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The Influence of Precedent on State Supreme Courts

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Abstract

Studies of policy making by courts need to examine the actual policy adopted in the majority opinion rather than studying votes. The authors examine the responsiveness of state supreme courts to precedents announced by the US Supreme Court by examining their treatment of the precedents in their opinions, testing the utility of precedent vitality versus the impact of ideological preferences. They find that the vitality of Supreme Court precedent is a strong predictor of the way in which the precedent is treated by state courts, even after controlling for ideological distance and institutional features of state court systems.

Keywords

state courts, precedent treatment, implementation, lower court responsiveness

> If adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished. This can happen in a number of circumstances, such as when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases, when its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake.
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> Concurring opinion by C. J. Roberts in *Citizens United v. Federal Election Commission* (2010)

The conventional wisdom repeated in virtually all recent scholarship on appellate courts is that "judges make policy" (Segal and Spaeth 2002, 6). Yet while the policy-making role of courts is routinely cited as an important rationale for the social science study of courts, it remains true to this day that "the most theoretically rich and empirically robust studies by judicial scholars generally focus on explaining case outcomes (e.g., who wins or loses) or the behavior of individual justices" (Maltzman, Spriggs, and Wahlbeck 2000, 6). Most empirical studies give little attention to either the substance of policy or the process by which policy is made. In fact, one recent assessment notes that the "paucity of systematic theoretical or empirical studies that treat law as a variable to be explained" is striking (Hansford and Spriggs 2006, 3). While the myriad studies that examine whether the decisions of courts or the votes of the judges support "liberal" rather than "conservative" outcomes have some general relevance for the understanding of the policies produced by courts, an analysis with such a limited focus sheds little light on actual policy making. Appellate courts make policy with the content of their opinions that provide interpretations and rules (precedents) designed to guide and constrain the future actions of judges and other public officials. Characterizing those opinions as merely liberal or conservative inevitably misses much of the significance of the rules adopted and in some instances actually distorts the substance of the precedent adopted.

The major exception to this tendency of empirical research on the courts to ignore the actual policy content of decisions is a series of studies that investigate the implementation or "impact" of the policy decisions (i.e., precedents) announced by the US Supreme Court. These studies start with the premise that lower courts have a clear, legally enforceable obligation to faithfully follow and implement the precedents established by courts above them in the legal hierarchy. Most of these impact studies have involved qualitative assessments of whether the decisions of lower courts, including state supreme courts, are in compliance with the rule announced by specific prior decisions of the US Supreme Court (Songer 1988). While these studies do have the virtue of a focus

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on the policies adopted by the lower courts, they provide limited insight into the nature of the policy making involved in implementation.

The study of implementation of US Supreme Court decisions is an important field for study within judicial politics and political science more broadly. Understanding how other political actors and lower courts interpret and implement judicial precedent shows to what degree other political actors view the US Supreme Court as legitimate. If other political actors frequently shirk from a precedent because they disagree with it ideologically, issues of enforcement of US Supreme Court decisions might arise. The factors that might cause a court to utilize a precedent are also important to study for similar reasons. Do precedents set by a minimum—or near minimum—winning coalition carry less weight? Similarly, if the Supreme Court erodes a precedent over time (without explicitly overruling it), is it less likely to be faithfully implemented by lower courts? In the context of state high courts it is possible in either situation that a state court might be more likely to treat the precedent in a negative fashion or if it is ambiguous to utilize ideological influences to help determine how the precedent should be treated.

In particular, the concurrence by Chief Justice Roberts above elucidates the potential importance of understanding why lower courts might be interested in how US Supreme Court precedents change over time. This quotation is a good example of how the "hotly contested" nature of precedent over time can be explicitly used as a criterion for not following the legal principle of stare decisis. Our theory and empirical test examine this concept as applied to state courts. Our primary research question is, do state supreme courts treat US Supreme Court precedent positively or negatively based on the strength of that precedent?[1] Specifically, we look at the potential impact of prior treatment by the US Supreme Court of its own precedent and the size of the winning coalition in the precedential decision on the likelihood of positive treatment of that decision by state courts of last resort.

The Limitations of Previous Studies of Impact and Implementation

The extensive prior literature on the impact of Supreme Court precedents on the subsequent decisions by lower courts is primarily concerned with whether or not the lower court decisions are in compliance with the precedent. "Compliance" was generally understood to involve the "proper application of standards enunciated by the Supreme Court in deciding cases raising similar or related questions. Noncompliance involves a failure to apply—or properly apply—those standards" (Tarr 1977, 35). Determining whether a particular decision was noncompliant required the use of traditional legal analysis. The literature on judicial impact revealed a number of specific instances of lower court noncompliance, including some overt defiance of the US Supreme Court by state court judges (Peltason 1961; Manwaring 1968; Gruhl 1980; Tarr 1977; Songer 1983; Canon 1973;1974; Canon and Kolson 1971; Johnson and Canon 1984; Wasby 1970; Beatty 1972). However, the broader finding emerging from these studies was that most cases of noncompliance were found in a few areas of controversial civil rights and liberties issues, including criminal procedure, school desegregation, and school prayer (Baum 1978; Songer and Sheehan 1990), and that overall the rate of noncompliance was quite low (Songer, Segal, and Cameron 1994). Nevertheless, the series of compliance studies has limited utility for understanding policy making by state courts because a compliance focus inevitably misses much of the dynamics of the relationship among courts in our federal system (Songer 1987, 831). Lower courts may fail to support the basic policy of the Supreme Court without being overtly noncompliant with any specific decision (Wasby 1970; Beatty 1972); therefore, one cannot gain an adequate perspective on the policy making of state courts if analysis is limited to studies of compliance.

