.78. Thus any case in which ten or more amicus briefs were filed was coded as salient. Twelve of the 127 Supreme Court cases in this study were coded as salient cases.

of the appellate panel that is in line attitudinally with the direction of the Supreme Court decision. In order to obtain an independent measure of the ideology of circuit court judges, I utilize the party of the appointing president, which has been shown to be a reliable measure of judicial ideology (Tate 1981; Carp and Rowland 1983; Tate and Handberg 1991).

To illustrate, where two of three judges on a circuit court panel were appointed by President Carter, while the third was appointed by President Bush, and the Supreme Court issued a liberal decision, ideological consistency of the panel for that particular decision is 67%. Conversely, if that same panel treated a conservative Supreme Court decision, then ideological consistency is 33%. By coding the makeup of every Court of Appeals panel in this manner, I am able to incorporate *en banc* decisions. Such a measure also captures more information than would a dummy variable for majority consistency or inconsistency.

Issue Areas. In their comprehensive analysis of Supreme Court decision making, Segal and Spaeth (1993) find that justices' attitudes, as measured by past voting behavior, are powerful predictors of subsequent voting behavior in civil rights and liberties and criminal procedure cases. They found, additionally, that attitudes are less successful in predicting the justices' votes in economic, judicial power, and federalism cases.

Thus, I expect that the influence of ideology will be moderated by the types of issues involved in the cases. According to the issue areas identified in the Supreme Court Judicial Database, I group the cases into three broad categories: *Civil Rights and Liberties*,[14]

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[14]This category includes civil rights, First Amendment, due process, and privacy cases.

Criminal Procedure, and *Economic Activity*.[15] I include three multiplicative terms in the model, where each issue category is interacted with *Ideological Consistency*, in order to assess the impact of ideology in each of these areas.

Change in Supreme Court Composition. Appeals court judges may also be influenced in their decision making by the ideological composition of the Supreme Court. If lower court judges do, in fact, consider the likelihood of reversal, they should be attentive to changes that have occurred in the makeup of the Supreme Court since a particular precedent was established. My argument is that lower court judges will feel less constrained to follow a given decision when the ideology of the Court has moved away from that decision.

I use the Segal and Cover (1989) scores as measures of the ideological values of Supreme Court justices. In order to derive attitudinal measures from sources independent of votes, Segal and Cover analyzed the content of newspaper editorials that were published between the nomination and confirmation of each justice. These scores have been updated and backdated to include the nominees of Franklin Roosevelt through Clinton (Segal *et. al.* 1995).

To determine the ideological makeup of a given Supreme Court, I calculate the mean of the ideology scores of the justices on that Court. I subtract the mean of the Court that issued a decision from the mean of the Court at the time the appeals court treats the decision, to obtain a measure of the change in the ideological composition of the Court. I then

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[15]Thirty-three of the Supreme Court cases I examine do not fall into any of these categories.

combine this measure with the direction of the Supreme Court decision so that the findings may be interpreted consistently. To illustrate, if the composition of the Supreme Court has become more conservative and the Courts of Appeals are applying a conservative decision, the direction of this measure is positive. If the Court has become more liberal and the Courts of Appeals are applying a conservative decision, the direction of this measure is negative. The reverse is true when an appeals court is applying a liberal decision.

The estimation of a logistic regression model which includes these legal and attitudinal variables will shed light on the extent to which each variable influences the behavior of circuit court judges in the treatment of precedent.

COURTS OF APPEALS' TREATMENT OF CIVIL RIGHTS AND LIBERTIES DECISIONS FROM 1966-1975: A MULTIVARIATE ANALYSIS AND A COMPARISON OF TREATMENT AMONG AND WITHIN CIRCUITS

The analysis performed in this chapter is similar to that of Chapter 4, in that I examine the role of legal and attitudinal factors in influencing circuit court treatment of precedent. However, rather than focusing on the decisions of a single term, a model is specified which explains the treatment of the Supreme Court's civil rights and liberties decisions from 1966-75.[16] Civil rights cases are among the most controversial cases that courts hear and are decisions that may potentially impact a substantial number of citizens. Thus it is important to study the interpretations afforded these decisions by the actors responsible for giving them effect.

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[16]This time period was selected for two reasons. First, it encompasses decisions of both the Warren and Burger Courts; and second, it allows an adequate span following the decisions to assess variance in the adherence to a particular precedent over time.

Research on the Supreme Court suggests that different considerations guide judicial decisions in cases involving civil rights and liberties issues. For example, Segal and Spaeth (1993, 225-6) found that measures of the justices' ideological attitudes and values were highly successful predictors of their votes in civil rights and liberties and criminal procedure cases, while personal preferences were not as explanatory in economic, judicial power, and federalism cases. A comparison of the civil rights findings with those of the 1987 Term will indicate whether attitudinal motivations dominate appeals court decision making in civil rights and liberties cases to the exclusion of legal considerations.

I confine this analysis to the Court's formally decided, full opinion cases (DEC_TYPEs 1 and 7 in the Supreme Court Database), and I include civil rights, First Amendment, due process, and privacy cases (VALUEs 2, 3, 4, and 5) in the category of civil rights and liberties. I also restrict this study to cases which were appealed from the circuit courts. Thus I trace the treatment of 163 civil rights and liberties decisions of the Supreme Court. The resulting data set includes 5664 instances in which an appeals court decision treats a Supreme Court decision.

The variables that are included in the civil rights model are operationalized in the same manner as in the model of the 1987 Term, with a few exceptions. As the issues raised and the legal provisions relied upon in these cases are substantially similar, a measure of *Complexity* which incorporates these factors is inappropriate. In addition, an alternative measure of *Salience* is more suitable for this analysis. In civil rights and liberties cases, a large number of amicus briefs are likely to be filed, as these cases may have widespread policy implications; thus the filing of amicus briefs does not provide an adequate basis for differentiating these cases. Instead, Congressional Quarterly's listing of the important

decisions of each term, provided in CQ's *Guide to the U.S. Supreme Court*, is utilized (Cook 1993; Brenner and Spaeth 1995).[17]

Two variables relating to the strength of Supreme Court precedent are measured more precisely in the civil rights model. Rather than simply indicating whether there were dissents to a particular decision, as in the model of the 1987 Term, the *Unanimous* variable utilized here captures those cases in which no dissenting votes were cast and no concurring opinions were written. Precedents for which both outcome and reasoning had the approbation of all of the justices are thus coded as unanimous. The *One-Vote Margin* variable in the model of the 1987 Term is intended to distinguish those cases decided by the narrowest possible margin. According to the rules of Supreme Court procedure, cases in which a lower court decision is reversed by a vote of five to three are also decided by a minimum winning coalition. The *Minimum Winning Coalition* variable in the civil rights and liberties model measures 5-4 and 4-3 decisions, as well as 5-3 reversals.

Additional legal factors are incorporated into the civil rights model, including whether the Supreme Court decision emanated from the Burger Court, whether the precedent has been modified by subsequent decisions, the amount of time that has passed since the precedent was announced, and whether the appeals court decision was rendered *en banc*.

Burger Court. A dummy variable for a Burger Court decision is employed as an additional indicator of the clarity of a particular precedent. Carp and Rowland (1983, 11) characterize Burger Court precedents as ideologically imprecise and inconsistent in contrast to the "Warren Court's narrow, but more consistent, liberalism." Another scholar states that

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[17]According to CQ's determination, 14 of the 163 cases in this analysis are coded as salient.

"one of the most significant characteristics of the Burger Court is ambiguity in the legal rules it [applies]" (Walker 1978, 360). As I trace decisions of both the Warren and Burger Courts in this analysis, lower court treatment of these Courts' decisions may be compared. The objective is to assess whether there is empirical support for the hypothesis that Burger Court precedents are more confusing than those of the Warren Court and thus are followed less frequently in the circuit courts.

Doctrinal Modification. A number of studies have suggested that a consistent series of Supreme Court decisions may be more pivotal for compliance than the clarity of a single decision (Gruhl 1980; Johnson and Canon 1984, 51; Johnson 1987). The analysis of the four decisions in Chapter 3 illustrates how a precedent may be modified or obscured by ensuing Court decisions. A dummy variable is included in the model to indicate those Courts of Appeals' decisions that took place after a significant change in Supreme Court doctrine, to assess how these courts are responding to such modifications and to control for alterations in precedent.

The Court's treatment of *Rosenbloom v. Metromedia*,[18] one of the cases traced here, illustrates the importance of such a variable. In this libel decision, the Court ruled that private persons who had become involved in public issues would have to show actual malice to recover compensatory damages. However, in its subsequent decision in *Gertz v. Welch*,[19] the Court implicitly overruled *Rosenbloom*, holding that such persons would not have to show actual malice to recover damages. It is critical to distinguish those appeals court cases

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[18]403 U.S. 29 (1971).

[19]418 U.S. 323 (1974).

which treated *Rosenbloom* after *Gertz*, as the lower courts should no longer be following the *Rosenbloom* precedent.[20]

Age of Precedent. In order to determine whether a new or old precedent is more persuasive, I include a measure of the length of time between the Supreme Court and circuit court decisions. A precedent may grow stronger with the passage of time as it is applied and clarified in subsequent decisions and even extended to other areas (Johnson 1987); or, the authority of a Supreme Court decision may erode over time due to shifts in Court personnel and doctrine (Marshall 1989; Pacelle and Baum 1992). Time is measured as the number of years between High Court and lower court decisions.

En Banc. I include a dummy variable for those appeals court decisions that are rendered by all of the judges in a circuit, in order to test competing hypotheses regarding decision making in these cases.[21] An explanation of *en banc* decisions has been advanced which parallels that of salient Supreme Court decisions; i.e., *en banc* cases involve

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[20]In addition to *Rosenbloom*, other Supreme Court decisions which were modified significantly by later decisions include *Pierson v. Ray*, 386 U.S. 547 (1967); *Lau v. Nichols*, 414 U.S. 563 (1974); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); and *Wood v. Strickland*, 420 U.S. 308 (1975). *Pierson* and *Wood* outlined subjective and objective components to be established in qualified immunity analysis, but the Supreme Court eliminated the subjective component in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The *Lau* Court said that, while an equal protection violation under the fourteenth amendment requires proof of discriminatory intent, all that is required to establish a Title VI violation is proof of disparate impact. However, in *Board of Regents v. Bakke*, 438 U.S. 265 (1978), the Court held that Title VI prohibits only uses of racial criteria that would violate the fourteenth amendment. In deciding *LaFleur*, the Court employed "irrebuttable presumption" analysis, but its subsequent decision in *Weinberger v. Salfi*, 422 U.S. 749 (1975), severely limited the use of this doctrine as a generally acceptable mode of analysis in cases involving constitutional challenges to statutes or regulations.

[21]223 of the 5664 appeals court cases in this analysis were decided *en banc*.

significant and controversial issues, and the Supreme Court will be attentive to the resolution of these cases (George 1997). If lower courts perceive that review is likely, they may feel more constrained by precedent in reaching their decisions. Alternatively, the Supreme Court may be less likely to review decisions reached by the circuit as a whole, as such a procedure allows a fuller consideration of the case (Atkins 1972; Richardson and Vines 1970). Circuit court judges may discern that they have more freedom in decision making in such cases.

The civil rights and liberties data is also used to assess the extent of inter- and intra-circuit conflict in the treatment of these decisions. A number of studies have noted variation among the business and behavior of these courts in general (Baum, Goldman, and Sarat 1981; Howard 1981; Carp and Rowland 1983; Davis and Songer 1988-9; Wenner and Dutter 1989) and the differential application of Supreme Court decisions in particular (Vines 1963; Combs 1982). Panel assignment procedures foster inconsistent decision making within circuits as well as among them. A number of scholars have recognized the potential for panel decisions to represent the preferences of a minority of circuit judges (Richardson and Vines 1970; Atkins 1972; Goldman 1975; Howard 1981; Songer 1982).

In order to determine the degree of variation among the circuits in the treatment of precedent, I use difference-of-proportions tests to compare the rate of following precedent in the Courts of Appeals as a whole to the following rate in individual circuits. I also run twelve iterations of the civil rights model, including a dummy variable for a different circuit each time, in order to determine whether the treatment of Supreme Court decisions in a particular circuit differs significantly from such treatment in the other circuits. In order to evaluate diversity in the adherence to precedent within circuits, I compare the decisions of liberal-dominated panels with those of conservative-dominated panels. These tests will

provide evidence of the extent of inter- and intra-circuit inconsistency in the treatment of precedent.

CHAPTER 3

COURTS OF APPEALS' TREATMENT OF FOUR SUPREME COURT DECISIONS: AN EXPLORATION

The legal model of judicial decision making suggests that there is a widespread norm within the legal community of deference to the decisions of higher courts. There is also evidence, both anecdotal and systematic, suggesting that judges do not wish to see their decisions reversed. It is in highly salient cases where lower court judges should be most aware of existing precedent, and where avoidance of precedent is most likely to come to the attention of the higher court. In a preliminary examination of the relationship between the Supreme Court and the Courts of Appeals, and the legal and attitudinal forces which may define this relationship, I study the Courts of Appeals' treatment of four Supreme Court decisions. I focus specifically here on the clarity of Supreme Court precedent and the support on the Court for that precedent, and I explore the influence these elements have on the Courts of Appeals' application of these four decisions.

I look first at two decisions where the Court's rulings are unambiguous and where its reasoning is well-explicated in the opinions of the Court. In *U.S. v. Wade*, the Supreme Court held that a criminal defendant's sixth amendment right to counsel applies to all critical stages of the prosecution, including a post-indictment lineup. In *Griggs v. Duke Power Co.*, the Court held that, under Title VII of the Civil Rights Act of 1964, any employment practice which excludes blacks and is not related to job performance is prohibited.

I also examine two cases that are equivocal in terms of the justifications for the Court's decisions and the guidelines for the decisions' application in the lower courts. In *Lemon v. Kurtzman*, the Court held that, in order to avoid a violation of the establishment clause of the first amendment, a statute must have a secular legislative purpose, its primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive entanglement with religion. In *Terry v. Ohio*, the Court held that certain situations present exceptions to the warrant requirement of the fourth amendment; in such situations the appropriate analysis is a balancing of the justification for the search or seizure against the invasion it entails.

In the following sections, I discuss each of these four cases, paying particular attention to the reasoning employed by the Supreme Court in reaching its decisions. I trace the interpretation of these decisions in subsequent Court cases to determine whether these precedents have been modified, obscured, or even abandoned. I also provide a discussion of the perspectives of legal scholars who have analyzed these decisions and their application in the lower courts. Finally, I examine the treatment these decisions have been afforded in the Courts of Appeals and consider characteristics of the Supreme Court's decisions which may have determined this treatment.

U.S. v. WADE, 388 U.S. 218 (1967)

On April 2, 1965, Billy Joe Wade and an accomplice were arrested and charged with robbery. Several weeks after his arrest, and without notice to his appointed counsel, Wade was exhibited in a lineup to witnesses of the robbery and was compelled to repeat the words allegedly spoken by the robber. The witnesses identified Wade as the robber. They

confirmed their identification on direct examination at trial. Wade's counsel argued that the conduct of the lineup violated Wade's fifth amendment privilege against self-incrimination and his sixth amendment right to the assistance of counsel, but Wade was convicted by the district court. The circuit court, holding that the lineup was a violation of Wade's sixth amendment rights, reversed the conviction and ordered a new trial at which the in-court identification was to be excluded. The Supreme Court granted *certiorari*. The Court reversed the judgment of the circuit court and remanded the case to the district court.

Writing for the Court, Justice Brennan first addressed the fifth amendment issue. He found the controlling case to be *Schmerber v. California*, 384 U.S. 757 (1966), where the Court held that the privilege against self-incrimination protects the accused only from being compelled to provide evidence of a testimonial or communicative nature. Wade was compelled merely to exhibit his person for observation by witnesses prior to trial, which involved no compulsion to give evidence having testimonial significance (388 U.S. 218 at 222). Neither was the statement which Wade was compelled to utter testimonial in nature, as his voice was being used solely as an identifying physical characteristic (*Id.* at 222). The Court concluded that the lineup did not violate Wade's fifth amendment privilege against self-incrimination.

Regarding Wade's right to counsel at the post-indictment lineup, the Court recognized that the criminal court process requires confrontations of the accused by the prosecution at pretrial proceedings which could determine the accused's fate, and that prior decisions had construed the sixth amendment guarantee to apply to "critical" stages of the proceedings (*Id.* at 224). The language of the sixth amendment encompassed counsel's assistance whenever necessary to assure a meaningful "defence" (*Id.* at 225). Thus any

pretrial confrontation of the accused should be scrutinized to determine whether the presence of his counsel is necessary to preserve his right to a fair trial (*Id.* at 227). The Court found that there was grave potential for prejudice in a pretrial lineup, and they held that Wade's post-indictment lineup was a critical stage of the prosecution at which he was entitled to counsel (*Id.* at 236-237).

Having resolved these issues, the Court considered whether the courtroom identification of Wade should have been excluded due to the absence of counsel at the lineup. The Court held that the proper test to be applied was whether the courtroom identification was the product of the illegal lineup (*Id.* at 244). The Supreme Court reversed the judgment of the circuit court and remanded the case to the district court to determine whether the in-court identifications had an independent source, and if not, whether the use of the identifications as evidence was harmless error (*Id.* at 242).

Justices Black, Harlan, Stewart, and White cast dissenting votes. Justice Black argued that the lineup violated Wade's privilege against self-incrimination. He reasoned that if Wade had been compelled to speak in open court, he would have been acting as a witness against himself; being forced to supply evidence against himself by talking outside the courtroom was equally violative of his fifth amendment right (*Id.* at 245). He also objected to the rule of evidence which the Court established regarding use of the courtroom identification. He viewed the rule as unsound, as well as an encroachment on the constitutional prerogative of the states and the federal government to determine their own rules of evidence (*Id.* at 248, 250).

Justice White, writing for Justices Stewart and Harlan, objected to the broadness of the Court's decision, which he claimed would bar the use of a wide range of relevant

evidence solely because a step in its acquisition occurred outside the presence of defense counsel (*Id.* at 250). He also took issue with the basis for the Court's decision, which was the widespread utilization of improper police procedures (*Id.* at 251). Justice White believed that the decision would not contribute measurably to more reliable pretrial identifications and that it could lead to fewer convictions (*Id.* at 259).

Justice Douglas wrote a brief concurrence in which he joined the opinion of the Court, except for the Court's holding that compulsory lineups do not violate the fifth amendment. Justice Fortas also wrote a concurring opinion which Chief Justice Warren and Justice Douglas joined. Justice Fortas agreed with Justice Black that the accused should not be compelled in a lineup to speak the words of the person who committed the crime. He argued that it was the "kind of volitional act...which falls within the historical perimeter of the privilege against compelled self-incrimination" (*Id.* at 260). Justice Clark also wrote a concurring opinion, in which he expressed his agreement with the Court's holding that a lineup is a critical stage of the prosecution.

