Bureaucrats in Black Robes

by

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Thesis submitted in partial fulfillment of
the requirements for the degree of Doctor
of Philosophy in the Department of
Political Science in the Graduate School
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2020

ABSTRACT

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Abstract

At the time of its formation, the Supreme Court was noted to have, "…neither FORCE nor WILL, but merely judgment" (Hamilton 1788). For decades, political science research has explored how the Supreme Court achieves compliance from lower courts despite the Supreme Court's shrinking docket and the politicization of the judiciary. In this dissertation, I explore a series of organizational problems the Supreme Court faces and how the Supreme Court has strategically solved these problems. These strategies, I argue, reflect a traditional bureaucratic organization – complex, with unavoidable procedure and inefficiencies.

The results of this dissertation contribute to political science research and demonstrate how the Supreme Court copes and overcomes its organizational limitations through relying on its managerial tools in order to gain and maintain control over the judiciary. My results indicate that, despite organizational and resource limitations, the Supreme Court is frequently able to organize itself and its procedures successfully and achieve a high degree of compliance by lower courts. There are three important implications drawn out from this dissertation. First, the Supreme Court relies on an oversight system that is akin to a fire alarm rather than a patrol system. Second, lower court actors can act strategically in order to convey critical information to the Supreme Court and may influence which decisions by lower court will be reviewed by the Supreme Court. Third, the Supreme Court actively combats policy drift in lower federal

courts, and drift by lower courts is shown to occur when the Supreme Court does not delegate binding rules.

This dissertation employs a non-equivalent dependent variable research design. Chapter Two explores why and when the Supreme Court overrules its own precedents. This chapter argues that the Supreme Court is motivated to achieve compliance from lower courts and maintain its institutional legitimacy when it decides to overrule a precedent. This chapter introduces an original dataset which captures the lower courts' treatment of precedents that were established by the Supreme Court. The empirical results in this chapter reveal that the Supreme Court is more likely to reverse one of its own precedents once a handful of lower appellate courts have begun to treat it negatively, an action which involves a lower court explicitly stating that it will not apply a precedent in their opinion. I theorize that the Supreme Court can observe how a precedent is applied in lower courts, its agent, and in turn, the Supreme Court can make an informed decision as to whether a precedent should be overruled. This chapter expands political science literature by empirically demonstrating that ideological conflicts do not exclusively motivate the Supreme Court's decision to overrule and, instead, the act of overruling is a form of institutional and legal maintenance that is well within the Supreme Court's responsibilities because the Supreme Court is the supervisor of the judiciary.

Chapter Three investigates the role of information at the Supreme Court's agenda-setting stage. This chapter also introduces an original dataset of majority and

dissenting opinions by the courts of appeal. The dataset also notes whether these lower court decisions were appealed to the Supreme Court or not and whether the Supreme Court decided to review the appealed case or not. Notably, the dataset in Chapter Three was developed through the meticulous coding of documents from the archive of personal papers by former Associate Justice Harry A. Blackmun. This chapter empirically demonstrates how lower court judges may 'blow the whistle' on their colleagues' non-compliance with precedent, encourage the losing party to appeal to the Supreme Court, and produce a signal that captures the Supreme Court's attention and encourages the Supreme Court to review. The results of this chapter emphasize how oversight is inherently problematic in a large hierarchy like the federal judiciary and the role lower court agents may have in shaping the Supreme Court's agenda.

Finally, Chapter Four concerns how lower courts respond when the justices on the Supreme Court's bench fail to organize themselves into a majority coalition; in turn, there is no decision produced by the Supreme Court with binding precedential value. Once again, this chapter introduces an original dataset of lower court treatments to majority and plurality opinions by the Supreme Court spanning from 1970 to 2016. The results of this chapter indicate that when the Supreme Court does not delegate a binding rule to lower courts, and instead the Supreme Court only offers a guideline, lower courts react by applying the guidelines they prefer in their opinions and ignoring the ones they find less favorable. This behavior suggests that, over time, the lower courts will drift from each other and the Supreme Court in their application of law in the resolution of

similar cases when there is no binding rule. This chapter contributes to political science by empirically demonstrating an aspect of agency studies that is often overlooked in judicial politics – the immediate and long-term consequences of the Supreme Court's failure to delegate and perform a crucial duty as the supervisor of the judiciary.

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List of Abbreviations and Symbols

Abbreviations:

CoA(s)	U.S. Courts of Appeals
D.C. Cir.	District of Columbia Circuit Court of Appeals
DDD	All-Democratic Appellate Panel
DDR	Democratic-Majority Appellate Panel
DRR	Republican-Majority Appellate Panel
FE	Fixed Effects
Ideo.	Ideology
Prev.	Previous
RRR	All-Republican Appellate Panel
USSC	U.S. Supreme Court

Symbols:

# of	Number of
R^2	R-Squared Value
1st	First Circuit Court of Appeals
2nd	Second Circuit Court of Appeals
3rd	Third Circuit Court of Appeals
4th	Fourth Circuit Court of Appeals
5th	Fifth Circuit Court of Appeals
6th	Sixth Circuit Court of Appeals
7th	Seventh Circuit Court of Appeals
8th	Eighth Circuit Court of Appeals
9th	Ninth Circuit Court of Appeals
10th	Tenth Circuit Court of Appeals
11th	Eleventh Circuit Court of Appeals

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1. Introduction

Delegation is foundational for the operation of the judiciary. However, the organization of the judiciary leaves the Supreme Court with an incontrovertible set of agency problems. For example, it would likely take the Supreme Court an entire term to review the hundreds the cases resolved in a single day by the lower appellate courts (Klein 2002; Cross 2007). Further compounding this agency problem are the justices' differing ideological preferences and differing philosophical approaches towards interpreting and applying law. Despite the agency problems facing the Supreme Court, we observe lower courts complying with the decisions by the Supreme Court at a relatively high rate (Songer 1987; Songer and Sheehan 1990; Songer, Segal, and Cameron 1994; Westerland et al. 2010; Klein and Hume 2003; Johnson 1979; Lax 2003; Kastellec 2007; Beim, Hirsch, and Kastellec 2014). However, this compliance is not automatic (Bennesh and Redick 2002) – and is undoubtedly political (Canon and Johnson 1999; Epstein and Knight 2013).

Each chapter in my dissertation presents a new perspective on the relationship between the Supreme Court and lower courts as an agency. I argue the mechanisms and strategies relied on by the Supreme Court are designed to be efficient and are therefore not perfect. This dissertation illustrates how the administrative procedure, rules, and policies found within all bureaucratic organizations are also found in the judiciary. This dissertation demonstrates how doctrines are carefully crafted, updated, and maintained by the Supreme Court and distributed to all lower courts; and, in turn, compliance from

lower courts is mandated and supervised based on a set of procedures that are internal to the judiciary.

Many have modeled the judicial hierarchy as a disciplining organization. Where the Supreme Court sits atop of the judiciary and works to correct errors produced in lower courts (Epstein, Landes and Posner 2011; Kastellec 2007; Beim, Hirsch, and Kastellec 2014; Hettinger, Lindquist and Martinek 2004; Cameron, Segal, and Songer 2000). This line of judicial politics literature argues that the threat of review by the Supreme Court largely acts as the mechanism to drive lower courts to comply with the Supreme Court's precedents. Recent qualitative evidence supports the notion that lower court judges' professional reputations are damaged when the Supreme Court overrules one of their decisions (Choi, Gulati, and Posner 2011; Klein and Hume 2003; Cross 2005).

This dissertation argues that casting the Supreme Court as merely a disciplining organization is short-sighted and fails to address how the Supreme Court copes with the inevitable evolution of law, conflicts among lower courts, and emerging legal issues. If the Supreme Court exhausts its docket with cases which concern correcting perceived errors by lower courts, then the Supreme Court is denying itself the opportunity to create doctrines and policies in other important and emerging legal issues. In contrast to the error correction lens, this dissertation models the judiciary as a managerial institution and casts the Supreme Court as a supervisor for the judiciary. Under this theoretical model, the Supreme Court will still correct a lower court's non-compliance, but the Supreme Court also engages in doctrinal development and addresses emerging

issues in the law. As the supervisor, the Supreme Court can observe its lower court agents' actions, become informed, and then engage in error correction if necessary. This theoretical lens of the judiciary also argues that the Supreme Court has adopted policies to reduce the costs associated with monitoring its agents. That said, the Supreme Court's oversight is imperfect. Or in the words of the late Judge Stephen Reinhard from the Ninth Circuit Court of Appeals, "They [the Supreme Court] can't catch them all." I theorize that the Supreme Court operates like other managerial institutions (McCubbins and Schwartz 1984; Epstein and O'Halloran 1999; Moe 1990). By relying on cues and signals raised by lower court actors, such as appellate judges and losing parties, the Supreme Court is more efficiently able to identify which lower court cases, out of the tens of thousands which are appealed each term, are worthy of the Supreme Court's review. This system of oversight is known as 'fire alarm' oversight within the industrial organization literature (McCubbins and Schwartz 1984).

Circuit splits are one type of fire alarm that has consistently received attention in judicial politics literature (Perry 2009; Beim and Rader 2015; Hansford and Spriggs 2006; Klein 2002). Circuit splits occur when two or more U.S. Circuit Courts of Appeals, hereinafter courts of appeals, have issued conflicting resolutions in similar cases, meaning the cases present similar facts and questions of law. The Supreme Court has a great deal of interest in maintaining uniform application and interpretation of doctrines across all of its lower courts because varied applications of law to similar circumstances will likely lead to distrust and a weakening of the judiciary's legitimacy. Former

Associate Justice Van Devanter testified to this point, "[T]he ultimate guiding rule, should be announced by the Supreme Court, so that there may be uniformity of decision in the several circuits courts of appeal, and also uniformity of decision in the State Courts insofar as federal matters are concerned." Prior empirical work has indicated that the presence of a circuit split sends a strong signal to the Supreme Court that there is a need for the Supreme Court's attention via review and possible reversal (Hansford and Spriggs 2006; Beim and Rader 2015; Klein 2002; Perry 2009). However, there are many other scenarios and situations that may occur in lower courts that can also sound an alarm that the Supreme Court may need to review a case more closely; however, these signals have yet to be addressed in the literature.

This dissertation presents two chapters which fill in this gap in the literature and provides additional examples of fire alarms within the judiciary and the Supreme Court's response as the supervisor of the judiciary. Chapter Two observers how courts of appeal who explicitly refuse to apply a Supreme Court precedent while resolving a case before it, or more precisely, treat the precedent negatively in their opinion, can impact the Supreme Court's decision to revisit and potentially overrule a precedent. Chapter Three of this dissertation also fills in this gap in the literature by illuminating how dissenting opinions by judges on the courts of appeals can also act as an information signal to the Supreme Court. Specifically, the theory presented in Chapter Three highlights how appellate judges may 'blow the whistle', which is a particular type

of alarm, on their colleagues and strategically attempt to capture their supervisor's attention (i.e., the Supreme Court's attention).

The final chapter in this dissertation, Chapter Four, observes what happens when the Supreme Court fails to delegate a rule to lower courts. Or in other words, the Supreme Court fails to produce a majority opinion with precedential value and instead provides a plurality opinion which can only guide, rather than bind, decision-making behavior by the courts of appeals and all other lower courts. There are many reasons that the Supreme Court may fail to organize into a majority coalition, from internal conflict on the bench at the opinion-writing stage to mistakenly granting certiorari to case that the Supreme Court does not actually want to review, to many other sources. Over time, many lower courts have split over their interpretations of the same plurality decision by the Supreme Court. The empirical results in the final chapter of this dissertation indicate that when the Supreme Court fails to delegate a binding set of rules, the lower courts' application of law may drift from each other and the Supreme Court.

The agency theory presented in this dissertation has many implications for judicial politics research that can be explored further in future research. Future research may study the presence of multiple competing institutions, such as Congress and organized interest groups, and how these institutions influence the Supreme Court. Often separation-of-power models attempt to observe whether and to what extent the preferences of an external-actor have on decisions by the Supreme Court (Gely and

Spiller 1990; Clark 2009; Marks 2012). Yet, few of these separation-of-power models have considered the role of lower appellate courts (but see Owens 2010 along with Segal 1998). Further, most separation-of-power models within political science do not account for the agency costs the Supreme Court may incur if it adheres to the preferences of Congress or the Executive. The managerial theory of the judiciary provides may interesting insights for how traditional separation-of-power models may be updated to improve our understanding of the Supreme Court as both a legal and political institution.

Altogether, this dissertation employs a non-equivalent dependent variable research design and each chapter encapsulates large original datasets. One of the most important contributions of this dissertation is the theoretical and empirical investigation into how the Supreme Court may strategically develop binding tests, rules, and standards that are to be applied in decisions made by lower courts in order for the Supreme Court to achieve a more efficient monitoring system. This dissertation also highlights how the Supreme Court's decision making and the ways in which the Supreme Court sculpts doctrine in certain areas of law may improve iteratively over time as the Supreme Court may take advantage of observing lower courts' application of doctrine repeatedly over time. This dissertation also illuminates the costs the Supreme Court faces when aggregating information and how these information gathering costs may impact decision-making at the Supreme Court's agenda-setting stage and opinion

writing stage. Altogether, this dissertation provides both theoretical and empirical insights into the bureaucratic nature of the federal judiciary.

2. Dead Precedents: Overruling Supreme Court Precedents

> "Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."
>
> - Associate Justice Anthony Kennedy in *Hohn v. United States* (524 U.S. 236, 1998)

2.1 Introduction

The decision to overrule a precedent has been argued to shake the foundation of the Supreme Court's legitimacy. Loyalty to precedents has been described as the mechanism that allows law to achieve clarity, legitimacy, and predictability (Rasmusen 1994). Adherence to precedent, the normative behavior of *stare decisis*, implies there is continuity to the law and the judiciary is operating efficiently (Landes and Posner 1976). Or in other words, a decision made by the Supreme Court today is expected to stand tomorrow. Yet, between the 1946 and the 2013 term, the Supreme Court overruled 121 precedents – about two per term. In this chapter, I contribute to the growing literature concerned with the relationship between lower courts and the Supreme Court and ask: do lower courts influence the Supreme Court's decision to overrule a precedent? I offer an alternative perspective for understanding the decision to overrule precedents; rather than an odious political action, the act of overruling a precedent may be thought of as a necessary 'spring cleaning' for the law. Here, the act of overruling a precedent and

removing its binding nature is a form of legal maintenance, and this action is well within the Supreme Court's responsibility as the supervisor of the judiciary. I argue that because there is some degree of uncertainty when the Supreme Court establishes a precedent, the Supreme Court will go on to observe how the precedent is applied in lower courts. In time, the Supreme Court can make an informed decision as to whether the precedent should be overruled or not.

Some have suggested the Court loses legitimacy when it decides to overrule one of its own precedents. Murphy (2016, pg. 204) states, "When the Supreme Court reverses itself or makes new law out of whole cloth, [the Supreme Court] reveals its policy making role for all to see." Other scholars have focused on what drives the Supreme Court to engage in overruling behavior, concluding that the decision to overrule a precedent is largely motivated by ideological shifts among the members of the Supreme Court over time (Spriggs and Hansford 2001; Brenner and Spaeth 2006; Ulmer 1959) along with the age of a given precedent (Landes and Posner 1976; Ulmer 1959). This vein of the literature concludes that over time the ideology of the justices on the Supreme Court can shift in such a way that a majority of the justices no longer view a given precedent to have acceptable implications, and therefore will overrule a precedent so it cannot be implemented.

Prior research, for the most part, has studied the conditions on the Supreme Court which predict when the Supreme Court may decide to overrule a precedent. This chapter focuses on a more important, yet seriously understudied, question on how to

identify and predict which precedent the Supreme Court will overrule. I rely on the concept vertical *stare decisis* and develop a theory which argues that how lower courts implement a precedent can inform and influence the Supreme Court's decision to overrule the precedent in the future. I posit the Supreme Court faces many institutional and organization limitations, given its limited resources and the vast number of lower courts it is faced with monitoring. I argue that the Supreme Court relies on an oversight system in order to overcome these institutional limitations and efficiently monitor lower courts. Broadly, this chapter contributes to our understanding of oversight on the Supreme Court and the relationship between lower courts and the Supreme Court.

This chapter proceeds as follows. Section 2.2 investigates previous research into the behavior behind the Supreme Court's decision to overrule precedents. Section 2.3 addresses the literature concerning lower court treatments of Supreme Court precedents and the relationship between the courts of appeals and the Supreme Court. The data and research methodology are presented in Section 2.4. The results are explored and discussed at length in Section 2.5. Finally, Section 2.6 concludes this chapter with a discussion into future research into the agency relationship between the Supreme Court and multiple lower courts.

2.2 Background

The Supreme Court usually overrules one or two of its precedents each term. The act of overruling removes the binding nature of the precedent over lower courts and

future decisions by the Supreme Court. For this reason, overruled precedents are referred to as *dead precedents.*

While the decision to overrule a precedent is somewhat infrequent, it is highly salient for the law, judges, and legal scholars. That said, the Supreme Court's decision to overrule is not widely studied in political science. When the decision to overrule is addressed in judicial politics literature, most conclude the decision to overrule is motivated by ideological disagreements between the Supreme Court which enacted the precedent and the contemporary Supreme Court which is tasked with revisiting the precedent. For example, in an empirical study of the Supreme Court which captured the 1996 term to the 1992 term, Brenner and Spaeth (2006) conclude the Supreme Court's decision to overrule a precedent is driven by justices' maximizing their legal policy preferences. Brenner and Spaeth (2006, pg. 34) rely on a correlation between the age of a precedent, measured in the number of years since it was enacted, along with the saliency of the precedent, measured by the precedent being listed by The Congressional Quarterly as salient, and find that as a precedent ages it is more likely to be overruled and if a precedent is also salient, this probability increases dramatically.

In the same vein, Spriggs and Hansford (2001) argue the Supreme Court's decision to overrule is constrained by internal factors such as norms and traditions as well as external factors on the Supreme Court, such as the relationship between Congress and the Supreme Court. The cumulative results of the empirical investigation by Spriggs and Hansford (2001) imply the decision to overrule a precedent is largely

driven by ideological incongruences between the coalition of justices who enacted a precedent and the justices on the contemporary Supreme Court (see also Ulmer 1959).

In contrast with the research concerning the decision to overrule, lower court compliance with Supreme Court precedents has been studied with great vigor in judicial politics (Songer 1987; Songer and Sheehan 1990; Songer, Segal, and Cameron 1994; Westerland et al. 2010; Massood, Kassow, and Songer 2019). This literature has largely concluded that lower courts are highly compliant with the Supreme Court's precedents. However, this compliance is not automatic (Bennesh and Redick 2002) and is undoubtedly political (Canon and Johnson 1999; Epstein and Knight 2013).

Recently, Westerland et al. (2010) explored strategic compliance and asked whether lower courts take into account the preferences of the contemporary Supreme Court when deciding how to cite and treat a precedent by the Supreme Court. Westerland et al. (2010) found that as the ideological differences between the Supreme Court which enacted a precedent and contemporary Supreme Court grows, appellate judges are more likely to treat the given precedent negatively. Here, negative treatment is defined as explicitly not following and not applying a precedent in the legal reasoning when drafting an opinion for the resolution of a case. Overall, Westerland et al. (2010) and many others conclude that lower courts are strategic in their compliance with the Supreme Court's precedents.[1]

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[1] Similar conclusions concerning strategic behavior were presented by Haire, Songer, and Lindquist (2003) who studied the principal-agent relationships between trial courts and the appellate court tasked with review and the relationship between the appellate court and the Supreme Court. Haire, Songer, and

2.3 Theory: An Agency Model of the Federal Judiciary

Delegation is foundational for the operation of the judiciary. The principal, the Supreme Court, creates a set of rules and standards in its precedents that lower court agents are expected to implement in their decisions. Many have noted that the Supreme Court faces an agency problem as it seeks to ensure compliance by lower courts while overcoming limitations in terms of docket space and resources (e.g., Baum 1980). There are two interesting asymmetries which encompass this agency problem. The first is a capacity asymmetry, where lower courts resolve thousands of cases each term and the Supreme Court only has the capacity to review and resolve less than one hundred cases each term (Cross 2007; Klein 2002). The second is an information asymmetry between the Supreme Court and lower courts where lower courts deal with emerging legal issues first and there is some uncertainty surrounding precedents at the time they are established by the Supreme Court.

Some have modeled the judicial hierarchy as a disciplining organization. Where the Supreme Court sits atop of the judiciary and works to correct errors produced by lower court agents (Epstein, Landes and Posner 2011; Kastellec 2007; Beim, Hirsch, and Kastellec 2012; Hettinger, Lindquist and Martinek 2004; Cameron, Segal, and Songer 2000). This theoretical line in the literature argues the threat of review by the Supreme Court drives lower court judges to be compliant with Supreme Court precedents. Qualitative evidence suggests that when a lower court judge's professional reputation is

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Lindquist (2003) found that as Supreme Court's scrutiny of an appellate court increased, in turn, the appellate court's scrutiny of trial courts also increased.

hurt when their decision is overturned by the Supreme Court (Choi, Gulati, and Posner 2011; Kastellec 2016; Klein and Hume 2003; Cross 2005). However, the principal-agent relationship between the Supreme Court and lower courts as a disciplining organization does not address how the Supreme Court embraces and deals with the evolution of law. Specifically, the discipline model of the judicial hierarchy does not acknowledge that lower courts face new legal questions first; and, within lower courts, it is their responsibility to develop the legal reasoning, i.e., the applicability, of already existing precedents which bind their decision making behavior to new legal questions.