A further shortcoming of limiting a study of policy making to a compliance focus is the assumption of such studies that the meaning of precedents remains static. But Hansford and Spriggs (2006, 2) remind us that the meaning and scope of a precedent can change as the Supreme Court revisits and interprets it in future cases. They find that policy making by the US Supreme Court is strongly affected by the "vitality" of the precedent under consideration, which they define as the relative frequency of positive versus negative treatments of the precedent in the past. Moreover, the behavior of a wide variety of decision makers, including state court judges, can be influenced by the Supreme Court's decision to expand or restrict the meaning or applicability of one of its precedents (Hansford and Spriggs 2006, 109). Thus, to refine our understanding of the ways in which state court judges make policy, it is necessary to explore the ways in which those courts change their own interpretations of precedent in response to Supreme Court changes in the meaning of those precedents.

Finally, most of the earlier works focus on particular areas of law that are very narrow in scope. In contrast, we believe it is important to see in the broadest sense possible how courts utilize US Supreme Court precedents in a large array of cases. Only then can one examine the conditions that lead state supreme courts to follow or respond positively to US Supreme Court precedent that is presumed to be relevant. This question has never been answered in a systematic fashion among a wide array of

case types. The analysis below provides a first attempt to fill that gap in the literature.

Studying Policy Making versus Studying Decision Making

Characterizing state court decisions as simply liberal or conservative may miss the fact that a decision may give strong support to a liberal policy and yet produce an outcome for the particular litigants in the case that would be coded as "conservative" by conventional standards. For example, the landmark case of *Mapp v. Ohio* is widely regarded as one of the premier liberal decisions of the very liberal Warren Court.[2] Yet a state supreme court opinion that scrupulously followed both the reasoning and rule set forth in *Mapp* and demanded in unambiguous language that its lower courts and police adhere to both the letter and spirit of that precedent would nevertheless be coded as a conservative decision if its factual analysis of a particular case led it to conclude that a conviction for theft should be upheld because the police properly presented evidence that met the probable cause standard to a neutral and detached magistrate, received a search warrant from that judge, and then conducted a search that carefully stayed within the parameters of the warrant that produced evidence that was admitted at trial.

In addition, some opinions treat multiple US Supreme Court precedents and thus make policy on multiple legal questions within a single opinion. In our sample of cases, 67 percent of the state cases that treated at least one US Supreme Court precedent also treated a second Supreme Court precedent in the same opinion, and 22 percent of those state cases treated at least five precedents. Moreover, an opinion explaining a decision that would be characterized as "conservative" using standard coding conventions employed by most empirical analyses may nevertheless move the policy of the state in a "liberal" direction. For example, in the Alabama case *Ison v. State*, a defendant convicted of manslaughter had his conviction reversed by the intermediate appellate court and then reversed again (i.e., restoring the conviction) by the Supreme Court of Alabama.[3] This decision would conventionally be coded as a conservative decision because the criminal defendant lost. However, the opinion of the Supreme Court of Alabama ruled for the first time that *Miranda v. Arizona* was binding on Alabama courts.[4] Following *Miranda* (i.e., giving *Miranda* a positive treatment), the Alabama Supreme Court concluded that the confession was properly admitted at trial because the defendant was not in custody at the time of police questioning. So while the outcome for the individual defendant in the case was conservative, the policy announced by the Alabama Supreme Court moved state policy on the admissibility of confessions in a decidedly liberal direction.

An additional problem with conventional studies of outcomes that do not consider the policy adopted in the opinions of courts is that some opinions provide a treatment of some prior precedent that moves a particular legal policy of the state in a liberal direction while in the same opinion providing another treatment of a different precedent that moves state policy in a conservative direction. For example, in *People v. Talley*, the California Supreme Court overturned a defendant's conviction for burglary, a liberal decision under conventional coding rules.[5] However, in reaching this decision, the court treated two separate US Supreme Court precedents. First, the opinion provided a negative treatment of *Aguilar v. Texas*.[6] It distinguished the prodefendant *Aguilar* precedent from the California situation, concluding that the underlying corroboration of the informant's testimony justified the conclusion that the search warrant and thus the subsequent search were valid and that the evidence obtained from the search was admissible. However, the opinion went on to give a positive treatment of *Escobedo v. Illinois* and based on *Escobedo* concluded that the defendant's confession was not admissible.[7] This liberal interpretation led to the reversal of the conviction.

While state supreme courts frequently make policy on legal issues unrelated to federal law or the decisions of the US Supreme Court, we limit our analysis to their policy making on just those issues that are within the purview of federal law and/or interpretation of the US constitution.[8] In our constitutional system, the "supremacy clause" dictates that decisions of the US Supreme Court are binding precedent for all state courts when those courts make policy related to issues arising under federal law or the US Constitution. Nevertheless, such federal precedents do not translate into practical state policy automatically; instead, their impact on state judicial systems is mediated through the decisions of state appellate courts. Moreover, we know that state courts frequently exercise considerable discretion when deciding how to implement the "mandates" of the federal courts. As noted above, a long line of scholarship under the rubric of "impact" studies has found that the extent to which state courts apply federal precedents to their own jurisdictions varies considerably across states, time, and issue (Beatty 1972; Canon 1973; Gruhl 1980; 1981;Songer 1988; Wasby 1970). Outright defiance by state supreme courts of US Supreme Court precedent appears to be relatively rare. However, even when state courts do not seek ways to deliberately avoid following the full implications of federal precedents, they must constantly make discretionary decisions as to which federal precedent is closest to the particular fact situation presented in the case before them and/or how the Supreme Court would have applied its precedent to the fact situation that is at least partially different from the one that elicited the original Supreme

Court precedent. As discussed below, existing scholarship makes it is reasonable to believe that both ideological and contextual considerations may all affect the exercise of discretion by state courts in these policy-making situations. Given the problems with both conventional studies of judicial impact and the limitations of studying votes for the understanding of judicial policy making, the focus of this study is the way in which state supreme court opinions make policy for their state judicial systems by applying, expanding, or constricting precedents previously announced by the US Supreme Court.