COURTS OF APPEALS' TREATMENT OF *WADE*

There has been a state of confusion among lower court judges concerning the Supreme Court's intentions in *Wade* (Sobel 1971; Comment, *Iowa Law Review* 1972-3). This uncertainty likely stems from the Court's fractionalized opinion. The majority opinion in *Wade* has been "charitably referred to as a splintered opinion" (Read 1969-70, 351). Only Justices Brennan and Clark signed on to the two major portions of the Court's opinion, holding that there was no fifth amendment violation but that there was a sixth amendment violation. The Court's opinion obviously was not satisfactory to either of the largest

coalitions on the Court. Four justices saw both fifth and sixth amendment violations, and three saw neither fifth nor sixth amendment violations. The Court's exclusionary rule on all in-court identifications that are tainted by illegal out-of-court lineups received a bare five-to-four majority.

Another factor which could contribute to divergent treatment of the *Wade* decision in the lower courts is the Court's decision five years later in *Kirby v. Illinois*, 406 U.S. 682 (1972). In *Kirby*, the Court was asked to determine whether an accused had a constitutional right to counsel at a police station lineup that took place after an arrest but before an indictment or formal charges had been brought. A plurality of the Court refused to extend the right to counsel to preindictment identifications. The *Kirby* Court departed from *Wade*'s approach to the right to counsel by focusing on what constituted a "criminal prosecution" rather than what constituted a "critical stage in the proceedings" (Comment, *Iowa Law Review* 1972-3, 413). The Court's judgment stressed that the accused is entitled to counsel at any stage of the *prosecution* and declined to extend that right to a routine police investigation (406 U.S. 682 at 690). While the *Wade* Court had sought to ensure a meaningful defense for the accused, the plurality in *Kirby* emphasized society's interest in the "prompt and purposeful investigation of an unsolved crime" (*Id.* at 691).[1]

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[1]Three years after *Kirby*, the Supreme Court ruled that a probable cause determination is also not a "critical stage" in a criminal prosecution requiring appointed counsel. See *Gerstein v. Pugh*, 420 U.S. 103 (1975). The Court reasoned that, while pretrial custody may affect to some extent the defendant's ability to assist in the preparation of his defense, the absence of counsel at this stage does not present the high probability of substantial harm identified as controlling in *Wade*. The Court characterized probable cause hearings as informal procedures, where the consequences of determination were less severe, the fine resolution of conflicting evidence was not required, and credibility determinations were seldom crucial (*Id.* at 121).

The *Kirby* decision considerably restricted the role of counsel in protecting the pretrial rights of the accused and was unexpected in the legal community (Comment, *Iowa Law Review* 1972-3). In view of the possible prejudicial factors associated with lineup proceedings which the *Wade* Court had emphasized, legal commentators expected the lower courts to reject a pre-indictment--post-indictment dichotomy when applying *Wade* (Kelly 1973). Extending the right to counsel to preindictment confrontations seemed logical based on the Court's reasoning in *Wade,* and, as the dissenters in *Kirby* noted, the majority of lower courts since the *Wade* decision had taken this interpretation.[2] As Kelly (1973) argued, such an extension was the logical next step in the line of decisions that began with *Powell v. Alabama*, 287 U.S. 45 (1932), and extended through *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 377 U.S. 201 (1966).

Data on the Courts of Appeals' treatment of the four cases in this analysis is presented in Table 3.1. Support for the hypotheses that weak and unclear precedents are not well-received in the lower courts is found when we examine the treatment accorded *Wade* by the Courts of Appeals. The decision in *Wade* was followed in only 42% of the cases in which it was applied by the Courts of Appeals. This figure is especially striking given that the four cases examined here were followed 75% of the time.

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[2]As one example, note the Tenth Circuit's statements in *Wilson v. Gaffney*, 454 F.2d 142, 144 (10th Cir. 1972):

> [S]urely the assistance of counsel, now established as a post-indictment right, does not arise or attach because of the return of an indictment...The confrontation of a lineup...cannot have a constitutional distinction based upon the lodging of a formal charge. Every reason set forth by the Court in *Wade*...for the assistance of counsel post-indictment has equal or more impact when projected against a pre-indictment atmosphere.

When the higher court is sharply divided as to both the holding and the reasoning of a particular decision, as the Supreme Court was in *Wade*, lower court judges may be unsure of the direction the Court wants them to take in applying that decision. The final vote in the case was five to four. The justices wrote four concurrences and two dissents, so that a total of six separate opinions were written. Clearly, there was a low level of support among the justices for the Court's decision. Lack of support on the higher court may limit the authority which is attached to its decision (Rohde 1972), and it may also raise questions about the legal correctness of the decision (Johnson and Canon 1984, 58).

Failure on the part of the higher court to provide "consistent, continuing cues" to the lower courts also leaves these courts free to make their own inferences regarding the scope and applicability of higher court decisions (Johnson and Canon 1984, 51). The *Kirby* decision may have created uncertainty in the lower courts as to the direction the Supreme Court was taking in this area. Whether due to lack of agreement in the Court over the reasoning for the decision or the seemingly contradictory ruling in *Kirby*, the *Wade* decision seems to have left the lower courts unsure of the Supreme Court's policy intentions. The result is a low level of compliance in the Courts of Appeals.

GRIGGS V. DUKE POWER CO., 401 U.S. 424 (1971)

In 1968 a group of black employees brought a class action suit against Duke Power Company, the power generating facility at which they worked. The company required a high school diploma or the passing of intelligence tests for employment in or transfer to jobs at the plant. These requirements were not shown to be significantly related to successful job performance, and they operated to disqualify blacks at a substantially higher rate than whites.

The employees challenged the company's policy as a violation of Title VII of the Civil Rights Act of 1964. Section 703 (a) of the Act makes it unlawful for an employer to limit, segregate, or classify employees in order to deprive them of employment opportunities or adversely to affect their status because of race, color, religion, sex, or national origin. Section 703 (h) authorizes the use of any professionally developed ability test, provided that it is not designed, intended, or used to discriminate.

The district court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the company had openly discriminated on the basis of race in the hiring and assigning of employees, but that such conduct had ceased since the Act went into effect. That court held that since Title VII was prospective only, it did not apply to prior actions. The circuit court reversed in part. It held that residual discrimination arising from prior practices was not insulated from remedial action, but it agreed with the lower court that there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements. Therefore there was no violation of the Act. The employees appealed to the Supreme Court, arguing that the requirements were unlawful under Title VII unless they were shown to be job related. The Supreme Court granted *certiorari* and reversed the judgment of the circuit court.

Chief Justice Burger delivered the opinion for a unanimous Court.[3] He described Congressional intent in enacting Title VII:

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of

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[3]Justice Brennan took no part in the consideration or decision of this case.

> racial or other impermissible classification (401 U.S. 424 at 431).

The Court read the Act to proscribe "not only overt discrimination, but also practices that are fair in form, but discriminatory in operation" (*Id.* at 431). The Act was said to be directed to the "*consequences* of employment practices, not simply the motivation" (*Id.* at 432, emphasis in original). In the words of Chief Justice Burger:

> [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability (*Id.* at 432).

The Court held that an employment practice which operates to exclude blacks and which is not related to job performance is prohibited. The standard to be applied is business necessity, or "manifest relationship to the employment in question" (*Id.* at 432). The Court relied on the legislative history of Title VII, along with the fact that the Equal Employment Opportunity Commission had adopted guidelines consistent with the Court's decision, to support its holding (*Id.* at 436). The Court concluded that the requirement that employment tests be job related comported with congressional intent.

COURTS OF APPEALS' TREATMENT OF *GRIGGS*

One expert in the field of employment discrimination has praised the *Griggs* decision for "pouring decisive content into a previously vacuous conception of human rights" by defining discrimination in terms of consequence and effect rather than motive and purpose (Blumrosen 1972, 62). Under *Griggs*, discrimination became conduct rather than a state of mind (Blumrosen 1972). Such a definition was new to the field of employment discrimination, where a subjective test had previously been used. According to one

commentator, the lower federal courts "quickly grasped and applied" this concept of discrimination (Blumrosen 1972, 74). Lower courts have not limited *Griggs'* application to employment credentials such as high school diplomas and intelligence tests, but have extended it to such employment policies as the use of conviction records in hiring[4] and wage garnishment rules.[5]

While the lower courts expanded upon the *Griggs* decision by extending it to other areas, most of these courts have construed the business necessity defense more narrowly, "consistently demonstrat[ing] an extremely restrictive application of the business necessity defense...[so that] only the most essential business practices will survive attack" (Comment, University of Chicago Law Review 1979, 920). The lower courts have taken this initiative in spite of the Supreme Court's liberal application of the business necessity doctrine in its subsequent decisions.[6] Some commentators have attributed this behavior to the Court's failure to discuss adequately the scope of the business necessity defense, especially in terms of the types of business purposes that justify an employer's policy and how "necessary" the policy must be (Comment, University of Chicago Law Review 1979).

Lower court compliance with the *Griggs* decision may have been frustrated by ensuing Supreme Court decisions, particularly that of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), where the Court recognized a second type of Title VII violation. The *Griggs* Court held that a neutral employment policy which has a "disparate impact" on

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[4]*Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971); *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975).

[5]*Johnson v. Pike Corp. of America*, 332 F.Supp. 490 (C.D. Cal. 1971).

[6]*See, e.g., New York Transit Authority v. Beazer*, 440 U.S. 568 (1979).

persons protected under Title VII is prohibited. In *McDonnell Douglas*, the Court ruled that "disparate treatment" (i.e., treating some people less favorably because of race, color, religion, sex, or national origin) also violates Title VII. One legal scholar has observed that, since the recognition of these two types of Title VII violations, the Court has begun to merge the two types of cases, developing "identical orders of proof, as well as similar substantive defenses...for each type of case" (Furnish 1982, 445). This commentator has characterized the Court's disparate impact and disparate treatment cases as a "maze" through which a suitable path must be found (Furnish 1982).

According to *Griggs* and *McDonnell Douglas*, intent is irrelevant in a disparate impact case, but in a disparate treatment case it is crucial. Unlike a disparate impact plaintiff under *Griggs*, a *McDonnell Douglas* disparate treatment plaintiff must establish discriminatory intent, or that a "legitimate, nondiscriminatory reason" for an employee's rejection was a "pretext or [was] discriminatory in its application" (411 U.S. 792 at 780). In subsequent cases,[7] however, the Supreme Court developed a similar burden of proof for plaintiffs in disparate impact cases. By showing that an alternative practice would accomplish an employer's job related purpose with a less discriminatory impact, a plaintiff could demonstrate that an employer enacted a given policy as a pretext for intentional discrimination (*Albemarle*, 422 U.S. 405 at 428). The Court's decision four years later in *Beazer* "clearly injected the issue of intentional discrimination into disparate impact cases" (Furnish 1982, 424). The *Beazer* Court failed to mention the relevance of lesser-impacting alternatives under *Albemarle* and *Dothard*, and instead relied solely upon the absence of

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[7] *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979).

discriminatory intent in holding that the plaintiff had failed to rebut the business necessity defense.

The defense available to an employer in a disparate impact case is "business necessity" or job-relatedness (*Griggs*, 401 U.S. at 431), while in a disparate treatment case an employer must articulate a "legitimate non-discriminatory reason" for a discriminatory policy (*McDonnell*, 411 U.S. at 802). Subsequent decisions, however, have blurred the distinction between the two defenses, reducing the burden to be met by defendants in disparate impact cases (Furnish 1982). Note the Court's decision in *Beazer* which, according to one commentator, "allowed the establishment of a defense in a disparate impact case when the defendant did nothing more than articulate a legitimate non-discriminatory reason" (Furnish 1982, 439).[8]

In addition to the confusion which may have been created by *McDonnell Douglas* and the disparate treatment line of cases, a second factor may hinder the application of the *Griggs* decision in the lower courts. This factor is the standard by which employment tests are to be judged under Title VII (Wilson 1972; Comment, University of Chicago Law Review 1979). The Court suggested that the legality of such tests turns on the degree to which they predict job success. Test validation is both technical and difficult, and the establishment of this legal standard opened a "complex area of inquiry to judicial scrutiny" (Wilson 1972,

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[8]This assertion received further support in the Court's most recent disparate impact decision. In *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Court held that in disparate impact cases, the employer's burden of proof regarding business necessity "should have been understood to mean an employer's production--but not persuasion--burden" (490 U.S. 642 at 660). Justice Stevens dissented, charging the majority with blurring the distinction between the required defenses in disparate impact and disparate treatment cases and diminishing the employer's burden (*Id.* at 668-669).

844). According to one legal commentator, the *Griggs* decision left numerous questions regarding test validation unresolved, "thus providing the lower courts with considerable leeway for interpreting its mandate" (Wilson 1972, 847).

Griggs was followed in 69% of the decisions in which it was applied. This is six points less than the overall following rate for the four decisions. We might have expected more consistent application, given that the Court's ruling was straightforward and that the reasoning was agreed to by all of the justices. Baum (1976) suggested that clear decisions are relatively easy to achieve in cases with a narrow scope, and this seems to be an accurate description of the *Griggs* decision. The fact that the decision was unanimous, with a single majority opinion, also contributes to its clarity. The hypotheses advanced in previous studies seem to suggest that *Griggs* would have been followed even more faithfully than it was by the lower courts. One aspect of *Griggs* that could create problems with its interpretation is the Court's test validation standard, which introduced a degree of complexity into the decision. Even more crucial may be the confusion created by the Court's decisions in *McDonnell Douglas* and its progeny.

LEMON V. KURTZMAN, 403 U.S. 602 (1971)

In 1968 the Pennsylvania legislature passed the Nonpublic Elementary and Secondary Education Act, which authorized financial support for nonpublic schools through reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. The act was passed in response to a crisis that the legislature believed existed in the state's nonpublic schools due to rapidly rising costs. Several citizens

and taxpayers of Pennsylvania challenged the constitutionality of the act as a violation of the establishment and free exercise clauses of the first amendment. The three-judge district court dismissed the claim, and the Supreme Court noted probable jurisdiction. The Court reversed the judgment of the district court and remanded the case.

Chief Justice Burger wrote the opinion of the Court.[9] He began by articulating three tests that the Court had developed over the years in analyzing establishment clause cases (403 U.S. 602 at 612, 613). First, the statute must have a secular legislative purpose. Second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236 (1968). Finally, the statute must not foster "an excessive entanglement with religion," *Walz v. Tax Commission*, 397 U.S. 664 (1970).

The Court accepted the Pennsylvania legislature's stated purpose in passing the statute, which was to enhance the quality of the secular education offered in schools covered by compulsory attendance laws (*Id.* at 613). In the Court's view, the legislature recognized that the program "approached, even if it did not intrude upon, the forbidden areas under the Religion Clauses" (*Id.* at 613). Such a realization was evidenced in the precautions taken by the state to guarantee that the aid supported only secular educational functions (*Id.* at 613). The Court held that it did not need to consider whether these precautions adequately restricted the principal or primary effect of the program, since the "cumulative impact of the entire relationship arising under the statutes...involves excessive entanglement between government and religion" (*Id.* at 613-614).

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[9]Justice Marshall took no part in the consideration or decision of the case.

Chief Justice Burger acknowledged that some relationship between government and religious organizations is unavoidable (*Id.* at 614). He described the separation that must be maintained: "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship" (*Id.* at 614). The circumstances which should be considered are the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority (*Id.* at 615).

The Court found that the restrictions and oversight necessary to ensure that teachers play a "strictly nonideological role" promoted entanglements between church and state (*Id.* at 620). The schools were required to maintain accounting procedures that identified the "separate" cost of the "secular educational service," and these accounts were subject to state audit (*Id.* at 610). Aid was also limited to courses which were part of the curriculum in public schools. The fact that the program entailed a continuing cash subsidy was also an indication that control and surveillance would be necessary. The Court concluded that the statute created an "intimate and continuing relationship between church and state" and was therefore unconstitutional (*Id.* at 622).

Chief Justice Burger also discussed a broader base of entanglement which was presented by the "divisive political potential" of the program (*Id.* at 622). The issues presented by state aid to parochial schools would divide states and communities and would tend to "confuse and obscure other issues of great urgency" (*Id.* at 622-623). One of the principal goals of the first amendment was to protect against such political divisions along religious lines (*Id.* at 622).

Justice Douglas wrote a concurring opinion, which Justice Black joined, in which he argued that the use of taxpayers' money to support parochial schools violates the first amendment, regardless of whether the money is used for solely secular educational functions (*Id.* at 640-641). Justice Brennan also concurred, setting forth his views that the statute impermissibly involved the state with the "essentially religious activities" of sectarian educational institutions, and that the state government was using "essentially religious means to serve governmental ends, where secular means would suffice" (*Id.* at 658). Justice White published a concurring opinion in which he stated that an agreement between the school and the state that the state funds would be used only to teach secular subjects did not violate the first amendment (*Id.* at 670). However, he agreed with the Court that the district court's judgment should be reversed, as the taxpayers' claim should not have been dismissed for failure to state a cause of action.

COURTS OF APPEALS' TREATMENT OF *LEMON*

While the *Lemon* test appears straightforward, it has not led to predictable adjudication (Paulsen 1986). The Supreme Court itself has continued to struggle with the *Lemon* test and has voiced repeated dissatisfaction with both the test and the "vagaries of its application" (Paulsen 1986, 330). One commentator describes the Court's ambivalence: "At times the Court has described the test as a helpful signpost,[10] at other times the Court has suggested that it can be discarded in certain circumstances,[11] and at still other times the Court

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[10]See *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Mueller v. Allen*, 463 U.S. 388 (1983); *Hunt v. McNair*, 413 U.S. 734 (1973).

[11]See *Marsh v. Chambers*, 463 U.S. 783 (1983).

has held that it must be rigorously applied"[12] (Marshall 1986, 497). The result is a "patchwork of ad hoc decisions inside a legal framework that [has lost] its intellectual integrity" (Marshall 1986, 498).

The *Lemon* test appeared headed for obsolescence following several establishment clause decisions of the early 1980s. In *Marsh v. Chambers*, the Court ignored the test entirely in rejecting a challenge to a state legislature's practice of opening its sessions with a prayer led by a state-paid chaplain. In *Lynch v. Donnelly*, the Court applied the test in form only to allow a city to include a nativity scene in its annual Christmas display. In *Mueller v. Allen*, upholding tax deductions for tuition and other expenses of parochial school education, the Court indicated that it no longer viewed the *Lemon* test as the proper measure of establishment clause violations.

However, the establishment clause decisions of the Court's 1984 Term represented a shift in direction, with the revitalization of the *Lemon* test (Simson 1987). The Court applied the test in invalidating a state moment-of-silence law,[13] publicly financed programs offering remedial and enrichment classes to parochial school children in parochial school classrooms,[14] and a state law barring employers from requiring employees to work on their

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[12]See *Stone v. Graham*, 449 U.S. 39 (1980); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

[13]*Wallace v. Jaffree*, 472 U.S. 38 (1985).

[14]*Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985).

Sabbath.[15] The Court affirmed its commitment to the *Lemon* test in its only establishment clause decision of the 1985 Term.[16]

In spite of the Court's professed fidelity to the analysis set forth in *Lemon*, the *Lemon* test has remained the subject of continued criticism, and even derision, among members of the Court. In his colorful concurrence in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), Justice Scalia provided the following analogy to the Court's invocation of the *Lemon* test:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District (*Id.* at 398).