Aligning with other agency models, I argue the Supreme Court assumes the supervisor position of the judiciary. In turn, the Supreme Court observes the lower courts' decisions and becomes informed. This lens of the judicial hierarchy is sometimes referred to as a 'bottom-up information dynamic' (Biem 2017; Callander and Clark 2017; Hansford, Spriggs, and Stenger 2013).[2] Under this agency theory, the judicial hierarchy is modeled as a learning organization where the Supreme Court utilizes an oversight system that relies on the strongest signals from trusted agents (McCubbins and Schwartz 1984).[3] It would be unreasonable to expect the Supreme Court to go out searching for cases to review, rather the appellate system within the federal judiciary is structured in such a way that prevents this behavior by the Court. While the Supreme Court has

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[2] Some formal models have also considered how lower court decision-making affects rule creation and doctrine development by Supreme Court (Bueno de Mesquita and Stephenson 2002; Lax 2012).

[3] The Supreme Court, like other managerial institutions, can adopt policies to reduce the costs associated with monitoring its agents. Internally, the Supreme Court has developed a set of normative guidelines in order to decide which cases should be reviewed (see Perry 2009). One of these guidelines involves determining whether there is a significant difference among the courts of appeals, known as a circuit split, over the interpretation or implementation of a Supreme Court precedent.

exclusive control over its agenda, in terms of the number of cases it will review and which cases it will review, it is limited to review only the cases that are appealed to it. Moreover, even if the Supreme Court could review cases at will, absent an appellate process, it would simply be too costly in terms of time and resources for the Supreme Court to review each decision made by lower courts. As such, it is reasonable to expect that the Supreme Court relies on cues and signals when overseeing lower courts. Specially, the organization of the judiciary is structured in a way where lower courts resolve the bulk of cases, and the ways in which these cases are resolved may send signals to the Supreme Court and draw the Supreme Court's attention to specific cases and precedents. Thus, the Supreme Court engages in a form of oversight that is more akin to 'fire alarms' than a 'police patrol' (McCubbins and Schwartz 1984).

Returning to the information asymmetry between lower courts and the Supreme Court, it is important to note that there is some degree of uncertainty surrounding a Supreme Court precedent at the time it is established. This uncertainty may be related to vagueness within the text of the Supreme Court's opinion, or the Supreme Court's inability to predict emerging legal issues, unforeseen applications, mistakes within the precedent, and so on.[4] After a precedent is established, lower courts may adjust their behavior to comply with the Supreme Court and rely on the precedent when resolving cases. Here, within the complaint and non-complaint behavior of lower courts,

[4] Notably, Staton and Vanberg (2008) study of the role of vagueness in judicial opinions and conclude that the amount of vagueness in an opinion increases when a court is concerned with its legitimacy and the implementation of its decisions.

especially when aggregated, can act as useful information signals for the Supreme Court.

In this present chapter, non-compliance by lower courts, in the form of negative treatments of precedent, is argued to be an influential information signal to the Supreme Court which may inform the Supreme Court that a precedent may need to be overruled or that the lower court may be need to 'corrected' (i.e., reviewed and reversed). Notably, negatively treating a Supreme Court precedent is can be a costly action for a lower court judge because it increases the probability the court's decision is reviewed and reversed by the Supreme Court as the act of negatively treating a precedent usually involves explicit expressed disapproval of the precedent. Specifically, prior research has demonstrated that opinions by courts of appeals which contain negative treatments to Supreme Court precedents have an increased probability of review and an increased probability of overturn by the Supreme Court (Hansford and Spriggs 2006; Niblett 2010; Niblett and Yoon 2015). Even the potential cost of having a decision be overturned, negative treatments of Supreme Court precedent within opinions by the courts of appeals is relatively rare.

A negative treatment of a precedent may signal ideological disagreement between the lower court faced with implementing the precedent and the Supreme Court which enacted the precedent. That said, negative treatments may also signal that there is something wrong with a precedent. Because lower court judges incur a potential cost when negatively citing a precedent, this signal has the potential to gain credibility by

observers (Lupia and McCubbins 1994). Either way, negative treatments of precedent by lower courts appears to garner the Supreme Court's attention. And once the Supreme Court's attention is captured it may take on the costs of understanding whether the lower court's compliance was rooted in ideological or legal issues; from there, the Supreme Court may choose to reverse the lower court and also choose to overrule the given precedent.

Beyond ideological inconsistencies between a lower court and a given precedent, there are legitimate policy and legal concerns which likely influence the decision to treat a precedent negatively. For example, in 1979 the Supreme Court resolved *Arkansas v. Sanders* (442 U.S. 753, 1979), the Supreme Court held that the warrantless search of personal luggage merely because it was located in an automobile lawfully stopped by the police is a violation of the Fourth Amendment. Several lower court decisions immediately criticized this ruling as inefficient because police with probable cause to stop and search a vehicle were now prevented from also searching suitcases and other containers in the vehicle without a search warrant.[5] *Arkansas v. Sanders* received 32 negative citations, with at least one negative treatment from each court of appeals between 1979 and 1985. Unsurprisingly, during the 1991 term, the Supreme Court overruled its decision in *Arkansas v. Sanders*.[6] At an aggregate, if many or all of the courts of appeals are issuing negative treatments towards a precedent this may act as a strong

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[5] See: *United States v. Bonitz* (826 F. 2d 954) and United States v. Freire (710 F. 2d 1515)

[6] In *California v. Acevedo (*500 U.S. 565, 1991) the Court stated, "the police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."

signal for the Supreme Court that the precedent should be reconsidered and may need to be overruled.

In turn, two predictions based on how lower courts' treatment of precedent may influence the Supreme Court's decision to overrule the precedent are developed. First, as the number of negative treatments towards a precedent by the courts of appeals increases, the probability the Supreme Court overrules the precedent is expected to increase. Second, as the number of courts of appeals who issue negative treatments to a precedent increases, the probability the Supreme Court overrules the precedent is also expected to also increase. Note that the second prediction does not concern the total number of negative citations a precedent receives, rather the prediction concerns the distinct number of lower appellate courts that are issuing the negative treatments.

Ideology has been demonstrated to play a large role in judicial decision-making (e.g., Segal and Spaeth 2002), though not an exclusive role (e.g., Epstein and Knight 2013). Some lower courts are more ideologically proximate to the Supreme Court and others are more ideologically distant. Continuing with the model of the judicial hierarchy as an agency, some lower court agents are expected to be trusted more by the Supreme Court than others when the lower court and Supreme Court share similar ideological and philosophical attitudes towards the law. Metaphorically, this suggests that some signals offered by lower courts may be louder than others. Here, the third prediction offered by this chapter is that the Supreme Court is more likely to overrule a

precedent when ideologically proximate lower courts treat the precedent negatively, as compared to when an ideologically distant court treats the same precedent negatively.

As stated above, previous research has identified changing ideological preferences among members on the Supreme Court as a mechanism for motivating the Supreme Court to overrule a precedent (Spriggs and Hansford 2001). This prediction has important implications for the intersection of ideological and decision-making on the Supreme Court along with attitudes towards the legitimacy of decisions by the Supreme Court. Here, it is expected that the probability a precedent is overruled will increase as the ideological distance between the enacting Supreme Court and the contemporary Supreme Court also increases.

Legal issues, rules, and precedents percolate over time across the judicial circuits (Klein 2002). For this reason, the age of the precedent must be accounted for when studying the likelihood the precedent will be overruled or not (Landes and Posner 1976; Ulmer 1959). Most would not expect a precedent to be overruled within a year or two of its establishment, especially if there has been no change in the composition of justices on the Supreme Court. On the other hand, if a precedent has existed for multiple decades and is embedded in some area of the law, we would also not expect this precedent to be overruled (Ulmer 1959). It is expected that for most situations where a precedent was ultimately overruled, the precedent had been established for some length of time and during this time the lower courts have the opportunity to implement the precedent, the Supreme Court's bench may change, and the ideology of the Supreme Court's bench

may also change. This leads to the prediction of a concave relationship between the age of a precedent and the probability it will be overruled – where young and old precedents are less likely to be overruled and middle-aged precedents are expected to be overruled more frequently.

Within the judicial politics literature, most have argued the decision to overrule a precedent is conditional on its previous treatment by the Supreme Court itself (Ulmer 1959; Wahlbeck 1997; Spriggs and Hansford 2001). Ulmer (1959) posited if the Supreme Court has positively treated a precedent at least two times, then the precedent has been institutionalized and therefore cannot be undone in the future. Similarly, Spriggs and Hansford (2001) argued that precedents with prior negative treatments by the Supreme Court are less costly for the Supreme Court to overrule in the future because their precedential legitimacy has been discredited. Altogether, previous treatment of a precedent by the Supreme Court establishes some form of path dependency and suggests, more consequentially, that overturning a precedent which has been previously treated positively may have a larger blow to the Supreme Court's legitimacy than a precedent which has been previously treated negatively by the Supreme Court (Murphy 2016). As such, it is predicted that as the number of previous negative treatments of a precedent by the Supreme Court increases the probability the precedent is overruled will increase.

Several have suggested unanimous and consensual majority coalitions behind a Supreme Court decision have a higher level of legitimacy and likelihood of compliance

by lower courts and other agents as compared to decisions resolved through a minimum-winning coalition (Rohde 1972). Likewise, others have posited large coalitions of judges create a temporal safeguard for a precedent. Benjamin and Vanberg (2016) demonstrate the willingness of lower court courts to negatively cite a precedent increases following all of the justices from the enacting coalition behind a precedent departing from the Supreme Court's bench. It is expected the larger the enacting majority coalition behind a precedent is, the less likely it will be overruled in the future, as compared to precedents that were established by minimum-winning majority coalitions.

The predictions above originate from the agency theory of the judicial hierarchy along with findings from previous empirical research. The next section introduces the data and empirical tests used to explore each prediction.

2.4 Data and Methodology

A panel dataset was constructed for the analyses in this chapter. The unit of analysis is a Supreme Court precedent and term dyad. Precedent-term dyads were constructed and relied on as this structuring of the data allows us to study changes over time, such as how the ideological composition of the Supreme Court changes following the establishment of a precedent. There were 8,357 unique precedents established by the Supreme Court between 1946 and 2013. There are 327,651 observations within the panel data. Each observation represents a precedent and each term of its existence, starting in the term it was handed down by the Supreme Court and ending with the 2013 term or

the term when the precedent was overruled. This precedent-dyad structure of data is fairly common to empirical judicial politics research, however there is one notable flaw: it assumes that the Supreme Court may address any previous precedent in any term. When, in practice, we know that a case must be appealed to the Supreme Court for review in order for there to be a possibility that the Supreme Court will review it.

Next, the LexisNexis Corporation (LexisNexis) provided a list of 121 overruled Supreme Court precedents that were established between 1946 and 2010 and subsequently overruled between 1947 and 2013. The dependent variable, *Overruled*, is binary and identifies if a precedent was overruled by the Supreme Court in a given term or not.

Along with the overruled data, LexisNexis supplied a dataset that identifies all negative treatments of Supreme Court precedents by the courts of appeals between 1946 and 2013.[7] Negative treatments of Supreme Court precedents are identified through a method known as Shepard's Citations. This methodology classifies how a cited Supreme Court precedent was treated. Here, negative treatments are identified by a group of trained lawyers who are tasked with reading and coding how a court treats a cited precedent within the court's opinion (Spriggs and Hansford 2000).[8] Specifically, negative treatments of precedent are identified when the Shepard's citations method finds that a

[7] Note the data provided by LexisNexis initially included negative treatments within published concurring and dissenting opinions by the courts of appeals. This citation data was not included in this chapter. This chapter utilizes negative treatments issued by the eleven regional circuit courts of appeals; future iterations will include negative treatments from the D.C. Circuit.
[8] Spriggs and Hansford (2000) demonstrated a high degree reliability and validity of identifying treatments with Shepard's citations.

lower court questioned, limited, criticized, or distinguished a precedent. The Court of Appeals for the Ninth Circuit was found to treat precedents by the Supreme Court negatively more frequently than any other judicial circuit.

Notably, a precedent established by the Supreme Court in the 2000 term, *Apprendi v. New Jersey* (530 U.S. 466), garnered the most negative treatments by the courts of appeals in a term. This criminal procedure precedent was negatively treated in 398 separate cases across the courts of appeals in 2001 – only one year after it had been established. Of the negative treatments: 16 were from the Court of Appeals for the First Circuit, 100 originated from the Court of Appeals for the Fifth Circuit, and 46 negative treatments were from the Court of Appeals for the Fourth Circuit. Altogether, this single precedent-term dyad demonstrates the variability of negative treatment behavior across the courts of appeals.[9]

A set of variables are constructed based on the negative treatment data. First, the number of negative treatments a precedent receives from each court of appeals is counted. Then, a rolling sum is estimated for each court of appeals to indicate the *Number of Previous Negative Treatments* for each precedent by each lower court for each term.[10]

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[9] *Apprendi v. New Jersey* (530 U.S. 466) has not been overruled by the Supreme Court at the time of writing this chapter.

[10] A separate counting variable was created. This variable identifies the number of previous negative treatments from a Court of Appeals in the previous five years. This variable was used in a separate logit regression found in Appendix A. The results of this estimation are similar in terms of directionality and significance of covariates.

The *Number of Previous Negative Treatments* by the Supreme Court directed at each precedent was also identified with data provided by LexisNexis. This variable ranges from 0 to 18, with a mean of 1.04 and a standard deviation of 1.76. Most Supreme Court precedents are never negatively treated by the Supreme Court. That said, there are some notable precedents that have accumulated many negative treatments by the Court. In the 1978 term, for example, there were four separate majority opinions by the Supreme Court that contained negative treatments of the precedent established in *International Shoe Co. v. Washington* (326 U.S. 310, 1945).

If a precedent was never treated negatively by a court of appeals or the Supreme Court, the binary variable *No Negative Treatments,* is valued at zero. Around 42% of the precedents within this chapter (3,510 of 8,357) have never been treated negatively by a court of appeals or the Supreme Court.

There is common knowledge to some degree between lower appellate courts and the Supreme Court. Here, each court can observe whether another court has previously treated a given precedent in a negative way. It is possible, and empirically addressed at greater length in the results section of the chapter, that lower courts may perceive the Supreme Court's decision to negatively cite a precedent as a 'free pass' to also negatively cite the precedent. However, when we observe the overruled precedents in this dataset and whether the Supreme Court of a court of appeals issued the first negative treatment towards the precedent, it appears relatively balanced with 59 of the 121 overruled precedents being negatively treated by courts of appeals first. A binary variable, *Court of*

Appeal First Negative, was created to control for the path dependency negative treatments between the Supreme Court and appellate courts. If the Supreme Court was the first court to negatively treat a given precedent the variable *Court of Appeal First Negative* is valued at zero.

In order to assess the impact of ideological distance between the Supreme Court and each court of appeals, an ideology measure that places all of the courts on the same dimension is necessary. Judicial Common Space Scores are created by relying on a series of factors related to the nomination of judges and justices to federal benches along with ideological features of the Supreme Court developed by Martin and Quinn (2002) (Epstein et al. 2007). In practice, these ideology scores allow us to evaluate the distance between the Supreme Court and each court of appeals for each year. It is important to note that these ideology scores force the ideology of judges' and justices' to lie on a single dimension, from liberal to conservative values. Yet, within a given issue area say privacy or criminal procedure, we likely observe a re-ordering of judges and justices with the liberal-to-conservative dimension; implying that judicial actors can possess liberal preferences in some areas of the law and conservative preferences in others. Given that many of the overruled precedents originate in salient issue areas of law, future research will consider how an appellate judge's and supreme court justice's ideology in a specific issue area plays in to the decision to overrule a precedent.

A set of variables that identify the *Ideological Distance: Supreme Court and [X] Circuit* was created by subtracting the Judicial Common Space Score of the median

active judge on a circuit court of appeals from the score for the median justice on the Supreme Court. The median judge of each court of appeals was used as a proxy for the ideology of the given circuit court of appeals because even though decisions produced by these courts are crafted by panels of three judges, the decisions produced by each panel are subject to internal review by the entire bench of active judges – a review process known as *en banc*. Here, *en banc* review relies on a simple majority vote of all active judges on the appellate court's bench. Due to the threat of *en banc* review, we can reasonably expect that decisions by courts of appeals to align within the preferences of the median judge on the court's bench regardless if that judge was active in the resolution of the case (Atkins 1972; Abramowicz 2000). Positive values in these ideological distance measures indicate that the Supreme Court is more conservative than a given circuit court of appeals, and negative values indicate that the Supreme Court is more liberal than the a given circuit court of appeals.

Given the extended period of time that is covered in this chapter, we can observe the dynamic ideological distance relationship between each circuit court of appeals and the Supreme Court. It is important to note that partisan ideology as we think about it today, was quite different in the earlier time periods of this study. On that same note, the linkage between party and ideology, especially in law, became stronger over time and was likely driven by the increasing politicization of judicial appointments. Figure 1 demonstrates patterns of ideological distance between the Supreme Court and two relatively liberal courts (the First Circuit and the Ninth Circuit Courts of Appeals) along

with the ideological distance between the Supreme Court and two relatively conservative courts (the Fifth Circuit and Eleventh Circuit Courts of Appeals) over time.

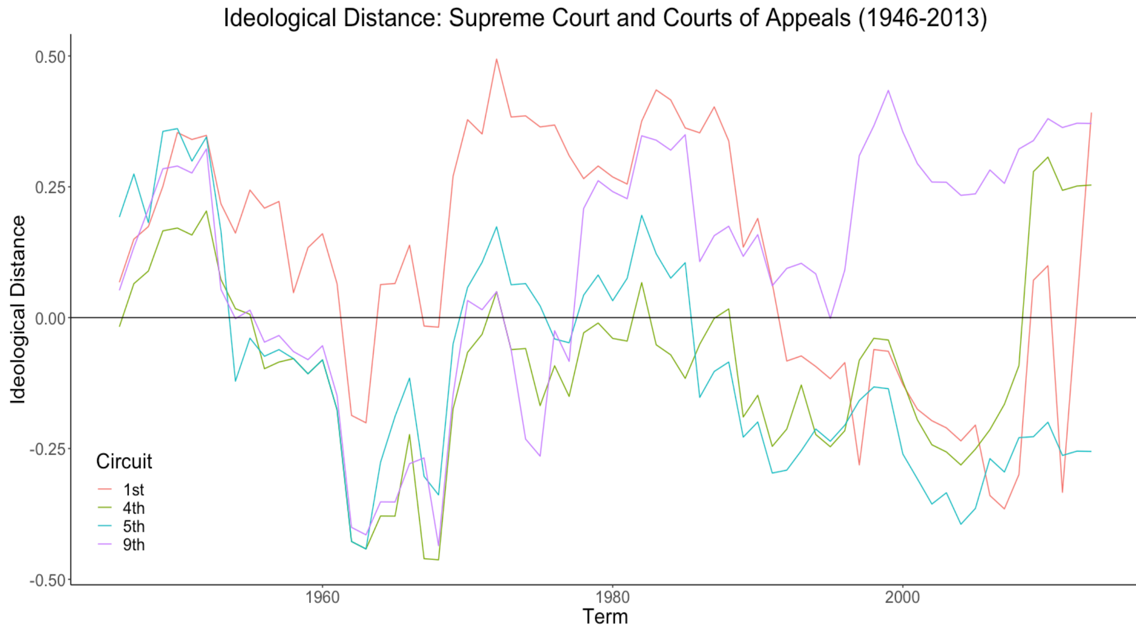

Figure 1: Ideological Distance between the Supreme Court and Lower Courts

Next, the *Ideological Distance Between the Enacting and Contemporary Supreme Court* variable is measured. Here, the ideology score of the median justice of the Supreme Court at the time a precedent is established is subtracted from the ideology score of the median justice of a contemporary Supreme Court. Positive values indicate that the contemporary Supreme Court is more conservative than the enacting Supreme Court, and negative values indicate that the contemporary Supreme Court is more liberal than the enacting Supreme Court.

Several additional variables were created with the help of the Supreme Court Database (SCDB) (Spaeth et al. 2015). The size of the majority coalition behind each precedent was identified through the *MajSize* variable in the SCDB. The average precedent established between 1946 and 2013 was backed by a majority coalition of 7.01 justices. Interestingly, precedents that were eventually overruled by the Supreme Court were, on average, established by majority coalition of 6.14 justices. Next, the age of a precedent was determined based on the term it was decided. Overruled precedents are, on average, 29 years old at the time of their overruling.

2.5 Results

Table 1 present the results of a rare-event logistic regression (King and Zeng 2001). This model includes a measure of the aggregate number of previous negative treatments across the courts of appeals. This aggregate measure is implemented to establish an initial correlation between prior negative treatments by courts of appeals and the probability a precedent is overturned. The number of previous negative treatments by all courts of appeals, measured in a single year, ranges from 0 to 398, with a mean of 0.77 and a standard deviation of 3.71.

Table 1: Results of Rare Event Logit in Explaining the Overruling of a Precedent

	Dependent Variable: *Overruled*
# of Previous Negative Treatments by CoA(s)	0.118*** (0.030)
# of CoA(s)	1.090*** (0.108)
Age of Precedent	0.139** (0.043)
$(\text{Age of Precedent})^2$	-0.003*** (0.001)
Enacting Majority Coalition Size	-0.430*** (0.091)
CoA First Negative	1.744*** (0.353)
Ideo. Distance Enacting & Contemporary USSC	0.617 (0.792)
# of Previous Negative Treatments by USSC	0.128* (0.069)
Ideo. Distance (USSC) * # of Prev. Negative Treatments (USSC)	-0.324 (0.287)
# of Previous Negative Treatments (CoAs) * # of CoA(s)	-0.032** (0.008)
No Negative Treatments	0.257 (0.362)
Constant	-7.294*** (0.677)
N	314,792
Akaike Inf. Crit.	1,113.10

Note: *p<0.10; **p<0.05; ***p<0.00

The results in Table 1 uphold the expected relationship between the total number of previous negative treatments by all courts of appeals and the decision of the Supreme Court to overrule a precedent The results indicate, for example, if the mean number of previous negative treatments (0.771) the court of appeals increases by one standard deviation (2.545), and the number of courts of appeals engaging in the negative treatments is held at one, then the odds the Supreme Court overrules the precedent (versus not overruling) increase by a factor of 3.71.