Theoretical Framework

Policy making by state supreme courts can occur in a number of different ways. In the present study, we focus on one of its manifestations: the interpretation by state courts of precedents set by the prior decisions of the US Supreme Court that the state courts have deemed relevant for the resolution of the disputes on their docket. All appellate courts choose which precedents need to be addressed to explain or justify the legal policy laid out in their opinions.[9] We leave to further research the question of how courts decide which precedents are most relevant for their consideration. In the analysis below, we limit our attention to how state courts treat those precedents they have decided are most relevant, based on the premise that US Supreme Court cases that treat state courts are by nature especially relevant to state court decision making. Following the approach of Hansford and Spriggs (2006, 6) we conceptualize the treatment of precedent as taking one of two forms of interpretation.[10] Courts may interpret a precedent positively by relying on it as the legal authority for the resolution of the case before them or the resolution of one or more of the issues presented by that case. Through such a positive treatment, by reinforcing a precedent as being important and deserving of continued attention, the US Supreme Court sends signals to lower court judges (including state high court justices) that they continue to stand by the precedent. Alternatively, a court may interpret a precedent negatively by restricting its reach or calling into question its continuing importance. Most often a negative treatment involves distinguishing a precedent by finding it inapplicable to the factual situation in the current case, limiting it by restating the rule in a narrower fashion, or criticizing its rationale or application in a way that may undercut the future legal authority of the precedent. In the sample of cases included in the analysis below, there were no instances of a precedent being overruled; in fact, the overwhelming majority of negative treatments of US Supreme Court precedent were instances in which the state court distinguished the precedent.[11]

The unit of analysis below is each treatment of US Supreme Court precedent by the decisions of state supreme courts. As noted above, each opinion of a court may, and frequently does, treat more than one precedent. Our dependent variable is whether each of those precedents is treated positively or negatively.

An understanding of state supreme court treatment of precedents announced by the US Supreme Court starts with the assumption that state courts have considerable discretion. First, it is useful to note that as a practical matter state supreme courts are the court of last resort for a very large portion of the cases on their docket. In recent years, state supreme courts have decided about seven thousand cases per year with approximately one-half of 1 percent of those being reviewed by the US Supreme Court. Moreover, while many of the cases decided by state supreme courts have some basic similarities to cases announcing the precedents of the US Supreme Court, in few cases are the facts identical to the facts in the precedent cases. Thus, state courts possess a high degree of discretion in determining which if any federal precedents should guide their decisions. In addition, it is important to recognize that precedents do not remain static over time. The meaning and scope of federal precedents are constantly subject to possible revisions and reinterpretations by subsequent decisions of the US Supreme Court. Thus, the vitality of the precedents treated by state supreme courts is quite variable. Hansford and Spriggs (2006) have shown that variation in this vitality of precedent has a substantial impact on subsequent treatments of the precedent by both the US Supreme Court itself and in the lower federal courts.

Precedent vitality has an important impact on policy making by the US Supreme Court because the Court is concerned with maintaining a high level of legitimacy as a way to enhance its ability to make authoritative policy that will be implemented by other political actors (Hansford and Spriggs 2006). Similarly, we would expect that concern for legitimacy by state supreme court justices would lead them to be especially likely to follow precedents with high vitality. In addition, state supreme court justices may have some concerns with the possibility of reversal by the US Supreme Court.[12] While the extent to which such strategic concerns motivate the actions of the justices is not well established, to the extent to which these concerns do exist they would increase the probability that the justices would be more likely to accord positive treatment to precedents with high rather than low vitality. Finally, lower court judges are socialized to accept the basic norms that include the idea that US Supreme Court precedent is binding. As a result of these multiple motivations, we expect that state supreme court judges will be even more likely than their brethren on the US Supreme Court to provide positive treatment of precedents with high vitality and less likely to provide such positive treatment to precedents with low vitality. Thus, our first hypothesis is,

Hypothesis 1: As precedent vitality increases, the probability of a state supreme court interpreting the precedent positively increases.

As a corollary, one would expect that other measures that reflect the general strength or acceptance of precedent should also lead to an increased probability of a positive treatment of the precedent. In particular, past research suggests that the vote margin on the Supreme Court adopting the original precedent is one such indicator of precedent strength (Hansford and Spriggs 2006, 41; Danelski 1986; Johnson 1979). A larger Supreme Court margin might show lower courts that support for the precedent is likely to persist over time; for instance, if a precedent was adopted eight to one or seven to two, one would expect that majority support on the Court would remain even after one or two of the justices in the opinion coalition had left the Court. It seems plausible that if a US Supreme Court decides a case on a narrow margin, lower courts might interpret that precedent as having more "wiggle room" to shirk and distance other cases from that precedent.

Additional evidence for the importance of majority size on the US Supreme Court comes from several sources. In a theoretical sense, scholars have noted that a narrow majority may serve to undermine the legitimacy of an opinion (Wasby 1970). Still other research notes that lower court responses to US Supreme Court decisions (in particular, remands) vary depending on the size of the winning coalition (Pacelle and Baum 1992). Finally, in previous work, Spriggs and Hansford (2001) find that the US Supreme Court is more likely to overturn opinions that have many concurrences and a small winning coalition compared to cases that have few concurrences and/or a relatively large winning coalition. This leads to our second hypothesis:

Hypothesis 2: As the margin of the Supreme Court in the original case precedent increases, the probability of a state supreme court interpreting the precedent positively also increases.