Scalia went on to note that, over the years, five of the justices sitting on the Court when *Lamb's Chapel* was decided had "driven pencils through the creature's heart" and a sixth had joined an opinion which did so (*Id.* at 398).

The *Lemon* test has been criticized by the legal community on a number of grounds. With regard to the second part of the test, the requirement that the principal or primary effect be one that neither advances nor inhibits religion, some critics have objected to the Court's broad reference to advancements and inhibitions of religion (Simson 1987). They have pointed out the difficulties involved in defining what is and is not "religious" and have argued that it is not a task for which courts are particularly well-suited (Paulsen 1986).

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[15] *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

[16] *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986).

The third part of the test prohibits legislation that will foster excessive government entanglements with religion. The Court interpreted this to require that the "character and purpose of the institutions" and the "resulting relationship between the government and the religious authority" be assessed to determine the likelihood of such an effect taking place in the future. This standard has been criticized as an invitation to judges to decide the fate of a law based on a set of circumstances that does not exist, or, in effect, to render an advisory opinion (Simson 1987). According to one legal scholar, "While the role of subjectivity has always been especially pronounced in religion clause litigation, the excessive entanglement test invites a whole new degree of judicial subjectivity" (Ripple 1980, 1216-7).[17]

The ambiguity in the *Lemon* test may stem from the language of the first amendment (Simson 1987). In the *Lemon* opinion, Chief Justice Burger characterized the religion clauses as "at best opaque" (*Id.* at 612). He acknowledged that, in deciding what is permitted and what is forbidden by the religion clauses, the Court could "only dimly perceive the lines of demarcation" (*Id.* at 612). The Court's use of the religion/nonreligion dichotomy is seen

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[17]The author also addressed the Court's discussion of political entanglement:

> When the Court turns to an assessment of 'political entanglement,' an even greater opportunity for reliance on the subjective is present. An assessment of how politics and religion will mix in any given political environment necessarily involves a personal judgment based in large part on the Justice's own political experience, observation, and, possibly, tolerance for the methods of a particular religious sect. It is a judgment easily swayed by the contemporary political climate and by the influences of regionalism from which no member of the Court entirely escapes (Ripple 1980, 1217).

as further evidence of the Court's unclear thinking about the establishment clause (Paulsen 1986).

The lack of clarity in the *Lemon* decision may have an additional source. The final vote was unanimous; while a unanimous decision indicates support on the Court for the judgment, it does not necessarily lead to a clear and coherent mandate. Rohde (1972) showed that in cases with important policy implications, the justices may suppress their disagreements in order to present a united front.[18] Such a tactic should minimize the probability and degree of noncompliance (Rohde 1972); however, the result may be that the language of the opinion is weakened, as it is written to accommodate a number of different positions. Opinions which are compromises of a variety of views are likely to be ambiguous. In fact, three concurring opinions were written in *Lemon*, in which the justices expressed their own views.

Johnson and Canon (1984, 54) suggested that interpretations of ambiguous decisions are less likely to be noncompliant, since noncompliance is difficult to define for such decisions. In other words, unclear decisions may provide lower courts with leeway to deviate from the higher court's ruling while technically remaining in compliance. Consistent with this hypothesis, the *Lemon* decision was followed in an overwhelming 90% of the cases in which it was treated in the Courts of Appeals. The vagueness of the standards set forth

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[18]Rohde (1972) described such cases as "threat" situations. One type of threat situation exists in issue areas in which there is likely to be noncompliance with the Court's mandate. There has been widespread resistance to the Court's line of establishment clause cases, particularly the school prayer decisions.

in the *Lemon* test may have created a precedent with which almost any lower court decision could be harmonized.

Another possibility is that *Shepard's* codes as *followed* any lower court decision which nominally applies the *Lemon* test, regardless of the interpretation of the individual standards of the test. It is unlikely that a lower court would decide an establishment clause case without citing *Lemon v. Kurtzman* as controlling. The high rate of compliance with *Lemon*, then, may be a function of *Shepard's* coding conventions, rather than evidence of faithful application in the lower courts.

TERRY V. OHIO, 392 U.S. 1 (1968)

While on patrol, a Cleveland police detective observed three men engaging in behavior which he interpreted as "casing a job." The officer approached the men, identified himself, and asked for their names. Following their responses, he grabbed the petitioner Terry and patted down the outside of his clothing. He felt a revolver in Terry's overcoat and directed the men into a store, where he removed Terry's overcoat and found the revolver. The trial court convicted Terry of carrying a concealed weapon, denying Terry's motion to suppress the weapon. The intermediate appellate court affirmed, and the state supreme court dismissed the appeal on the ground that no substantial constitutional question was raised. The Supreme Court granted *certiorari* and subsequently affirmed the judgment of the Ohio appellate court.

Chief Justice Warren delivered the opinion of the Court. The Court recognized that whenever a police officer has restrained an individual's freedom to walk away, he has "seized" that person; and when a police officer has explored the outer surfaces of a person's

clothing, a "search" has taken place (392 U.S. 1 at 16). Thus the fourth amendment comes into play as a limitation upon police conduct in "stop and frisk" encounters (*Id.* at 19).

The situation in this case was one which required swift action on the part of the police and therefore, as a practical matter, could not be subjected to the warrant procedure (*Id.* at 20). However, the "notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context" (*Id.* at 20). The police officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion" (*Id.* at 21). The appropriate test for determining the reasonableness of fourth amendment activity is a balancing of the need to search or seize against the invasion necessitated by that search or seizure (*Id.* at 21).

A police officer has an immediate interest in ensuring that the person he confronts is not armed with a weapon that could be used against him (*Id.* at 23). The test to be applied in establishing an officer's authority to conduct a search is whether a reasonably prudent man, based upon the circumstances and in light of his experience, is warranted in his belief that his safety or the safety of others is in danger (*Id.* at 27). A search for weapons must be limited to that which is necessary for their discovery and may be characterized as something less than a "full" search (*Id.* at 26). In the present case, the Court found that the search was permissible and that the pistol seized from Terry was properly admitted into evidence.

Justice Black concurred in the Court's judgment and opinion (*Id.* at 31), except where the opinion relied upon the Court's opinion in *Katz v. United States,* 389 U.S. 347 (1967), and the concurring opinion in *Warden v. Hayden*, 387 U.S. 294 (1967). Justice Harlan wrote a concurring opinion to make explicit his view that "the officer's right to interrupt Terry's freedom of movement and invade his privacy arose only because circumstances warranted

forcing an encounter...in an effort to prevent or investigate a crime" (*Id.* at 34). Justice White issued a concurrence to express his belief that, if an investigative stop is justifiable, there is no constitutional violation if relevant questions are asked and the person is briefly restrained (*Id.* at 35).

Justice Douglas dissented from the Court's decision. He objected to the Court's disclaiming probable cause. He argued that the crime committed was carrying a concealed weapon and that there was no basis for concluding that the officer had probable cause to believe this crime was being committed (*Id.* at 36). If a warrant had been sought by the officer, a judge would therefore have been unauthorized to issue one (*Id.* at 36). The effect of the Court's decision was to give greater power to the police to make a seizure and conduct a search than a judge has to authorize one (*Id.* at 36). A seizure of a person is reasonable under the fourth amendment only if the police are required to possess probable cause before they seize him (*Id.* at 38).

COURTS OF APPEALS' TREATMENT OF *TERRY*

The *Terry* decision has been subjected to widespread criticism due to the lack of specific guidelines it provided to lower courts (LaFave 1968; Williamson 1982; Dix 1985). The *Terry* Court held that a seizure in order to conduct a weapons search is not an investigatory seizure and is therefore not subject to the same fourth amendment requirements as investigatory seizures; but it "completely failed to address the criteria for determining when an investigatory seizure occurs, the factors distinguishing investigatory seizures from other detentions, and the validity of nonarrest detentions other than those incident to weapons searches" (Dix 1985, 857). One critic has accused the *Terry* Court of making a "conscious

effort to leave sufficient room for later movement in almost any direction" (LaFave 1968, 46). Another legal scholar has attributed the vagueness of the *Terry* decision to a more noble purpose, "the development of a doctrine flexible enough to accommodate both the impact of different kinds of detentions upon citizens' fourth amendment interests and the variety of law enforcement interests involved in different detentions" (Dix 1985, 855).

In subsequent cases, the Supreme Court has addressed many of the issues left unresolved in *Terry*. According to one commentator, however, the Court "has yet to provide standards that will produce consistent and logical treatment of the issues in the lower courts and workable guidelines for law enforcement officials" (Williamson 1982, 817). Another legal expert (Dix 1985) cited several examples which lend support to this assertion. In *Adams v. Williams*, 407 U.S. 143 (1972), the Court assumed, virtually without discussion, the validity under the fourth amendment of nonarrest detentions for investigatory purposes. In other cases, as well, the Court has been "unable or unwilling to address the questions clearly and definitively" (Dix 1985, 858). In *Dunaway v. New York*, 442 U.S. 200 (1979), and *Florida v. Royer*, 460 U.S. 491 (1983), the Court ruled that nonarrest investigatory detentions which were valid at their inceptions had become unreasonable, but failed to discuss why this was so, or even when the detentions became invalid. In *Hayes v. Florida*, 470 U.S. 811 (1985), the Court held that movement to the stationhouse of a suspect detained pursuant to a nonarrest detention was impermissible, but did not address the constitutional limits on the transportation of suspects.

Problems in lower court application of *Terry* are likely to arise, not from lack of Court support, but from uncertainty about the intended scope of the rule. The *Terry* decision seemed to have the support of the Court, in that only one justice dissented and two of the

three justices who concurred did so only to emphasize particular portions of the Court's reasoning; but the insufficient guidance regarding the substance of the fourth amendment's requirements for nonarrest detentions may allow lower courts a great deal of freedom in their applications of *Terry*. The *Terry* decision was followed in 86% of the lower court decisions which relied on it. This finding is consistent with Johnson and Canon's (1984) hypothesis that the Court's failure to provide precise standards regarding the scope of a particular decision may enable lower courts to provide their own interpretations, which are expressed so as to be in accord with the decision.

DISCUSSION

The legal scholars who have analyzed the Supreme Court's decisions in each of these cases have agreed that the decisions left numerous questions unanswered and thus provided the lower courts with considerable freedom in interpreting them (Sobel 1971; Wilson 1972; LaFave 1968; Dix 1985). A single decision cannot answer all questions about the scope of its applicability; judging is to some degree subjective. This study has sought to identify characteristics of higher court rulings which tend to enhance, and to limit, this subjectivity. A few hypotheses may be advanced.

A decision which was unambiguous but which lacked support on the Court (*Wade*) was not faithfully implemented in the Courts of Appeals, while another clear decision which had the support of all the justices (*Griggs*) was followed more consistently but not to the degree that we might expect. Two decisions established standards which were vague and subjective and which had the support of the justices (*Lemon* and *Terry*), and these were

uniformly followed in the lower courts. This suggests that a precedent which provides straightforward and coherent guidelines for its application may be more restrictive on lower court decision making, while a precedent which sets forth vague and equivocal standards may give lower court judges more room to maneuver. Examination of all four cases highlighted the importance of the perceived authority of the Court's decision, in terms of Court support, in influencing lower court treatment.

The analyses of *Lemon* and *Terry* indicate that cases which involve constitutional provisions may permit a wider range of interpretations than cases which involve statutory provisions or other rules. The examination of *Lemon* also introduced an interesting hypothesis regarding support on the higher court for its decision. This hypothesis is a corollary of the clarity vs. ambiguity hypothesis discussed above. Court support may interact with the type of case the Court is deciding as a predictor of lower court treatment. Some unanimous decisions will provide clear directions to the lower courts and will not leave much room for judges to reconcile divergent rulings; but some unanimous decisions, especially those that establish policies which may encounter resistance in the lower courts, will be the product of compromise. In the latter type of unanimous decisions, the Court's intentions may be ambiguous and thus easier to comply with.

This exploration also suggests that the Court's rulings in subsequent cases may limit the precedential impact of its decisions. The Court may later reach decisions which seem to contradict prior rulings, develop alternative modes of analysis for highly similar cases, or exhibit only sporadic allegiance to its previous decisions; and lower courts may be left in

doubt as to how and when past precedents should be applied. When precedent becomes obscured, other forces are likely to act upon decision making in the lower courts.

It should be clear from this analysis that legal variables relating to Supreme Court decisions do not provide an adequate explanation of the treatment of these decisions in the Courts of Appeals. This examination illustrates the need for multivariate tests of the influence of ideological, as well as legal, factors on lower court behavior in light of Supreme Court precedent. I conduct such analyses in the chapters which follow.

TABLE 3.1
COURTS OF APPEALS' TREATMENT OF FOUR SUPREME COURT DECISIONS

	NOT FOLLOWED	FOLLOWED
U.S. V. WADE	58.0% (76)	42.0% (55)
GRIGGS V. DUKE POWER CO.	31.3% (36)	68.7% (79)
LEMON V. KURTZMAN	10.4% (11)	89.6% (95)
TERRY V. OHIO	14.2% (47)	85.8% (283)
TOTAL	24.9% (170)	75.1% (512)

CHAPTER 4

COURTS OF APPEALS' TREATMENT OF THE DECISIONS OF THE 1987 TERM: A MULTIVARIATE ANALYSIS[1]

According to the most recent, and most comprehensive, study of Supreme Court decision making (Segal and Spaeth 1993, 255), "attitudes...are crucial to explaining the votes of the Supreme Court...Virtually no support is found for non-attitudinal factors." Supreme Court justices, unlike their lower court colleagues, are said to be free to act in accordance with their personal ideologies and values for three reasons (Segal and Spaeth 1993, 73). First, the legal rules governing decision making (e.g., precedent, plain meaning, intent of the framers, balancing) do not limit the discretion of the justices; second, as the Supreme Court is a court of last resort, its decisions cannot be overturned by other courts; and third, Supreme Court justices lack electoral and political accountability and ambition for higher office, so that they need not respond to other political actors.

It is important to note that Segal and Spaeth (1993) emphasize the applicability of the attitudinal model to the Supreme Court due to these unique institutional characteristics.[2]

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[1]An earlier version of this chapter was presented as a co-authored paper, "Ambivalence at the Courts of Appeals: Does the Legal or Attitudinal Model Apply?," at the 1996 Meeting of the Midwest Political Science Association (Hurwitz and Reddick 1996).

[2]Note some of Segal and Spaeth's (1993, 358) concluding comments:

> [A]lthough we do not think the Supreme Court is necessarily

Decision making on lower courts, however, is not similarly unfettered. Judges are socialized, through their law school training, their membership in legal organizations, and their interactions with colleagues, to defer to the decisions of higher courts (Segal, Songer, and Cameron 1995). Thus precedent should play a significant role in their behavior. In addition, the Supreme Court has discretionary jurisdiction, so that it may choose to review those lower court decisions which conflict with the preferences of the justices. Finally, unlike Supreme Court justices, subordinate judges may aspire to positions on higher courts. Thus their decisions may be tempered by political forces.[3]

Studies of lower court decision making have revealed that a variety of factors are brought to bear upon outcomes in these courts (*see, e.g.,* Emmert 1992; Songer and Haire 1992; Brace and Hall 1993; Songer, Segal, and Cameron 1995). These factors include, but are not limited to, case facts, legal issues raised by the litigants, nature of the litigants, background characteristics of the judges, environmental and contextual features, and decision making rules and procedures. Thus the most successful models of lower court behavior are those which integrate legal, attitudinal, and institutional approaches.

> unique in being driven attitudinally, we suspect that intervening variables of a non-attitudinal sort appreciably affect lower-court decision making...If neo-institutionalism has taught political science anything over the past decade, it is that institutional structures shape incentives.

[3]Political ambition as a constraint on lower court judges is particularly germane to circuit court judges. Segal, Songer, and Cameron (1995) reported that fourteen of the last twenty justices appointed to the Supreme Court were members of the Courts of Appeals at the time of their nomination.

Likewise, at the level of the Supreme Court, political scientists have grown wary of a description of judicial decision making which relies primarily upon attitudinal motivations. In spite of the force of Segal and Spaeth's (1993) argument, and the empirical support provided, judicial behavioralists have continued to assert that legal considerations are not absent from Supreme Court decision making. An analysis of the Court's death penalty decisions (George and Epstein 1992) revealed that the most successful prediction of outcomes resulted from an incorporation of both legal and extralegal factors; and in an examination of search and seizure cases before the Court, Segal (1984) found legally relevant facts to be much more influential than extralegal facts in accounting for the Court's decisions.[4] As one study of the Supreme Court's abortion and death penalty jurisprudence concluded (Epstein and Kobylka 1992, 302), "the law and the legal arguments grounded in the law matter, and they matter dearly."

In light of this continued reliance on the significance of legal doctrine and the institutional boundaries of the attitudinal model, I examine here the utility of legal and attitudinal explanations in describing the treatment of Supreme Court precedent in the Courts of Appeals. As discussed in Chapter 1, there is a paucity of such studies in the literature. Thus this analysis should provide a meaningful contribution to our understanding of judicial decision making in these intermediate federal courts.

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[4]The studies of George and Epstein (1992) and Segal (1984) specify so-called "fact-pattern" models of Supreme Court decision making. Segal and Spaeth (1993) argue that the influence of fact patterns is consistent with both legal and attitudinal models.

HYPOTHESES

Most public law scholars have contended that Courts of Appeals judges have policy goals which they would like to pursue if possible (*see, e.g.,* Goldman 1966, 1975; Howard 1981; Johnson 1987; Songer and Haire 1992; Songer, Segal, and Cameron 1994). However, these judges may be constrained from carrying out their personal preferences to the full extent, as their legal socialization may motivate them to adhere to Supreme Court precedent and the accompanying principle of *stare decisis.* Consequently, these judges will be reluctant to have their decisions reversed on appeal (Baum 1978; Pacelle and Baum 1992), and they should act accordingly to ensure that the Supreme Court does not reverse their decisions.

Scholars have reported that Supreme Court behavior affects the manner in which lower courts react. For instance, Wasby (1970) set forth a number of hypotheses which suggested that lower courts are more likely to abide by a clear Supreme Court decision that has the support of the members of the Court. On the other hand, the greater the ambiguity of the policy enacted by the Court, the less likely lower courts are to apply faithfully such precedent. Other scholars have advanced similar hypotheses, arguing that divisiveness on the High Court leads to less compliance in the courts below (Rohde 1972; Johnson and Canon 1984; Marshall 1989; Pacelle and Baum 1992).

Although many researchers have offered these hypotheses, they have not been adequately tested. Johnson (1979, 792) sought to fill this void by examining what he referred to as the "widely accepted, but generally untested, idea that attributes of the original Supreme Court decisions influence lower court reactions to and acceptance of the decisions."

Johnson's (1979) analysis focused on levels of Supreme Court support for precedent and employed such indicators of support as the size of the voting and opinion majority, the number of dissenting votes and opinions, and the author of the majority opinion. He calculated various correlation coefficients for these indicators and lower court treatment of precedent. Contrary to his hypotheses, however, none of these relationships was statistically significant.

The study conducted here is similar to that of Johnson (1979), as *Shepard's* is utilized to code lower court treatment of precedent and the influence of Court support is considered as a motivating force in this treatment; but it differs in that a multivariate model is specified and estimated, incorporating both legal *and* attitudinal factors which are hypothesized to affect the behavior of circuit court judges. My findings also differ from those reported by Johnson.