The results concerning the relationship between the age of a precedent and its probability of being overruled are consistent with the predicted concave relationship. The estimated negative coefficients in the quadratic formula imply that we would

observe a concave shape if the estimations were to be plotted. The results in Table 1 also indicate that as the size of the enacting majority coalition increases, the odds the precedent will be overruled decreases. These two findings are consistent with prior empirical studies in judicial politics.

The results in Table 1 demonstrate a large and statistically significant relationships between the likelihood the Supreme Court overrules a precedent and the number of previous negative treatments a precedent has received from the Supreme Court itself. Similarly, there is a large, positive, and statistically significant relationship, found between the ideological distance between the enacting Supreme Court and the contemporary Supreme Court and the probability the Supreme Court will overrule a precedent. The predicted probability of a precedent being overruled is estimated in order to depict the nature of this interaction between the number of previous negative treatments by the Supreme Court and the difference in the Supreme Court's ideology. For this estimation, the ideological distance variable was varied from one standard deviation below its mean value (-0.146), its mean value (0.027), and one standard deviation above its mean value (0.200); the number of previous negative treatments variable was allowed to vary across is full range of values (0 to 18); and all continuous variables in the model were held at their mean values. The result of this predicted probability estimation is plotted in Figure 2.

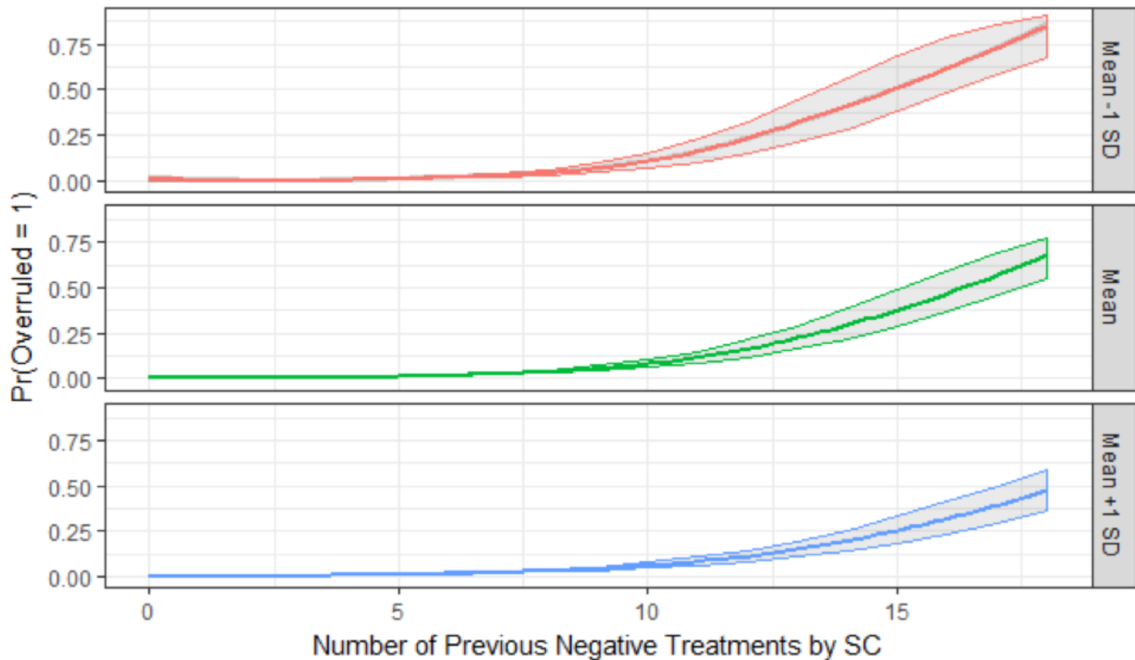

Figure 2: Predicted Probability of Observing an Overrule: Varied by Ideological Distance between the Enacting and the Contemporary Supreme Court

The trends within Figure 2 indicate there is a strong relationship between the previous number of negative treatments of a precedent by the Supreme Court and the probability the Court decides to overrule the given precedent. The panels within Figure 2 represent different levels of ideological distance between the enacting and the contemporary Supreme Court. The highest predicted probability of overrule (95%) occurs when the ideological distance is one standard deviation below its mean value, implying the contemporary Supreme Court is far more liberal than the enacting Supreme Court and the Supreme Court has previously treated the precedent negatively in 18 prior decisions. Yet, when there has been the same number of previous negative

treatments towards a precedent by the Supreme Court and the ideological distance between the enacting and original coalition is one standard deviation above its mean value, suggesting the contemporary Supreme Court is far more conservative than the enacting Supreme Court, the predicted probability of overruling a precedent is only 53%. Together, the results somewhat support the notion that when the contemporary Supreme Court is significantly more liberal than the enacting Supreme Court, the contemporary Supreme Court is more likely to overrule a precedent as opposed to a contemporary Supreme Court that is significantly more conservative than the enacting Supreme Court.

At the time a precedent is overruled, on average, the precedent has been previously treated negatively time times by about two (1.9) distinct circuit courts of appeals have negatively cited the precedent and the precedent has received three negative treatments. A set of predicted probabilities are estimated in order to understand the relationship between the number of previous negative treatments by the courts of appeals and the number of courts of appeals who engaged in issuing those negative treatments. The difference in the probability we observe the Supreme Court overruling a given precedent was estimated iteratively, where the number of courts of appeals issuing negative treatments and the number of negative treatments is varied and the results are compared against the central tendencies of all other variables from the model. The number of courts of appeals issuing negative treatments was varied from 1, 3, 5, 7, and 9 courts. The number of negative treatments varied from 5, 50, to 100 (except

for when 7 or more courts were involved, under this scenario the minimum number of negative citations was set to 10). The results of this estimation processes are shown in Figure 3 below.

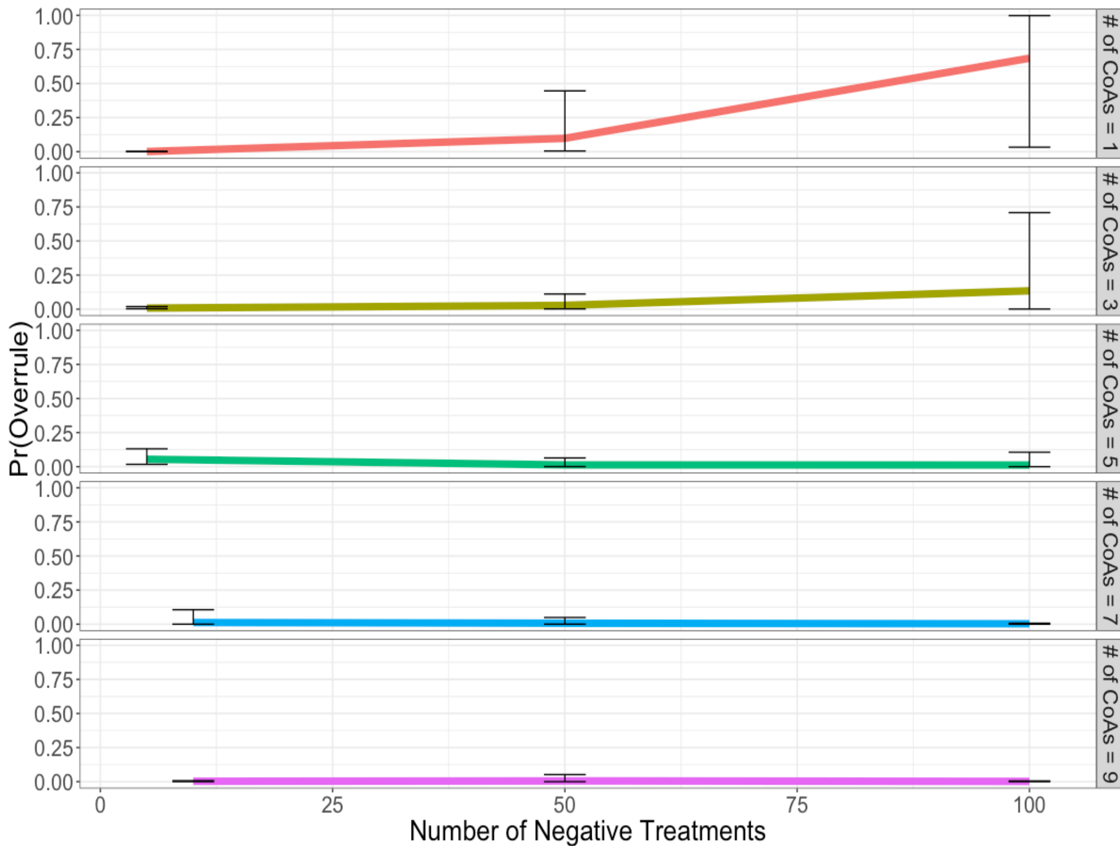

Figure 3: Predicted Probability of Observing an Overrule: Varied by Number of Negative Treatments and Courts of Appeals Issuing Negative Treatments

In the top panel of Figure 3, we observe as the number of negative treatments increases, the probability the precedent is overruled also increases even though there is only a single appellate court issuing these negative treatments. Whereas, in the two panels at the bottom of Figure 3, where seven or more circuit courts of appeals are

involved in issuing negative treatments, the probability we observe the precedent being overruled is very low.[11]

Altogether, the results in Figure 3 imply that if the Supreme Court is going to overrule a precedent – it is more interested in overruling precedents that 'splits' across the courts of appeals. Here, a split would suggest that some courts of appeals issue a negative treatment of the precedent and others implement the precedent faithfully. Further, the results in Figure 3 results also suggest that the Supreme Court may not feel a need to overrule a precedent if it has nearly unanimous negative treatments and rampant non-compliance in courts of appeals. Or in other words, the results imply the Supreme Court prefers to overrule precedents that are being implemented in some courts of appeals and not others - signifying that the act of overruling a precedent is a form of doctrinal development for the Supreme Court rather than simply bring non-compliant lower courts back into compliance.

On the other hand, it is important to note that when a precedent is negatively treated by one court of appeals and this court is not overturned by the Supreme Court, then other courts may feel free to start negatively citing a precedent. This type of spillover behavior is possible because one court can observe the treatment behavior of the other courts.

It is important to note that prior negative treatments of a precedent by the Supreme Court may influence a lower court's decision to treat the precedent negatively.

[11] It should be noted that only 31 Supreme Court precedents (of 8,357) have received negative treatments from eight or more courts of appeals; and only three of these precedents have been subsequently overruled by the Supreme Court.

Here, lower courts can observe previous negative treatments by the Supreme Court and this action by the Supreme Court may signal to lower courts that a precedent is open for criticism (Hansford and Spriggs 2006). A chi-square test of independence between the number of previous negative treatments a precedent receives from the Supreme Court and the number of negative treatments a precedent receives from all courts of appeals was estimated to account for this potentially confounding effect. The results suggest we cannot reject the null hypothesis. More simply, the results of this independence test indicate there is some kind of non-random relationship between the number of negative treatments a precedent receives by the Supreme Court and the number of treatments the same precedent receives from lower courts.[12] However, it should also be noted that there are thousands of precedents that are never negatively treated by the Supreme Court but go on to be negatively treated by a court of appeals.

Interestingly, the results in Table 1 do not uphold one of the most consistent arguments in the literature. The estimates in Table 1 do not reveal a statistically significant relationship between the likelihood the Supreme Court overrules a precedent and the ideological distance between the enacting and contemporary Supreme Court. However, the results do suggest there is a statistically significant relationship between the number of previous negative treatments a precedent receives from the Supreme Court and the likelihood the precedent was overruled. The interaction of these two important variables is not statistically significant. These results suggest that once the

[12] The estimated p-value of this chi-square test is less than 2.2e-16.

negative treatment behavior of the courts of appeals is included in the model, the variables related to the role of ideology on the Supreme Court lose their statistical significance. When the regression in Table 1 is re-estimated without the variables related to the behavior of the courts of appeals variables, the ideological distance variable for the Supreme Court and the interaction between the ideological distance variable and the number of previous negative treatments by the Supreme Court are estimated to have statistically significant relationships with the probability the Supreme Court overrules a precedent.

Next, a more complex model which account of the relationship between each circuit court of appeals and the Supreme Court is presented. A rare events logit regression was also implemented in this analysis. [13]

[13] Please see Appendix A for the alternative estimation of this model. The alternative estimation utilizes a moving five-year window to calculate the cumulative sum of negative treatments by the courts of appeals.

Table 2: Results of Rare Events Logit: Explaining the Decision to Overrule with Negative Treatments by Courts of Appeals

	Dependent Variable: *Overruled*
# of Previous Negative Treatments 11th Circuit	0.015 (0.006)*
Ideo. Distance USSC & 11th Circuit	-0.462 (0.434)
# of Prev. Negative Treatments (11th) * Ideo. Distance (USSC & 11th)	-0.023 (0.014)*
# of Previous Negative Treatments 10th Circuit	-0.043 (0.008) ***
Ideo. Distance USSC & 10th Circuit	1.211 (0.290) ***
# of Prev. Negative Treatments (10th) * Ideo. Distance (USSC & 10th)	0.040 (0.027)
# of Previous Negative Treatments 9th Circuit	-0.026 (0.004)***
Ideo. Distance USSC & 9th Circuit	-1.452 (0.217)***
# of Prev. Negative Treatments (9th) * Ideo. Distance (USSC & 9th)	-0.032 (0.008)***
# of Previous Negative Treatments 8th Circuit	0.054 (0.005)***
Ideo. Distance USSC & 8th Circuit	-1.201 (0.332)***
# of Prev. Negative Treatments (8th) * Ideo. Distance (USSC & 8th)	0.287 (0.022)***
# of Previous Negative Treatments 7th Circuit	-0.049 (0.007)***
Ideo. Distance USSC & 7th Circuit	-0.374 (0.169)*
# of Prev. Negative Treatments (7th) * Ideo. Distance (USSC & 7th)	0.055 (0.016)***
# of Previous Negative Treatments 6th Circuit	0.097 (0.006)***
Ideo. Distance USSC & 6th Circuit	0.346 (0.267)
# of Prev. Negative Treatments (6th) * Ideo. Distance (USSC & 6th)	-0.009 (0.018)
# of Previous Negative Treatments 5th Circuit	-0.057 (0.003)***
Ideo. Distance USSC & 5th Circuit	1.994 (0.416)***
# of Prev. Negative Treatments (5th) * Ideo. Distance (USSC & 5th)	-0.009 (0.013)
# of Previous Negative Treatments 4th Circuit	-0.013 (0.005)*
Ideo. Distance USSC & 4th Circuit	-1.430 (0.382)***
# of Prev. Negative Treatments (4th) * Ideo. Distance (USSC & 4th)	0.074 (0.021)***
# of Previous Negative Treatments 3rd Circuit	0.031 (0.008)***
Ideo. Distance USSC & 3rd Circuit	1.014 (0.353)**
# of Prev. Negative Treatments (3rd) * Ideo. Distance (USSC & 3rd)	-0.185 (0.040)***
# of Previous Negative Treatments 2nd Circuit	0.061 (0.005)***
Ideo. Distance USSC & 2nd Circuit	-1.112 (0.318)***
# of Prev. Negative Treatments (2nd) * Ideo. Distance (USSC & 2nd)	-0.096 (0.019)***
# of Previous Negative Treatments 1st Circuit	0.107 (0.007)***
Ideo. Distance USSC & 1st Circuit	0.572 (0.359)
# of Prev. Negative Treatments (1st) * Ideo. Distance (USSC & 1st)	-0.129 (0.020)***
Age of Precedent	-0.007 (0.008)
(Age of Precedent)^2	-0.001 (0.000)***
Enacting Majority Coalition Size	-0.412 (0.017)***
Ideo. Distance Enacting & Contemporary USSC	2.617 (0.160)***

# of Previous Negative Treatments by USSC	0.412 (0.02)***
Ideo. Distance (USSC) * # of Prev. Negative Treatments (USSC)	-0.061 (0.089)
Constant	-1.976 (0.217)***
Observations	327,651
Akaike Inf. Crit.	19,086.210

Note: *p<0.10; **p<0.05; ***p<0.01

Broadly, the results in Table 2 support the predicted relationships between negative treatment of precedents by courts of appeals and the probability that the Supreme Court overrules the precedent. The results indicate if the mean number of previous negative treatments (0.69) increases by one standard deviation (9.18), the odds the Supreme Court overrules the precedent (versus not overruling) increase by a factor of 9.44. Further, if the number of previous negative treatments by the First Circuit Court of Appeals, for example, is increased from its mean value to one standard deviation above the mean value and the ideological distance between the First Circuit and the Contemporary Court was small (0.1), the odds the Supreme Court overrules the given precedents (versus not overruling) increases by a factor of 9.62.

The results in Table 2 indicate that as the size of the enacting majority coalition behind a precedent increases, the odds the precedent will be overruled in the future decrease. Again, the results indicate there is a concave relationship between a precedent's age and odds it will be overruled. Likewise, the estimated results in Table 2 are similar to findings in Table 1; prior negative treatments by the Supreme Court and increasing ideological distances between the enacting and contemporary Supreme Court lead to an increase in the odds we observe a precedent being overruled.

No two circuit courts of appeals are the same. Likewise, the docket within each court of appeals varies from one to the next. Overall, the results in Table 2 support the predicted relationship between negative treatments of a precedent by a court of appeals and an increased probability the Supreme Court will overrule the precedent. The predicted probability a precedent is overruled is estimated and plotted for each court of appeals. This estimation was preformed while holding the all variables related to the other courts of appeals and the Supreme Court constant at their mean values. Table 3 below depicts the mean ideological distance between each circuit court of appeals and the Supreme Court. The results of this process are plotted below in Figure 4. Each estimation allowed a court of appeals to vary in the number of previous negative treatments from 0 to 50, while holding the ideological distance between the given appellate court and the Supreme Court at its mean value.

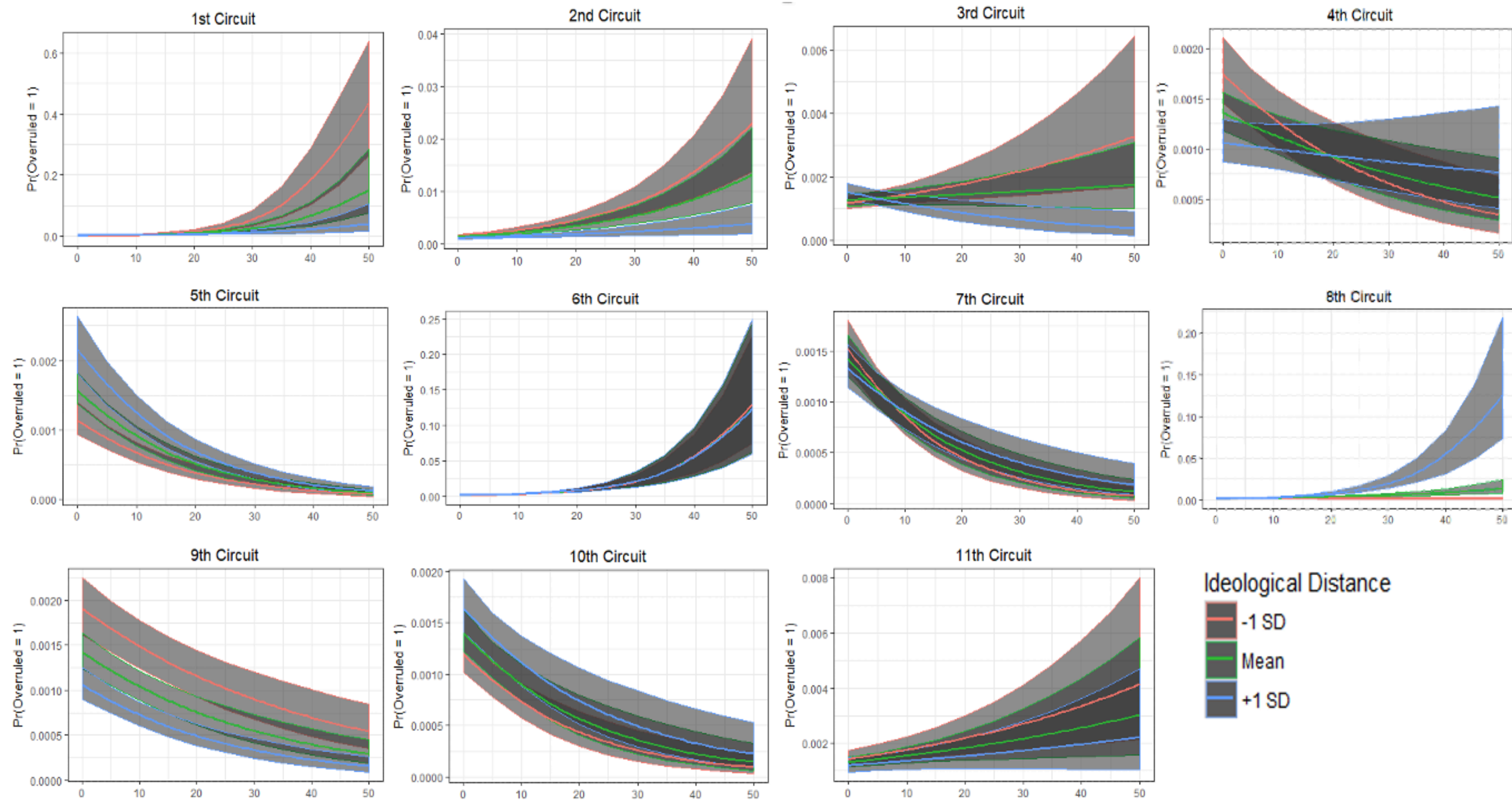

Figure 4: Predicted Probability of Overruling a Precedent Based on the Number of Negative Treatments from Each Circuit

Table 3: Mean Ideological Distance Between the Contemporary Supreme Court and Each Circuit Court

Circuit	Mean Ideological Distance (USSC to Circuit)	Circuit	Mean Ideological Distance (USSC to Circuit)
1	0.056	7	-0.019
2	0.215	8	-0.023
3	0.189	9	0.169
4	-0.086	10	-0.045
5	-0.158	11	-0.063
6	0.032		

The results in Figure 4, reveal that for some circuits, such as the First Circuit and the Eighth Circuit Court of Appeals, the predicted probability of overruling depicts the expected relationship – as the number of previous negative treatments increases, the probability of overrule increases. Other circuits, such as the Ninth and Tenth Circuits, appear to have little or no predictive power. Yet, as we observe in Table 3, the average ideological distance between these most predictive circuits and least predictive circuits varies greatly. Where, for example, the positive statistic for the Ninth Circuit suggests the Supreme Court is more conservative than the appellate court and the small negative statistic for the Tenth Circuit suggests the Supreme Court is slightly more liberal.