An extensive literature now suggests that both ideological and contextual factors may also influence judicial decisions. Thus, it is reasonable to believe that such factors will be involved when state courts decide whether to interpret a precedent positively or negatively. Attitudinal models of decision making lead to the expectation that the ideological distance between the preferences of the state court interpreting precedent and the US Supreme Court that originally announced the precedent would have a negative effect on the treatment of precedent. Since attitudinal models assume that state judges seek to adopt policy consistent with their own political preferences, as attitudinal distance increases one would expect that precedent would be less likely to be followed. Instead, judges who care about policy (we assume that all do, as does the overwhelming majority of the literature) would be expected to treat such distant precedents negatively. Conversely, if the ideological distance between the two courts is relatively short, we would expect to see a higher probability of the state supreme court interpreting the precedent in a positive way. However, existing literature suggests that state judges are more constrained than their brethren on the US Supreme Court with the result that one should expect that ideological distance will have less of an effect on the treatment of precedent at the state level compared to the US Supreme Court (Langer 2002).

Studies of state supreme court decision making also indicate that while judges are sometimes constrained by nonideological concerns, to the extent to which they are unconstrained, they prefer to make decisions in which the outcome is consistent with their political attitudes (Brace and Hall 1997; Hall 1992; Hall and Brace 1994, 1995). Thus, judges will be more likely to treat a given precedent positively when such a treatment will enable them to support an outcome that is consistent with their ideological preferences. These considerations lead to two hypotheses about the impact of ideology on the treatment of precedent by state supreme courts.

Hypothesis 3: As the ideological distance between the Supreme Court at the time the precedent was set and the political preferences of the state supreme court at the time of the state court treatment increases, the likelihood of a state supreme court interpreting the precedent positively decreases.

Hypothesis 4: The likelihood that precedent will be treated positively increases when the positive treatment of precedent is consistent with an outcome whose ideological direction is consistent with the ideology of the median judge on the court.

Finally, we also include several other variables in the model for the sake of completeness and for incorporating other theories of judicial decision making. Foremost among these are the inclusion indicators for the method of selection for justices on a state high court (Brace and Hall 1990, 1993, 1997; Langer 2002; Brace, Langer, and Hall 2000). By including these variables, we control for the possibility that institutional factors may have a role in how state high courts treat precedent, even though this has never been tested before and we have no a priori expectation about how these institutional factors (or whether they will at all) affect how a state court treats US Supreme Court precedent in its cases. Regardless, we

attempt to control for all neoinstitutional and state supreme court decision-making factors besides case facts. We do not include case facts in the model because our article examines multiple areas of the law, and therefore making a case facts model is unfeasible.[13]

Data and Method

To examine the impact of precedent strength on state supreme court treatment of US Supreme Court precedents, we rely on an original data set containing the universe of state supreme court decisions issued between 1994 and 2006 that treat a US Supreme Court precedent issued (from a state court jurisdiction) during the Court's 1993 and 1994 terms.[14] To select the cases for our data set we Shepardized all formally decided US Supreme Court cases decided with full written opinions during the 1993 and 1994 terms that treat state courts, selecting for analyses all state high court decisions that *Shepard's* classifies as positive or negative treatments.[15] The resulting data set contained 341 state supreme court decisions treating thirty-one different US Supreme Court precedents. Decisions from high courts from forty-nine states were included, with only two states producing more than 5 percent of the total observations.[16] Variation in the frequency with which the thirty-one US Supreme Court decisions were treated was also relatively even, with treatments of only one case composing more than 10 percent of the total observations.[17]

The dependent variable for our analysis is a dichotomous indicator of whether a state supreme court treated a precedent positively (coded as 1) or negatively (coded as 0), according to *Shepard's Citations*. Because of the dichotomous nature of the dependent variable, logistic regression analysis with clustered standard errors was used in all analyses. Clustering by states was utilized to account for potential heteroscedasticity in the data because of unmeasured state-level influences. While other mechanisms are available to deal with this issue, we argue that this technique is appropriate as it is more efficient than using fixed effects and is more straightforward to interpret than multilevel approach while yielding substantively equivalent results in most cases (Primo, Jacobsmeier, and Milyo 2007).

We include two independent variables to measure the strength of the US Supreme Court precedent treated by a state high court. The first, precedent vitality, was taken from Hansford and Spriggs (2006) and updated through the 2006 term of the US Supreme Court. The measure is simply the number of positive US Supreme Court treatments of a precedent minus the number of negative treatments, with a baseline vitality score of 0 assigned to a precedent with no treatments. Treatment is coded positively when a case is reported as "followed" or "paralleled" according to *Shepard's* and negative when it classified as "criticized," "distinguished," "limited," or "questioned" by *Shepard's*. The variable is continuous and can theoretically go from negative infinity to infinity but in our data ranges from −2 to +2. Consistent with our first hypothesis, we expect this variable to be positively related to the dependent variable.

As an alternative measure of precedent strength, we include the margin of the vote in the Supreme Court decision being treated. For this measure we rely on Spaeth's US Supreme Court Database. We convert the marginality scores from the VOTE variable in the Spaeth Database to a simple measure of the margin of victory for the majority coalition. The variable ranges from 1 for a five to four decision to 9 for a nine to zero decision. We expect margin to have a positive impact on the likelihood of a state court interpreting a precedent positively consistent with our second hypothesis.[18]

In addition to our measures of precedent strength, it is essential to include a measure of the ideological distance between the judge on the state high court treating the precedent and the justices of the US Supreme Court that initially decided it.[19] While this effect may be less than for US Supreme Court justices reviewing past decisions of the Court, previous research consistently shows that the decision making of state high court judges is affected by ideological influences (Brace and Hall 1997; Langer 2002). The difficulty in constructing such a measure lies in the absence of directly comparable measures of ideology for the justices of the US Supreme Court and state supreme court judges. Given this difficulty, we rely on a four stage process that we argue is a valid approximation. First, we normalized the party-adjusted surrogate judge ideology scores (PAJID) (Brace, Langer, and Hall 2000) scores for all state supreme court judges and calculate *z* scores for each judge-year. Next, we inverted and normalized the judicial common space scores (Epstein et al. 2007) for the justices of the US Supreme Court for the same time period and calculate *z* scores for each justice-year. Third, we calculated median scores for the US Supreme Court at the time each of the precedents were decided and for each treating state supreme court.[20] Finally, using the normalized medians, a simple absolute distance was calculated.[21] Consistent with our third hypothesis, we expect increases in ideological distance to be negatively related to the likelihood of positive treatment.