The contrast in findings between this study and Johnson's (1979) may be attributable to the different ways in which Court support is operationalized. Johnson utilized continuous variables in his measurements; however, my data indicates that the influence of Court support is strongest at the extremes, i.e., in unanimous decisions and decisions reached by a one-vote margin, and that there is little variation in the treatment of precedents established by other decisional coalitions (*see* Table 4.2).

Additionally, Johnson's measures may not accurately capture the factors which limit the authority of precedent in the lower courts. It is hypothesized here that it is concurring, rather than dissenting, opinions which detract from the majority opinion. A justice who concurs in the Court's decision desires the same outcome as the other justices in the majority

but would reach that outcome for different reasons. Concurring opinions are likely to provide circuit court judges with the bases upon which to distinguish precedents in their decisions.

In order to evaluate the applicability of legal and attitudinal models to Courts of Appeals treatment of Supreme Court precedent, I test a number of hypotheses. *Hypotheses 1* and *2* relate to the strength or authoritativeness of Supreme Court precedent. According to the research of Wasby (1970), Rohde (1972), and others, lower court judges will be constrained from deciding cases on the basis of their beliefs when the Court is unequivocal in issuing a decision. In other words, the stronger the precedent, the more likely it is that circuit court judges will abide by *stare decisis*, regardless of whether they agree with the precedent. I quantify the strength of precedent in terms of the support on the Court for a decision.

> *Hypothesis 1.* There is a positive relationship between a unanimous Supreme Court precedent and the following of that precedent in the Courts of Appeals.

A judge who does not follow a unanimous Court decision is more likely to provoke the Court into hearing and reversing the judge's decision (Songer, Segal, and Cameron 1994); wishing to avoid this circumstance, the judge is more likely to follow the precedent (Johnson 1979; Pacelle and Baum 1992).

> *Hypothesis 2.* There is a negative relationship between a Supreme Court precedent which was established by a one-vote margin and the following of that precedent in the Courts of Appeals.

A 5-4 or 4-3 decision is weak in that the members of the Court barely agree on the outcome. A lower court judge who disagrees with this decision will not be as likely to

follow it, in part because he realizes that the chances of reversal are slim (Songer, Segal, and Cameron 1994). Moreover, the authority of the decision could be in doubt, since the justices are closely divided (Johnson and Canon 1984).

Similar to *Hypotheses 1* and *2*, a lower court judge is more likely to follow a Supreme Court decision which is clear and unambiguous (Baum 1978). *Hypotheses 3, 4,* and *5* employ alternative measures of decisional clarity.

> *Hypothesis 3.* There is a negative relationship between the number of concurring opinions that the Supreme Court issues in establishing a precedent and the following of that precedent in the Courts of Appeals.

When the Court issues a decision in which a number of justices write separate, concurring opinions, there apparently is some dissension on the Court with respect to the legal reasoning underlying the decision. As a result, circuit court judges will perceive that this is not a clear precedent; therefore, they will be less likely to follow such a decision than when the Court is united and issues few, if any, concurring opinions.[5]

> *Hypothesis 4.* There is a negative relationship between a complex Supreme Court precedent and the following of that precedent in the Courts of Appeals.

The literature is somewhat contradictory on this point, as some scholars argue that the greater the complexity of a Court decision, the less likely the decision is to be followed

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[5]The following is offered as anecdotal support for this hypothesis:

> The Chief did not like concurrences. He felt that they were often nitpicking, that they added little to the law, and that they split majorities... They confused as much as they enlightened lower court judges, Burger felt. Also, concurrences detracted from the main opinion... (Woodward and Armstrong 1979, 58).

below (Wasby 1970); others (Johnson 1987, 333) depict complex precedents as providing "many 'handles' that lower court judges may grasp to justify their decisions." *Hypothesis 4* espouses the former view, asserting that complicated Supreme Court decisions will foster confusion in the lower courts and will not be applied consistently.

Hypothesis 5 concerns constitutional issues in a case.

> *Hypothesis 5.* There is a negative relationship between a Supreme Court precedent which interprets a constitutional provision and the following of that precedent in the Courts of Appeals.

This hypothesis is justified for two reasons. First, the language of most constitutional provisions is somewhat ambiguous and has been subject to a wide range of interpretations (Solan 1993). Second, as constitutional provisions generally are controversial, they "may be precisely those in which the impact of the Supreme Court on lower courts is at its minimum" (Songer 1987, 830).

The next hypothesis concerns the significance of the issues within a case.

> *Hypothesis 6.* There is a positive relationship between a salient Supreme Court precedent and the following of that precedent in the Courts of Appeals.

Circuit court judges are more likely to follow decisions with important policy implications (Johnson 1979; George 1997). When a lower court does not abide by a salient precedent, it is more likely to gain the attention of the Court, thus increasing the likelihood of review.[6]

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[6]I recognize Baum's (1978, 215) claim that "policies that do elicit widespread non-adoption are likely to be significant ones, because minor policies generally lack the capacity to motivate strong opposition." Despite the apparent logic of this assertion, due to the increased likelihood of review, I maintain that highly salient cases are more likely to be

In addition to the above hypotheses which concern aspects of the legal model, attitudinal factors should be pivotal as well.

> *Hypothesis 7.* There is a positive relationship between an appellate panel's ideological consistency with the direction of a Supreme Court precedent and the following of that precedent in the Courts of Appeals.

Very simply, Courts of Appeals judges will vote attitudinally if at all possible, as they will be more likely to follow decisions with which they agree (Segal and Spaeth 1993).

Furthermore, attitudes should be more influential when certain issues are at bar. As the following hypothesis demonstrates, consistent with the findings of Segal and Spaeth (1993), attitudes should matter most in civil rights and liberties and criminal procedure cases.

> *Hypothesis 8.* In civil rights and liberties and criminal procedure cases, there is a positive relationship between an appellate panel's ideological consistency with the direction of a Supreme Court precedent and the following of that precedent in the Courts of Appeals; in economic activity cases, this relationship is not as strong.

Civil rights and liberties and criminal procedure cases generate potentially intense beliefs among judges. In these cases, therefore, appeals court judges should be more likely to follow their own preferences as opposed to Supreme Court precedent. At the other extreme, ideology should be less important in cases involving economic activity and other issues. Since these cases raise fewer passions, appeals court judges are more likely to abide by the norm of deference (Songer and Sheehan 1990; Segal and Spaeth 1993).

Finally, the changing makeup of the Supreme Court should make a difference in whether Courts of Appeals judges apply precedent.

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followed by lower courts.

> *Hypothesis 9.* There is a positive relationship between a Supreme Court precedent which has gained greater ideological support on the Court, due to changes in Court composition, and the following of that precedent in the Courts of Appeals.

Generally speaking, circuit court judges will feel less constrained by a specific precedent when it appears that the current Court may be less likely to support that decision, as the likelihood of review should decrease in that instance (Wasby 1970).

These hypotheses incorporate both legal and attitudinal components, as both types of factors should influence the decision making of circuit court judges. The operationalization of these factors is described in detail in Chapter 2 (*see pp.* 30-36) and is summarized in Table 4.1. Table 4.1 also specifies the direction of the relationships which are hypothesized to exist between these legal and attitudinal variables and the treatment of precedent. In the next section, I estimate a multivariate logistic regression model in order to determine the extent to which these attitudinal and nonattitudinal variables motivate the treatment of precedent in the Courts of Appeals.

FINDINGS

In light of the norm of deference to hierarchical authority, it is not surprising that the Courts of Appeals followed Supreme Court precedent in 70.8% of the cases in our sample. Table 4.2 provides preliminary evidence of the importance of the strength and clarity of precedent, as well as considerations of Supreme Court review, in moderating this obligation to adhere to precedent. According to the bivariate relationships between treatment and characteristics of Supreme Court decisions, an ambiguous precedent is not afforded such

favorable treatment in the Courts of Appeals. The rate of following precedent drops to 57.7% when two concurring opinions are written, to 60.5% when the case involves multiple issues and legal provisions, and to 65.5% when the application of a constitutional provision is involved. Precedents which issue from a sharply divided Court (i.e., 5-4 decisions) are followed only 64.2% of the time. In reaching decisions which are likely to gain the attention of the High Court, the circuit courts are more likely to follow precedent, i.e., in 73.1% of such cases. These findings illustrate the importance of legal elements in Courts of Appeals decision making and suggest the need for more sophisticated analysis.

Incorporating these legal factors, along with the ideological measures already discussed, into a model of appeals court treatment of precedent permits a determination of the effects of each of these factors when other potentially influential factors are taken into account. The following model is estimated:

$$P(\textit{Treatment}=1) = b_0 + b_1(\textit{Unanimous}) + b_2(\textit{One-Vote Margin}) + b_3(\textit{Concurring Opinions}) + b_4(\textit{Complexity}) + b_5(\textit{Constitutional Provision}) + b_6(\textit{Salience}) + b_7(\textit{Ideological Consistency}) + b_8(\textit{Ideological Consistency} \times \textit{Civil Rights}) + b_9(\textit{Ideological Consistency} \times \textit{Criminal Procedure}) + b_{10}(\textit{Ideological Consistency} \times \textit{Economic Activity}) + b_{11}(\textit{Change in Supreme Court Composition})$$

Each b_i indicates the change in the log of the odds of following precedent due to changes in the value of variable *i*, controlling for the values of the other variables. It is hypothesized that b_1, b_6, b_7, b_8, b_9, b_{10}, and $b_{11} > 0$ and that b_2, b_3, b_4, and $b_5 < 0$.

Table 4.3 presents the estimated coefficients and significance levels for this logistic regression model which predicts whether the Courts of Appeals will follow a particular Supreme Court decision. A likelihood ratio test, which tests the null hypothesis that all coefficients in the model except the constant are zero, indicates that the block of coefficients

is significantly different from zero at $p<0.001$.[7] Each coefficient achieves statistical significance at $p<0.05$ and is in the expected direction. The model correctly classifies 71.3% of appeals court decisions.[8]

Appeals courts are less likely to adhere to precedent in cases decided by a one-vote margin. Additionally, as the number of concurring opinions the justices write in a given case increases, the likelihood that the decision will be followed decreases. Circuit courts are also less likely to follow precedent in cases involving constitutional provisions and cases dealing with complex subject matter.

Consistent with the findings of Segal and Spaeth (1993) regarding Supreme Court decision making, in both civil rights and liberties cases and criminal procedure cases, Courts of Appeals judges are motivated by their personal policy goals. Specifically, appellate panels become more likely to follow precedent in civil rights and criminal procedure cases as ideological agreement with Supreme Court decisions increases. They are also more likely

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[7]The likelihood ratio test statistic is calculated as $-2\log(L_0/L_1)$, where L_1 is the likelihood function for the full model as fitted and L_0 is the maximum value of the likelihood function if all coefficients except the constant are zero. The test statistic is χ^2-distributed, with degrees of freedom equal to the number of independent variables.

[8]The model achieves only a 1.71% reduction in error from predicting treatment based upon the proportion of decisions followed. Percent reduction in error is calculated according to the following formula:

$$100 \times \frac{\%\text{ correctly classified} - \%\text{ in modal category}}{100 - \%\text{ in modal category}}$$

It is important to point out that the goal in developing this model is not to improve predictive accuracy with respect to circuit court treatment of precedent. Rather, the purpose is to identify circumstances under which circuit court decisions will follow precedent and when they will avoid precedent. The model performs extremely well in this regard.

to adhere to precedent when the Supreme Court has become more predisposed ideologically toward that precedent. Finally, appeals courts are more likely to defer to the Supreme Court in cases that have important policy implications.

In estimating the model, likelihood ratio tests were calculated in order to determine whether some of the variables had zero coefficients and thus should be deleted from the model.[9] Interestingly, these tests indicated that *Ideological Consistency* and *Unanimous* did not contribute to the explanatory power of the model. The expectation that ideology was less important in economic cases was confirmed, as these tests indicated that *Ideological Consistency* × *Economic Activity* was also a redundant variable.

Interesting results obtain when the probability of following precedent under certain conditions is calculated. To show the substantive impact of the independent variables, I ran several simulations to predict the likelihood that a circuit court would follow a Supreme Court decision. By holding the other independent variables constant at their mean or modal values and varying the values of the variables of interest, one can demonstrate how these

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[9]The likelihood ratio test which was calculated above as a measure of goodness-of-fit can also be used to determine whether individual coefficients are zero. In such a test, L_1 is the value of the likelihood function for the complete model, and L_0 is the value of the likelihood function for the reduced, or nested, model. The number of degrees of freedom is equal to the number of coefficients hypothesized to be zero.

When *Ideological Consistency* was omitted from the model, the likelihood ratio was 0.483 with p=0.487. When *Ideological Consistency* × *Economic Activity* was omitted, the likelihood ratio was 0.358 with p=0.549. When *Unanimous* was omitted, the likelihood ratio was 0.016 with p=0.901.

variables of interest affect the probability that a circuit court will defer to Supreme Court authority.[10] Table 4.4 presents these predicted probabilities.

I highlight some of the more intriguing aspects of this table here. The baseline probability of following precedent indicates that in the most common circumstances, i.e., when the independent variables take on their mean or modal values, precedent will be followed 74% of the time. *Complexity* has the most dramatic effect on the likelihood of following precedent. Specifically, when a Supreme Court decision deals with multiple issues and/or legal provisions, the probability that the decision will receive favorable treatment in the Courts of Appeals drops to 0.56. On the other hand, *Salience* provides the most substantial increase in the probability of following a Supreme Court decision, in that judges will follow precedent established in highly significant cases 87% of the time. When the justices agree with the legal reasoning set forth in the opinion of the Court and no concurring opinions are written, precedent is also more likely to be followed than under normal conditions, at a rate of 76%; this figure drops to 65% when three concurring opinions are written.

In order to determine the degree of confidence that may be placed in these findings, some diagnostic tests should be performed. One should assess the leverage that particular patterns of independent variables have on the coefficient estimates, to ensure that certain combinations of values are not exerting disproportionate influence on the results. Appendix B details the diagnostic checks that were performed. Specifically, these diagnostics indicate

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[10]The appropriate equation is $1/(1 + \exp(-X\beta))$.

that certain cases in the data set are poorly fit by the model and are exerting undue leverage on the results.

Several strategies for treating such influential cases have been suggested. One is to consider what makes these cases unusual, which may lead to better model specification. I examined the outlying cases in the data but found nothing to suggest that an important variable had been omitted from the model. Another approach to dealing with outliers is to delete problematic cases. While this would allow a better fit of the remaining data, it obviously is not an appropriate solution (Granato, Inglehart, and Leblang 1996).

Some methodologists, (*e.g.*, Hamilton 1992; Granato, Inglehart, and Leblang 1996) have suggested an alternative estimation procedure -- bounded influence estimation. Bounded influence estimation is one type of robust estimation. When applied to outlier-filled data, robust techniques are more efficient than traditional techniques and give more accurate confidence intervals and tests (Western 1995). With bounded influence estimation, the influence of outlying cases on coefficient estimates is reduced, or bounded, based upon the magnitude of their influence. In practical terms, poorly fitting observations with large deviances are given less weight in the estimation. This weighted estimation is repeated, updating the weights with each iteration, until there is little difference from one iteration to the next. Such a technique is appropriate for this model.

Bounded influence methods are designed to resist the leverage of unusual values of the independent variables. Hamilton (1992, 207) suggests a "quick-and-dirty" bounded influence technique which assigns weights to cases on the basis of leverage, and I executed this technique here. First, I identified the 10% of the cases in the data set that are most

influential based upon the values of h_j, the leverage of pattern j. For the remaining 90% of the data set, h_j was less than 0.166. I then assigned a weight of 1 to any case where h_j < 0.166, and a weight of $(0.166/h_j)^2$ to any case where $h_j \geq 0.166$.[11] Finally, I reestimated the logistic regression, weighting the cases by these values.

There was little difference in results between the logistic regression and bounded-influence logistic regression models. Table 4.5 allows a direct comparison of these results. Generally speaking, in the bounded influence model, the values of the coefficients are slightly smaller, but the standard errors are smaller as well. Notably, all of the coefficients are in the hypothesized direction and remain statistically significant at $p<0.05$. Because the bounded influence results represent the "bulk of the data, not just a few outliers" (Hamilton 1992, 211), and because these robust findings are similar substantively and statistically to the logit results, I am confident that the model fits the data well, in spite of some outlying cases revealed by the diagnostics.

It is interesting, as well as instructive, to consider some empirical evidence in support of these findings or, in other words, to consider how these considerations play out in the decision making of appeals court judges. In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Supreme Court upheld against an establishment clause challenge the Adolescent Family Life Act, which prohibits federal funding of organizations involved with abortions, while

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[11]117 cases were assigned a weight of 0.70, 11 cases were assigned a weight of 0.98, and 102 were assigned a weight of slightly less than 1. Thus, a total of 230 cases received less than full weight. Hamilton (1992) suggests that the magnitudes of the weights may be instructive as diagnostic tools. The sizes of the weights assigned here indicate that, for all but the 117 cases in our data set which were assigned a weight of 0.70, leverage is not a serious problem.

allowing funding of religious groups advocating self-discipline as a form of birth control. This decision was rendered by a vote of 5-4, two concurring opinions were authored, and a constitutional provision was at issue. These factors have been identified as decreasing the likelihood that such precedents will be followed. However, the decision also involved a civil liberties issue, and such cases tend to activate the personal preferences of judges. Consistent with this expectation, in the six appeals court cases which applied *Bowen v. Kendrick*, this precedent was followed when ideological consistency was 67% or 100% (three cases), and it was not followed when ideological consistency was 33% (three cases). These findings indicate the importance of judges' policy goals in the resolution of certain types of cases.

While four of these six decisions involved the issue of taxpayer standing to bring suit, the remaining two involved *Kendrick's* interpretation of the "principal or primary effect" prong of the *Lemon* test. The *Kendrick* Court stated that a statute is void if "motivated wholly by an impermissible purpose" (487 U.S. 589 at 602). One circuit court opinion, issued by a liberal-dominated panel, labeled this statement as dictum. In holding a city ordinance unconstitutional, the court relied instead on the less restrictive standards of other establishment clause decisions.[12] In contrast, a second decision turned to *Kendrick* for "guidance for the appropriate application of the purpose prong of the *Lemon* test" and found that the statute in question satisfied this prong.[13] One judge, a Carter appointee, dissented from the panel's opinion in this case. She questioned the majority's selective reliance on

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[12]*Church of Scientology Flag Service Org., Inc. v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993).

[13]*Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991); quotation at 775.

Kendrick and advocated a "primary" or "actual" purpose test, concluding under this approach that the statute was unconstitutional. These are instances in which appeals court decision making appears to be ideologically driven, as the model specified here suggests.

Another example of the utility of this model is found in the treatment of the Court's decision in *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988). Here the Court held that a state may not categorically prohibit lawyers from soliciting business by sending truthful letters to individuals known to face particular legal problems, but it may require lawyers to file a copy of solicitation letters with a state agency. The Court's opinion received only limited support, in that six justices signed on to Parts I and II, but only four justices signed on to Part III. In addition, the application of the first and fourteenth amendments was in question. In light of the results presented here, it is not surprising that the *Shapero* precedent was followed in only three of the six circuit court decisions in which it was treated.