Altogether, the results in Table 1 and Table 2 provide support for one of the main hypotheses: as the number of negative treatments a precedent receives from lower courts increases the higher the probability the precedent will be overruled. Further, the result in Table 1 demonstrate that negative treatments by lower courts which are more ideologically proximate to the Supreme Court are more predictive for overruling the

precedent. In Table 1, negative treatments across all courts of appeals were aggregated together. Whereas in Table 2, the effect of negative treatments of precedent by one court of appeals was estimated while holding all other courts of appeals constant.

Because the lower appellate courts can observe each other's behavior, this may lead to pooling in the data, where one lower court cites a precedent negatively and is not subsequently reversed by the Supreme Court and this, in turn, gives a green light for other lower appellate courts to treat the given precedent negatively. Within the data, there are 161 precedents that received negative treatments from all eleven regional appellate courts. Of the 161 precedents which have received negative treatments from all lower appellate courts in the data, only eleven were overruled by the Supreme Court. Future network analysis studies will explore how lower courts may influence each other's citation behavior.

2.6 Conclusion

Most argue that negative treatment of a Supreme Court precedent by a court of appeals is a potentially costly and political act (Hansford and Spriggs 2006; Westerland et al. 2010). Most expect the Supreme Court to 'correct' or reverse lower court actors who do not follow precedent (e.g., Cameron, Segal, and Songer 2000). However, this chapter has demonstrated that negative treatments by lower courts can also be informative signals for the Supreme Court. In turn, these information signals may highlight to the Supreme Court were the law is incomplete or when an older doctrine does not fit with modern facts. The empirical evidence presented in this chapter demonstrated there are

two key conditions which predict an increased probability a precedent will be overruled: when the Supreme Court is ideologically aligned with the lower court that is negatively citing a precedent; and when a handful, but not all or even a majority, of the courts of appeals have treated the precedent negatively.

The Supreme Court is designed to be the highest court in the United States. However, the bulk of federal cases are resolved in lower federal courts. Precedents established by the Supreme Court are to be implemented and guide lower court decision-making. This chapter offered a new perspective for political science literature on the relationship between the Supreme Court and courts of appeals. This chapter demonstrates that non-compliance with a precedent by a lower court, in the form of a negative treatments of precedents, can inform the Supreme Court's decision to overrule a precedent. This chapter also breaks from the tradition of casting the Supreme Court as a disciplining principal and instead offers an agency perspective of the judiciary as an institution where the Supreme Court is a supervisor.

This chapter began with a discussion of the Supreme Court's decision to overrule precedents. Often judges and scholars have criticized this behavior by the Supreme Court as political, illegitimate, and untrustworthy. This chapter sheds new light on this discussion, and instead suggests overruling a precedent and, in turn, engaging in the development of a new precedent is a responsible action for the Supreme Court when the decision to overrule is based on actions and signals from the lower courts that are tasked with implementing precedents. Besides political and ideological biases within the lower

appellate courts and the Supreme Court, we observe lower courts signaling to the Supreme Court through negative treatments of precedents when they are struggling to implement a precedent, are dissatisfied with the application of a precedent, or when they believe the Supreme Court simply arrived at the wrong precedent. Thus, the decision to overrule a precedent can be viewed as a both a legal and political decision. In turn, future research will likely benefit from observing the act of overruling as a form of doctrinal development that is well within the powers vested in the Supreme Court rather than preemptively casting the act of overruling as inherently political.

3. An Invitation for Review: Whistleblowing in Dissenting Opinions

3.1 Introduction

This chapter argues that dissenting opinions published by the courts of appeals act as an information signal for the Supreme Court. Prior research has previously demonstrated that the Supreme Court is more likely to review a lower court decision if a dissenting opinion complements the lower court's opinion. The critical contribution of this chapter to judicial politics research is the identification of different types of dissenting opinions. Further, I argue in this chapter that cases that are accompanied by a dissenting opinion that was motivated by disagreement over the law are more likely to be reviewed by the Supreme Court than cases with an accompanying dissenting opinion that was motivated by ideological and partisan differences.

I demonstrate in this chapter that disputes over the law, which sometimes materialize as dissenting opinions, provide an information signal to the Supreme Court that is similar to the signal presented when there is a split among the circuits (Beim and Rader 2015; Spriggs and Hansford 2006). Altogether, this chapter demonstrates that disagreement over the law within a lower court is a powerful motivator for the Supreme Court to intervene and clarify the law, develop doctrine, and sometimes reverse a lower court's decision. The empirical results within this chapter indicate dissenting opinions produced by appellate judges may signal both legal and political disputes. Further, the results replicate existing political science research and finds that the presence of a dissenting opinion in a case resolved by a court of appeals correlates with the case being

more likely to be appealed to the Supreme Court. The empirical results also indicate that the Supreme Court is more likely to grant certiorari and review cases resolved by a court of appeals when there is a dissenting opinion and the ideological composition of the panel of appellate judges, along with the ideology of their circuit, does not align with the ideological preferences of the Supreme Court.

Theoretically, I argue in this chapter that even though the Supreme Court is interested in correcting lower court errors, the Supreme Court also takes on a supervisor role over the judiciary. For this reason, it is expected that the Supreme Court also focuses on maintaining and developing doctrines in order to and ensure uniformity in the application of the law among the lower courts. Overall, this chapter contributes to political science literature by presenting several new avenues for research into the certiorari process and the Supreme Court's decision to review. This chapter implements an original dataset based on the docket sheets, pool memorandum, and voting lists within the Blackmun Archive. The Blackmun Archive documents the Supreme Court's agenda setting stage for the 1986 term through the 1993 term.

This chapter begins with a background on the appeals system and how the Supreme Court reviews and votes throughout the certiorari process. Next, a theory on the role of whistleblowers from within the judiciary is presented. This theory frames published dissenting opinions by appellate judges as the result of a strategic decision by the judges. Next, an original dataset based on docket sheets and memos authored during Justice Harry A. Blackmun's tenure during the Rehnquist Court (1986 term through the

1993 term) is detailed at length. The results and their implications are presented and discussed at length. This chapter concludes with a discussion on future research into the role of lower courts' influence on the Supreme Court's agenda.

3.2 Background

This chapter is not the first empirical study on how dissenting opinions by the courts of appeals may capture the Supreme Court's attention. Some scholars have previously theorized that the presence of a dissenting opinion by an appellate court may cue the Supreme Court's attention at the certiorari stage and have found that the Court is more likely to review a case if there is an accompanying published dissenting opinion versus a case with no dissenting opinion (Tanenhaus, Schick, Muraskin and Rosen 1963; Caldeira, Wright, and Zorn 1999; Black and Owens 2016). That said, the jurisprudential, behavioral, and attitudinal motivations behind an appellate judge's decision to author a dissenting opinion are less developed within the literature (but see Atkins 1973).

We frequently observe unanimous agreement in courts of appeal. Within the opinions published by courts of appeal between 1970 and 2011, only 4.3% had an accompanying dissenting opinion.[1] A great deal of literature on the Supreme Court and state supreme courts has argued that dissenting opinions are the result of some strategic action by a justice or set of justices (Brace and Hall 1990, 1993; Epstein and Knight 1998). Here, dissenting opinions are portrayed as some kind of signal by the authoring judge in order to identify like-minded judges (e.g., Hettinger, Lindquist and Martinek 2004), curb

[1] This statistic is based on data collected from Mayer Corpus. Please see footnote 8 and accompanying text for additional information.

the panel majority's behavior (e.g., Kastellec 2007), or trigger an *en banc* review (e.g., Beim, Hirsch, and Kastellec 2016). Each of these studies indicates that dissenting opinions may be the result of strategic behavior by judicial actors. However, within political science, most studies almost exclusively conclude that dissenting opinions are motivated by ideological disagreements between the dissenting judge and judge who is authoring the majority's opinion. The judicial politics literature has largely missed how legal disagreements, distinct from a conflict rooted in one's partisan ideology, may motive a judge to choose to author a dissenting opinion strategically. The following theoretical section in this chapter seeks to fills in this gap in the literature.

With regard to the judges themselves, we observe cases before federal courts of appeals being resolved in panels composed of three judges. Appellate judges are randomly assigned to panels (Levy 2017; Chilton and Levy 2015). There are a handful of studies within political science that have examined how ideological differences and differences in the immutable characteristics among the members of the panel can impact which party in a case will prevail (Kastellec 2011; 2013). Notably, Kastellec (2013) finds that racial diversity within a panel can predict the resolution of affirmative action cases before the courts of appeals. Likewise, other studies have demonstrated how panels composed of judges with differing genders can impact how a case is resolved (Farhang and Wawro 2004). Others have studied how the ideological differences between the judge who is authoring the court's opinion and the two other judges on the same panel will impact the content of the court's opinion (Hinkle 2017). Altogether, the existing

judicial politics literature implies that the immutable characteristics and the ideology of judges matters along with how these characteristics conform with the two other appellate judges on their panel.

The act of dissenting is costly for appellate judges. Many have noted how dissenting may impact collegial relationships (Songer 1982; Atkins and Green 1976), add uncertainty to the court's decision (Epstein, Landes, and Posner 2011), and possibly encourage non-compliance with the majority coalition's opinion (Zilis 2015; Boyd 2015). Several have noted that the act of dissenting is strategic (Epstein and Knight 1998, pg. 10). An empirical study by Niblet and Yoon (2015) on all opinions published by the courts of appeals from 2001 to 2015, find that majority opinions often cite precedents that are ideologically similar to the preferences of the judge who is authoring the opinion and precedents cited in the dissenting opinion are ideologically similar to the dissenting judge's preferences. Niblet and Yoon (2015) conclude that it is often the case that judges' ideology motivates their decision to rely on some precedents rather than others and this, in turn, leads to disagreements which result in dissenting opinions rather than disagreements over the same precedent (i.e., the law) which results in a dissenting opinion. In contrast with most empirical judicial politics studies on dissents in the federal appellate courts, Hettinger, Lindquist, and Martinek (2004) conclude that the attitudinal model better accounts for an appellate judge's decision to dissent compared to a strategic model. Hettinger, Lindquist, and Martinek (2004) find that ideological disagreement between an appellate judge and the majority opinion writer

from the same panel provides more predictive support for the judge's decision to dissent as compared to a strategic account, where the judge is argued to condition their decision to dissent on whether circuit intervention, in the form of an *en banc* review, would obtain the judge's preferred outcome.

Procedurally, a majority opinion that is published by a court of appeals can only be reversed through an *en banc* review or by the Supreme Court. *En banc* review is a form of judicial review that each court of appeals possesses for overseeing its judgments. This review process was created to combat situations where a panel of three judges creates a legal policy that is contrary to the preferences of a majority of judges within a circuit (Atkins 1972; Abramowicz 2000). Each court of appeals establishes its *en banc* procedures. For the most part, the review process involves almost all active judges from a court. Decisions to overturn a panel's decision almost exclusively rely on majority-rule. Prior research by Giles et al. (2007) revealed that while the courts of appeal resolved nearly 27,000 cases in 1999, only 94 of these decisions were reviewed *en banc*. Giles et al. (2007) conclude that the probability of *en banc* review and reversal appears to be almost as low as the probability of Supreme Court review and reversal. Two recent studies present somewhat conflicting results, but also offer curious insights into the dynamic of *en banc* review. First, Giles, Walker, and Zorn (2006) find that the presence of a dissenting opinion will increase the probability a case is rereviewed *en banc*. However, the results by Giles, Walker, and Zorn (2006) also find when a case has been decided in a way that conflicts with the ideological preferences of a majority of the circuit's active

judges, the predictive significance of the presence of a dissenting opinion on the probability of *en banc* review is diminished. However, Beim and Kastellec (2014), find that a combination of ideological discord and the presence of a dissenting opinion both have independent and statistically significant relationships with the probability the panel's decision is reviewed *en banc*. Here, Beim and Kastellec (2014) conclude that conservative circuits are more likely to review liberal-leaning decisions *en banc*, and the same pattern holds for liberal circuits and conservative decisions. Separate from ideology, Beim and Kastellec (2014) also find dissenting opinions contain some kind of signaling effect which, in turn, leads to a higher probably that a panel's decision will be reviewed *en banc*.

Procedurally, the Supreme Court relies on the "Rule of Four" to decide if it will take the case. Here, if four of the nine Justices feel like an appealed case should be reviewed, they will issue a vote in favor of granting a writ of certiorari. This writ is a legal order from the Supreme Court for the lower court, that resolved the given appealed case, to send the records of the case to the Supreme Court for review. At this moment in history, the Supreme Court receives over 10,000 appeals or petitions for a writ of certiorari each term. These petitions are divided among the justices' clerks who review each petition and, in most circumstances, author a memo discussing the merits for and against a writ of certiorari. Importantly, there is already a substantial amount of existing research on discretionary case selection by Supreme Court which has demonstrated that decisions by courts of appeals that are accompanied by a dissenting

opinion are significantly more likely to be granted a writ of certiorari than cases without a dissenting opinion (Richardson and Vines 1967; Giles, Walker, and Zorn, 2006; Blackstone and Collins 2014).

The following section develops a theory on information signals in the judiciary. The theory section in this chapter aligns with the strategic literature above and frames an appellate judge's decision to dissent the result of the judge's strategic decision. However, in contrast with most political science literature, this chapter does not treat the informational value offered by dissenting opinions as equal. Below, this chapter develops a theory concerning what kind of information signals the Supreme Court is most likely to pay attention to.

3.3 Theory: Whistleblowing in the Judiciary

There is an extensive theoretical literature which documents how whistleblowers can inform superiors of possible non-compliance or mismanagement by an agent (McCubbins and Schwartz 1984; Lupia and McCubbins 1994; Gailmard and Patty 2013). I argue in this chapter that, in some circumstances, a dissenting judge can act as a whistleblower. This whistleblowing signal is argued to occur when a judge authors a dissenting opinion that appears counter to a judge's apparent ideological interests. Notably, if the dissenting judge shares a relatively similar ideology as the other judges on the panel, then the act of dissenting implies there is a deeper and more complex issue motivating this opinion-writing behavior. Whereas, if the dissenting judge is in the ideological minority of their panel, then it is more difficult to untangle whether partisan

politics, jurisprudential differences, or both political and legal elements are motiving this opinion-writing behavior. Within political science literature, this concept is often referred to as the *value of bias in information signals* (Calvert 1985; Bendor, Taylor, and Van Gaalen 1987). Here, a signal that appears biased against an appellate judge's preferences is expected to capture the Supreme Court's attention more so than a signal that is biased towards the dissenting judge's preferences.[2]

Dissenting opinions that are counter to an appellate judge's straightforward ideological preferences for the resolution of a case referred to as counter-dissents hereinafter are expected to send a louder signal to the Supreme Court. These counter-dissents are argued to send a stronger signal because counter-dissents defy traditional ideological lines and lead to judges with similar partisan and philosophies preferring different resolutions of the case. In turn, counter-dissents may signal the legal issue or issues within a case are highly complex and, therefore, worthy of review by the Supreme Court. Likewise, dissents and counter-dissents may also signal non-compliance with precedent. Altogether, this theory treats judges who author counter-dissent as akin to 'whistleblowers' and presents several predictions about how the presence or absence of a dissent will interact with preferences on the Supreme Court and influence the decision to review and possibly reverse an appellate panel's decision. As noted above, dissenting opinions, regardless if they are motivated by legal, or political, or both legal and political frictions on an appellate panel, seek to signal the same information to the Supreme

[2] In a formal model by Cameron, Segal, and Songer (2000) this concept is referred to as the "Nixon goes to China Result". Here, actions and signals that are counter to one's preferences send a more powerful signal to others engaged in the game.

Court: the majority coalition arrived at the wrong result and misapplied the law. More simply, dissenting opinions can provide the Supreme Court a legally reasoned road map for how a case should have resolved and encourage the Supreme Court to reverse their colleagues' opinion.

Facially, all dissenting opinions are framed as if they are driven by jurisprudential disagreement. However, counter-dissents are more costly to craft because these dissenting opinions cross traditional ideological lines, break more norms of consensus, and potentially damage collegial relationships as compared to other dissenting opinions. Prior research by Lupia and McCubbins (1998) on trust and persuasion has demonstrated that the costs related to an effort can impact the level of persuasion the effort has on observers. Here, the judge who crafts a counter-dissent likely undertakes more costs and in turn the Supreme may be more persuaded by this type of dissent and more likely to grant as compared to other cases resolved by the courts of appeals because there is a stronger information signaled in these cases.[3]

Imagine, for example, two panels from the same appellate circuit are resolving the same case. This case concerned whether the Stored Communications Act of 1986 violates the Fourth Amendment or not.[4] Both panels conclude the warrantless collection of cellular data through the Stored Communications Act does not violate the Fourth Amendment, reasoning that cellular data is not considered private property under the Fourth Amendment. The first panel is composed of three Republican appellate judges

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[3] Similarly, costly speech can influence the level of perceived trustworthiness of the speaker (Lupia and McCubbins 1998).

[4] This example is based largely on facts and legal issues found within *Carpenter v. United States* (2017).

(RRR), and the second panel is composed of two Republican appellate judges and a Democratic appellate judge (DRR).[5] Assume that one judge from each panel authors a dissenting opinion. There are three possible dissenting scenarios: (1) the Democratic judge in the DRR panel dissents; (2) a Republican judge in the DRR panel dissents; and (3) one of the Republican judges in the RRR panel dissents. Without reading these fictitious dissenting opinions, we can form a reasonable expectation as to which dissents are motivated by ideological differences and which are motivated by jurisprudential differences. In turn, we can label which dissents are counter-dissents.

Here, counter-dissents are identified based on 1) the identity of the judge that authored the dissenting opinion and 2) the identity of the two remaining panel members who find themselves in the majority coalition. Table 4 depicts how counter-dissents are identified within the hypothetical Stored Communications Act case scenario.

Table 4: Counter-Dissents in Courts of Appeals Cases

Panel	Dissenting Judge	Counter-Dissent
RRR	Republican	YES
DRR	Democratic	NO
DRR	Republican	YES

It is essential to highlight that the dissenting opinion, in the bottom row within Table 4, is labeled as a counter-dissent. Here, the Republican judge that dissented was part of the partisan-majority on the bench, and for this reason, the dissent should be viewed as a counter-dissent. This chapter maintains that if we observe a partisan-

[5] The partisanship of a judge is identified based on the partisanship of the president who most recently nominated the given judge to their bench. This proxy for identifying partisanship is consistent with judicial politics and legal studies literature (Kim 2009).

minority judge in the majority coalition and the other partisan-majority judge in the minority coalition, it is at the very least evidence the resolution of the case did not follow traditional partisan lines and suggests the case involves a complex issue or issues that do not map onto the "traditional" single dimension of partisan ideology.[6]

As mentioned above, the act of dissenting is costly to appellate judges in terms of time, resources, in the form of potential damage to collegial relationships with other judges, and potentially impacts the legitimacy of the court and the court's decisions. As such, an appellate judge who could be potential whistleblowers and considers authoring a counter-dissent may find the cost of authoring the separate opinion outweighs the utility they would potentially receive if the Supreme Court agreed to review the case and decided to reverse the majority's opinions. Therefore, the potential courter-dissenting judge may choose not to author the separate opinion given the costs outweigh the likelihood their dissent will successfully draw the Supreme Court's attention and lead to a reversal of the lower court's decision. Likewise, if the judge perceives the cost of writing separately and the expected utility of review and possible reversal by the Supreme Court to be essentially equal, then the potential whistleblowing judge would likely not author a separate opinion (e.g., Sloss 1973).

Notably, the disposition of a court of appeals' majority opinion and the ideological composition of the Supreme Court likely has a great deal of impact on the Court's decision to review and potentially reverse the lower court's decision along with

[6] There is mixed empirical evidence related to the impact of heterogeneous panel compositions on the outcome of resolved by Courts of Appeals (Kastellec 2011, 2013; Hinkle 2017).

a judge's decision to author a counter-dissent in the first place. The act of authoring a counter-dissent may allow a lower court judge to blow the whistle on her colleagues' non-compliance with the preferences of the Supreme Court. The disposition and resolution of a case will often take on a liberal or conservative lens. That said, cases exist on a continuum according to the facts of the case and often do not perfectly pool on the "liberal" or "conservative" side. Moreover, there are significant research constraints, in terms of time and expertise, placed on political scientists who attempt to label decisions by the courts of appeal as "conservative" or "liberal".