To assess the validity of this measure, we preformed a supplementary analysis of the comparability of the two normalized measures. The ideal comparability analysis would involve checking for consistency in the scores for individuals appearing in both groups. Unfortunately, for the time period for which PAJID scores exist, only one individual has served on both the US Supreme Court and

the supreme court of a state—David Souter. However, eighteen individuals have served on both a state supreme court and a US court of appeals. Since the common space scores for a judge of the courts of appeals and a justice of the US Supreme Court lie in the same ideological space, if there is no significant difference in the two sets of scores for these individuals, then our measure should be valid. To test this, we preformed a difference of means test and a Wilcox signed-rank test for the normalized PAJID and common space score of these eighteen individuals. There results revealed no statistically significant difference, thus confirming the validity of our measure.

In addition to the ideological distance measure, we also need a measure of the impact of state court ideology on the likelihood of a positive treatment. Such a measure must test the assumption that a liberal (conservative) court will prefer a liberal (conservative) case outcome, and if such an outcome can be achieved from a positive treatment of precedent, then the probability that the court will make such a positive treatment will increase. To test this prediction, we proceeded in two steps. First, we created a congruence variable scored 1 in cases where positive treatment of Supreme Court precedent will lead to a liberal outcome and 0 when a positive treatment will lead to a conservative outcome. Thus, our congruence measure taps the expectations of the state court regarding the policy outcome, given a positive treatment. We next created a multiplicative term, taking the value of the product of this congruence variable and the ideology of the median judge on the state supreme as described in the previous paragraph. We hypothesize that this multiplicative term will be positively related to the likelihood of a positive treatment of precedent.

In addition to our explanatory variables of interest, we include a set of control variables to account for variation in the method of judicial retention used in a state. Scholars have consistently found that the method of judicial selection conditions the votes of state supreme court judges (Brace and Hall 1997; Hall 1992). Therefore, we include dummy variables in our analysis for judges who face partisan or nonpartisan election and for those who face retention elections (appointment is excluded as a baseline category). While we believe that this institutional feature affects the voting behavior of state court judges in many instances, we have no a priori expectation as to how it should affect treatment of US Supreme Court precedent. We also include a control for the presence of an intermediate appellate court.[22]

Results

Before examining the tests of our hypotheses, we note that in the universe of our cases, state supreme courts gave positive treatments to precedents 62 percent of the times in which they provided a substantive interpretation of federal precedent. All but two of the forty-nine states interpreting US Supreme Court precedents gave a positive treatment to at least one precedent.[23] This generally positive treatment of precedent was present across all regions of the country.

Table 1. The Impact of Strength of Precedent on State Supreme Court Treatment of U.S. Supreme Court Precedents, 1994-2006

Variable	Coeff.	*SE*	*z* score
Independent variables			
Vitality	1.031***	0.281	3.66
Margin	0.215**	0.077	2.79
Ideological distance	0.147	0.297	0.49
Ideological congruence × court ideology	0.922*	0.435	2.12
Ideological congruence	–2.041***	0.435	–4.69
Institutional variables			
Retention election	0.656	0.429	1.51
Partisan or nonpartisan election	0.612	0.451	1.36
Intermediate appellate court	–0.733	0.454	–1.61
State court median justice ideology	–0.174	0.334	–0.52
Constant	0.737	0.695	1.06
Model fit statistics			
N	304		
χ^2	52.98***		
Log likelihood	–151.244		
% correctly predicted	72.11		
PRE (%)	10.09		

*$p < .05$. **$p < .01$. ***$p < .001$. PRE = Percent Reduction of Error.

Table 1 displays the results of our analysis. The overall fit of the model is quite good. Moreover, it correctly predicts 72.11 percent of the cases, which represents a 10.09 percent improvement over the null model. It also appears to provide support for our first two hypotheses relating to precedent strength. Both vitality and margin are statistically significant at the .01 level and in the predicted direction. This indicates that US Supreme Court precedents that have received prior positive treatment for the US Supreme Court are more likely to be treated positively by a state high court than those with no prior treatment or prior negative treatments. Moreover, the other measure of precedent strength—Supreme Court margin—also appears to exert an independent effect on state supreme court treatment. Our findings here confirm previous research that argues that a wider margin in Supreme Court decisions leaves less "wiggle room" for future judges deciding another case on point.

One counterintuitive result relates to our measure of ideological distance. Our third hypothesis predicts that increased ideological distance between a state supreme court and the US Supreme Court that issued the precedential decision should have a negative impact on the probability of a positive treatment of precedent. Conversely, we find that the impact is substantively small and not statistically significant. What explains this counterintuitive result? While we can only speculate at this point, it seems possible that in many instances a court can "follow" a precedent but still reach the desired ideological outcome. Following a liberal precedent but reaching a conservative decision on the merits (or vice versa) is far from uncommon (e.g., we noted above instances in which courts gave a positive treatment of the liberal precedents *Mapp v. Ohio* and *Miranda v. Arizona* in decisions that reached conservative outcomes). Future research should explore this question further.

While this explanation for the finding that the ideological distance between the original precedent and the current state court decision is somewhat speculative, it is consistent with our findings on the impact of the current ideology of the state court on its treatment of precedent. The results reported in table 1 that indicate that while the zero-order relationship between the ideology of the state court and the likelihood of a positive treatment of precedent is not statistically significant, the interaction of this variable with the congruence between the treatment of precedent and the case outcome is positive and statistically significant as predicted. That is, a liberal court is more likely to positively treat precedent when such a positive treatment will lead to a liberal outcome. And similarly a conservative court is more likely to positively treat precedent when such a positive treatment will lead to a conservative outcome.