The reasoning of those decisions which did not follow the *Shapero* precedent is illustrative of the tactics employed by lower courts to limit the application of decisions which are equivocal or of doubtful authority. In one decision, the appellate panel ruled that solicitation laws requiring charitable organizations to provide a state agency with copies of any oral solicitation violated the first amendment.[14] The panel refused to extend the *Shapero* decision to charitable solicitations, as solicitation by lawyers was commercial speech and not subject to the exacting scrutiny required for charitable solicitations. Another case dealt with the constitutionality of a state law disallowing access to criminal justice records to be used

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[14]*Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989).

for direct mail advertising by attorneys, but allowing such access for noncommercial purposes.[15] The appeals court upheld the statute on the basis of the privacy issues involved and distinguished the *Shapero* precedent, as the attorneys in *Shapero* presumably already possessed the information necessary to solicit. In a third decision, the circuit court held that the case was not yet ripe for review, an issue that the appellate panel raised *sua sponte*.[16] In all three of these decisions, the Courts of Appeals relied upon questionable grounds to avoid compliance with a relevant, but legally ambivalent, precedent.

DISCUSSION

One of the more interesting findings of this study is that attitudinal factors, as measured by ideological consistency, are not generally explanatory with respect to behavior in the Courts of Appeals. In fact, as statistical tests demonstrated (*see fn. 9*), ideology has no independent effect on appeals court decision making across the broad range of issues considered. Attitudes have a profound influence when civil rights and liberties and criminal procedure issues are at play; but when other issues are applicable, ideology has no effect, as legal factors seem to be most influential here. Thus, *Hypothesis 7* with respect to ideological consistency is not supported by these findings. On the other hand, *Hypothesis 8,* which deals with the importance of ideology in particular issue areas, is fully confirmed by these results.

Unanimity carried little weight with the circuit courts, as there was almost no distinction between unanimous decisions and those decided by more narrow margins. In

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[15]*Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir. 1994).

[16]*Felmeister v. Office of Attorney Ethics*, 856 F.2d 529 (3rd Cir. 1988).

fact, contrary to *Hypothesis 1,* the unanimity variable carried so little statistical weight that it was dropped from the final model (*see fn. 9*). Competing forces may be at work with respect to unanimous decisions. Some of these decisions may be straightforward and unequivocal, so that there is no basis for disagreement. Others may be the product of compromise, where the justices weaken the language of the majority opinion in order to achieve consensus and present a united front. In any event, this is yet another study which has demonstrated that, contrary to popular belief, unanimous decisions are not provided any greater deference in the lower courts.

Significantly, however, appellate panels are much less likely to follow close Supreme Court decisions. Indeed, there was a clear distinction between lower court treatment of cases decided by one-vote margins and virtually all other coalitions. Apparently, when they confront a close case (i.e., 5-4 or 4-3), judges perceive either that there is dissension on the Court or that the Court is less inclined to reverse a contrary decision below, since a change in Court membership or a one-vote swing could alter the precedent. In any event, it seems that appeals courts feel less constrained and work within their "room to maneuver" (Songer, Segal, and Cameron 1994, 693) when the Court is closely divided. *Hypothesis 2*, therefore, is confirmed by this analysis.

Hypotheses 3, 4, and *5* set out various measures of the clarity of a Supreme Court decision, and each of these three hypotheses is borne out by the results. Specifically, circuit court panels are less likely to follow a decision when an increasing number of concurring opinions are written, when complex subject matter is involved, and when constitutional

provisions are at issue. These findings, therefore, strongly suggest that lower courts are much less likely to follow ambiguous as opposed to clear Court precedent.

Finally, as for *Hypothesis 6,* these findings indicate that decisions with important policy implications are more likely to be followed by circuit courts. Accordingly, and contrary to Baum's (1978) contention (*see fn. 6*), this hypothesis is confirmed. *Hypothesis 9* is also supported by the results; when lower courts perceive that a prior Court decision may not be supported by the current Court, they do not feel as obliged to follow that decision.

These results suggest that attitudinal factors are not universally instructive in explaining decision making in the Courts of Appeals, as ideology has an impact only in civil rights and liberties and criminal procedure cases. In other issues areas, legal factors appear to control behavior, which is partially demonstrated by judges following precedent at better than a 70% clip. Lower court judges abide by the norm of deference, at least in some types of cases, as evidently that is a part of what judges do. In any event, these results indicate that both legal and attitudinal variables are important in explaining outcomes in the circuit courts.

TABLE 4.1

OPERATIONALIZATION OF CONCEPTS AND DIRECTIONAL RELATIONSHIPS BETWEEN VARIABLES: THE 1987 TERM

Concept	Operationalization	Measurement	Relationship to Following Precedent
Strength of Precedent	Unanimous	Dummy variable indicating Supreme Court cases that were decided by a vote of 9-0, 8-0, 7-0, or 6-0.	+
	One-Vote Margin	Dummy variable indicating Supreme Court cases that were decided by a vote of 5-4 or 4-3.	-
Clarity of Precedent	Concurring Opinions	Number of concurring opinions that were issued in a Supreme Court case.	-
	Complexity	Dummy variable indicating Supreme Court cases where 3 or more legal provisions and/or issues were involved.	-
	Constitutional Provision	Dummy variable indicating Supreme Court cases where a constitutional provision was interpreted.	-
Policy Significance	Salience	Dummy variable indicating Supreme Court cases where 10 or more amicus briefs were filed.	+
Judicial Preferences	Ideological Consistency	Percentage of the appellate panel that agreed ideologically with the direction of the Supreme Court decision.	+
	Change in Supreme Court Composition	Difference in mean ideology scores between two Courts, incorporating the direction of the Supreme Court decision.	+

TABLE 4.2

BIVARIATE RELATIONSHIPS BETWEEN TREATMENT AND LEGAL FACTORS: THE 1987 TERM

		NOT FOLLOWED	FOLLOWED
VOTE MARGIN	UNANIMOUS	27.3% (172)	72.7% (457)
	7	31.0% (39)	69.0% (87)
	6	22.4% (13)	77.6% (45)
	5	45.8% (11)	54.2% (13)
	4	28.9% (56)	71.1% (138)
	3	27.0% (20)	73.0% (54)
	2	27.8% (40)	72.2% (104)
	1	35.8% (78)	64.2% (140)
CONCURRING OPINIONS	0	28.9% (241)	71.1% (592)
	1	26.5% (132)	73.5% (367)
	2	42.3% (55)	57.7% (75)
	3	20.0% (1)	80.0% (4)
CONSTITUTIONAL PROVISION	YES	34.5% (123)	65.5% (234)
	NO	27.6% (306)	72.4% (804)
COMPLEXITY	YES	39.5% (30)	60.5% (46)
	NO	28.7% (399)	71.3% (992)
SALIENCE	YES	26.9% (32)	73.1% (87)
	NO	29.5% (397)	70.5% (951)

TABLE 4.3
LOGISTIC REGRESSION OF TREATMENT: THE 1987 TERM

Explanatory Variable	Coefficient	Standard Error	*t* Statistic
_Constant	0.961	0.092	
Attitudinal Factors			
Ideological Consistency × Civil Rights and Liberties	0.631	0.262	2.411
Ideological Consistency × Criminal Procedure	0.844	0.254	3.326
Change in Supreme Court Composition	0.712	0.299	2.382
Legal Factors			
One-Vote Margin	-0.550	0.180	-3.057
Concurring Opinions	-0.177	0.090	-1.977
Constitutional Provision	-0.383	0.155	-2.471
Complexity	-0.821	0.287	-2.860
Salience	0.791	0.254	3.107

Log-likelihood = -863.672

N = 1467
$\chi 2\ (8)$ = 45.72
$p > \chi^2$ = 0.000

TABLE 4.4
PREDICTED PROBABILITIES OF FOLLOWING PRECEDENT: THE 1987 TERM

Baseline		0.744
Ideological Consistency in Civil Rights Cases		
	100%	0.819
Ideological Consistency in Criminal Procedure Cases		
	100%	0.848
Change in Supreme Court Composition		
	-0.35	0.692
	0.35	0.787
One-Vote Margin		0.627
Concurring Opinions		
	0	0.762
	3	0.653
Constitutional Provision		0.665
Complexity		0.562
Salience		0.865

TABLE 4.5

LOGISTIC REGRESSION VS. BOUNDED INFLUENCE LOGISTIC REGRESSION: THE 1987 TERM

	Logistic Regression			Bounded Influence Logistic Regression		
Explanatory Variable	Coefficient	Standard Error	*t* Statistic	Coefficient	Standard Error	*t* Statistic
_Constant	0.961	0.092		0.957	0.094	
Attitudinal Factors						
Ideological Consistency × Civil Rights and Liberties	0.631	0.262	2.411	0.634	0.259	2.448
Ideological Consistency × Criminal Procedure	0.844	0.254	3.326	0.847	0.251	3.374
Change in Supreme Court Composition	0.712	0.299	2.382	0.711	0.295	2.409
Legal Factors						
One-Vote Margin	-0.550	0.180	-3.057	-0.549	0.178	-3.079
Concurring Opinions	-0.177	0.090	-1.977	-0.175	0.089	-1.959
Constitutional Provision	-0.383	0.155	-2.471	-0.383	0.153	-2.502
Complexity	-0.821	0.287	-2.860	-0.818	0.284	-2.884
Salience	0.791	0.254	3.107	0.789	0.251	3.137

CHAPTER 5

COURTS OF APPEALS' TREATMENT OF CIVIL RIGHTS AND LIBERTIES DECISIONS FROM 1966-1975: A MULTIVARIATE ANALYSIS AND A COMPARISON OF TREATMENT AMONG AND WITHIN CIRCUITS

The analysis of Chapter 4 indicated that Courts of Appeals judges behaved differently when civil rights and liberties issues were under consideration. Specifically, circuit court judges were more likely to be motivated by their personal policy goals in such cases. In light of these findings, it is important to undertake a closer examination of decision making in these cases, in order to determine whether ideological values predominate over legal forces in influencing appeals court treatment of precedent.

The civil rights and liberties decisions investigated here include decisions of both the Warren and Burger Courts. Cases involving civil rights and liberties issues dominated overwhelmingly the agenda of the Burger Court, and on the Warren Court agenda they were second only to economic activity cases (Segal and Spaeth 1993, ch. 6). While Warren Court decisions in these cases are identified with "freewheeling libertarianism" (Schubert 1974, 198), the decisions of the Burger Court are characterized by "cautious conservatism" (Segal and Spaeth 1993, 117). The Warren Court favored individual over community rights and national over state power; alternatively, the Burger Court exhibited preferences for community rights and state power. The Warren Court made ten of the specific guarantees of the Bill of Rights applicable to the states, but the Burger Court limited or denied federal

protection to several of these provisions (Walker 1978). One political scientist (Steamer 1976, 5) provides this somewhat facetious description of the distinction between the two Courts:

> The Warren Court liked criminals, minorities, and people who wear sweatshirts with four letter words on them. It did not like police, prosecuting attorneys, or draft card burners. The Burger Court like[d] the police (although not enough to permit them to wear long hair), welfare people, Indians, women, and drugstores...The Burger Court dislike[d] prisoners, shoplifters, pushcart dealers, homosexuals, and human fetuses during the first three months of gestation.

The views of Court commentators have been confirmed by empirical analysis. According to data provided in Segal and Spaeth (1993, ch. 6), the percentages of liberal decisions rendered by the Warren Court in civil rights, First Amendment, due process, and privacy cases were 77.1, 71.7, 55.8, and 50.0, respectively. The percentages of liberal decisions announced by the Burger Court in the same issue areas were 51.7, 49.2, 35.6, and 28.6. The stark contrast in the policy making of the Supreme Court under these two Chief Justices provides fertile ground for analyzing lower court treatment of the precedents established by these Courts.

HYPOTHESES

According to the findings in Chapter 4, the attitudes and values of Courts of Appeals judges are important determinants of their decisions in civil rights and liberties cases. However, as their decisions are subject to Supreme Court review and as they may have ambitions of membership on the Supreme Court, circuit court judges are constrained in their capacity to follow their own preferences. The hypotheses tested here incorporate legal forces

which may come into play in appeals court treatment of precedent. These legal considerations include the strength and clarity of precedent and the political and social significance of precedent. Hypotheses which control for the influence of ideological factors are also specified.

The first four hypotheses deal with the strength of a particular precedent, in terms of the authority which is attributed to a precedent. As Baum (1976, 101) notes, "acceptance of authority represents one of several motivations which help to determine the treatment of appellate decisions." A precedent which is viewed as carrying the full authority of the High Court should be more readily espoused by the lower courts.

One indicator of the strength or authority of a decision is the level of support a decision garnered from the Court's members (Johnson 1979; Johnson and Canon 1984, 58). Level of support is operationalized in *Hypotheses 1* and *2*.

> *Hypothesis 1*. There is a positive relationship between a unanimous Supreme Court civil rights and liberties precedent and the following of that precedent in the Courts of Appeals.

A number of scholars have suggested that the Supreme Court may strive to achieve unanimity in decisions which have important policy implications and which may encounter resistance in their implementation (*see, e.g.,* Rohde 1972; Hutchinson 1979). Consensus in decision making may enhance the perceived legitimacy of the decision and may lend the decision greater weight in the lower courts (Johnson and Canon 1984, 58). *Hypothesis 1* asserts that unanimous decisions will be treated more favorably in the circuit courts.

On the other hand, a decision to which the justices cannot agree may raise questions in the lower courts regarding the legal correctness of the decision. *Hypothesis 2* concerns precedents which were established by a minimum winning coalition on the Court.

> *Hypothesis 2.* There is a negative relationship between a Supreme Court civil rights and liberties precedent which was established by a minimum winning coalition and the following of that precedent in the Courts of Appeals.

In these decisions, a substantial bloc on the Court favors an alternative outcome. As a result, lower court judges may be reluctant to comply with such rulings, since these rulings could change in conjunction with membership turnover on the Court (Marshall 1989; Pacelle and Baum 1992).

Hypothesis 3 deals with the Supreme Court's treatment of precedent in later decisions.

> *Hypothesis 3.* There is a negative relationship between a Supreme Court civil rights and liberties precedent which has been modified substantially by subsequent decisions and the following of that precedent in the Courts of Appeals.

There are two justifications for including this variable in the model. First, it is important to control for ensuing alterations in precedent, as *stare decisis* only binds judges to current doctrine.[1] Second, a number of studies have highlighted the importance of a clear

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[1]There is not a perfectly collinear relationship between doctrinal modification and the treatment of precedent in the circuit courts. Many of these modified decisions are not explicitly overruled, and more significantly, appeals court opinions continue to refer to them for guidance even when they have been substantially altered.

One example of this behavior is found in the Courts of Appeals' treatment of *Rosenbloom v. Metromedia* (1971). As discussed in Chapter 2 (*see pp.* 39-40), the *Rosenbloom* Court held that the actual malice standard in libel cases applied to private persons who had become involved in issues of "public or general concern" (403 U.S. 265 at 44). However, in *Gertz v. Welch* (1974), the Court implicitly overruled *Rosenbloom*, noting the difficulty of requiring judges to determine which issues were and were not of "public or general interest" (*Id.* at 41). The Court went on to delineate three classes of "public figures" to whom the actual malice standard would apply, one of which was individuals who "have thrust themselves to the forefront of particular public controversies" (418 U.S. 323 at 345).

Even after the *Gertz* decision, circuit court opinions continued to cite *Rosenbloom*

and consistent line of precedent in achieving lower court compliance (Gruhl 1980; Johnson and Canon 1984, 51; Johnson 1987; Segal, Songer, and Cameron 1995). When a Supreme Court decision has been altered or obscured by later decisions, such revisions should be acknowledged by the circuit courts.

Some scholars have reasoned that, over time, the authority of a particular precedent is eroded by changes in Court personnel and doctrine (Marshall 1989; Pacelle and Baum 1992). On the other hand, some researchers have argued that precedent becomes more forceful as it is clarified in subsequent decisions and applied in other areas (Johnson 1987). *Hypothesis 4* takes this view, stipulating that a precedent grows stronger, and thus is treated more favorably in the lower courts, with the passage of time.

> *Hypothesis 4.* There is a positive relationship between the length of time that has passed since a Supreme Court civil rights and liberties precedent was established and the following of that precedent in the Courts of Appeals.

In addition to the strength or authority of precedent, a second factor which may contribute to divergent lower court responses to Supreme Court directives is the clarity with which the Court makes these directives known. Baum (1976, 92) argues that ambiguity in decision making may preclude faithful implementation of decisions in two ways: "by leaving loyal judges uncertain as to their superior's intent and by providing leeway which recalcitrant

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as authority. Note a portion of the First Circuit's opinion in *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980):

> Distinguishing what would be "an issue of public or general concern" under *Rosenbloom* from a "public controversy" under *Gertz* is not a clearcut task...[W]e find ourselves returning to the job from which the Court in *Gertz* felt it had liberated us (*Id.* at 590).

judges may use to evade obedience to a directive." *Hypotheses 5, 6,* and *7* relate to the importance of an unequivocal Supreme Court decision. In these hypotheses, clarity is operationalized in three different measures: the number of concurring opinions that are written, whether a constitutional provision is at issue, and whether the decision is rendered by the Burger Court.

> *Hypothesis 5*. There is a negative relationship between the number of concurring opinions that the Supreme Court issues in establishing a civil rights and liberties precedent and the following of that precedent in the Courts of Appeals.

Concurring opinions present differing viewpoints and provide alternative interpretations of legal provisions. These individual expressions may serve to weaken the majority opinion.

> *Hypothesis 6*. There is a negative relationship between a Supreme Court civil rights and liberties precedent which interprets a constitutional provision and the following of that precedent in the Courts of Appeals.

As Solan (1993, 170) asserts in his linguistic analysis of judicial decisions, "the words in the Constitution...obviously underdetermine their applicability to particular situations." When a constitutional provision is the basis of adjudication, there is greater potential for numerous, and conflicting, interpretations. Thus we would expect to see more variation in lower court treatment of constitutionally based precedents.

> *Hypothesis 7*. There is a negative relationship between a Supreme Court civil rights and liberties precedent which was established by the Burger Court and the following of that precedent in the Courts of Appeals.

One study of policy making in the federal courts has hypothesized that the inconsistency and ambiguity of Burger Court opinions contributes to the discretion that

lower court judges are able to exercise (Carp and Rowland 1983, 11). Another states that "the Burger Court's decisions in...civil liberties are unlikely to generate uniform compliance" due to their lack of precision (Walker 1978, 384). Accordingly, *Hypothesis 7* specifies that civil rights decisions emanating from the Burger Court should be followed less frequently in the Courts of Appeals.

Competing hypotheses are offered with regard to lower court treatment of Supreme Court decisions which have important political or social ramifications. One view is that lower court judges are more apt to follow such decisions, as a deviant decision is more likely to come to the attention of the High Court and to be selected for review (Johnson 1979; George 1997). An alternative belief is that highly significant decisions will encounter more resistance in the lower courts, precisely because of their widespread implications (Baum 1978). It is hypothesized here that, because of the legal socialization that judges undergo, the possibility of review will be the prevailing influence. *Hypothesis 8* suggests that this consideration will lead to more faithful application of salient decisions.