When we take into account the ideological composition of the Supreme Court, an additional prediction related to counter-dissents emerges. Assume the median justice on the Supreme Court is moderately-conservative, and overall the Supreme Court has a conservative-lean. Assume there are four decisions on appeal before the Court and that each decision was based on the same facts and the panels of appellate judges. The panels that resolved these cases are equal in every way – except for their ideological composition, which varies. In turn, we may expect the Supreme Court to pay attention to some appealed decisions over the others. Specifically, if the panel is composed of all Democratic judges and one authors a dissenting opinion, it suggests that the majority coalition may have reached a liberal-leaning outcome, there may be a complex legal issue or issues present in the case, and that there may be possible non-compliance with precedent. In turn, this scenario is ripe for a conservative-leaning Supreme Court to review and reverse the decision reached by a panel composed of all Democratic judges

where one judge has dissented. That said, if the appellate panel is composed of all Republican judges, the Supreme Court may be more hesitant to review, even with the presence of a counter-dissent, because the majority coalition likely reached a conservative-leaning outcome that aligns with the preferences of a majority of the justices on the Supreme Court. When the panel's majority coalition is heterogeneous, meaning it is composed of at least one Republican judge and one Democratic judge, it is less clear how the ideological lean of the majority coalition's decision will interact with the ideological lean of the Supreme Court. Here, the identity of the dissenting judge, as a Democratic judge or Republican judge, may impact the information that is signaled to the Supreme Court. These predictions are depicted in Table 5.

Table 5: Predicted Relationship Between Panel Composition and Supreme Court

Panel	Dissenting Judge, the "Whistleblower"	Expected Probability of Review by Conservative-Leaning Supreme Court
RRR	Republican	Low
DRR	Republican	Moderate
DDR	Democratic	Moderate
DDD	Democratic	High

Similar to counter-dissents, there are instances where a judge from the majority coalition will author a separate opinion known as a special concurrence. This type of separate opinion may also be the product of strategic behavior that is motivated by jurisprudential disagreements. Here, a judge concurs with the decision reached by the majority coalition but disagrees with the legal reasoning within the majority's opinion. Notably, within the courts of appeals, special concurrences occur at an even less

frequent rate as compared to dissenting opinions. Likely, the costs associated with authoring a special concurrence, in terms of time, resources, and professional costs, leads to fewer special concurrences being produced in lower federal courts as compared to the Supreme Court. Critical to this present chapter, a special concurrence likely does not send as strong of a signal to the Supreme Court as a counter-dissenting opinion. Because special concurrences are in agreement with the majority's resolution of a case and agree which party should prevail. Or in other words, special concurrences reflect unified support for which party should win and which party should lose and highlight disagreement over how to justify how the panel has identified the winner and loser. In turn, the importance of the disagreement may be muted.

In contrast with special concurrences, a counter-dissenting opinion informs an observer that the level of jurisprudential disagreement defied traditional ideological lines and led judges with similar political philosophies to prefer different outcomes. For these reasons, dissents and counter-dissents are employed in this chapter as the critical informational signal to study instead of concurrences and special concurrences. That said, future research will likely find it necessary to theoretically and empirically examine how special concurrences by appellate courts can act as information signals for the Supreme Court and influence the Court's decision to review.

The next section introduces the data and empirical tests used to explore the counter-dissent predictions.

3.4 Data and Methodology

This chapter relies on an original dataset derived from the notes and papers of former Associate Justice Harry A. Blackmun, which have been carefully archived in the Blackmun Archive (Epstein, Segal, and Spaeth 2008).[7] The documents within the Blackmun Archive capture the certiorari process on the Supreme Court from the 1986 term through the 1993 term. This archive identifies over 9,000 lower court cases that were petitioned for writs of certiorari before the Supreme Court and reviewed by Justice Blackmun's clerks, the number of cert votes each case received, the accompanying memorandums authored by Justice Blackmun's clerks, and which judges voted in favor or against hearing a case. While the Blackmun Archive does not contain all cert petitions from the 1986 term to the 1993 term, the Archive is a representative sample of all petitions filed in this time period because the petitions were divided through the Supreme Court's internal "cert pool" procedure. The cert pool was instituted by Chief Justice Warren E. Burger in 1973. Here, a copy of each petition received by the Supreme Court goes into the cert pool and is assigned to a random clerk. In turn, that clerk prepares and circulates a memo for all of the justices whose clerks are also participating in the pool (Thompson and Watchtell 2009, pg. 241). Interestingly, at the time Justice Blackmun's archive was being developed, Chief Justice William Rehnquist developed a reputation for chastising clerks whose memos were late, too long, biased, or left drafts of memos in an unsecured location (Greenhouse 2006, pg. 1370). Altogether, there are 9,037 appeals available for study in the Blackmun Archive. However, only 4,513 originated

[7] http://epstein.wustl.edu/blackmun.php. Last accessed May 8, 2020.

from the federal courts of appeals. Many of the appeals within the Blackmun Archive originated in state supreme courts. These appeals from state supreme court were removed from this current chapter but were saved for future research interest.

The majority and dissenting opinions published by the courts of appeals were provided by Jonathan Mayer's Advancing Empirical Legal Scholarship data repository.[8] A text-scraping technique was applied to identify all judges from each three-judge panel for each case. The text-scraping technique also identified the date each opinion was published and which circuit court published the given opinion. Next, the identified judges were matched with biographical data provided by the Federal Judiciary Center (FJC). If a dissenting opinion was published in a given case, the judge who authored the dissent and their biographical data were also noted. Based on this biographical information of all three appellate judges, the dissenting opinions were classified as counter-dissents or not.

The collected and parsed opinion-level data illuminates many noteworthy insights. Of the 50,449 cases resolved by courts of appeal between 1986 and 1993 which resulted in a published majority opinion, only 5.10%, or 2,572 majority opinions were accompanied by a dissenting opinion. Yet, of the 4,513 appealed decisions, 8.42% or 380 appealed decisions, were accompanied by a published dissenting opinion. Of the appealed cases with dissenting opinions, only 38.94%, or 148 of the 380 appealed decisions with dissenting opinions, were classified as a counter-dissent. These basic

[8] The opinions were collected from Jonathan Mayer's Advancing Empirical Legal Scholarship data repository of published opinions. http://webpolicy.org/2013/05/03/advancing-empirical-legal-scholarship-federal-appellate-opinions-and-rules / [https://perma.cc/N68V-A5NG].

statistics may reflect that the losing party before an appellate court is more likely to appeal the decision to the Supreme Court if there is dissenting opinion present. Notably. the presence of dissenting opinion and counter-dissents was relatively uniform across all judicial circuits. On average, for opinions published between 1986 to 1993, the Ninth Circuit Court of Appeals has the highest rate of counter-dissents and the Tenth Circuit Court of Appeals had the lowest rate.[9]

This study requires a two-stage analysis. First, we must observe if cases resolved by the courts of appeals where a dissenting opinion is present are more likely to be appealed to the Supreme Court. This aspect of the research design is important as the cost of appealing falls on the party which lost at the appellate court level, and not all cases resolved by the courts of appeal are appealed to the Supreme Court. The next stage considers the key question of this chapter: of the cases that are appealed to the Supreme Court, is the Supreme Court more likely to grant cert and review cases where there is an accompanying counter-dissenting opinion?

Altogether, this chapter utilizes a two-stage probit regression design – akin to a Heckman selection model. The dependent variable in the first stage is binary and asks if a given decision was appealed to the Supreme Court or not. The dependent variable in the second stage is also binary and asks if the Supreme Court granted certiorari to review a given decision or not. The main benefit of a Heckman-style research design is that it allows a researcher to correct bias from non-randomly selected samples, which is

[9] These rates were calculated by dividing the total number of counter-dissents published in the given time period by a circuit against the total number of majority opinions published in the given time period by the same circuit court.

a pervasive issue in judicial politics research, which almost exclusively relies on observational data. This chapter's research design explicitly models the individual sampling probability of each observation (the selection equation) together with the conditional expectation of the dependent variable (the outcome equation) (Heckman 1976).

Additional controls are included in each equation. Notably, fixed effects for each judicial circuit are included to control for the possibility that there is a higher (or lower) prevalence of appeals sought in some circuits and differences in the prevalence of counter-dissents across the circuits. Because the composition of each three-judge panel is randomly sampled, there is no need to control for a given judge with random intercepts for each judge. That said, the composition of active judges on each judicial circuit varies over time. In turn, the natural court of each circuit was identified. This variable is operationalized in a way that is similar to the Supreme Court Database's natural court variable (*naturalCourt*) (Spaeth et al. 2015), where a 'natural court' is defined as a period during which no personnel change occurred on a court. The coding of this variable is based on data from the Federal Judiciary Center (FJC), which identifies when a judge left her circuit, the amount of time a vacant seat was open, and the confirmation date of the replacement judge. Overall, this natural court variable for circuit courts is utilized as a fixed effect that controls for how the universe of active judges may vary. This control variable is critical because variations in the pool of active judges in each circuit may impact the probability we observe more or less ideologically homogeneous panels on

that circuit. Conspicuously, when there are more ideologically homogeneous panels in circuit courts, the probability we observe a counter-dissent may increase.

Next, the partisan lean of the appellate court's panel, which published a given decision that is potentially appealed and reviewed by the Supreme Court, is also controlled for. Here, I take advantage of single changes in the composition of appellate panels to more accurately estimate the impact of heterogeneous panels and the partisan lean of panels. In practice, cases resolved by panels composed of all Republican judges (RRR) will be compared against cases resolved by panels composed of two Republican judges and a single Democratic judge (RRD). Likewise, cases resolved by panels composed of all Democratic judges (DDD) will be compared against cases resolved by panels composed of two Democratic judges and a single Republican judge (DDR). This allows us to observe the effect of moving from an ideological homogenous panel and observe the role of partisanship.

Finally, the existing literature in judicial politics has revealed that ideology has a substantial, but not exclusive, role in judicial decision-making (Segal and Spaeth 2002; Epstein and Knight 2013). For this reason, I employ the Judicial Common Spaces Scores by Epstein, Martin, Segal, and Westerland (2007), and place Supreme Court judges and lower federal courts judges on the same ideological dimension. These scores identify the ideology of each federal court of appeals judge, district court judge, and each Supreme Court justice and places each of these actors in the same policy space. It is important to note that in the time period of this analysis the link between party and ideology is not as

firm as we could think of it in today's context. Similarly, the appellate judges in the present study, especially those within the South, may have a distinct linkage between their partisan identity and legal preference given the time they because a judge during the Civil Rights Movement.

Next, a measure that accounts for ideological differences in ideology between the Supreme Court and each appellate court is created with the Judicial Common Space scores. First, I identified the median active judge from each circuit court at the time an opinion was published. Next, I identified the median justice on the Supreme Court for the term following the publication of the appellate court's opinion. This decision was based on the general calendar system the Supreme Court follows in each term. Then, I estimated the difference between the circuit's active median judge and the median justice on the Supreme Court to create the *Ideological Differences in Supreme Court and Circuit Court* variable. The median active justice from each circuit court is utilized here as a proxy for the ideology of the circuit court because the *en banc* procedure, which involves the entire active bench of a circuit court reviewing a decision by a three-judge panel, and this system of review will likely act as a moderator on the decisions produced by each panel.

It is important to note that the primary analysis within this paper does not account for which judge on the three-judge panel writes the majority coalition's opinion. The empirical literature on the impact of ideological homogenous and heterogenous panels on judicial decision making is mixed (Kastellec 2011, 2013; Hinkle 2017).

Similarly, even at the level of the Supreme Court, there is a heated debate within the literature on the extent the justice who is tasked with authoring the Court's opinion judges, as compared to the median justice or the chief justice, impacts the opinion's contents (Carrubba, Friedman, Martin, and Vanberg 2012; Martin, Quinn, and Epstein 2004; Hammond, Bonneau, and Sheehan 2005; Lax and Cameron 2007). That said, the main analyses are replicated and control for the partisan identity of the opinion author at the end of the results section. This additional set of replication studies was performed in expectation of future research on the role of opinion-authors at the appellate court level, the decision by appellate judges to dissent, and the Supreme Court's decision to review and possibly reverse.

The next section presents the results of the two-stage model and discusses the implications of the empirical findings at length.

3.5 Results

In order to assess when appellate cases are appealed to the Supreme Court (the selection effect) and whether counter-dissents and ideology influence the Supreme Court's decision to review (the outcome effect), the results below are presented in the form of first and second stage regression models. The models below are estimated via a Heckman two-stage model with a probit regression model implemented at each stage. The first stage in each of the two-stage models below includes all cases with published majority opinion by a court of appeals from 1985 to 1993 (N = 50,449).

The second stage regression in Table 6 is limited to cases resolved by appellate panels that are composed of all Democratic judges and cases resolved by panels composed of a majority of Democratic judges that were also appealed to the Supreme Court for review during the 1986 to 1993 terms (N = 2,251). The second stage regression in Table 7 is limited to cases resolved by appellate panels that are composed of all Republican judge and cases resolved by panels composed of a majority of Republican judges that were also appealed to the Supreme Court for review during the 1986 to 1993 terms (N = 2,262).

Also presented in Tables 6 and 7 are the estimated McFadden's Pseudo R-squared for each stage of the regression model along with the percent correctly predicted statistic. Under McFadden's Pseudo R-squared equation, the likelihood of the intercept model is treated as a total sum of squares, and the log-likelihood of the full model is treated as the sum of squared errors. Further, the ratio of the likelihoods suggests the level of improvement over the intercept model offered by the full model. The likelihood will fall between zero and one. If a model has a very low likelihood, then the log of the likelihood will have a larger magnitude than the log of a more likely model. Therefore, a small ratio of log-likelihoods indicates that the full model is a far better fit than the intercept model. As a general rule of thumb, a McFadden's Pseudo R-squared value ranging from 0.2 to 0.4 indicates very good model fit (McFadden 1977, pg. 306). The percent correctly predicted (PCP) statistic is based on a methodology developed by Gelman and Hill (2006, pg. 99), which is defined as the proportion of cases

for which the deterministic prediction is wrong, (i.e., the proportion where the predicted probability is above 0.5, although the dependent variable is equal to zero and vice versa) (see also Herron 1999, pg. 90). Estimated PCP statistics range from zero to one, where values closer to one indicates that the model predicts the outcome better than models with a PCP closer to zero.

Table 6: Dissents, Appeals, and the Review of Democratic-Leaning Appellate Panels

	(1) Dependent Variable: *Appealed*	(2) Dependent Variable: *Cert Granted*
Dissent	0.013***	
	(0.001)	
Counter-Dissent	0.048***	0.185**
	(0.003)	(0.098)
Ideo. Diff. (USSC and CoA)	-0.022***	1.755***
	(0.002)	(0.518)
DDD Panel v. DDR Panel		-0.181**
		(0.077)
Intercept	-1.343***	-0.962***
	(0.008)	(0.037)
N	50,449	2,251
AIC	30,406.0	1,971.8
FE CoA Natural Court	YES	YES
FE Supreme Court Natural Court	YES	YES
McFadden's Pseudo R^2	0.098	0.092
Percent Correctly Predicted	91.05%	83.96%

Note: *p<0.10; **p<0.05; ***p<0.001

Table 7: Dissents, Appeals, and the Review of Republican-Leaning Appellate Panels

	(1) Dependent Variable: *Appealed*	(2) Dependent Variable: *Cert Granted*
Dissent	0.013***	
	(0.001)	
Counter-Dissent	0.048***	-0.072
	(0.003)	(0.109)
Ideo. Diff. (USSC and CoA)	-0.022***	1.343**
	(0.002)	(0.565)
RRR Panel v. DRR Panel		0.208**
		(0.079)
Intercept	-1.343***	-0.094***
	(0.008)	(0.035)
N	50,449	2,262
AIC	30,406.0	2,134.7
FE CoA Natural Court	YES	YES
FE Supreme Court Natural Court	YES	YES
McFadden's Pseudo R^2	0.098	0.093
Percent Correctly Predicted	91.05%	81.91%

Note: *p<0.10; **p<0.05; ***p<0.001

The results for the first stage regression found in both Table 6 and Table 7 is interpreted first. Here, we see there is a positive and statistically significant relationship between the presence of a published dissenting opinion or a court-dissenting opinion with the probability we observe a given appellate case be appealed to the Supreme Court. Notably, as the ideological difference between the circuit court which published an opinion and the Supreme Court increases, the probability we observe a case resolved by this circuit be appealed to the Supreme Court decreases. This relationship is statistically significant. Finally, the estimated intercept for this first stage regression, representative of the selection equation, has a negative and statically significant

relationship. In practice, this means that if all other predictors are set to zero in the model, meaning there was no dissent, no counter-dissent, and zero ideological differences between the circuit court which the decision originated and the Supreme Court, the probability we observe the case being appealed is low. This is likely driven by the resource constraints facing parties who seek to appeal a lower court's decision and the ex-ante expectation that the Supreme Court agrees to review around 1% of the cases appealed to it (e.g., Klein 2002). Further, this finding highlights the importance of dissenting opinions along with the important role that counter-dissenting opinions and ideology may play in the losing party's decision to appeal their case to the Supreme Court.

Next, the results found in the second stage regression in Table 6 are discussed. There is a strong positive and predictive relationship between the presence of a counter-dissenting opinion as compared to no dissenting opinion or a regular dissenting opinion, and the probability the Supreme Court grants certiorari and agrees to review the case. For example, if we assume the ideological differences between the Supreme Court and the given circuit court are held at its mean value, the probability the Supreme Court grants cert for a case resolved by an all-Democratic panel is 16.49% when a counter-dissent is present, a probability that is 4.18% higher than the probability the Court grants cert for a case resolved by an all-Democratic panel where no counter-dissent is present. The important role of counter-dissents is more extensive in the context of cases resolved by Democratic-leaning appellate panels. For example, if we assume the

ideological differences between the Supreme Court and the given circuit court is held at its mean value, the probability the Court grants cert for a case resolved by a majority-Democratic panel is 21.39% when a counter-dissent is present, a probability that is 4.99% higher than the probability the Court grants cert for a case resolved by a majority-Democratic panel where no counter-dissent is present. Moreover, the results in Table 6 also reflect that the Court is more likely to review cases determined by majority-Democratic panels as compared to cases resolved by all-Democratic appellate panels.

That said, the difference between the circuit court's ideology and the Supreme Court's ideology has the most substantial estimated relationship in the second stage model within Table 6. This result indicates that cases resolved by all Democratic judge panels or majority-Democratic panels, where the ideology of the circuit court that these judges sit is distant from the Supreme Court, the more likely to review a decision by these panels as compared to similarly composed panels from circuits which align more closely with the Supreme Court's ideology.

The results found in the second stage regression in Table 7 also present interesting results. Unlike the previous model of decisions by Democratic-leaning appellate panels, there is no statistically significant relationship between the presence of a counter-dissenting opinion as compared to no dissenting opinion or a regular dissenting opinion and the probability the Supreme Court grants certiorari and agrees to review the case when the appellate panel that issued the decision is Republican-leaning. Also, in contrast with the results in Table 6, the Supreme Court is more likely to review

cases resolved by homogenous panels, composed of three Republican judges, rather than cases resolved by heterogeneous majority- Republican appellate panels. Similar to the results presented in Table 6, the difference in ideology between the Supreme Court and a given circuit court has a substantial estimated predictive relationship. This result indicates that cases resolved by all-Republican judge panels or majority-Republican panels, where the ideology of the circuit court that these judges sit is distant from the Supreme Court, the more likely to review a decision by these panels as compared to cases resolved by panels from circuits which align more closely with the Supreme Court's ideology. The implications of the results in Tables 6 and 7 and the role of ideology and panel composition in the Supreme Court's decision to review is discussed at length in the implications section below.

Despite the simplicity of the models above, there is relatively good fit within the models. In the selection question, the first stage regression results presented in Tables 6 and 7, the percent correctly predicted is 91%. This fit statistic decreases to 84% for cases resolved by Democratic panels in Table 6 and 81% for cases resolved by Republican panels in Table 7. The McFadden's Pseudo R-squared also reflects a moderately good-fit for the first stage regression presented in Tables 6 and 7. And similar to the previous test-fit statistic, the quality of fit decreases slightly in the second stages presented in Table 6 and Table 7.

Next, the results concerning cert granting rates are further explored. Within Table 8, the number of observations varies, the first analysis includes cases resolved by

all-Democratic panels (DDD; N = 586), majority-Democratic panels (DDR; N = 1,665); all-Republican panels (RRR; N = 394), and majority-Republican panels (DDR; N = 1,868).

Table 8: Panel Composition, Counter-Dissents, and the Supreme Court's Decision to Review

	(1) (DDD) Dependent Variable: *Cert Granted*	(2) (DDR) Dependent Variable: *Cert Granted*	(3) (RRR) Dependent Variable: *Cert Granted*	(4) (DRR) Dependent Variable: *Cert Granted*
Counter-Dissent	0.263*	0.125	-0.367**	0.107
	(0.145)	(0.134)	(0.182)	(0.135)
Ideo. Diff. (USSC and CoA)	2.212**	1.550**	3.342*	1.092*
	(0.910)	(0.636)	(1.875)	(0.593)
Intercept	-1.164***	-0.957***	-0.667***	-0.952***
	(0.078)	(0.038)	(0.078)	(0.035)
N	586	1,665	394	1,868
AIC	457.25	1,517.8	419.79	1,713.3
FE CoA Natural Court	YES	YES	YES	YES
FE USSC Natural Court	YES	YES	YES	YES
McFadden's Pseudo R^2	0.018	0.004	0.017	0.002
Percent Correctly Predicted	86.68%	83.00%	77.41%	82.86%

Note: *p<0.10; **p<0.05; ***p<0.001

The results presented in Table 8 compare differences in the rate cert is granted across different appellate panel compositions. Notably, the role of counter-dissents in the cert grant process has a distinct partisan lean. The results in the first model reveal that even when controlling for the ideological distance between the Supreme Court and a circuit court, the Supreme Court is more likely to grant cert and review a case if it was resolved by a panel composed of three Democratic judges as compared to all other panel composition types. Whereas, the results in the third model in Table 8 reveal that, even

when controlling for the ideological distance between the Supreme Court and a circuit court, the Supreme Court is less likely to grant cert and review a case if it was resolved by a panel composed of three Republican judges as compared to all other panel composition types. Further, when a case is resolved by a heterogenous appellate panel, with two Republican judges and one Democratic judge or two Democratic judges and one Republican judge, there is no statistically significant relationship revealed between the presence of a counter-dissent and the likelihood the Supreme Court is more or less likely to grant review.