Finally, turning to the control variables, we see that the mode of retention for state court judges used in a given state has no substantial effect on the likelihood of a positive treatment of precedent. Each of the dummies for different types of elections for retention is not significantly different from the excluded category (retention by elected officials), and they are not significantly different from each other.[24] The presence of an intermediate appellate court appears to have a weak impact on the likelihood a state supreme court will positively treat a precedent of the US Supreme Court. Although only marginally significant ($p = .054$), the results show that in states with an intermediate appellate court, the high courts are less likely to positively treat US Supreme Court precedents. This effect is likely the result of the fact the intermediate appellate courts tend to weed out "easy" cases and leave the high courts in those states with cases where precedent is less clear.

While the results in table 1 show that the strength of precedent affects the likelihood a state high court will positively treat a US Supreme Court precedent, the logit coefficients give us only little insight as to the substantive effects. To get a better understanding of the magnitude of the effect of vitality and margin, we utilize simulations to calculate predicted probabilities of shifts in these variables holding all other variables at their mean level. When a precedent is weak on both of these measures (i.e., a five to four decision that has been negatively treated twice by the Supreme Court and never positively treated), the likelihood a state supreme court will positively treat that precedent is only 0.12. Conversely, when a precedent is strong on both measures (i.e., a nine to zero decision that has been positively treated twice by the Supreme Court and never negatively treated), that probability increases to 0.97! Looking at the strength indicators individually, both appear to have substantively strong effects, but it appears that the bulk of this combined effect comes from vitality. Holding margin (and the other variables) at its mean level and increasing vitality from its minimum to maximum level corresponds to a 0.75 increase in the probability a state court will positively treat a US Supreme Court precedent. While still of substantive significance, a corresponding shift in Supreme Court margin from its minimum to maximum level while holding vitality at its mean level corresponds to a more muted increase of 0.37, from 0.44 to 0.81.

Figure 1 shows the substantive impact of our measure of ideological congruence between the median member of a state supreme court and the ideological direction of a case outcome given a positive treatment of precedent. As the figure illustrates, the greatest differential effect of state court ideology on the likelihood of a positive treatment comes when positive treatment with lead to a liberal outcome. When a very conservative court faces a precedent of this type, there the probability of a positive treatment is less than 0.2. Conversely, when a relatively liberal court faces a US Supreme Court precedent that is likely to lead to a liberal outcome, they are substantially more likely to treat it positively. The substantive impact of state court ideology is much weaker when a court must determine whether to positively treat a precedent that will lead to a conservative outcome. While liberal courts are somewhat less likely to treat a US Supreme Court precedent positively in this situation than a conservative, the difference is quite small. Furthermore, it is interesting to note that only the most liberal state courts in our data (about 5 out of 337) are more likely to positively treat a precedent that will lead to a liberal outcome than one that will lead to a conservative outcome.

Conclusions

One of the important ways that state supreme courts make legal policy for their states is through the interpretation

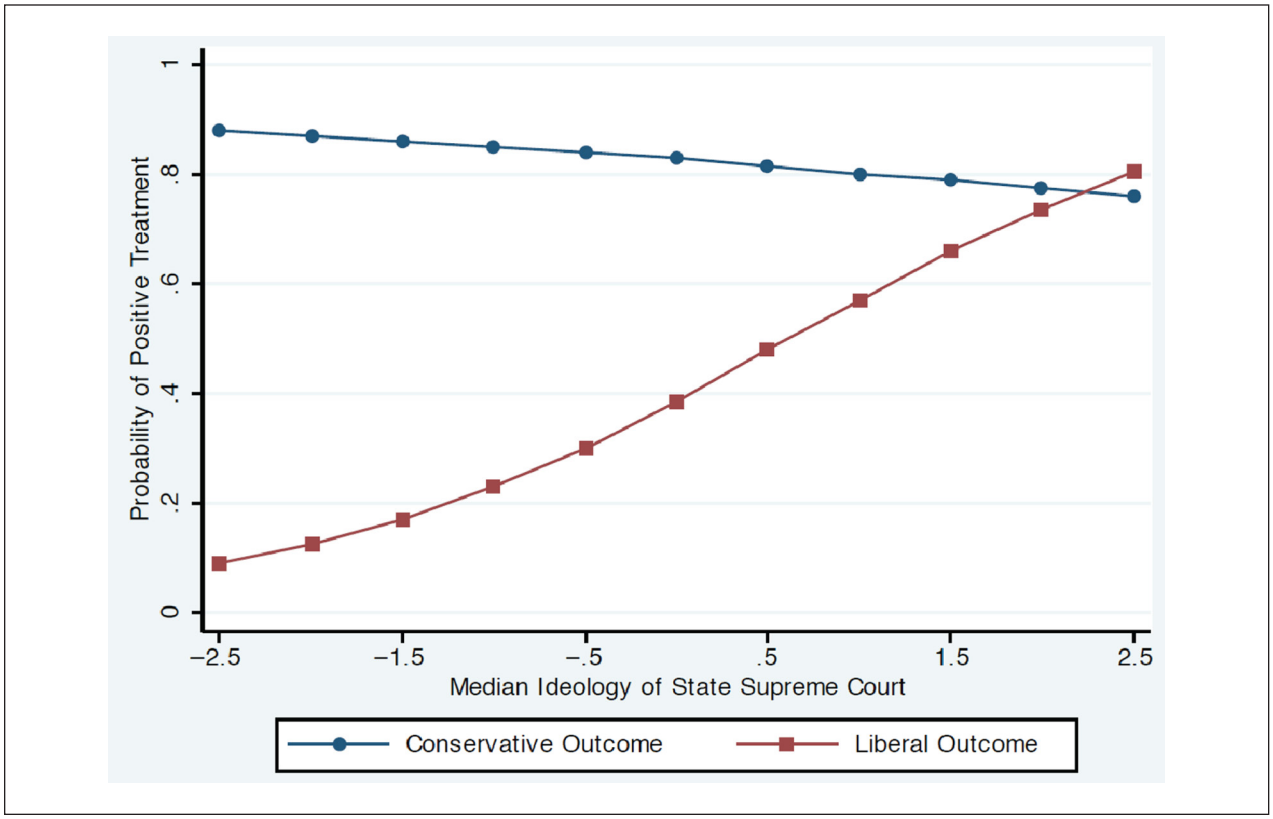

Figure 1. Substantive impact of ideological congruence on probability of a positive treatment of U.S. Supreme Court precedent