> *Hypothesis 8.* There is a positive relationship between a salient Supreme Court civil rights and liberties precedent and the following of that precedent in the Courts of Appeals.

There is general agreement that circuit courts will decide cases *en banc* when "difficult, complex, highly political, or simply significant questions" are involved (George 1997, 9). However, many scholars disagree about the deference the Supreme Court pays to *en banc* decisions. Some assert that because of the importance of such decisions, they will be monitored closely by the Court (George 1997). Alternatively, one study reports that the "higher court rarely confirms or reverses decisions made by the entire circuit membership"

(Richardson and Vines 1970, 123). The view adopted in *Hypothesis 9* is that the Supreme Court should give more credence to *en banc* judgments, and thus that circuit court judges should have more discretion in their decision making.

> *Hypothesis 9.* There is a negative relationship between *en banc* decisions in the Courts of Appeals and the following of Supreme Court civil rights and liberties precedents in those decisions.

As students of all levels of courts have demonstrated, personal attitudes and values and values are crucial determinants of judicial behavior (*see, e.g.,* Epstein and George 1992; Songer and Haire 1992; Brace and Hall 1993; Segal and Spaeth 1993; Segal, Songer, and Cameron 1995). *Hypothesis 10* relates to the importance of ideology in Courts of Appeals' treatment of Supreme Court precedent.

> *Hypothesis 10.* There is a positive relationship between an appellate panel's ideological consistency with the direction of a Supreme Court civil rights and liberties precedent and the following of that precedent in the Courts of Appeals.

Because of the established importance of individual policy goals, review-minded judges should be aware of the preferences of the High Court's members. When subordinate judges perceive that the ideological configuration of the Court has changed since a precedent was handed down, they should respond accordingly (Wasby 1970). *Hypothesis 11* describes the nature of this response.

> *Hypothesis 11.* There is a positive relationship between a Supreme Court precedent which has gained greater ideological support on the Court, due to changes in Court composition, and the following of that precedent in the Courts of Appeals.

The operationalization of the legal and attitudinal elements contained in these hypotheses is described in detail in Chapter 2 (*see pp.* 37-41) and is summarized in Table 5.1. Table 5.1 also specifies the direction of the relationships which are hypothesized to exist between these legal and attitudinal elements and the treatment of precedent. In the next section, these factors are included in a logistic regression model of the Courts of Appeals' treatment of Supreme Court civil rights and liberties decisions, in order to ascertain their role in determining this treatment.

FINDINGS

As with the decisions of the 1987 Term, the Supreme Court's civil rights and liberties decisions from 1966-75 received deferential treatment in the Courts of Appeals. The intermediate federal courts followed the precedents established by these decisions in 74.2% of their own decisions. In approximately one fourth of their decisions, however, the circuit courts did not follow a relevant Supreme Court precedent. Thus it is critical to identify the circumstances under which these courts fail to apply precedent. To accomplish this, the following model of appeals court treatment of Supreme Court civil rights decisions is estimated:

$$P(\textit{Treatment}=1) = b_0 + b_1(\textit{Unanimous}) + b_2(\textit{Minimum Winning Coalition}) + b_3(\textit{Doctrinal Modification}) + b_4(\textit{Age of Precedent}) + b_5(\textit{Concurring Opinions}) + b_6(\textit{Constitutional Provision}) + b_7(\textit{Burger Court}) + b_8(\textit{Salience}) + b_9(\textit{En Banc}) + b_{10}(\textit{Ideological Consistency}) + b_{11}(\textit{Change in Supreme Court Composition})$$

Each b_i indicates the change in the log of the odds of following precedent due to changes in the value of variable *i*, controlling for the values of the other variables. It is hypothesized that b_1, b_4, b_8, b_{10}, and $b_{11} > 0$ and that b_2, b_3, b_5, b_6, b_7, and $b_9 < 0$.

Table 5.2 presents the estimated coefficients and significance levels for this logistic regression model which predicts whether the circuit courts will follow a particular Supreme Court decision. A likelihood ratio test, which tests the null hypothesis that all coefficients in the model except the constant are zero, indicates that the block of coefficients is significantly different from zero at $p<0.001$.[2] Each coefficient achieves statistical significance at $p<0.05$ and is in the expected direction. The model correctly classifies 74.7% of appeals court decisions.[3]

According to the results in Table 5.2, the Courts of Appeals become less likely to follow a Supreme Court decision as more concurring opinions are written by the justices. The interpretation of a constitutional provision also decreases the likelihood that a precedent will be followed. These courts are attentive to Supreme Court modifications of prior precedents, as they are less likely to adhere to a precedent that has been substantially altered by a subsequent decision.

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[2]The likelihood ratio test statistic is calculated as $-2\log(L_0/L_1)$, where L_1 is the likelihood function for the full model as fitted and L_0 is the maximum value of the likelihood function if all coefficients except the constant are zero. The test statistic is χ^2-distributed, with degrees of freedom equal to the number of independent variables.

[3]The model achieves a 1.94% reduction in error from predicting treatment based upon the proportion of decisions followed. Percent reduction in error is calculated according to the following formula:

$$100 \times \frac{\%\text{ correctly classified} - \%\text{ in modal category}}{100 - \%\text{ in modal category}}$$

As noted in Chapter 4, the goal in developing these models is to determine when circuit courts fail to follow Supreme Court precedent. This model is very useful in identifying such situations.

Appellate panels are more likely to follow a decision which was agreed to by all of the justices, and they become more likely to follow precedent as the length of time increases since the precedent was established. Additionally, they are more likely to follow a precedent which comports with their personal preferences. Courts of Appeals judges are also aware of changes in the ideological composition of the High Court, as they are more likely to follow a decision which has the approval of the current Court. Contrary to *Hypothesis 7*, a Burger Court decision is more likely to be applied favorably in the circuit courts.

Likelihood ratio tests were calculated in order to determine whether some of the variables had zero coefficients and should therefore be dropped from the model.[4] I hypothesized that appeals court judges would be less likely to follow precedent in their *en banc* decisions and that they would be less likely to follow decisions reached by a minimum winning Supreme Court coalition. I also theorized that cases with important policy implications would be followed more often in the lower courts. However, tests for redundant variables indicated that *Minimum Winning Coalition*, *En Banc*, and *Salience* had little explanatory power in a model of circuit court treatment of precedent.

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[4]The likelihood ratio test which was calculated above as a measure of goodness-of-fit can also be used to determine whether individual coefficients are zero. In such a test, L_1 is the value of the likelihood function for the complete model, and L_0 is the value of the likelihood function for the reduced, or nested, model. The number of degrees of freedom is equal to the number of coefficients hypothesized to be zero.

When *En Banc* was omitted from the model, the likelihood ratio was 0.575 with p=0.448. When *Minimum Winning Coalition* was omitted, the likelihood ratio was 0.528 with p=0.467. When *Salience* was omitted, the likelihood ratio was 2.096 with p=0.148.

Predicted probabilities of following precedent under certain conditions are more readily interpretable than are logit coefficients.[5] Some of these predictions are displayed in Table 5.3. The baseline probability indicates the likelihood of following precedent when each independent variable takes on its mean or modal value. Under the most common circumstances, the probability of a circuit court following a Supreme Court civil rights precedent is 0.72. This figure increases notably, taking a value of 0.79, when the Supreme Court's membership becomes more attitudinally supportive of a past decision. A unanimous decision is followed at a similar rate of 0.78. A Warren Court decision is substantially less likely to receive favorable treatment in the circuit courts, as such decisions are followed only 59% of the time. A precedent which has been significantly revised by subsequent Supreme Court decisions is followed in only 47% of appeals court decisions. A five-year-old precedent is followed at a rate of 0.71, while a twenty-year-old precedent is followed at a rate of 0.78.

Those who advocate a strictly attitudinal description of judicial decision making could reasonably assert that appeals court judges do not fail to follow a particular Supreme Court precedent because the precedent lacks authority or because they are unsure of the Court's intentions for its application; rather, these judges avoid precedent because they see an opportunity to exercise their own preferences when the chances of Supreme Court review are slim. In order to investigate this possibility, I estimated the model again with interactive variables. The purpose of including these interaction terms is to ascertain whether attitudinal or legal factors determine treatment when both are present.

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[5]The equation for calculating these predicted probabilities is $1/(1 + \exp(-X\beta))$.

As a measure of *Ideological Consistency*, I used a variable which indicated whether the majority of the panel or circuit agreed with the direction of the Supreme Court decision. I interacted this variable with two of the measures of decisional clarity, *Concurring Opinions* and *Constitutional Provision.* The results of this analysis, as reported in Table 5.4, are inconclusive. The model does not allow one to predict treatment confidently when a panel or circuit approves of the outcome of a Supreme Court decision, but when the decision's interpretation is ambivalent. Perhaps other considerations come into play in such instances, which are not accounted for in the model. In any event, the argument that a lower court judge is relying on doctrinal justifications to mask his ideological inclinations is not supported by these findings.

Some diagnostics tests were employed to determine the robustness of the findings reported in Model 1. These diagnostics are the same as those performed in Chapter 4 (*see pp.* 84-85) and described in detail in Appendix B. The results of these tests indicated that only ninety-seven of the 5,656 cases are poorly fit by the model, according to the deviance residuals which were calculated. These cases truly fit the description of outliers; the ninety-seven cases which are problematic are comprised of forty-three different patterns of independent variables, so that each pattern on average consists of only between two and three cases. This indicates that the outlying patterns are unusual assortments of legal and attitudinal factors.

The diagnostic tests further demonstrated that no combinations of independent variables are exerting undue influence on the results, as deleting particular patterns did not produce significant changes in the estimated values. In fact, the leverage statistic h_j for each pattern never exceeds 0.03. According to these diagnostics, a great deal of confidence may

be placed in these findings, as the model fits 98% of the data extremely well and no case pattern is having a disproportionate impact on the results.

Some trends were discernible in the 2% of cases which were poorly fit by the model. Of these ninety-seven cases, forty-two applied Supreme Court precedents which were established by a unanimous vote margin. It is noteworthy that nearly half of the forty-two unanimous decisions (18) dealt with school desegregation. Desegregation was a politically divisive issue, in which the Supreme Court strove to present a united front in order to discourage public resistance (*see, e.g.,* Rohde 1972; Hutchinson 1979). However, in eight of the eighteen desegregation cases where a unanimous precedent was cited, the Court's solidarity did not promote compliance in the lower courts, as the precedent was not followed.

In fact, contrary to what the model predicts, a unanimous precedent was not followed in thirty-two of the forty-two circuit court decisions where it was found to be relevant. Ten of these treatments of unanimous decisions dealt with issues of due process, and in none of these instances was precedent adopted. It seems that, generally speaking, support on the Court for a precedent fosters obedience in the Courts of Appeals; but in certain issue areas, consensus is not sufficient to ensure favorable treatment of precedent.

This examination of outlying cases provides evidence that some issues may be more complex than others. Forty-six cases of the ninety-seven cases which were not well-explained by the model dealt with various due process issues, and twenty involved school desegregation.[6] Perhaps certain aspects of these issues raise more difficult questions, and further exploration is needed to account for their treatment.

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[6]Ten such cases dealt with one decision, *Swann v. Charlotte-Mecklenburg County Board of Education*, 401 U.S. 1 (1971).

DISCUSSION

Consistent with the findings of Segal and Spaeth (1993) and those reported in Chapter 4 of this study, judicial attitudes are an important determinant of decision making. The estimates reported in Table 5.2 illustrate that when appeals court judges agreed ideologically with the policy established by a Supreme Court decision, they were significantly more likely to apply that precedent favorably in their own decisions. These judges were also attentive to the ideological composition of the Supreme Court, for if a later Court was not as supportive of a decision as was the Court that rendered the decision, circuit court judges were less inclined to afford a positive treatment to that decision. *Hypotheses 10* and *11*, the two hypotheses relating to attitudinal factors, are therefore confirmed by these findings.

However, personal attitudes and values were not the only forces which influenced behavior in the Courts of Appeals, nor were they the strongest motivators. The actions of circuit courts judges were affected substantially by their legal training, which socialized them to defer to the decisions of higher courts and to subordinate their own preferences. As the simulations displayed in Table 5.3 demonstrate, many of the legal elements which were operationalized in the model had greater consequence for the treatment of precedent than did the attitudinal elements.

Partial support is obtained for the importance of the authoritativeness or strength of precedent in affecting circuit court behavior. *Hypothesis 1* is corroborated, as unanimous civil rights and liberties decisions had greater precedential value in the circuit courts than did nonconsensual decisions. I hypothesized that unanimous decisions would be followed more frequently in the Courts of Appeals because they carried the full authority of the Court. I

reasoned that the Court's agreement could act to mitigate any resistance the decisions might encounter in the lower courts. Pacelle and Baum (1992) offered an alternative explanation of the favorable treatment that might be afforded unanimous decisions. They argued that nonunanimous decisions are more likely to be controversial to the Court's audience; thus lower courts may respond more positively to unanimous decisions simply because they are less likely to disagree with them. It may be that these two considerations were working in concert to motivate circuit court deference to these decisions.

On the other hand, contrary to *Hypothesis 2*, appeals court judges were not influenced by closely divided Supreme Court rulings. I theorized that decisions which were reached by a minimum winning coalition on the Court were more likely to encounter opposition in the lower courts, as the justices were in sharp disagreement over the outcome. However, statistical tests (*see fn. 4*) showed that narrow decisional margins did not significantly diminish the propensity of circuit court judges to follow Supreme Court precedent.

Of particular import to circuit court judges was whether a Supreme Court precedent had been altered by subsequent decisions. As *Hypothesis 3* stipulates, lower court judges were acutely aware of modifications in precedent, and they reacted accordingly to these changes in doctrine. This finding is entirely consistent with the principle of *stare decisis*.

In addition to the level of Supreme Court agreement on a precedent, the age of a precedent may also serve as an indication of its authority. These findings indicate that, as Johnson (1987) speculated, lower courts may find older precedents more persuasive, or authoritative, than newer ones. Consistent with *Hypothesis 4*, as time passed since a precedent was established, the Courts of Appeals became more likely to follow that

precedent. This result may also be attributable to the fact that precedent is defined more clearly as its appropriate application is articulated in other decisions.

The clarity of Supreme Court policy was critical to its implementation in the Courts of Appeals. As more, and divergent, judicial viewpoints were expressed, appellate judges became uncertain of the direction the High Court wanted them to take. When the High Court was divided in its reasoning, the lower courts were divided in their applications of precedent. *Hypothesis 5* is thus supported. The interpretation of provisions of the Constitution may have also fostered confusion in the circuit courts, as specified by *Hypothesis 6*. This is evidenced by the fact that precedents which did not involve constitutional issues were more likely to be afforded favorable treatment.

Hypothesis 7 asserted that Burger Court decisions should be followed less often in the Courts of Appeals, as such decisions have been characterized as ambiguous and inconsistent (*see* Walker 1978; Carp and Rowland 1983). The findings in Table 5.2 contradict this hypothesis, as it was the decisions of the Warren Court which engendered negative responses from the circuit courts. There may be an attitudinal, rather than a legal, explanation for this phenomenon. The Burger regime has been termed the "era of Contemporary Conservatism" (Schubert 1974, 189-213). It is reasonable to suggest that the decisions of the Burger Court met with greater agreement in the Courts of Appeals because appointees of conservative presidents dominated these courts. In fact, 59% of active appeals court judges during the period under investigation were appointed by Republican presidents (*see* Table 5.5).

Hypothesis 8 relating to the salience of precedent is negated by the results of tests for redundant variables (*see fn. 4*). I expected that the Courts of Appeals would be particularly

attentive to Supreme Court decisions which had significant political or social ramifications, as contrary lower court decisions might be more apt to foster review. However, there was no evidence that the circuit courts treat these decisions differentially. Appeals court judges may have viewed all of the civil rights and liberties decisions traced here as having important policy consequences and, as a following rate of nearly 75% suggests, afforded these decisions a high degree of deference.

Hypothesis 9, which asserted that circuit courts will exercise more discretion in their *en banc* decisions, was also disproved on the basis of tests for redundant variables (*see fn. 4*). Clearly, *en banc* cases are distinguishable from those heard by three-judge panels, since the circuit is willing to expend the requisite resources for adjudication by all of its members. As Howard (1981, 9) explains, "circuit judges tend to avoid en bancs as cumbersome." In fact, the Administrative Office of United States Courts reported that in a recent year, less than one percent of the appeals terminated on the merits were handled *en banc*. It is possible that there were not enough *en banc* decisions in the data set to evaluate differential behavior, as just over 200 of the nearly 6,000 decisions were reached *en banc*.

INTER- AND INTRA-CIRCUIT VARIATION

Because of the infrequency of Supreme Court review, the Courts of Appeals have a great deal of freedom in their decision making. A number of scholars have recognized that the product of this discretion may be the creation of policy on a circuit-by-circuit, rather than a national, basis (Howard 1981; Carp and Rowland 1983; Davis and Songer 1988-9; Wenner and Dutter 1989). Goldman (1966, 382) found the institutional diversity of the circuit courts to be so pronounced that it "imposed limitations on data collection and analysis." Combs'

(1982) study provides empirical support for this allegation in the area of school desegregation, where the various circuits contemporaneously employed four different tests in determining whether proof of racial discrimination had been established.

Several explanations of inter-circuit differences in decision making are offered in the literature. One such explanation attributes decisional dissimilarities to regional forces which may act upon the circuits courts. For example, Howard (1981, 33) asserts that the organization and structure of these courts "may well spawn regionalization and regionalized national law." Carp and Rowland (1983, 88) also suggest that "some of the circuit-to-circuit variance may be caused by extralegal political and environmental influences." Regional values and interests may be relevant for some circuits such as the fourth, fifth, and eleventh, which are composed solely of southern states, and the seventh, which is made up of only midwestern states; but while some circuits clearly have a regional character, other circuits ignore such boundaries. For example, the ninth circuit consists of states from Alaska to Arizona and from Montana to Hawaii, and even includes the territory of Guam. In spite of the fact that these states share the western region of the United States, many of the policies pursued by Northwesterners are in direct conflict with those espoused by Californians, particularly in the area of environmental regulation. This ideological discord has prompted many legislators to lobby for the division of the ninth circuit.

Other scholars ascribe inter-circuit diversity to the disparate nature of the cases the various circuits hear. Howard (1981, 55) reported that each circuit he studied "became a magnet for certain subjects of federal law by virtue of location, special jurisdiction, and predilections." Even in those cases where the circuits dealt with similar issues, he detected differences in the types of parties which each circuit favored. Howard's (1981) findings for

the 1960s were confirmed by Davis and Songer's (1988-9) analysis of circuit court decision making in the 1980s. Subject matter specialization and preferences for certain classes of litigants enhance the potential for the creation of circuit-specific policy.