Consistent across all the first and second models in Table 8 is the finding of a strong positive and statistically significant relationship between increasing ideological differences on the Supreme Court and an increased probability that the Court will grant cert and review a given case. These findings suggest that appellate panels composed of all-Democratic judges or panels where Democratic judges are in the majority, from circuits that are ideologically distant from the Supreme Court, are the most likely to have their decisions reviewed by the Supreme Court. The same cannot be said for appellate panels composed of all-Republican judges or panels where Republican judges are in the majority, from circuits that are ideologically distant from the Supreme Court. The implications of this finding are fleshed out further within the implications section below.

As compared to the model fit statistics in Tables 6 and 7, the model fit statistics presented in Table 8 suggests the model does not fit the data as well as it did when the regression model was designed as the outcome-stage in a two-stage regression design.

Finally, the role of the opinion writing judge from the appellate panel is estimated and presented in Table 9. This set of estimations replicates the findings from Table 8 and is limited to panels with an ideologically heterogeneous composition because it allows us to study when the identity of the opinion writing judge is different and the same as the identity of the dissenting judge unlike homogenous panels where the partisan identity of the authoring and dissenting judge are always the same. A binary variable, *Democratic Opinion Writer*, was created to control for whether a Democratic appellate judge or a Republican appellate judge authored the majority coalition's opinion.

Table 9: Opinion Writer, Panel Composition, Counter-Dissents, and the Supreme Court's Decision to Review

	(1) (DDR) Dependent Variable: *Cert Granted*	(2) (DRR) Dependent Variable: *Cert Granted*
Counter-Dissent	0.129	0.051
	(0.134)	(0.138)
Ideo. Diff. (USSC and CoA)	1.585**	1.150
	(0.636)	(0.595)
Democratic Opinion Writer	0.104	0.176**
	(0.073)	(0.080)
Intercept	-1.002***	-0.991***
	(0.049)	(0.040)
N	1,665	1,868
AIC	1,517.8	1,710.6
FE CoA Natural Court	YES	YES
FE USSC Natural Court	YES	YES
McFadden's Pseudo R^2	0.005	0.004
Percent Correctly Predicted	83.00%	82.86%

Note: *p<0.10; **p<0.05; ***p<0.001

Similar to the results in the second and fourth models in Table 8, the relationship between the *Counter-Dissent* variable and the Supreme Court's decision to review the panel's decision does not achieve statistical significance in Table 9. Interestingly, the previously statistically significant results for the *Ideological Differences* variable appears to dissipate in the model that contains decisions by majority-Republican panels, the second model in Table 9. However, the partisan identity of the panel's opinion author does have a statically significant relationship with the Supreme Court's decision to review. The results indicate, when there is no counter-dissent present and the ideological difference between the circuit the panel is from and the Supreme Court is held at its mean value,

the probability the Supreme Court decides to review a case is 20.57% for panels composed of two Republican judges and one Democratic judge and the lone Democratic judge authors the panel's decision; this probability is 4.65% higher than if one of the two Republican judges on an otherwise identical panel authored the majority coalition's opinion. However, within the model that concerns Democratic-leaning panels, there is no statistically significant relationship between the partisan identity of the author of the majority coalition's opinion author and the Supreme Court's decision to review the panel's decision.

3.6 Implications

The Blackmun Archive captures petitions for writs of certiorari submitted between the 1986 term to the 1993 term. Historically, this period of time in the history of the United States is often referred to as 'the rise of the new right'. This populist-conservative movement grew following the election of President Ronald Reagan in the 1980 election and resulted in the Republican Party retaking majority control of the U.S. House of Representatives in the 1994 midterm election. The conservative politics of this era were favorable among anti-tax crusaders, advocates of deregulation, defenders of an unrestricted free market, along with advocates of more powerful American presence abroad.

Concurrent with the rise of the new right, the Supreme Court was resolving critical legal issues such as the right to die (*Cruzan v. Director of the Missouri Department of Health*, 1990); whether flag burning is protected by the First Amendment of the U.S.

Constitution (*Texas v. Johnson*, 1989); whether the federal government can prosecute tribal members under the Endangered Species Act for hunting on reservations (*United States v. Dion*, 1986). President Reagan nominated Chief Justice William Rehnquist in 1986. Associate Justice Anthony Kennedy joined the Supreme Court during the 1988 term. When Justice Kennedy joined the Court's bench, he found himself in the company of two other associate justices nominated by President Regan: Associate Justices Antonin Scalia and Sandra Day O'Connor. As such, the Supreme Court's had a notable conservative slant during the time Justice Blackmun's archive was being populated.

The results above suggest that cases resolved by courts of appeals were more likely to be appealed to the Supreme Court when the circuit court, where the appealed decision originated, was more ideologically aligned with the Supreme Court. It is not too difficult to imagine a scenario of losing litigants deciding not to appeal to the Supreme Court because they have a politically-backed hunch that the Supreme Court will be less interested in reversing a circuit's decision and expanding the precedential value of decisions by circuits that are ideologically distant from the Court.

Of the cases that are appealed to the Supreme Court under a petition for a writ of certiorari, the conservative-slant of the Court appears to impact the perception of the information signal offered by counter-dissents. Here, the Supreme Court is more likely to grant cert and review a case if it was resolved by a panel of appellate judges composed of two Democratic judges and one Republican judge, as compared to cases determined by an appellate panel composed of three Democratic judges. However,

when we compare cases resolved by a homogenous Republican appellate panel to cases resolved by a panel composed of two Republican judges and a single Democratic judge, the Supreme Court is more likely to review the decision by the homogenous Republican panel.

There are likely two distinct mechanisms driving the Supreme Court's decision to review and explain the story of ideological differences and the partisan-lean of appellate panels that were illuminated in the results above. The first mechanism is error-correction, political science often casts the Supreme Court as the principle of the judiciary who oversees and corrects mistakes in lower courts (e.g., McCloskey and Levinson 2016). This attitude towards the Supreme Court is prevalent in the literature but does not exclusively explain the Supreme Court's agenda setting behavior. One may assume that a majority decision and the legal reasoning in its opinion that was decided by two Democratic judges may be farther left, or in other words more liberal, than a majority decision by one Democratic appellate judge and one Republican judge. In the eyes of a conservative Supreme Court and following this logic, there may simply be "more error" to correct for these decisions resolved by an appellate panel of all-Democratic judges.

Amplification is the second possible mechanism that is driving the Supreme Court's decision-making behavior. Because the Supreme Court is the highest court in the land and sets precedents for all other courts and binds itself to precedent, the Supreme Court may strategically review and affirm some decisions by a lower court in order to

bind all other lower courts to follow and apply a particular doctrine. This likely explains why decisions made by homogenous appellate panels of three Republican judges are more likely to be reviewed than panels were there is a Republican majority, as the lone Democratic judge on a Republican-majority panel may dampen or moderate the conservative-ness of the panel's decision. Future empirical research will test these two potential mechanisms by adding a third stage to the regression model: whether the Supreme Court reverses or affirms the lower court's decision.

Moreover, turning back to the results presented in Table 8, we see that counter-dissents in cases resolved by homogenous Democratic appellate panels are significantly more likely to be reviewed by the Supreme Court. This finding supports specific aspects of the whistleblower theory, which argued that counter-dissents can trump partisan and ideologically based signals and provide the Court critical insight into the complicated nature of the legal issues within a given case. Altogether, the results in Table 8 largely reflect the theoretical predictions in Table 5.

3.7 Conclusion

The whistleblower theory presented in this chapter contains several avenues for future research into the influence that lower courts have on the Supreme Court's agenda. Future analyses will replicate this present chapter to study how dissenting impacts the decision to appeal, the Supreme Court's decision to grant review, and ultimately if counter-dissents are more influential than other dissenting opinions on the Supreme Court's decision to affirm or reverse along with whether counter-dissents are

more influential over the legal reasoning content of the Supreme Court's opinions. An additional question that future research may touch on is how does a judge's prestige affects her ability to signal legal rather than political conflicts within dissenting opinions? Another vein of research that is deserving of more empirical research are studies on the strategic behavior by state supreme court justices. Interestingly, this venue of courts provides additional political elements available to study, as some state supreme court justices are elected through partisan elections, non-partisan elections, and other state supreme court justices are appointed by the governor of their state. Further, these state courts provide significantly more diversity, in terms of immutable characteristics, legal education, and political experience, as compared to judges in federal courts. For this reason, state supreme courts are a ripe venue to apply the whistleblower theory in future research.

Altogether, the results suggest that dissents and counter-dissents may act as critical information signals to the Supreme Court. Specifically, the results indicate that partisan politics has a large, but not exclusive role in the decision-making process behind what is appealed to the Supreme Court and what is reviewed to the Supreme Court. This chapter highlighted how oversight is integrally problematic in large hierarchies such as the federal judiciary and how dissenting opinions by lower courts, the Supreme Court's agents, function as an information signal.

4. Treating Uncertainty: Lower Court Responses to Plurality Decisions by the Supreme Court

4.1 Introduction

How do lower courts react when the Supreme Court reaches a plurality decision? Plurality decisions by the Supreme Court occur when a majority of justices on the Supreme Court can agree on the holding of a case (which party wins and which party loses); however, no majority-sized coalition is formed to generate a legal reasoning and therefore no binding doctrine is established by the Supreme Court. I argue in this chapter that in situations where the Supreme Court has failed to organize itself and delegate a binding doctrine to lower courts, the Supreme Court has set the stage for lower courts to act opportunistically.

Most judicial politics scholars are interested in observing whether ideological differences between lower courts and the Supreme Court impact lower court's compliance. In practice, these scholars often measure the rate at which lower courts comply with binding Supreme Court precedents (Westerland et al. 2010; Bennesh and Redick 2002; Cannon and Johnson 1999; Hansford and Spriggs 2006; Kastellec 2007, 2011; Kim 2009; Black and Spriggs 2013; Black et al. 2016; Hinkle 2015). Rather than follow this approach to study compliance by lower courts, I leverage the non-binding nature and uncertainty surrounding plurality opinions by the Supreme Court. Here, a plurality opinion is the controlling opinion when no majority opinion exists, consisting of the majority of the majority. In turn, plurality opinions operate more like guidelines delegated by the Supreme Court rather than binding rules. Theoretically, I argue if

lower courts were fully compliant, we should observe similar attempts to integrate the Supreme Court's legal reasoning behind a plurality opinion regardless of the ideology, size of coalition behind the polarity decision, and so on. Empirically, I observe whether lower courts take advantage of the uncertainty behind plurality opinions in order establish their own legal policies – a concept similar to agency drift.

This chapter makes several important empirical contributions. First, the pattern of lower courts' treatment towards plurality opinions demonstrates a distinct pattern of non-compliance by lower courts. Specifically, the results suggest that rather than explicitly not following a plurality decision by the Supreme Court, lower courts are more likely to ignore the decision. However, when the plurality decision provides a lower court an opportunity to extend their decision in a direction that aligns with their ideological preferences, we observe lower courts to be more likely to follow the Supreme Court's decision. The results also indicate the Marks Rule, a rule developed by the Supreme Court itself to guide lower courts' treatments of plurality decisions, made a moderate impact on the lower courts' compliance and behavior towards plurality decisions by the Supreme Court. Finally, this chapter highlights how disagreements among the courts of appeals may be based on their differing applications of the Marks Rule towards the same plurality decision from the Supreme Court. In turn, the Marks Rule, a rule that was meant to guide lower courts, may also be a nascent mechanism behind splits among the circuit courts. Ultimately, this chapter contributes to political science by demonstrating an aspect of agency studies that is often overlooked in judicial

politics literature – the consequences of the Supreme Court's failure to reach a majority decision; or in other words, what happens in a hierarchical institution when its supervisor does not delegate clear and binding directions to its agents.

First, a background on the concept and frequency of plurality decisions by the Supreme Court is presented. Next, the Marks Rule, initially developed by the Supreme Court in the 1977 term, is introduced and discussed at length. A theory based on the agency relationship between the Supreme Court and lower courts is detailed. Next, the data and research design section are presented. There are two sets of empirical results exhibited in this chapter. The conclusion section highlights the implications of this chapter for political science more broadly.

4.2 Background

The Supreme Court has resolved several notable cases through plurality decisions. In *Regents of the University of California v. Bakke* (1978), for example, six justices filed their own opinion. None of the opinions garnered more than four signatures. None of the opinions had precedential authority akin to a typical majority opinion from the Supreme Court –where a majority or more of the justices agreed to both how the case should be resolved and the reasoning behind this resolution as it is discussed in the coalition's opinion.

Several scholars and judges have commented on what drives the Supreme Court to plurality decisions rather than majority decisions. Judge Frank H. Easterbrook, from the Seventh Circuit Court of Appeals, has suggested the Supreme Court's certiorari

process leads the Supreme Court to select cases that seem interesting and important, and, in turn, these cases produce divisions among the justices. Whereby in some circumstances, the Supreme Court may be too divided to form a majority coalition (Easterbrook 1982). Others have proposed that plurality decisions are the result of the chief justice's poor leadership skills (Davis and Reynolds 1974). Still others, like Novak (1980), have offered a more normative understanding of plurality decisions, where plurality decisions are argued to be a reflection of the lack of social consensus on fundamental values and issues. Novak's (1980) foundational proposal has gained the most traction within political science literature. Empirically, prior scholars have demonstrated that plurality decisions occur more frequently in criminal procedure and civil rights cases as compared to any other issue area before the Supreme Court (Epstein, Segal, Spaeth and Walker 2007; Corley 2009). An empirical study by Corley, Sommer, Steigerwalkt, and Ward (2010) revealed that plurality decisions are more likely to occur in cases with politically salient issues. Interestingly, the results by Corley, Sommer, Steigerwalkt, and Ward (2010, pg. 188) found that the chief justice is the least likely justice to write or join a special concurring opinion that would result in a splintering of the Supreme Court and a plurality decision rather than majority opinion. This finding conforms with earlier literature on the Supreme Court which suggests the chief justice's leadership impacts the output of the Supreme Court and the collegiality observed on the Supreme Court (e.g., Murphy 1964).

There has not been a consistent output of plurality decisions by the Supreme Court over time, which suggests that the chief justice, certain associate justices, and likely the cases themselves, drive the production of plurality decisions. Figure 5 below demonstrates the proportion of cases resolved by the Supreme Court for each term from 1946 to 2016, which resulted in a plurality decision.[10] Between the 1946 term to the 2016 term, there were 234 cases before the Supreme Court which resulted in plurality decisions. These plurality decisions represent 3.07% of all cases resolved by the Supreme Court within the time period.[11]

In *Marks v. United States* (430 U.S. 188), decided at the end of the 1977 term, the Supreme Court created the Marks Rule for lower courts tasked with interpreting plurality decisions. The Supreme Court defined the Marks Rule as, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Supreme Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . ." (430 U.S. 188, pg. 193). Figure 5 also identifies when the Marks Rule was created with a red dotted line.

[10] Data provided by variable *decisionType* in the Supreme Court Database (Spaeth et al. 2015).
[11] Per curium opinions and decrees by the Supreme Court were not included in the dominator of this estimation. Please see the codebook for the Supreme Court Database's variable *decisionType* for a discussion of these types of decisions (Spaeth et al. 2015).

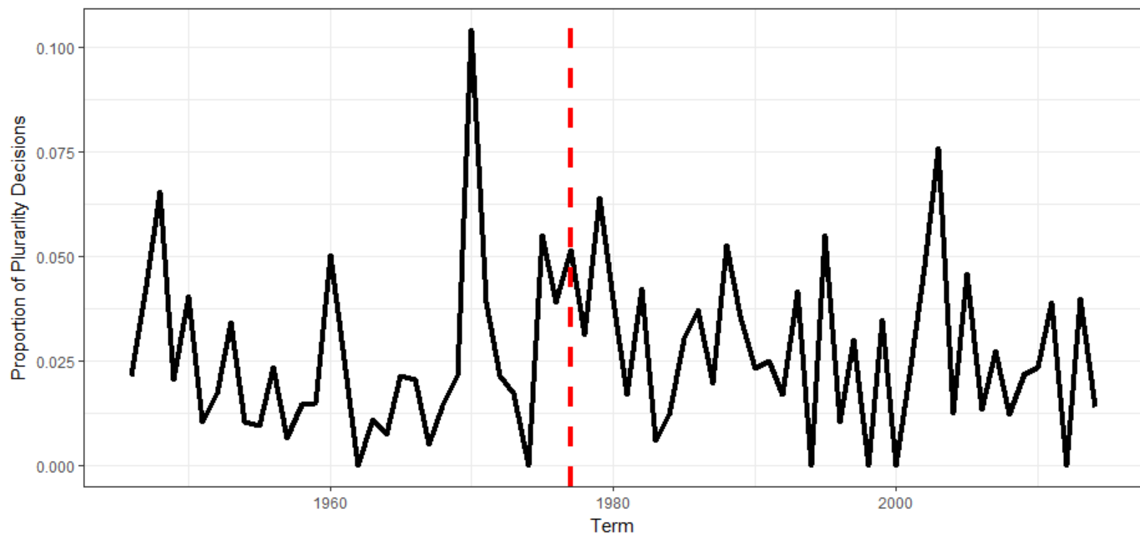

Figure 5: Plurality Decisions by the Supreme Court (1946-2016 Terms)

4.2.1 The Marks Rule

Despite the creation of the Marks Rule, many claim the lower courts are "…left to their own devices to determine the precedential value of most plurality opinions." (Novak 1980, pg. 767). Likewise, several appellate judges have expressed their frustration with applying the Marks Rule when interpreting plurality decisions by the Supreme Court. Then Judge Brett Kavanaugh, now Associate Justice Kavanaugh, wrote in his concurring opinion for *United States v. Duvall* (740 F.3d 604, 613; D.C. Cir. 2013), "…in splintered cases, there are multiple opinions precisely because the Justices did not agree on a common rationale."

In response to the ambiguity surrounding plurality decisions and the uncertainty surrounding the application of the Marks Rule, lower courts have adopted their own methodologies for understanding plurality decisions (Re 2018; Novak 1980; Corley 2009;

Cross 2010). One of the most common methods is known as the *Fifth Vote Approach*, where the controlling rule in a fragmented decision lies in the opinion that represents the views of the median justice from the Supreme Court's bench. Judge Easterbrook explicitly discussed this approach in *Annex Books, Inc. v. City of Indianapolis* (581 F.3d 460, 465; 7th Cir. 2009) stating, "because the other Justices divided four to four, and Justice Kennedy was in the middle, his views establish the holding."

Alternatively, other lower courts have adopted the *All Opinions Approach*. Here, all opinions, including dissents, are regarded as contributing to the Supreme Court's decision. In practice, lower courts interpret the holding in the case to be where the most convergence occurs across the opinions.[12] Figure 6 below depicts this interpretative approach. It is important to note that none of the opinions in Figure 6 would be considered to have precedential authority, instead lower courts interpreting the holding a case to be where at least five or more justices are in agreement.

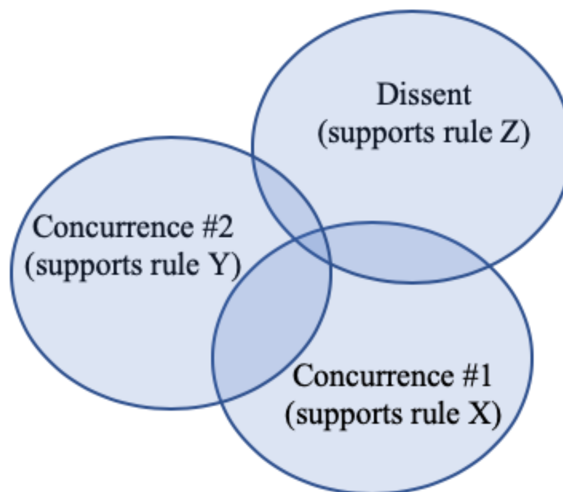

Figure 6: All Opinions Approach to the Marks Rule

[12] See *United States v. Johnson* (467 F.3d 56, 65; 1st Cir., 2006) for an example of this approach.

At other times, lower courts may apply a subsetting mechanism to the opinions generated by the Supreme Court to uncover the holding in a case. Under this approach, the *Subsetting Approach*, it appears that lower courts may observe the part of the Marks Rule which states, "…holding of the Court may be viewed as that position taken … on the narrowest grounds…" literally to mean the most narrow rule offered in one of the opinions by the Supreme Court should be regarded as the established rule, regardless of how many justices signed onto this opinion. Here, lower courts usually reason that because the narrowest rule will always apply when the broader rule applies, but not vice versa, then the narrowest rule should be adopted. Further, the lower appellate courts will often provide reasoning behind this approach and state that because some justices were willing to sign onto the broader rule, it should also be understood that they also agreed to the narrower rule. Figure 7 below presents this interpretative approach graphically. It is important to note that not all plurality decisions by the Supreme Court present lower courts with the option to apply this interpretative methodology as this logical subsetting approach is generally only available when the Supreme Court is conflicted as to whether a narrow or a broad rule should be adopted.

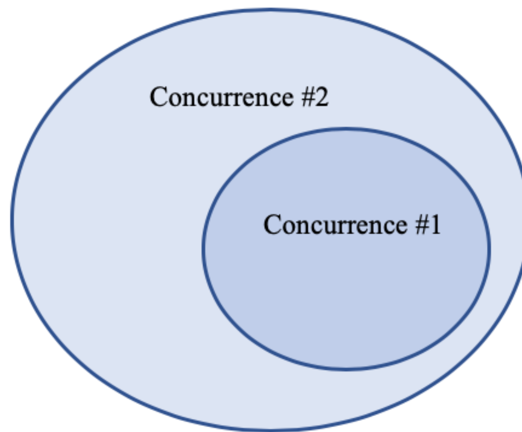

Figure 7: Subsetting Approach to the Marks Rule

Often, the process by which judges and justices reach decisions and apply rules is traditionally information-dependent, and the boundaries in the universe of information are known. As demonstrated above, plurality decisions cloud the universe of information and potentially interact with judges' ideologies and philosophies about the law. As a result, we observe lower courts arriving at heterogonous applications and interpretations of the same plurality decision. Even judges who are acting in 'good-faith' and are passionate about 'getting the law right' can reach different conclusions and interpretations of a case whether the outcome contains a set of plurality decisions rather than a majority decision.