of precedents announced by the US Supreme Court. The legal theory of our constitution is that precedents related to federal questions adopted by the US Supreme Court are binding on all state courts. At one level, these expectations were followed completely. There were no decisions in our sample of cases in which the state supreme court openly defied the US Supreme Court and refused to accept the legitimacy of the Supreme Court precedent. But in spite of adhering to this general principle of national supremacy, state supreme courts remain important players in determining the actual meaning, which is to say the actual policy significance, of federal law in their states. A simple overview of our data suggests that state courts have considerable discretion as they interpret the meaning of these federal precedents. Most notably, in two-thirds of all of the US Supreme Court precedents in our data, different courts (either in different states or at different points in time) provided different treatments, some positive and some negative, of the same precedent. Thus, while state supreme courts generally provided positive treatments of US Supreme Court precedents, using the precedent as the basis for their decision in slightly over three-fifths of their cases, negative treatments that modified the practical meaning of the precedent or carved out exceptions in which their lower courts were told that the precedent did not apply were also quite common.

Turning to the explanation of the reasons for these differences in policy making, we discovered that state courts did not treat all precedents as having the same significance or same weight. Instead, two different measures of the relative legal strength of precedents were strongly related to the likelihood that the state supreme court would provide a positive treatment of the precedent. Most importantly, what Hansford and Spriggs (2006) call the "vitality" of a precedent had a major impact on the way the state supreme courts interpreted the precedent. The more the US Supreme Court reinforced its original precedent with subsequent decisions indicating continued support for the precedent, the more likely state courts were to provide a positive treatment of the precedent. Yet as strong as these effects of the strength of precedent are, they are modified to some extent by the ideology of the state court judges. Within the limits that appear to be set by the strength of precedent, state supreme courts are most likely to make very positive interpretations of the precedent to guide their lower courts when such positive interpretations can be used to advance the ideological preferences of the state court majority.

These findings are significant because many previous empirical studies (e.g., see Segal and Spaeth 1996 and most of the literature on judicial impact cited above) implicitly assume that all precedents are the same and that lower courts face a simple dichotomous choice to either follow or not follow the precedent. Our findings suggest that the reality of state court policy making in our federalist system is more complex. State supreme courts appear to be generally responsive to the precedents announced by the US Supreme Court but do not think that all precedents carry equal weight. Thus, state courts exercise discretion, providing positive and sometimes expansive support for some precedents, especially those that have high "vitality" and those that can be used to reach policy outcomes that are compatible with the judges' political preferences. Conversely, state courts provide more constrictive interpretations to other precedents that mute their policy impact in their state judicial system.[25]

Acknowledgments

The data relied on for the analysis below are from an original data set collected by the authors. The data will be on Don Songer's website at http://people.cas.sc.edu/songer. The data will be available for download in a Stata format. The web page also will include the codebook for the variables available in the data set and the Stata code used to run the analysis. The authors would like to thank Professor Tom Hansford for graciously sharing the precedent vitality scores he created and for his insights on the workings of *Shepard's Citations*. We also would like to thank Chris Bonneau for looking at previous iterations of this article and for his very helpful comments. Finally, we would like to thank the two anonymous reviewers for comments that helped to improve and clarify aspects of the article. A previous version of this article was presented at the 2009 Southern Political Science Association annual meeting on January 3, 2009.

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Notes

1. The top appellate courts in our states go by a variety of names that vary across state governments. In fact, two states (Texas and Oklahoma) actually have separate top courts for criminal and civil cases. For the sake of ease of understanding, in the remainder of this article we refer to all such courts as simply state *supreme courts*.
2. 367 US 643 (1961).
3. 800 So 2d 511 (Alabama Supreme Court, 1967).
4. 384 US 436 (1966).
5. 423 P2d 564 (California Supreme Court, 1967).
6. 378 US 478.
7. 378 US 108.
8. State supreme courts of course make policy in additional ways. For example, their interpretations of their own precedents and their forays into statutory construction often create important legal policy for their states. Nevertheless, understanding the ways in which state courts create legal policy through their responses to decisions of the US Supreme Court that are legally binding on them has long been viewed as an important component of larger concerns with the nature of federalism in the United States and the sufficiency of traditional understandings of the legal hierarchy. We leave the other aspects of state judicial policy making to future studies.
9. One might question whether there is a selection issue if state courts may sometimes ignore a precedent that they "should" treat. However, even if there is a nontrivial number of cases in which a state court deliberately does not discuss a relevant Supreme Court precedent, we do not believe that the omission is critical to the focus of our analysis. Our focus is on policy making by state supreme courts. State supreme courts make policy when they provide interpretations of the meaning of federal precedents to the lawyers and lower court judges in their state. That is, it is the opinion and the way it is written—not the votes of the justices per se—that make policy. If they decide a case on factual or narrow grounds that do not reach the meaning of the federal precedent, they may have created an outcome for the specific litigants that will withstand further review, but they will not have made policy.
10. Specifically, Hansford and Spriggs develop a measure that is built from *Shepard's Citations*. They add the number of times that a precedent is listed in *Shepard's* as being treated positively and subtract from that sum the number of times that the precedent is treated negatively for all cases in the US Supreme Court from 1948 to 2001. We update the precedent vitality scores through the year 2005. A positive treatment is defined as a case that *Shepard's* codes as "followed," whereas a negative treatment is coded as "distinguished," "limited," or "criticized." This produces a measure they call "precedent vitality," which essentially measures the strength of the precedent over time. There is a separate measure for each US Supreme Court case for each year, so one can easily see how the cases vary over time in precedent vitality.
11. There may be some occasions when a state supreme court will be able to avoid complying with a US Supreme Court precedent by deciding a given case on independent state grounds. However, such cases do not appear in our sample of cases analyzed because in those cases there is no "treatment"

of the federal precedent in the state court opinion. Thus, we do not attempt to control for differences in state court constitutions in our model.