A final explanation of circuit-based variation is an attitudinal one, asserting that decisional inconsistencies among the circuits may be due to differences in circuit composition. A number of studies have documented distinct judicial behavior according to the party affiliation of the judge or of the president who appointed the judge (*see, e.g.,* Goldman 1966, 1975; Tate 1981; Carp and Rowland 1983; Tate and Handberg 1991). Table 5.5 displays the percentages of active judges in each circuit who were Democratic and Republican appointees.[7] During this time, the Courts of Appeals as a whole were dominated by appointees of Republican presidents, although the makeup of each circuit varied. Nearly three-fourths of seventh circuit judges were appointed by Republican presidents. While the third, fourth, tenth, and DC circuits were reasonably well-balanced, only in the fifth circuit were there more Democratic appointees than Republican ones.

In order to determine whether civil rights and liberties precedents are treated differentially among the circuits, I first employ standard difference-of-proportions tests. I compare the rate of following precedent in each circuit to that in the Courts of Appeals as a whole. The null hypothesis is H_O: $\pi_C = \pi_c$, where π_C is the proportion of decisions followed in all of the circuits and π_c is the proportion of decisions followed in individual circuits. The alternative hypothesis is H_A: $\pi_C \neq \pi_c$. Rejection of the null hypothesis indicates that

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[7]In relating the makeup of each circuit to its decisional tendencies, it is important to point out that, as noted in Chapter 1, it is not only the active circuit judges who may sit on appellate panels. Retired circuit judges, judges from other circuits, district court judges, and even retired Supreme Court justices may be assigned to these panels.

precedent is followed more often, or less often, in a particular circuit. A two-tailed test is used, where H_O is rejected at $\alpha = 0.05$ if the *t*-statistic is 1.96 or greater.[8]

Table 5.6 provides the rates at which precedent is followed in each circuit, as well as a breakdown of the treatment of liberal and conservative precedents. The difference-of-proportions tests demonstrate that there is substantial variation in the treatment of precedent among the circuit courts. While the eighth and eleventh circuits were more likely than the other circuits to follow precedent, the first circuit was less likely to follow precedent. The ninth circuit may also have been less likely to follow precedent.

An analysis of treatment based upon the ideological direction of precedent suggests that some of this behavior may be attitudinally motivated. The ninth circuit was less likely than other circuits to follow liberal precedents, while the first and second circuits were less likely than other circuits to follow conservative precedents. The eighth and eleventh circuits were more likely than other circuits to follow conservative precedents. Additionally, the eighth and ninth circuits were more likely to follow conservative precedents than they were to follow liberal ones.

I also reestimate the civil rights model twelve times, including a dummy variable for a different circuit in each run. The results of these estimations will indicate whether the decision making of individual circuits is significantly different from that of the Courts of

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[8]A difference-of-proportions test is calculated as

$$t = \frac{(P_A - P_B)}{\sqrt{P_C (1 - P_C) (n_A + n_B / n_A \times n_B)}}$$

where $P_C = (n_A P_A + n_B P_B) / n_A + n_B$. H_O is rejected at $\alpha = 0.10$ if the *t*-statistic is 1.64 or greater and at $\alpha = 0.01$ if the *t*-statistic is 2.57 or greater.

Appeals as a whole when other factors are controlled for. The coefficients and standard errors are presented in Table 5.7. The results of the difference-of-proportions tests are confirmed to some extent, as the eighth circuit was more likely than the other circuits to follow precedent and the first circuit was less likely to follow precedent.

To summarize the findings in Tables 5.6 and 5.7, in the third, fourth, fifth, sixth, seventh, tenth, and DC circuits, no patterns of variation in the treatment of precedent were discernible. Decision making in these circuits closely resembled that of the Courts of Appeals as a whole. This finding is of particular interest with respect to the fourth, fifth, and seventh circuits. As Table 5.5 shows, the seventh circuit was dominated overwhelmingly by conservative appointees; yet this circuit was not more likely than others to follow conservative precedents, nor did it treat conservative precedents differently from liberal ones. Regarding the fourth and fifth circuits, these circuits have historically been said to rule conservatively in their race relations and Fourteenth Amendment cases (*see, e.g.,* Carp and Rowland 1983), but no such trends were apparent here.

However, in the first, second, eighth, ninth, and eleventh circuits, definite precedential biases were found. The first and second circuits were less likely than the other circuits to apply conservative precedents. The first and second circuits consist of the New England states and New York, and the literature reports that East Coast Republicans are more liberal than their fellow Republicans in the rest of the nation (*see, e.g.,* Carp and Rowland 1983). It is not surprising, then, that even though two-thirds of the judges of both the first and second circuits were Republican appointees, these circuits made fewer conservative rulings than did their GOP colleagues in other parts of the country.

The eighth and ninth circuits exhibited similar behavior in some respects. Both circuits favorably applied conservative precedents more often than they did liberal ones; and while the eighth circuit espoused conservative precedents more often than the other circuits, the ninth circuit complied less frequently with liberal precedents than its counterparts. However, although the eighth circuit was more deferential to precedent overall than were the other circuits, the ninth circuit may have been less obedient.

The eighth circuit is composed of six midwestern states, plus Missouri and Arkansas. The conservatively oriented behavior of this circuit is explainable in light of the findings of one study of the federal courts (Carp and Rowland 1983), where the authors discovered only minimal partisan differences among the judges of the eighth circuit. In fact, the liberalism scores of Republican judges were higher than those of Democratic judges, so that even the "liberal" judges were likely to support conservative policies.

As with the eighth circuit, Carp and Rowland (1983) reported only slight differences in liberalism indexes among ninth circuit judges. Their data also indicated that western judges reached more conservative decisions than did northern and eastern judges, particularly in civil rights and liberties cases. Thus the ninth circuit's conservative approach to the treatment of Supreme Court precedent is understandable.

The eleventh circuit was notably obedient to precedent. It was significantly more likely to adopt all precedents and conservative precedents than were the other circuits. It was also more likely than the other circuits to adhere to liberal precedents, although the *t*-value is not statistically significant. These findings are especially intriguing when one considers a possible institutional motivation for this behavior. The eleventh circuit was not created

until 1981, when it was carved out of the fifth circuit.[9] Research on the U.S. Supreme Court indicates that in the years following its creation, consensus was the norm, with the justices casting dissenting votes only infrequently (*see* Epstein *et. al.* 1996). In fact, substantial dissent did not appear until the 1940s. The eleventh circuit may have behaved similarly following its inception, showing especial deference to Supreme Court precedent, regardless of its ideological tenor, in order to establish its legitimacy as a decision making institution.

Two of the federal circuits tended to avoid precedent in general. The first circuit was significantly less likely than the other circuits to apply Supreme Court decisions in its rulings, and there is some evidence that this is also true of the ninth circuit. These circuits seemed to perceive that they had a great deal of independence in their decision making, and they took advantage of this opportunity to shape their own public policies.

The analysis presented here does not permit an evaluation of Howard's (1981) explanation for inter-circuit variation in decision making. He reported that differences in circuit outcomes were due, at least in part, to differences in the types of cases each circuit adjudicated; but, as this study is limited to circuit decision making in civil rights and liberties cases, this claim cannot be assessed. There is limited evidence of regional patterns in decision making, as the northeastern circuits exhibited more liberal tendencies than did the rest of the nation, while the western circuit was more conservative. However, no such trends were observable in the southern circuits; and while the eighth circuit ruled more conservatively than other circuits, this behavior was not apparent in the other midwestern circuits, i.e., the sixth and seventh circuits. Finally, some support is found in the eighth and

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[9]*See* Barrow and Walker (1988) for a thorough account of the division of the fifth circuit.

ninth circuits for an attitudinal explanation of circuit diversity. It is important to note, however, that in seven of the twelve circuits, decision making is consistent with that of the Courts of Appeals as a whole.

In his extensive study of the Courts of Appeals, Howard (1981, 8) contended that the decentralization of the federal courts could potentially lead to the "Balkanization of national law." The evidence presented here indicates that his concerns are justified with respect to decision making in at least some circuits, as there is meaningful variation in the extent to which individual circuits adhere to Supreme Court doctrine in their decisions. In some circuits, the application of precedent appears to be attitudinally determined. But in the majority of circuits, judges appear to be guided in large part by past Supreme Court rulings.

In addition to variation among circuits in the treatment of precedent, many scholars have acknowledged the potential for variation within circuits as well (Richardson and Vines 1970; Atkins 1972; Goldman 1975; Howard 1981; Songer 1982). This variation is said to be a product of decision making procedures, as the majority of Courts of Appeals decisions are made by three-judge panels rather than all of the circuit judges. Richardson and Vines (1970, 123) assert that "the panel system...enhances the opportunity for intracourt conflicts on policy positions," and according to Howard (1981, 9), panel rotation is "a potential source of disharmony in federal law."

Few circuits have been able to avoid accusations of "panel packing" (Howard 1981). One study (Atkins and Zavoina 1974) has illustrated the capacity of a chief judge to obtain outcomes favorable to his policy position through panel assignments. This analysis reported that, from 1961 to 1963, a minority of fifth circuit judges decided a disproportionate number

of race relations cases, usually in favor of black plaintiffs. The authors attributed this finding to the fact that Chief Judge Elbert Tuttle, a member of the liberal minority voting bloc, assigned judges to these cases who shared his pro-civil rights ideology. One of his fellow circuit judges had publicly accused Tuttle of such a strategy in a dissenting opinion.[10]

If panel decisions are truly a function of which judges comprise the panel, we would expect to see a great deal of diversity in the treatment of precedent according to the ideological makeup of the panel. Table 5.8 presents the rates of following precedent for appellate panels according to their ideological composition. Panels consisting of three liberal judges were more likely than other panels to follow liberal precedents. Panels made up of two conservative judges and one liberal judge were more likely to follow conservative precedents than they were to follow liberal ones, and this may also be true of panels composed of three conservative judges.

Additional evidence of ideologically motivated decision making by Courts of Appeals panels is provided in Table 5.9, which breaks down panel behavior by circuit. Liberal-dominated panels in the sixth circuit were more likely to follow liberal precedents than conservative ones, while conservative-dominated panels in the eighth and ninth, and perhaps seventh, circuits were more likely to follow conservative precedents than liberal ones. Interestingly, in the third circuit, liberal-dominated panels were more likely to follow conservative precedents than they were to follow liberal precedents.

This analysis of panel decision making indicates that the ideological composition of appellate panels can have a significant influence on the decisions that are reached. In the

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[10]*See* Judge Ben Cameron's dissent in *Armstrong v. Board of Education in the City of Birmingham*, 323 F.2d 337 (5th Cir. 1963).

sixth, seventh, eighth, and ninth circuits, Supreme Court precedent was followed more often when it comported with the personal preferences and policy goals of panel members. Thus the anecdotal findings of Atkins and Zavoina's (1974) study are confirmed here. However, there is also evidence that panel members are not driven solely by their own attitudes, but that they take the authority of Supreme Court precedent into account in their decisions. It is noteworthy that panel decisions on the third circuit appear to be motivated by *stare decisis* rather than the policy preferences of the judges, while judges in the remaining seven circuits seem to be influenced by a combination of legal and extralegal factors.

TABLE 5.1

OPERATIONALIZATION OF CONCEPTS AND DIRECTIONAL RELATIONSHIPS BETWEEN VARIABLES: CIVIL RIGHTS AND LIBERTIES

Concept	Operationalization	Measurement	Relationship to Following Precedent
Strength of Precedent	Unanimous	Dummy variable indicating Supreme Court cases that were decided by a vote of 9-0, 8-0, 7-0, or 6-0.	+
	Minimum Winning Coalition	Dummy variable indicating Supreme Court cases that were decided by a vote of 5-4 or 4-3 and cases where a lower court decision was reversed by a vote of 5-3.	-
	Doctrinal Modification	Dummy variable indicating Supreme Court precedents which are applied in the Courts of Appeals after a significant modification of precedent has occurred.	-
	Age of Precedent	Number of years since a Supreme Court case was decided.	+
Clarity of Precedent	Concurring Opinions	Number of concurring opinions that were issued in a Supreme Court case.	-
	Constitutional Provision	Dummy variable indicating Supreme Court cases where a constitutional provision was interpreted.	-
	Burger Court	Dummy variable indicating Supreme Court cases that were decided by the Burger Court.	-

TABLE 5.1 (CONT'D)

Concept	Operationalization	Measurement	Relationship to Following Precedent
Policy Significance	Salience	Dummy variable indicating Supreme Court cases that are included in CQ's listing of important decisions.	+
Institutional Deference	*En Banc*	Dummy variable indicating Courts of Appeals cases that were decided by the entire circuit membership.	-
Judicial Preferences	Ideological Consistency	Percentage of the appellate panel that agreed ideologically with the direction of the Supreme Court decision.	+
	Change in Supreme Court Composition	Difference in mean ideology scores between two Courts, incorporating the direction of the Supreme Court decision.	+

TABLE 5.2
LOGISTIC REGRESSION OF TREATMENT: CIVIL RIGHTS AND LIBERTIES (MODEL 1)

Explanatory Variable	Coefficient	Standard Error	*t* Statistic
_Constant	0.321	0.136	
Attitudinal Factors			
Ideological Consistency	0.326	0.106	3.082
Change in Supreme Court Composition	0.321	0.106	3.027
Legal Factors			
Unanimous	0.271	0.094	2.898
Doctrinal Modification	-1.071	0.253	-4.228
Age of Precedent	0.024	0.005	4.761
Concurring Opinions	-0.154	0.044	-3.498
Constitutional Provision	-0.257	0.072	-3.572
Burger Court	0.613	0.102	6.028

Log-likelihood = -3130.084

$N = 5656$
$\chi^2(8) = 193.72$
$p > \chi^2 = 0.000$

TABLE 5.3
PREDICTED PROBABILITIES OF FOLLOWING PRECEDENT: CIVIL RIGHTS AND LIBERTIES

Baseline		0.725
Ideological Consistency		
	0%	0.691
	100%	0.756
Change in Supreme Court Composition		
	-1	0.659
	1	0.786
Unanimous		0.776
Doctrinal Modification		0.475
Age of Precedent		
	5 Years	0.707
	20 Years	0.776
Concurring Opinions		
	0	0.739
	4	0.604
No Constitutional Provision		0.773
Warren Court		0.588

TABLE 5.4
LOGISTIC REGRESSION OF TREATMENT: CIVIL RIGHTS AND LIBERTIES (MODEL 2)

Explanatory Variable	Coefficient	Standard Error	*t* Statistic
_Constant	0.365	0.146	
Attitudinal Factors			
Ideological Consistency	0.288	0.144	1.994
Change in Supreme Court Composition	0.326	0.106	3.062
Legal Factors			
Unanimous	0.272	0.094	2.894
Doctrinal Modification	-1.073	0.253	-4.235
Age of Precedent	0.024	0.005	4.668
Concurring Opinions	-0.175	0.059	-2.975
Constitutional Provision	-0.262	0.090	-2.917
Burger Court	0.589	0.102	5.760
Attitudinal and Legal Interactive Terms			
Ideological Consistency × Concurring Opinions	0.054	0.079	0.680
Ideological Consistency × Constitutional Provision	-0.003	0.112	-0.029

Log-likelihood = -3116.439

$N = 5632$
$\chi^2(10) = 189.77$
$p > \chi^2 = 0.000$

TABLE 5.5
CIRCUIT COMPOSITION BY PARTY OF APPOINTING PRESIDENT

	DEMOCRATIC APPOINTEES	REPUBLICAN APPOINTEES
1ST	33.3% (4)	66.7% (8)
2ND	31.3% (10)	68.8% (22)
3RD	45.5% (15)	54.5% (18)
4TH	42.3% (11)	57.7% (15)
5TH	55.6% (30)	44.4% (24)
6TH	40.6% (13)	59.4% (19)
7TH	26.9% (7)	73.1% (19)
8TH	32.0% (8)	68.0% (17)
9TH	42.0% (21)	58.0% (29)
10TH	45.5% (10)	54.5% (12)
11TH	14.3% (1)	85.7% (6)
DC	44.8% (13)	55.2% (16)
TOTAL	41.1% (143)	58.9% (205)

NOTE: Figures include only active circuit judges. Data were obtained from the Auburn judicial background data set.

TABLE 5.6

RATES OF FOLLOWING PRECEDENT BY CIRCUIT: CIVIL RIGHTS AND LIBERTIES

	RATE	T-VALUE	RATE	T-VALUE	RATE	T-VALUE	RATE	T-VALUE	RATE
PRECEDENT	1ST		2ND		3RD		4TH		ALL
ALL	0.687 (294)	2.094**	0.712 (462)	1.413	0.733 (415)	0.404	0.766 (364)	-1.016	0.742 (5664)
LIBERAL	0.714 (140)	0.416	0.735 (200)	-0.154	0.699 (196)	0.943	0.752 (202)	-0.682	0.730 (2843)
CONSERVATIVE	0.662 (154)	2.596**	0.695 (262)	2.145**	0.763 (219)	-0.265	0.784 (162)	-0.836	0.755 (2821)
LIBERAL VS. CONSERVATIVE		0.960		0.941		-1.471		-0.717	
	5TH		6TH		7TH		8TH		ALL
ALL	0.728 (816)	0.853	0.744 (426)	-0.091	0.764 (678)	-1.241	0.788 (523)	-2.312**	0.742 (5664)
LIBERAL	0.713 (457)	0.758	0.759 (220)	-0.936	0.752 (307)	-0.827	0.754 (289)	-0.878	0.730 (2843)
CONSERVATIVE	0.747 (359)	0.332	0.728 (206)	0.868	0.774 (371)	-0.802	0.829 (234)	-2.549**	0.755 (2821)
LIBERAL VS. CONSERVATIVE		-1.083		0.733		-0.672		-2.085**	

TABLE 5.6 (CONT'D)

	RATE	T-VALUE	RATE	T-VALUE	RATE	T-VALUE	RATE	T-VALUE	RATE
PRECEDENT	9TH		10TH		11TH		DC		ALL
ALL	0.712 (695)	1.699*	0.751 (361)	-0.379	0.805 (272)	-2.328**	0.735 (358)	0.293	0.742 (5664)
LIBERAL	0.671 (319)	2.235**	0.755 (204)	-0.778	0.781 (146)	-1.358	0.699 (163)	0.865	0.730 (2843)
CONSERVATIVE	0.747 (376)	0.338	0.745 (157)	0.283	0.833 (126)	-2.001**	0.764 (195)	-0.283	0.755 (2821)
LIBERAL VS. CONSERVATIVE		-2.205**		0.218		-1.080			

NOTE: Numbers in parentheses indicate the total *N* for that sample.