4.3 An Agency Theory of the Judiciary

Institutionally, the judiciary can be boiled down to a principal-agent model. Miller and Moe (1986, pg. 175) define principal-agent models as "an analytical expression of the agency relationship, in which one party, the principal, enters into a contractual agreement with another, the agent, in the expectation that the agent will

subsequently choose actions that produce outcomes desired by the principal." Here, there are simply too many cases for the Supreme Court, the principal, to resolve. Consequently, the Supreme Court develops and delegates doctrine to lower courts, the agents. Lower courts resolve significantly more cases than the Supreme Court ever could. However, the Supreme Court closely monitors lower courts' applications of precedents and will review lower courts when it believes that the lower courts have not complied in their application of rules and doctrine that the Supreme Court has created and delegated. Without the Supreme Court's monitoring and enforcement mechanisms, lower courts, with their own preferences and motivations, would likely shirk but are otherwise induced to follow precedent (e.g., Alchian and Demsetz 1972).

The Supreme Court's monitoring and enforcement mechanisms will likely never be perfect. Yet, despite imperfections in the Supreme Court's monitoring, we still observe a high degree of compliance with Supreme Court decisions by the lower courts (Benesh and Reddick 2002; Masood, Kassow, and Songer 2019; Hansford and Spriggs 2006; Westerland et al. 2010). Notwithstanding its rarity, identifying non-compliance by lower courts and when non-compliance is most likely to occur offers an interesting insight into the dynamics of the agency relationship between lower courts and the Supreme Court and hints at the gaps in the Supreme Court's control over the judiciary.

Within the broader theoretical literature, scholars interested in principal-agent relationships have demonstrated that agents have an easier time evading a principal's commands when those commands are ambiguous compared with when those

commands are clear (e.g., Calvert, McCubbins, and Weingast, 1989). Given the vagueness and ambiguity of plurality decisions, they create a ripe situation for drift in lower courts; defined as, "…the ability of an agency or other executive actors to enact outcomes different from the policies preferred by those who originally delegated power" (McCubbins, North, and Weingast 1987, pg. 699). When the Supreme Court issues a plurality decision, it may provide an opportunity for lower courts to roam further than usual into non-compliance territory as (1) the lower courts who dislike the holding may find it easier to evade the decision and justify their evasion on the fact that the plurality opinion is not binding precedent and (2) the lower courts who prefer a certain holding may find it easier to justify their adoption and draw on extreme positions within an opinion even though those positions do not have majority support.

When the Supreme Court resolves a case and issues a majority opinion, the doctrine established in the majority opinion is expected to act as an ex-ante control against lower court non-compliance, as it leaves little to no room for lower courts to deviate. However, when the Supreme Court is unable to delegate clearly to lower courts, then it is expected lower courts, whether well-intentioned or not, will use their own heuristics to untangle the directions the Supreme Court has given to them as they continue to resolve cases.

A lower court may dislike a decision by the Supreme Court, but it may feel constrained by the possibility that if it were to be non-compliant, then the Supreme Court could potentially review and reverse its decision. Further, when a lower court is

deciding between not following a precedent, ignoring the precedent, neutrally citing the precedent, or following the precedent, the lower court may look to the preferences of their supervisor, the Supreme Court, and allow their perception of the higher court's preferences to influence their citation behavior. There may also be situations where a lower court feels constrained by the ideological composition of the current Supreme Court and their desire not to be reviewed and reversed. It is expected that the cost of non-compliance may be too high under this scenario and instead the lower court would prefer to implement a simple neutral citation towards a Supreme Court decision.

4.4 Data and Methodology

In order to determine whether plurality opinions affect compliance by the lower courts and the impact of the Marks Rule, I identify and examine lower court treatments of the Supreme Court's majority opinions and plurality opinions from the 1970 term to the 2016 term (N = 644,687). A simple binary variable is used to identify if a case before the Supreme Court was resolved through a plurality decision or not. The unit of analysis in each regression is a dyad of each unique court of appeals decision that is observed to cite a unique Supreme Court decision.

There are three dependent variables developed within this study. Each dependent variable is based upon the lower appellate court's treatment towards a given decision (plurality or majority) by the Supreme Court. These treatments are: 1) followed 2) neutral and 3) not followed. A lower court's treatment of each opinion is identified through the Shepard's citations indicator, developed by LexisNexis, which involves

"proper application of standards enunciated by the Supreme Court in deciding all cases raising similar or related questions," versus not following, which "involves a failure to apply—or properly to apply—those standards" (Tarr 1977, pg. 35). In practice, LexisNexis employs a set of lawyers to review cases and apply a set of strict guidelines in order to code the sentiment of the citations, i.e., the treatment, within a court's opinion towards other opinions. As such, Shepard's indicators are a valid proxy for identifying whether a lower court complied with a decision by the Supreme Court or not.[13] The *followed* indicator is valued at one if the Shepard's citations imply the lower court followed a given Supreme Court decision. The *neutral* indicator is valued at one if the Shepard's citations imply the lower court explained or harmonized a given Supreme Court decision. The *not followed* indicator is valued at one if the Shepard's citations imply the lower court questioned, limited, criticized, or distinguished a given Supreme Court decision. Neutral treatments of Supreme Court decisions were the most common treatment by lower courts – almost 86% of all citations in the dataset; and not following a decision was the least frequent treatment of Supreme Court decisions by lower courts – less than 3% of all citations in the dataset.

A binary variable, *Marks Rule*, was created to identify if the Marks Rule was established at the time a lower court is citing a decision by the Supreme Court. This variable allows us to ascertain whether the creation of the Marks Rule had an impact on

[13] Shepard's citation indicates include following types of legal interpretations: "Question", "Limit", "Criticize", "Distinguish", "Follow", "Explain", and "Harmonize". For more information on how citations are classified as a type of legal interpretation, or treatment, please see the following handout from LexisNexis: https://www.lexisnexis.com/shepards-citations/printsupport/shepardize_print.pdf (last accessed May 1, 2020).

how lower courts approach plurality decisions by the Supreme Court. The first set of analyses are limited in scope to include only citations towards plurality decisions from the seven years before and the seven years following the creation of the Marks Rule (1970-1985; N = 111,795). Three logit regressions are performed across the three dependent variables of interest.[14] The *Marks Rule* variable is included in each regression as the critical variable of interest. If the *Marks Rule* variable does not yield statistically significant results, in either a positive or negative direction, it implies the Marks Rule did not impact the likelihood a lower court followed (or did not follow) a plurality decision by the Supreme Court. Other control variables are also included in this first set of logit regressions and are discussed at length below.

The next set of analyses include all lower court treatments to Supreme Court decisions (plurality and majority) from the 1978 term to the 2016 term (N = 532,892). This slice of time was chosen to account for the possibility that the Supreme Court changed its behavior towards plurality decisions following the adoption of the Marks Rule. A binary variable, *Plurality*, that identifies whether the citation by the lower court involved a plurality or majority decision by the Supreme Court is included in each regression.

The age of the decision, measured in years from the time the Supreme Court published it to the time the given lower court cited it, is also included in each analysis. Prior research has demonstrated that the age of a decision can impact lower court compliance. Benjamin and Vanberg (2016) illustrated that the willingness of lower courts

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[14] Given the rarity of not following a decision by the Supreme Court, the results of the third regression are replicated using a rare events logit model (King and Zeng 2001). These results may be found in Appendix B.

to cite negatively (i.e., not follow), a precedent may increase over time as Supreme Court justices from the enacting coalition leave the Court's bench.

Next, the size of the coalition behind the decision by the Supreme Court is included. Arguably, plurality decisions with four justices in agreement will have more authoritativeness than a plurality decision with only two justices in agreement – despite neither coalition achieving majority-sized status. A somewhat similar argument can be raised for the sizes coalitions behind the Supreme Court's majority opinions. In general, larger coalitions reflect the strength of a position and can inform lower courts how the Supreme Court may resolve cases in a given issue area moving forward as future cases are appealed to the Court. It is expected the larger the enacting majority coalition behind a majority opinion is, the more likely it will be followed by lower courts. Similarly, it is expected the larger the coalition behind a plurality opinion is, the more likely lower courts will follow it. It is important to note that this methodological approach assumes there is a monotonic relationship between the size of a coalition and the dependent variable. Yet, there is a likely a notable difference between eight-to-one decisions and the nine-to-zero decision as compared to seven-to-two decisions against eight-to-one decisions (Rohde 1972).

Ideology has a sizable, but not exclusive, role in decision-making within the Supreme Court and lower appellate courts (Segal and Speath 2002; Epstein and Knight 2013). I rely on the Judicial Common Spaces Scores by Epstein, Martin, Segal, and Westerland (2007) to place Supreme Court judges and lower federal courts judges on the

same ideological dimension. These scores identify the ideology of each federal court of appeals judge, district court judge, and each Supreme Court justice and places each of these actors in the same policy space. First, the change in the Supreme Court's ideology from the time a decision was published to the time a lower court cited the decision was accounted for in a variable named *Ideological Change on Supreme Court.* To create this variable, I measured the difference in ideology between the median justice on the Supreme Court at the time the decision was enacted and the median justice on the Supreme Court at the time a lower court cited the decision. Next, I measured the difference in ideology between the current Supreme Court and each lower court. This variable, *Difference in Supreme Court and Lower Court Ideology*, involved first identifying the median active judge from each circuit court at the time the circuit court was citing a given Supreme Court decision. Then, the difference between the circuit's active median judge and the median justice on the Supreme Court at the time a Supreme Court decision was cited was estimated. The median active justice from each circuit court is utilized here as a proxy for the ideology of the circuit court because the *en banc* procedure of review, which involves the entire bench of active judges in a circuit court reviewing a decision produced by a three-judge panel, likely restrains and moderates each three-judge panel.

Finally, the estimations also include a control for the prior treatment of a cited decision by the Supreme Court itself. Precisely, the variable *Not Followed by Supreme Court*, controls for prior instances where the Supreme Court did not follow its own

decision. This count variable ranges from zero to eleven, with a mean of 0.073. Notably, prior research by Hansford and Spriggs (2006) found that lower courts respond to how the Supreme Court has interpreted its own decisions. Hansford and Spriggs (2006) argue that when the Supreme Court does not follow one of its precedents, it effectively signals to observers, i.e., the lower courts, that the decision is not good law. In turn, the authority of a Supreme Court's precedent is expected to diminish in the eyes of lower courts when the Supreme Court has previously not followed the precedent. It is unclear if the same trend will follow for plurality opinions by the Supreme Court or not.

Also included as a fixed effect within each regression is the natural court of each court of appeals. This variable is operationalized in a way that is similar to the Supreme Court Database's natural court variable (*naturalCourt*) (Spaeth et al. 2015), where a 'natural court' is defined as a period during which no personnel change occurred on a court. The coding of this variable is based on data from the Federal Judiciary Center, which identifies when a judge left her circuit, the amount of time a vacant seat was open, and the confirmation date of the replacement judge. Overall, this natural court variable for the appellate courts is utilized as a fixed effect that controls for how the universe of active judges may vary and controls for how panels of three judges may be composed within circuits.

The following section presents the results of the two sets of analyses.

4.5 Results

The results on the impact of the Marks Rule on lower court compliance with plurality and majority decisions are first presented in Table 10.

Table 10: The Impact of the Marks Rule (1970-1985)

	Dependent Variable: Followed	**Dependent Variable: Neutral**	**Dependent Variable: Not Followed**
Marks Rule	0.028	0.016	-0.090**
	(0.026)	(0.022)	(0.034)
Plurality Decision	-0.539**	0.338**	-0.094
	(0.179)	(0.128)	(0.170)
Marks Rule * Plurality	0.530**	-0.484**	0.338
	(0.220)	(0.159)	(0.214)
Age	-0.068***	0.0715***	-0.060***
	(0.003)	(0.003)	(0.004)
Coalition Size	0.069***	-0.035***	-0.037***
	(0.007)	(0.005)	(0.009)
Ideo. Difference (USSC and COA)	-0.264**	0.246**	-0.149
	(0.093)	(0.077)	(0.123)
Ideo. Difference (USSC and USSC)	0.441***	0.436***	-0.340**
	(0.109)	(0.091)	(0.148)
Not Followed by USSC	0.012	-0.074***	0.147***
	(0.010)	(0.007)	(0.011)
Intercept	-2.187***	1.465***	-2.265***
	(0.067)	(0.056)	(0.090)
N	111,795	111,795	111,795
FE CoA Natural Court	YES	YES	YES
AIC	67,872	88,353	42,903
Percent Correctly Predicted	88.91%	83.17%	94.26%

Note: ***p<0.001, **p<0.05, *p<0.1

The results in Table 10 are striking. When we observe the results across all three models in Table 10, the *Marks Rule* variable garners statistical significance in only the *Not Followed* model. Yet, the *Plurality Decision* variable retains statistical significance in the

Followed and *Neutral* models in Table 10. Interestingly, the interaction between the *Marks Rule* variable and the *Plurality Decision* variable is statistically significant across all three models. In order to illuminate these results in a digestible form, a set of conditional probability plots are created to further unpack this interactive relationship and the estimated impact on the expected behavior of lower courts. These figures were generated while holding continuous variables at their mean values and binary variables at their modal values. These estimated figures are presented in Figure 8 below and are discussed at length.

Returning to the results for the *Followed* model in Table 10, we observe that as a decision by the Supreme Court ages, it is slightly less likely to be followed by lower courts. However, aligning with prior literature in judicial politics, as the coalition size behind a Supreme Court's decision increases, regardless if it is a plurality or majority opinion, the likelihood the lower courts apply and follow the decision is expected to increase. Assume for example, that all variables in the model were set to their mean values, and we varied the *Plurality Decision*, *Marks Rule*, and the *Coalition Size* variables. Under these circumstances, the results indicate that there is 0.048 predicted probability that a lower court will follow a plurality decision with four justice in support of it during the pre-Marks Rule time period; and this probability is 0.031 lower than if we were observing the same lower court but after the Marks Rule had been created. This estimation highlights, with all else equal, the lower courts are more likely to follow a plurality decision following the creation of the Marks Rule. Alternatively, there is a 0.103

predicted probability a lower court during the pre-Marks Rule time period would follow a majority decision by the Supreme Court where there were eight justices in the majority coalition; however, in the post-Marks Rule period, the predicted probability raises slightly to 0.106 with all else equal. Overall, these estimated probabilities illustrate how the Marks Rule may have directed lower courts to follow plurality decisions more often than they had done so previously. It is important to note that this set of results assumes there is a monotonic relationship between the size of a coalition and the dependent variable; where, in actuality, there is a likely a notable difference between eight-to-one decisions and the nine-to-zero decision as compared to seven-to-two decisions against eight-to-one decisions (Rohde 1972). Future research will break down this coalition variable to allow for a more precise study of coalition sizes.

Next, the results in Table 10 indicate that as the ideological distance between a court of appeals and the current Supreme Court increases, the we are less likely to see the appellate court follow the Supreme Court's decisions. Yet, when the ideological distance between the enacting Supreme Court and the current Supreme Court increases, the likelihood we observe the lower court following the Supreme Court's decisions increases. This effect likely reflects as scenario where the current Supreme Court shifts to be more ideologically similar to a given court of appeals and, therefore, less ideologically similar to the enacting Supreme Court. Notably, there was no statistically significant relationship between the number of times the Supreme Court had not followed its own decision and the likelihood a lower court follows the decision.

As stated above, neutral citations to Supreme Court decisions are the most common form of citation behavior by lower courts. This form of treatment found within a lower court's citation represents a lower court's compliance with a given decision. Within the *Neutral* model in Table 10, we observe that as a decision by the Supreme Court ages, it is slightly more likely to be neutrally cited by lower courts. In contrast with the previous model, as the coalition size behind a decision increases, regardless if it is a plurality or majority opinion, the likelihood the lower courts neutrally cite the decision is expected to decrease. This may be due to the expectation that lower courts are more likely to choose to issuing a following treatment as opposed to a neutral treatment towards a decision by the Supreme Court as the coalition behind the decision grows. Likewise, as the ideological distance between a given circuit court and the current Supreme Court increases, we are more likely to observe a neutral citation to a Supreme Court decision as compared to the lower court explicitly following or explicitly not following the decision.

As noted in the theory section above, a lower court may dislike a decision, but the lower court is constrained by the ideological composition of the current Supreme Court and their desire not to be reviewed and reversed. In turn, the cost of non-compliance may be too high, and the lower court would prefer to implement a simple neutral citation towards a Supreme Court decision. Similar to the *Followed* model in Table 10, as the ideological distance between the enacting Supreme Court and the current Supreme Court increases, the lower court is more likely to cite a decision

neutrally. In contrast with the *Followed* model in Table 10, when the Supreme Court has previously not followed its own decision, the lower courts are expected to be less likely to cite these decisions neutrally.

The *Not Followed* model in Table 10 concerns the most explicit form of non-compliance by lower courts. Similar to prior findings in judicial politics literature, we observe that as a decision by the Supreme Court ages, it is slightly less likely to be not followed by lower courts. In other words, the longer a Supreme Court decision exists, the less likely a lower court will not follow it. The result may reflect how decisions by the Supreme Court may become more engrained in the law overtime. As the coalition size behind a decision increases, regardless if it is a plurality or majority opinion – the likelihood the lower courts do not follow the decision is expected to decrease. These findings highlight how decisions with significant support from the Supreme Court's bench are the least likely to be not followed by lower courts; and, in turn, garner the most compliance by lower courts. The ideological distance between a given circuit court and the current Supreme Court did not have a statistically significant relationship. This lack of significance may be driven by the rarity of lower courts not following Supreme Court decisions.[15] The results in Table 10 demonstrate that when the ideological distance between the enacting Supreme Court and the current Supreme Court increases, the likelihood the lower courts do not follow the Supreme Court's decisions is expected to decrease. This effect may be due to the current Supreme Court shifting to be more

[15] This model is replicated with a rare event logit regression (King and Zeng 2001). These results may be found in Appendix B.

ideologically similar to a given circuit court and, therefore, less ideologically similar to the Supreme Court, which enacted the given decision. Notably, there was a strong statistically significant relationship estimated between the number of times the Supreme Court had not followed its own decision and the likelihood the lower courts also do not follow the decision.

Figure 8 below unpacks the expected conditional probability of a lower court's citation behavior towards a plurality decision and majority decision by the Supreme Court in the pre- and post-Marks Rule time periods. The conditional probability plots also demonstrate how a lower court's compliance (or lack of) is expected to change when the decision by the Supreme Court is a plurality decision as compared to a majority decision.

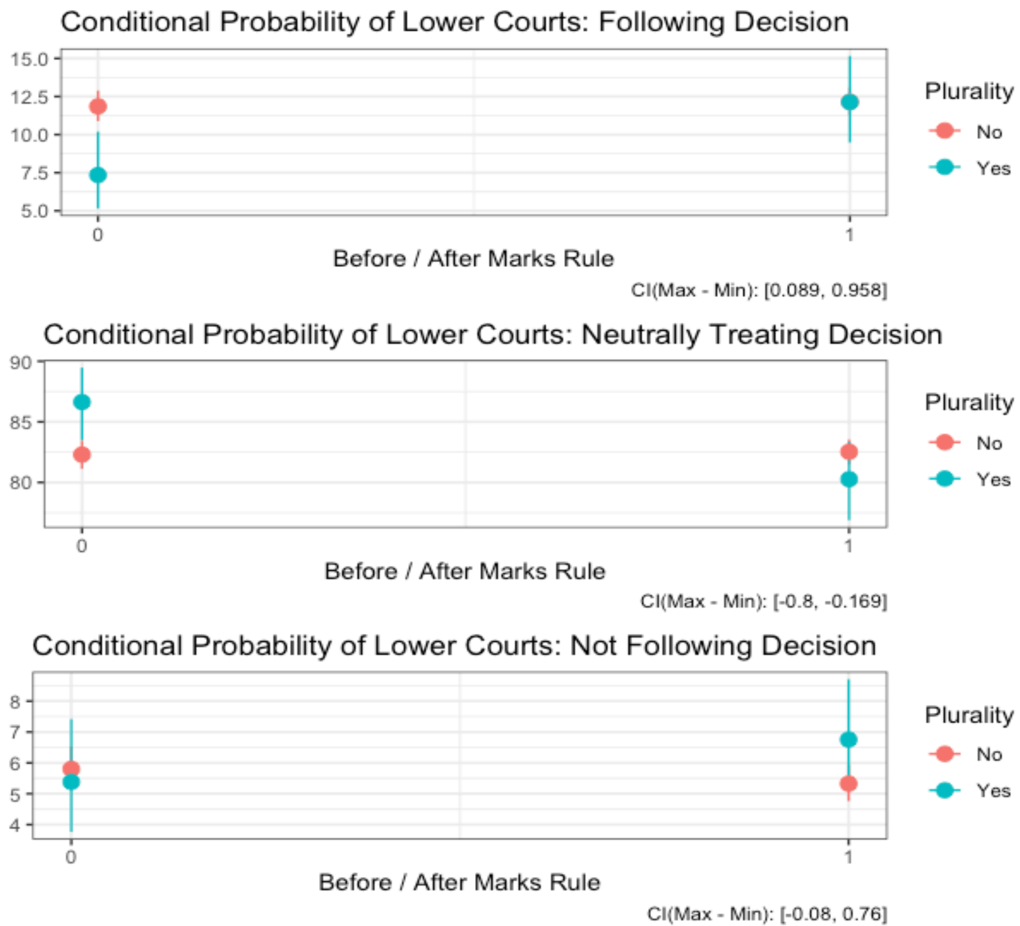

Figure 8: Conditional Probabilities of Lower Court Treatments of Supreme Court Decisions – Before and After the Marks Rule

The first panel in Figure 8 demonstrates that prior to the Marks Rule, majority decisions by the Supreme Court had a higher probability of being followed than plurality decisions. However, after the Marks Rule was developed, the statistical significance of this relationship disappeared (the estimated conditional probabilities overlap greatly within Figure 8). With regards to neutral treatments of Supreme Court decisions by the lower courts, the probability of observing a neutral treatment by lower courts is distinct between plurality and majority opinions in a statistically significant

way for both time periods (before and after the Marks Rule). Finally, the third panel in Figure 8 highlights how plurality and majority decisions by the Supreme Court had similarly expected probabilities of being not followed by lower courts prior to the Marks Rule. However, Figure 8 demonstrates that after the Marks Rule was developed, it appears that lower courts are more willing to not follow majority opinions as compared to plurality decisions.