12. While we acknowledge the possibility that the makeup of the current US Supreme Court may influence potential strategic considerations by state supreme court judges, we do not account for this in the following analyses for two reasons—one theoretical and one methodological. Theoretically, the low likelihood of review by the US Supreme Court makes it unlikely that the state court will alter their decisions for fear of reversal. Methodologically, including measures of ideological distance between state high courts and *both* the original and current US Supreme Court would introduce potential collinearity problems because of the high correlation ($r = .97$) between these two measures.
13. In particular, we run models that examine various institutional factors, such as the type of election system, whether there is an intermediate appellate court, and other factors the literature makes clear are important determinants of state supreme court voting.
14. We begin with the year 1993 because before that date *Shepard's Citations* did not systematically report state court treatments of US Supreme Court precedents. According to an email received by the authors on November 13, 2008, from Jane W. Morris, J.D., director of customer programs for LexisNexis, before 1993 there were only some isolated additions of editorial treatment by state courts, and those were generally in response to specific customer requests. Our own spot checking of the accuracy of the coding of treatments by state courts of Supreme Court precedents in the 1960s and 1970s confirms that substantially fewer than half of the actual treatments by state courts were reported by *Shepard's*.
15. There appear to be no idiosyncratic features associated with the years chosen for analysis compared with other data in the ten years surrounding 1993 and 1994. Similar to other years from 1986 through 2005, the predominant categories of cases are criminal procedure and economic. Even when looking only at treatments of state high courts by the US Supreme Court, these cases are also in line in that regard because state court jurisdictional cases and the overall docket are statistically comparable in issue type and ideological orientation. When using the Spaeth criteria, only two cases from the US Supreme Court "formally altered precedent," which seems like a low number but is in keeping with the time frame of the analysis. We also look at the possibility of forum shopping, or the idea that litigants could potentially ask for standing in the federal court system if there was a legitimate federal claim. Approximately 60 percent of the cases in our sample were criminal cases; therefore, jurisdiction would lie solely in the state court. In the remaining 40 percent of cases, there exists the potential for litigants to assert a federal claim and file in federal court. Based on cross-tabulations and a χ^2 test of a sample of fifty-one cases, we find that there is no statistically significant difference in the probabilities of litigants winning regardless of whether the case could have been heard in federal court. Moreover, as a further check we also ran a model with only the criminal cases and found no significant differences in our results.
16. The New Hampshire Supreme Court did not treat any of the US Supreme Court's 1993 or 1994 decisions. Decisions of the California Supreme Court compose 10.56 percent of the observations; Pennsylvania Supreme Court decisions compose 8.50 percent.
17. *Simmons v. South Carolina* (512 US 154, 1994) was treated ninety-seven times in our data, for a total of 28.45 percent of the observations. Because of the potential that treatments of this single case could be driving our results, all analyses were reestimated with treatments of *Simmons* dropped from the analysis. The substantive results were unchanged.
18. Hansford and Spriggs (2006) show that the age of a precedent affects its treatment by the US Supreme Court. They find that older precedents tend to be immune from negative treatment in a way that precedents of a more recent vintage are not. To test for such an effect on state supreme court treatment of US Supreme Court precedents, we include a control variable for precedent age in an alternative model specification available in Online Appendix A. We find that precedent age appears to have no effect on state court treatment. However, this finding must be viewed with some caution because of the limited range of this measure.
19. It is possible that the makeup of the current US Supreme Court will have a greater influence on decision making by state supreme courts than the US Supreme Court that set the precedent. While we do not include a measure of current Supreme Court ideology in this analysis (for the reasons discussed in note 12), we did run two alternative models. The first includes measures of the ideological distance between the state supreme court and *both* the original and current US Supreme Courts. The second includes only the second of these distance measures. The results of these analyses show no substantive differences from our primary model and are available in Online Appendices B and C.
20. Medians were calculated using the Stata module GRMEDF (Kolenikov 2000).
21. There is a growing literature questioning the centrality of the US Supreme Court's median member in setting policy. For example, Lax and Cameron (2007) suggest that the opinion writer exerts the greatest control over Court policy, while Westerland (2003) argues that the median member of the majority coalition plays the pivotal role. While a discussion of the merit and flaws of each of these alternative measurement strategies is beyond the scope of

this article, we specified two alternative models using each of these measures in place of the ideology of the median member of the US Supreme Court in the calculation of our ideological distance variable. Our substantive conclusions are unchanged in each of these models. The results of these alternative models are available in Online Appendices D (opinion writer) and E (median of majority coalition).

22. A table of descriptive statistics is available in Online Appendix F.
23. And the two states that provided only negative treatments considered the treatment of precedent in only one and three cases, respectively.
24. In a further analysis not displayed in the interests of parsimony, it was also shown that the interaction of mode of retention and state ideology was not substantially related to the likelihood of a positive treatment of precedent; for example, if a state with retention elections had a conservative mass ideology among the citizens of the state, it was no more likely to treat a precedent positively if that treatment was consistent with a conservative case outcome than if such a treatment would result in a liberal case outcome.
25. We have the results from several additional models as well as descriptive statistics in the "supplemental materials" section of this article. They are posted online on the *Political Research Quarterly* Web site.

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