*$P < 0.10$
**$P < 0.05$

TABLE 5.7
ESTIMATED COEFFICIENTS AND STANDARD ERRORS FOR CIRCUIT VARIABLES:
CIVIL RIGHTS AND LIBERTIES

Circuit	Coefficient	Standard Error	*t* Statistic
1st	-0.314	0.132	-2.373
2nd	-0.139	0.110	-1.262
3rd	-0.053	0.118	-0.447
4th	0.192	0.130	1.470
5th	-0.048	0.088	-0.545
6th	0.007	0.118	0.060
7th	0.125	0.098	1.280
8th	0.280	0.113	2.465
9th	-0.144	0.092	-1.567
10th	0.039	0.129	0.300
11th	0.169	0.161	1.048
DC	-0.049	0.126	-0.392

TABLE 5.8

RATES OF FOLLOWING PRECEDENT BY IDEOLOGICAL COMPOSITION OF PANEL: CIVIL RIGHTS AND LIBERTIES

	ALL PRECEDENT		LIBERAL PRECEDENT		CONSERVATIVE PRECEDENT		LIBERAL VS. CONSERVATIVE PRECEDENT
	RATE	T-VALUE	RATE	T-VALUE	RATE	T-VALUE	T-VALUE
3 LIBERALS	0.768 (611)	-1.293	0.783 (341)	-2.019**	0.748 (270)	0.291	1.017
2 LIBERALS, 1 CONSERVATIVE	0.746 (1887)	-0.172	0.748 (936)	-0.959	0.744 (951)	0.737	0.200
1 LIBERAL, 2 CONSERVATIVES	0.741 (2015)	0.263	0.712 (1014)	1.220	0.771 (1001)	-0.949	-3.024***
3 CONSERVATIVES	0.728 (913)	1.022	0.702 (443)	1.316	0.753 (470)	0.140	-1.731*
TOTAL	0.744 (5426)		0.732 (2734)		0.756 (2692)		

NOTE: Numbers in parentheses indicate the total *N* for that sample.

*$p < 0.10$
**$p < 0.05$
***$p < 0.01$

TABLE 5.9

RATES OF FOLLOWING LIBERAL VS. CONSERVATIVE PRECEDENT BY CIRCUIT AND IDEOLOGICAL COMPOSITION OF PANEL: CIVIL RIGHTS AND LIBERTIES

	DIFFERENCE	T-VALUE	DIFFERENCE	T-VALUE	DIFFERENCE	T-VALUE	DIFFERENCE	T-VALUE
	1ST		2ND		3RD		4TH	
LIBERAL-DOMINATED	0.111 (76/93)	1.519	0.040 (34/44)	0.368	-0.181 (53/43)	-2.065**	-0.008 (94/79)	-0.127
CONSERVATIVE-DOMINATED	-0.059 (59/57)	-0.711	0.048 (165/213)	1.036	-0.047 (132/153)	-0.891	-0.072 (92/76)	-1.072
	5TH		6TH		7TH		8TH	
LIBERAL-DOMINATED	-0.024 (273/185)	-0.577	0.114 (125/124)	2.104**	0.079 (84/120)	1.329	-0.025 (132/100)	-0.477
CONSERVATIVE-DOMINATED	-0.029 (160/151)	-0.574	-0.101 (92/80)	-1.473	-0.066 (216/241)	-1.642*	-0.158 (139/118)	-3.002***
	9TH		10TH		11TH		DC	
LIBERAL-DOMINATED	-0.015 (120/153)	-0.276	0.022 (81/74)	0.318	-0.062 (99/80)	-1.064	-0.002 (106/126)	-0.034
CONSERVATIVE-DOMINATED	-0.106 (193/216)	-2.356**	0.007 (120/74)	0.109	-0.042 (46/40)	-0.488	-0.137 (43/52)	-1.490

NOTE: A positive difference indicates that liberal precedent was followed more often than conservative precedent. Numbers in parentheses denote total *N*s for liberal and conservative precedents, respectively.

*$p < 0.10$ **$p < 0.05$ ***$p < 0.01$

CONCLUSION

The three sets of Supreme Court decisions which were analyzed here were favorably applied by the Courts of Appeals in about three-fourths of their decisions. This is strong evidence of these judges' internalization of the norm of *stare decisis*, or deference to the decisions of higher courts. The following excerpt from a circuit court opinion summarizes the position which seems to be espoused by many circuit jurists:[1]

> For us, of course, there is no question whether to adhere to *Jones* and *McCrary*; they are part of our marching orders, mandates which we can either obey or seek other work. *Bhandari v. First National Bank of Commerce*, 829 F.2d 1343, 1349 (5th Cir. 1987).

However, due to the infrequency of Supreme Court review of lower court decisions, those who study the Courts of Appeals continue to point out the independence which judges are free to exercise. These scholars' concern is realized in the statements which immediately followed the above acknowledgment of the authority of Supreme Court precedent:

> But that is not the issue. The issue is whether, because the Supreme Court reasoned in a particular manner on one subject, we are obliged to extend that reasoning, when it seems to us -- and not to us only -- severely flawed, to a new series of situations to which the Court has not yet spoken. *Id.* at 1349.

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[1]The opinion author refers here to two past Supreme Court decisions: *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968), and *Runyon v. McCrary*, 427 U.S. 160 (1976).

Because the absence of direct Supreme Court oversight creates opportunities for policy-minded judges to deviate from precedent, and because the Courts of Appeals are charged almost exclusively with the task of ensuring the consistent interpretation and application of federal law, it is critical to determine what motivates these judges. In other words, when supervision and sanctions from the High Court are rare, do circuit court judges feel constrained in their decision making by Supreme Court doctrine, or do they feel free to pursue their own policy goals? Identifying the factors that influence the treatment of precedent in the Courts of Appeals has been the purpose of this study.

The first step in addressing this question was to explore circuit court treatment of four major Supreme Court decisions (Chapter 3). This preliminary examination focused on the clarity and authoritativeness of precedent. Specifically, I analyzed the Supreme Court's decisions and reasoning in these cases in order to determine whether characteristics of the Court's rulings were related to their application in the Courts of Appeals. I found that the extent of Supreme Court agreement on the outcomes seemed to affect responses to the decisions in the lower courts, as appellate panels treated more favorably those decisions which had garnered the support of the justices.

Such a definitive assertion may not be made regarding decisions which were characterized as ambiguous, based upon the divergent views expressed in separate opinions and the legal provisions which were involved. One decision in which a constitutional amendment was at issue and in which concurring and dissenting opinions were written received disparate treatment in the circuit courts, while a similarly equivocal decision was followed consistently. I concluded that these legal considerations provided an incomplete account of appeals court behavior in these cases.

The analysis of Chapter 4 buttressed this inference. Here I incorporated attitudinal measures for appeals court judges with legal factors in a multivariate model of the treatment of decisions from the Supreme Court's 1987 Term. I found that the policy preferences of circuit judges were indeed significant influences in their application of precedent, as these judges tended to be more supportive of a precedent which comported with their personal views; however, the importance of judicial ideology was limited to cases involving civil rights and liberties and criminal procedure. These are precisely the issues raised in the cases which were examined in Chapter 3, so it is understandable that legal elements did not provide a comprehensive explanation of appeals court treatment of these decisions.

In contrast to the limited relevance of personal attitudes and values, legal factors were crucial determinants of the actions of circuit judges with respect to the broad range of 1987 Term decisions. When a Supreme Court decision was equivocal, as evidenced by the application of a constitutional provision, the issuance of separate opinions, or complex subject matter, appellate panels were much less likely to afford a positive treatment to the decision. Appeals court judges also seemed to be affected by the likelihood of Supreme Court review, as they were substantially more deferential to precedents which had important policy implications.

Many of these findings were replicated in Chapter 5. Because of the additional, attitudinal forces which motivated appeals court judges in civil rights and liberties and criminal procedure cases, as established in Chapter 4, I restricted this analysis to treatment of the Supreme Court's civil rights and liberties decisions. In confirmation of the indications in Chapter 4, circuit court judges applied civil rights and liberties precedents in accordance with their own attitudes and values. Clearly, as has been suggested in other studies of

judicial behavior, these are highly salient issues which appeal to the personal views of judges and encourage them to pursue their favored policy outcomes.

In conjunction with personal preferences, legal considerations were significantly related to the treatment of civil rights and liberties precedents in the Courts of Appeals. The circuit courts exhibited attentiveness to the Supreme Court's treatment of its own decisions by selectively adopting precedents which the Court had subsequently modified, while precedents which were not altered in ensuing Court decisions seemed to grow more authoritative over time. As with the decisions of the 1987 Term, ambiguous civil rights decisions did not fare well in the intermediate federal courts. The publication of several concurring opinions and the application of constitutional provisions seemed to foster confusion in the lower courts, as such decisions were followed only sporadically.

Each of the three analyses in this study suggested that the level of Supreme Court consensus may serve as an indicator to the lower courts of a decision's legitimacy and may thus influence judicial responses to Supreme Court decisions. In Chapter 3, anecdotal evidence of the importance of Court support for a decision was presented. In the models of Chapters 4 and 5, this element manifested itself differently. While the circuit courts responded negatively to precedents of the 1987 Term which were established by a minimum winning Court coalition, they were significantly more likely to obey civil rights and liberties precedents when the Court was unanimous in both its ruling and its reasoning. Regardless of the way in which it is operationalized, the extent of Supreme Court agreement is obviously crucial in accounting for lower court compliance.

Much of the behavior of Courts of Appeals judges with respect to the treatment of precedent may be motivated by the perceived likelihood of Supreme Court review. These

judges may be more apt to adhere to unanimous precedents and to disregard narrowly established ones in part because the probability of garnering the votes of four justices for review is substantial in the former case and only slight in the latter. Additionally, circuit judges may apply more favorably those precedents which relate to important political or social issues because they believe that the High Court is more concerned about the resolution of such cases. The importance of the age of precedent also suggests that appellate judges may be review-minded; when a precedent has been firmly established in Supreme Court jurisprudence, the justices should be more attentive to its application in the lower courts.

As a further test of the proposition that appeals court judges wish to avoid Supreme Court reversal, I included a variable in the models of the 1987 Term decisions and of the civil rights and liberties decisions which measured the change in the ideological composition of the Court since a precedent was handed down. This variable may serve as an indirect indicator of the likelihood of review. If circuit court judges do, in fact, take this into account their decision making, they should be more deferential when the ideology of the current Court has moved in the direction of a past precedent; alternatively, when there appears to be less attitudinal support for a precedent, these judges should not feel similarly bound by the precedent. This hypothesis was confirmed in both analyses, suggesting that the perceived probability of review is a critical component in any explanation of circuit court behavior.

It is apparent from the case studies and the model estimations presented here that there are some situations in which appeals court judges take advantage of the opportunity to pursue their own policy goals. When the Supreme Court's intentions are unclear, when there is substantial disagreement among the justices, and when they care deeply about the outcome of a case, appellate judges tend to deviate from strict adherence to precedent. Alternatively,

circuit judges are more faithful to Supreme Court mandates when the High Court is united in rendering its decision, when a precedent has become entrenched in Court doctrine, and when they perceive that a deviant ruling is likely to be reviewed.

Upon concluding that circuit court judges do indeed behave independently in some situations, I analyzed the effect this discretionary decision making had on the uniformity of national law. I found that in a few circuits the motivation of *stare decisis* was strong, as these circuits exhibited high rates of following precedent. In several circuits, adherence to precedent was ideologically determined; some circuits were more deferential to conservative precedents while others favored liberal ones. However, treatment of precedent in a majority of circuits was substantially similar to that of the Courts of Appeals as a whole; that is, they adopted precedent, regardless of its ideological tenor, in about three-fourths of their decisions. This examination suggests that much of the apprehension regarding the diverse application of federal law is unwarranted.

In spite of the convincing evidence which has been presented in this study, the findings remain incomplete. Analyses of cases which were poorly fit by the model indicated that the majority of these outliers were instances in which the Courts of Appeals did not follow a relevant Supreme Court decision. Thus, while I have determined a number of scenarios in which appellate panels will be less deferential to precedent, some of these circumstances have not been identified.

A number of scholars have pointed to institutional differences among the circuit courts, ranging from whether district court judges should prepare written justifications for their decisions to the definition of what constitutes auto theft (*see* Carp and Rowland 1983, ch. 4). In analyses of other levels of courts, researchers have found such institutional

contexts and internal rules to be pivotal to explanations of judicial decision making (*see, e.g.,* Brace and Hall 1993). This may be a fruitful avenue of exploration for Courts of Appeals' behavior as well.

APPENDICES

APPENDIX A

TABLE A.1
COMPARISON OF ANALYSES INCLUDING AND EXCLUDING THE CODING OF DISSENTING OPINIONS: THE 1987 TERM

	With Dissenting Opinions (N = 1467)			Without Dissenting Opinions (N = 1448)		
Explanatory Variable	Coefficient	Standard Error	t Statistic	Coefficient	Standard Error	t Statistic
_Constant	0.961	0.092		0.998	0.094	
Attitudinal Factors						
Ideological Consistency × Civil Rights and Liberties	0.631	0.262	2.411	0.676	0.268	2.518
Ideological Consistency × Criminal Procedure	0.844	0.254	3.326	0.848	0.259	3.279
Change in Supreme Court Composition	0.712	0.299	2.382	0.700	0.304	2.298
Legal Factors						
One-Vote Margin	-0.550	0.180	-3.057	-0.540	0.183	-2.945
Concurring Opinions	-0.177	0.090	-1.977	-0.192	0.091	-2.110
Constitutional Provision	-0.383	0.155	-2.471	-0.334	0.158	-2.110
Complexity	-0.821	0.287	-2.860	-0.841	0.289	-2.908
Salience	0.791	0.254	3.107	0.765	0.257	2.982

APPENDIX B

FIT AND INFLUENCE DIAGNOSTICS FOR LOGISTIC REGRESSION

The deviance residual is one kind of standardized residual that may be calculated.[1] $\Delta\chi^2_{D(j)}$ measures the change in deviance that results from deleting all cases with a particular pattern (j) of independent variables.[2] Thus it provides a measure of how poorly the model fits a particular pattern. Large values of $\Delta\chi^2_{D(j)}$ indicate that the model would fit the data much better if the jth pattern were deleted. A rule of thumb is that values of $\Delta\chi^2_D$ greater than 4 indicate a significant difference in model fit between a model which includes a particular pattern of independent variables and a model which excludes these cases. Nineteen patterns, including 138 cases, produced a $\Delta\chi^2_D$ higher than 4, with the largest $\Delta\chi^2_D$ of 9.836 from a pattern comprised of four cases.

ΔB_j measures the standardized change in estimated parameters that results from deleting all cases with the jth pattern of independent variables.[3] A large value of ΔB_j indicates that the jth pattern exerts substantial influence, where a value greater than 1 is

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[1] $d_j = \pm \{2 [Y_j \ln(Y_j / m_j \hat{P}_j) + (m_j - Y_j)\ln(m_j - Y_j) / m_j(1 - \hat{P}_j)]\}^{1/2}$, where j represents a particular pattern of independent variables, and m_j is the number of cases with the jth pattern. The sum of squared deviance residuals, Σd^2 or χ^2_D, can be used to test whether a given logit model is significantly worse than a perfect-fit model.

[2] $\Delta\chi^2_{D(j)} = -2[\ln L - \ln L_j]$, where L is the likelihood of a model estimated from the full data set, and L_j is the likelihood for the same model estimated after deleting all cases with the jth pattern.

[3] $\Delta B_j = r_j^2 h_j / (1 - h_j)^2$, where h_j is the leverage of any one jth-pattern case times the number of times the pattern occurs. r_j is the Pearson residual, calculated as $jY - jm\hat{}jP / \sqrt{m_j \hat{P}_j(1 - \hat{P}_j)}$.

considered large. Only one pattern, consisting of eleven cases, produced a ΔB greater than 1. This pattern produced a ΔB of 1.15 and a $\Delta\chi^2_D$ of 9.628.

Figure B.1 is a graph of $\Delta\chi^2_D$ against predicted probability, with the size of the plotting symbols proportional to ΔB. Thus it combines information about fit and influence. Each circle represents a particular combination of independent variables. The larger the circle, the more influential a particular combination is. A case where precedent is followed (Y=1) despite a low predicted probability of following will fall toward upper left. A case where precedent is not followed (Y=0) despite a high predicted probability of following will fall toward upper right.

Pattern 267 represents the four cases with a $\Delta\chi^2_D$ of 9.836. The model predicts that, for this combination of independent variables, the probability of following precedent is 0.68. However, precedent is not followed in any of these four cases. Pattern 204 represents the eleven cases with large values of both $\Delta\chi^2_D$ and ΔB. The model predicts that, for this combination of independent variables, the probability of following precedent is only 0.69, but precedent is followed in all eleven of these cases.

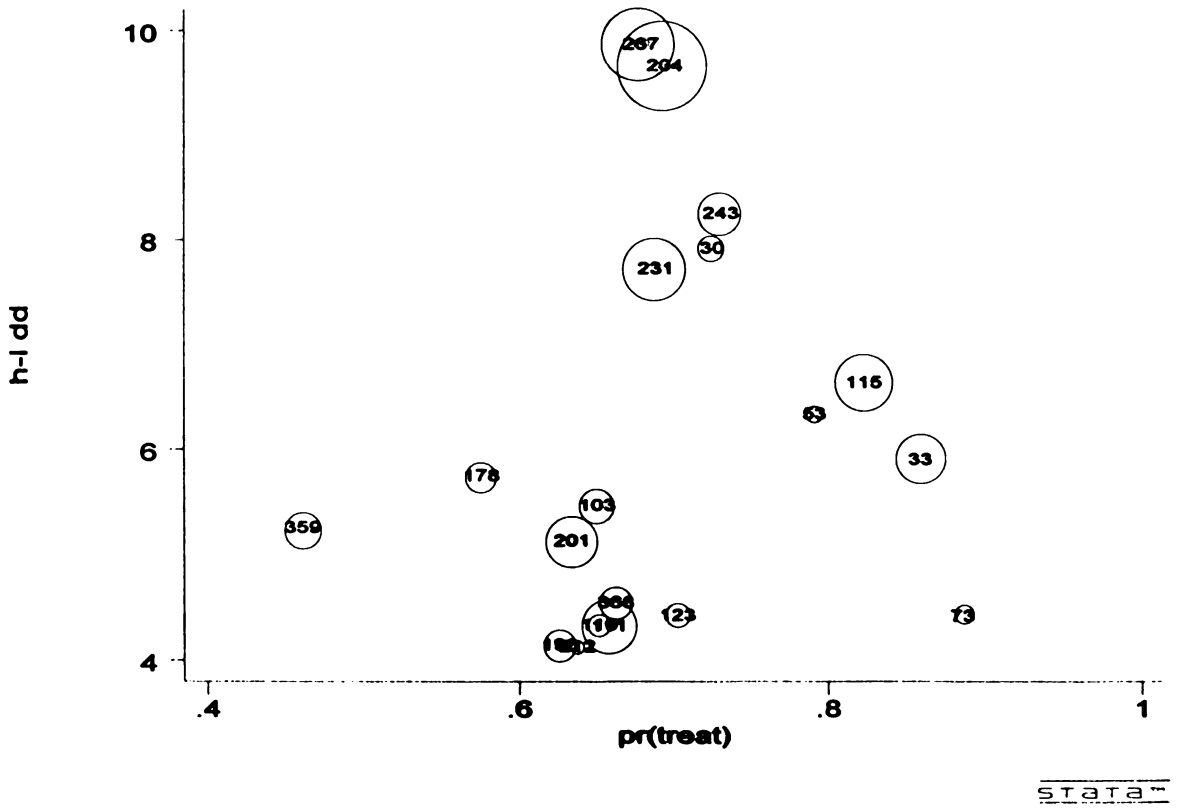

FIGURE B.1
MODEL FIT AND INFLUENCE OF OUTLYING CASES

LIST OF REFERENCES

LIST OF REFERENCES

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