The insights from the last panel in Figure 8 are noteworthy. Many would expect lower courts to be more likely not to follow plurality decisions as compared to majority decisions. This effect is likely driven by lower courts' fear of review and reversal because majority decisions as, because of their nature, were created through larger coalitions and are indicative of the Supreme Court being more able and willing to review and reverse a non-compliant lower court as compared to the coalition behind a plurality decision. That said, this finding may also be driven by the fact that the number of instances of lower courts not following plurality decisions was decreasing before the Marks Rule was created. Figure 9 demonstrates this potential explanation for the results presented in Figure 8 and Table 10.

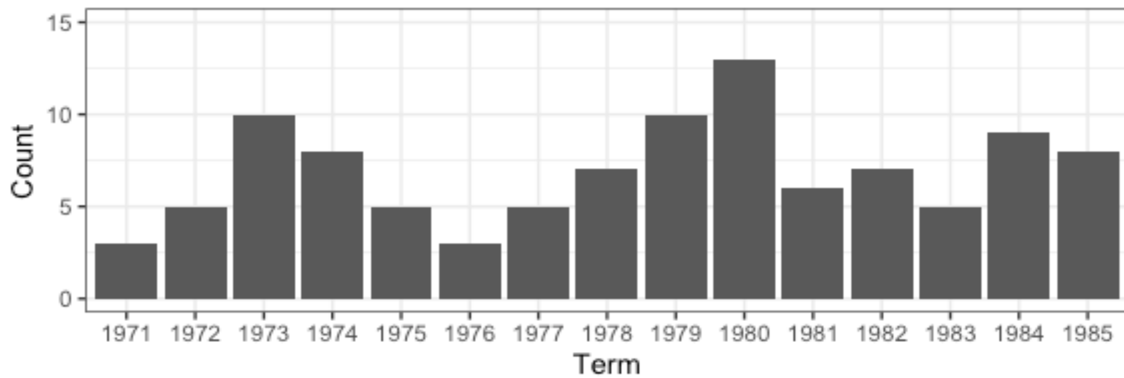

Figure 9: Count of Lower Courts Not Following Plurality Decisions by the Supreme Court (1970-1985)

In general, a lower court may find it easier and less costly to ignore plurality decisions they dislike instead of actively demonstrating their non-compliance with plurality decisions they dislike. Future research will employ the raw text of the majority and dissenting opinion to capture a set of citations, string-cites, which are similar to neutral citations but have even less affect. In turn, these string-cites, which are lists of citations which an legal opinion will cite to for support but not discuss (similar to academic writing), will likely provide even greater insight into whether lower courts are ignoring a precedent, as a reduction in string-cites towards a precedent is a lowest amount of effort a judge could put into citing a precedent.

Next, a set of difference-in-difference analyses are performed as an additional robustness check on the role of the Marks Rule on lower court's compliance with decisions by the Supreme Court. Keeping the time period limited to the seven years before and after the Marks Rule was introduced (1970-1985), the number of followed, neutral, and not followed treatments by lower appellate courts were counted for each

term for each type of Supreme Court decision (majority or plurality). Then a difference-in-difference estimation was performed over this aggregated data. This process allows us to observe if there is a difference in the number of treatments (followed, neutral, or not followed) towards each type of opinion after the Marks Rule was created. Here, the "treated" group is designated as the lower court citations to Supreme Court decisions after the Marks Rule was created; implying that the citations by lower courts prior to the Marks Rule represent the "untreated group."

Table 11: Difference-in-Differences Results: The Impact of the Marks Rule (1970-1985)

	Dependent Variable: Followed	Dependent Variable: Neutral	Dependent Variable: Not Followed
Plurality	-189.13	-1446.90	-103.07*
	(113.35)	(960.5)	(55.59)
Marks Rule	361.40**	3279.40**	171.00**
	(113.35)	(960.50)	(55.59)
Plurality * Marks Rule	-359.40**	-3263.50**	-169.27**
	(160.31)	(1358.30)	(78.62)
Intercept	191.40**	1477.80**	105.67**
	(80.15)	(679.20)	(39.31)
N	60	60	60
R^2	0.36	0.37	0.37

Note: ***p<0.001, **p<0.05, *p<0.1

The results in Table 11 illuminate the following findings. First, following the creation of the Marks Rule, there is an expected drop of almost 360 instances each term where lower courts follow a plurality decision by the Supreme Court. Likewise, following the creation of the Marks Rule, there is an expected drop of almost 3,264

neutral citations by lower courts each term towards plurality decisions by the Supreme Court. Finally, following the creation of the Marks Rule, there is an expected drop of almost 170 instances each term where lower courts do not follow plurality decisions by the Supreme Court. Altogether, it appears that the Marks Rule leads lower courts to cite plurality decisions by the Supreme Court less often (in either following, neutral citations, or not following the decision) while crafting their own opinions.

Next, Table 12 presents a set of results that are limited to the time period following the creation of the Marks Rule until the end of the citation data (1978-2016). Here, the results observe variations in lower court compliance with Supreme Court decisions and how compliance may vary by the type of decisions (plurality or majority) created by the Supreme Court.

Table 12: The Impact of Plurality Opinions on Lower Court Compliance (1978-2016)

	Dependent Variable: Followed	Dependent Variable: Neutral	Dependent Variable: Not Followed
Plurality Decision	0.280***	-0.265***	0.156
	(0.064)	(0.056)	(0.110)
Age	-0.011***	0.015***	-0.029***
	(0.000)	(0.000)	(0.001)
Coalition Size	0.124***	-0.093***	-0.032***
	(0.003)	(0.003)	(0.007)
Ideo. Difference (USSC & CoA)	-0.074**	0.077**	-0.070
	(0.035)	(0.031)	(0.068)
Ideo. Difference (USSC & USSC)	-1.113***	0.917***	-0.059
	(0.063)	(0.057)	(0.121)
Not Followed by USSC	0.062***	-0.074***	0.106***
	(0.004)	(0.003)	(0.007)
Intercept	-3.325***	2.837***	-3.582***
	(0.033)	(0.030)	(0.063)
N	532,892	532,892	532,892
FE CoA Natural Court	YES	YES	YES
AIC	243,487	286,399	87,513
Percent Correctly Predicted	92.49%	90.56%	98.07%

Note: ***p<0.001, **p<0.05, *p<0.1

The results of Table 12 imply, in a Marks Rule world, that plurality decisions are more likely to be followed by lower courts and less likely to be neutrally treated by lower courts. The results do not reveal a statistically significant relationship between the type of Supreme Court decision (plurality or majority) and the likelihood a lower court does not follow it.

The results in Table 12 reveal that as a decision ages, lower courts are slightly less likely to follow it. However, this may be due to natural, evolutionary-like, changes in doctrine where some decisions are replaced without being overruled. Similarly, as a

decision ages, lower courts are less likely to treat the cited decision in their opinions in a neutral way. Likewise, lower courts are less likely to not follow a Supreme Court decision as the decision ages.

Across all three models in Table 12, the coalition size behind a Supreme Court decision (regardless of the type of decision) had a statistically significant relationship with lower court compliance. The results demonstrate that lower courts are more likely to follow a decision as the number of justices who signed onto the decision increases. Likewise, as the size of the coalition increases, lower courts are expected to be less likely to treat a decision neutrally or not follow it. The predicted probability a lower court follows and does not follow a decision by the Supreme Court was calculated by varying the coalition size variable and holing all other variables at their mean values. The results of this exercise indicate that there is a 0.037 predicted probability that lower courts will follow a plurality decision with only three justices behind it and a 0.015 predicted probability that the lower courts will not follow this decision. These probabilities change with the inclusion of another justice to the plurality decision. The results imply there is a 0.089 predicted probability that lower courts will follow a plurality decision with four justices behind it and a 0.014 predicted probability that the lower courts will not follow this decision. Here, the probability the lower courts will follow a plurality decision increases as the number of justices behind the decision also increases, and the probability the lower courts do not follow a decision is demonstrated to decrease as the number of justices behind the decision increases. A similar finding is uncovered for

majority opinions. For example, the predicted probability of lower courts following a majority opinion increases from 0.097 to 0.109 when the size of the majority coalition increases from seven to eight justices. Likewise, the predicted probability of lower courts not following a majority opinion decreases from 0.011 to 0.010 when the size of the majority coalition increases from seven to eight justices.

Differences in ideology between a circuit court and the current Supreme Court along with ideological differences between the enacting Supreme Court and current Supreme Court did not achieve statistical significance in the *Not Followed* model in Table 12. This may be due to the relative rarity of lower courts explicitly not complying with the Supreme Court. Within the *Followed* model in Table 12, as the ideological distance between a circuit court and the Supreme Court increases, the less likely the circuit court will follow a decision by the Supreme Court. Likewise, as the ideological distance between a circuit court and the Supreme Court increases, the less likely the circuit court will neutrally treat a decision by the Supreme Court. Similarly, as the ideological distance between the enacting Supreme Court and the current Supreme Court increases, the less likely the circuit court will follow a decision by the Supreme Court. However, as the ideological distance between the enacting Supreme Court and the current Supreme Court increases, the more likely the circuit court will neutrally treat a decision by the Supreme Court.

Notably, across all three models in Table 12, the prior behavior of the Supreme Court towards its own decision is demonstrated to correlate with behavior by lower

courts in a statistically meaningful way. We still observe lower courts continuing to follow a decision even when the Supreme Court Supreme Court has not followed its own decision. That said, for each time the Supreme Court has not followed its own decision, the less likely we are to observe lower courts neutrally treating the decision. As the number of times the Supreme Court has not followed its own decisions, the more likely we are to observe a lower court also not follow the given decision.

Altogether, the results indicate that, when it comes citation behavior of lower courts, we observe differences in how lower courts approach plurality decisions by the Supreme Court as compared to majority decisions. It appears that lower courts are more likely to follow plurality decisions than majority opinion when there is ideological congruence between the decision and the given circuit court. Likewise, circuit courts are less likely to treat a plurality decision neutrally, and there is no statistically significant relationship between the type of decision by the Supreme Court and a lower court's decision to explicitly not follow the decision. In turn, the results presented in this chapter suggest that circuit courts may simply ignore plurality decisions, and this is why we do not observe explicit non-compliance by lower courts because they were not citing plurality decisions by the Supreme Court that they disagree with.

It is rather difficult to test if the lower courts are ignoring plurality decisions because it would require testing the absence of citation behavior by lower courts for a dataset that is too vast to code without significant legal knowledge and resources. That said, the raw citation data implies that over time the frequency that plurality decisions

are cited, regardless of whether the citation was made to express support or disapproval, has decreased over time. If we observe the plurality decisions from the Supreme Court's 1972 term (N = 4), for example, the lower appellate courts cited these plurality decisions 226 times in the five years following their publication. In contrast, the plurality decisions established during the Supreme Court's 1984 term (N = 8), we observe the lower appellate courts only citing these decisions 13 times in the five years following their creation. Additional and more statistically sound tests are required to conclude whether the willingness of lower courts to cite plurality decisions by the Supreme Court has reduced over time and if this has been a statistically meaningful change in the lower courts' behavior.

Based on the findings above, it appears that plurality decisions can distort the voice of the Supreme Court and leave a great deal of ambiguity in the law for lower courts to figure out. Because a plurality decision by the Supreme Court is not perceived as authoritative, consequently, we observe lower courts being less likely to follow or cite the decision. However, as the number of justices aligned behind a decision increases, regardless of the type of decision, the level of compliance by lower courts was demonstrated to increase. This suggests lower courts may take advantage of deep divisions and fractions on the Supreme Court to developing their own interpretation of the law.

4.6 Conclusion

It appears the Marks Rule is more than just gloss. That said, the Marks Rule is tacky and opaque. The Marks Rule is tacky because it leads circuit courts to a path dependency on certain methodologies for interpreting plurality decisions. Because their own precedents bound these lower courts, they become stuck in their ways for interpreting plurality decisions by the Supreme Court and do not appear to update their methodologies over time. Likewise, the Marks Rule is opaque simply because it is unclear what the intentions of the Supreme Court were at the time it crafted the rule. Altogether, the Marks Rule does appear to influence the lower courts' decision to follow or not follow a plurality decision by the Supreme Court. Future research, likely in the form of case studies, is needed to further determine the extent of a lower court's drift and whether their reliance and interpretation of a given plurality decision by the Supreme Court is in concurrence with the preferences of the enacting coalition or the preferences of the contemporary Supreme Court or the preference of the lower court itself.

This chapter offered a theory which argued that when the Supreme Court resolves a case and reaches a plurality decision, it sets the stage for drift in lower courts. Because there are varying approaches in applying the Marks Rule and other circuit-specific methodologies for interpreting plurality opinions, there are likely distinct inertia-like effects in interpreting plurality decisions among the circuits. Over time, these differences among the circuits may culminate in multiple lower courts reaching different

conclusions over the same legal question, a concept referred to as a circuit split (Rader and Beim 2015; Spriggs and Hansford 2006; Wasby 2002; Klein 2002). Consequently, the same issue will likely percolate back up to the Supreme Court over time as lower courts diverge on their interpretation of the rule or, more generally, an important question within law. In some situations, enough time has passed to allow for membership changes on the Supreme Court's bench; and, therefore, the likelihood of reaching a majority coalition has increased. However, for some highly contested areas of law, like criminal searches and affirmative action programs for colleges and universities, new personnel on the Supreme Court's bench may simply bring new ideas and does not impact the odds we observe a majority coalition forming in support of a doctrine. In other words, some questions before the Supreme Court may never receive an answer by a majority or more of the justices. Future research may take an interest in tracing how specific legal question before the Supreme Court, which initially result in a plurality decision but later a majority coalition develops, are impacted by the specific interpretative actions of lower federal courts.

Other future research may also observe whether the Supreme Court itself altered its organizational and opinion writing behavior in the wake of the Marks Rule. Did the justices change the way they form coalitions in expectation that the lower courts would go onto to interpret a plurality decision a certain way? Similarly, other future research may also consider whether the justices updated their opinion writing behavior to be more collegial or more concise when faced with deep divisions on the Supreme Court's

bench. Answers to these research questions could enlighten judicial politics research on how the Supreme Court forms coalitions and draft opinions to circumvent non-compliance by lower courts.

Overall, the results in this chapter demonstrated that plurality decisions by the Supreme Court are viewed differently by lower courts as compared to majority decisions. Lower courts are more likely to follow plurality decisions but are less likely to treat that decision neutrally. Thus, the evidence presented in this chapter suggest that lower courts drift from each other and the Supreme Court when they follow favorable plurality decisions and ignoring other, less favorable, plurality decisions.

5. Conclusion

These three chapters demonstrate distinctive insights into the managerial structure of the federal judiciary. While the Supreme Court has no control over which cases are resolved by certain lower courts and has no control over the nomination and retirement of lower court judges, we observe the Supreme Court relying heavily on the managerial tools they do have: the ability to set it's docket and the duty of crafting and maintaining laws and doctrines. In turn, despite these organizational limitations we observe a high degree of compliance between lower federal courts and the Supreme Court. I have shown that information flows throughout the judiciary in top-down scheme from the Supreme Court to lower courts, where doctrine and rules are delegated to direct the lower courts' decision making; but also in a bottom-up scheme where the aggregate of decisions and actions by lower courts can inform the Supreme Court's decision-making in term of its agenda and crafting doctrine. These insights on information dynamics support the theorized principal-agent model.

I have also shown how the federal judiciary, as a legal and political institution system, reacts when the Supreme Court fails to delegate doctrine to lower courts. Legally, it is important to understand how issues move up and down the judiciary and whether laws are applied uniformly across all levels of the hierarchy or not. I theorize that situations where the Supreme Court has failed to delegate doctrine leaves lower courts unsure and creates a foundation for the same issue to be dealt by the Supreme Court in the future.

The judiciary is more than a disciplining organization. There are several inherent aspects of the Supreme Court's role of the supervisor of the judiciary, such as crafting doctrine for emerging legal issues or overruling existing precedents which have biased outcomes, that are not sufficiently captured when the Supreme Court is a cast as a discipling actor. The agency model presented in this dissertation touches on several important questions about law and improves upon existing theoretical models in political science. Here, the Supreme Court's strategic actions, such as reviewing certain lower court cases or publishing a majority opinion as opposed to a plurality opinion, reflect how the Supreme Court is attempting to craft a coherent and enforceable corpus of law. Notably, many of the issues the Supreme Court confronts are driven by the sheer size of the judiciary.

Altogether, I demonstrated in this dissertation how the judiciary is organized in a way that is like a bureaucratic organization. The Supreme Court takes on a supervisor position within the organization and has developed a number of strategies to strengthen their ability to control and oversee the judiciary. I argued throughout this dissertation that the Supreme court's strategies reflect a traditional bureaucratic organization – complex, with unavoidable procedure and inefficiencies.

Appendix A

Table A.2: Alternative Specification of Previous Negative Treatments

	Dependent Variable: ***Overruled***
Any Prior Negative Treatments by CoA(s)	1.565***
	(0.051)
Age of Precedent	0.001
	(0.008)
(Age of Precedent)^2	-0.002***
	(0.000)
Enacting Majority Coalition Size	-0.371***
	(0.016)
Ideo. Distance Enacting & Contemporary (USSC to USSC)	2.024***
	(0.147)
Any Prior Negative Treatments by USSC	0.668***
	(0.080)
Ideo. Distance (USSC to USSC) * Any Prior Negative Treatments (USSC)	-0.512
	(0.353)
Constant	-2.652***
	(0.120)
N	327,651
Akaike Inf. Crit.	197,78
Percent Correctly Predicted	99.4%

Note: ***p<0.001, **p<0.05, *p<0.1

Appendix B

Table B.3: Rare Event Logit Results on the Impact of the Marks Rule (1970-1985)

	Dependent Variable: Not Followed
Marks Rule	-0.090**
	(0.034)
Plurality Decision	-0.082
	(0.170)
Marks Rule * Plurality	0.334
	(0.214)
Age	-0.060***
	(0.004)
Coalition Size	-0.374***
	(0.009)
Ideo. Difference (USSC and CoA)	-0.149
	(0.123)
Ideo. Difference (USSC and USSC)	-0.339**
	(0.148)
Not Followed by USSC	0.147***
	(0.011)
Intercept	-2.263***
	(0.090)
N	111,795
FE CoA Natural Court	YES
AIC	42,903

Note: ***p<0.001, **p<0.05, *p<0.1

Table B.4: Rare Event Logit Results on the Impact of Plurality Opinions on Lower Court Compliance (1978-2016)

	Dependent Variable: Not Followed
Plurality Decision	0.161
	(0.110)
Age	-0.029***
	(0.001)
Coalition Size	-0.032***
	(0.007)
Ideo. Difference (USSC and CoA)	-0.070
	(0.068)
Ideo. Difference (USSC and USSC)	-0.059
	(0.121)
Not Followed by USSC	0.106***
	(0.007)
Intercept	-3.581***
	(0.063)
N	532,892
FE CoA Natural Court	YES
AIC	87,513

Note: ***p<0.001, **p<0.05, *p<0.1

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Biography

Kristen graduated from the University of California, Merced, in 2015 with a Bachelor of Arts in Political Science with a minor in Public Health. Kristen began her graduate studies in political science in the Fall of 2015 at Duke University. There, she focused her research on judicial institutions. Her work has been published in *Cornell Law Review* (Benjamin, Stuart Minor and Kristen Renberg. 2020. "The Paradoxical Impact of Scalia's Campaign Against Legislative History" *Cornell Law Review* 105, no. 4 (2020): 101-169); and in the *Journal of Criminal Law & Criminology* (Finholt, Ben, Brandon L. Garrett, Karima Modjadidi, and Kristen M. Renberg. 2020 "Juvenile Life Without Parole in North Carolina" *Journal of Criminal Law & Criminology* 110, no. 2 (2020): 141-179). She has authored two book chapters. The first book chapter is titled, "The Transmission of Precedent in the U.S. Courts of Appeals." in *Open Judicial Politics: An Empirical Reader* (edited by Jennifer Segal Diascro, Rorie L. Solberg, and Eric N. Waltenburg, 2020). The second book chapter is in the *Research Handbook of Political Partisanship* and is titled "Does a Partisan Public Increase Democratic Stability?", this chapter was co-authored with John Aldrich, Austin Bussing, Arvind Krishnamurthy, Nicolas Madan, Katelyn Mehling, and Hannah Ridge.

Kristen also has a number of forthcoming articles. Her article with Mathew D. McCubbins and Joshua Y. Lerner, titled "The Efficacy of Measuring Judicial Ideal Points: The Mis-Analogy of IRTs" is conditionally accepted in the *International Review of Law and Economics.* Further, her article with Brandon L. Garrett, Karima Modjadidi, and Travis

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Kristen will graduate from Duke University in September 2020 with a Ph.D. in Political Science. Kristen will graduate from Duke Law in May 2022 with a Juris Doctor degree.