

## Patterns of Policy Making across State Supreme Courts

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In recent years, a number of state supreme courts have explicitly declined to follow decisions of the United States Supreme Court. In a 1998 opinion,<sup>1</sup> the Supreme Court of Georgia struck down a state law criminalizing sodomy and expressly rejected the Supreme Court's decision in *Bowers v. Hardwick*.<sup>2</sup> Likewise, several states have rebuffed a major decision of the Court on the free exercise of religion<sup>3</sup>, while a number of its criminal rights rulings have met with outright defiance from state supreme courts.<sup>4</sup> In one particularly egregious example, the Connecticut Supreme Court made clear its displeasure with the standard to be used in search and seizure cases established by the Supreme Court in *Illinois v. Gates*:<sup>5</sup>

We eschew the amorphous standard of *Gates* in passing upon article first, § 7, interpretation and apply the more specific standards of the *Aguilar-Spinelli* test . . . The *Aguilar-Spinelli* test, with its two prongs of "veracity" or "reliability" and "basis of knowledge," offers a practical and independent test under our constitution that predictably guides the conduct of all concerned, including magistrates and law enforcement officials, in the determination of probable cause.<sup>6</sup>

This example suggests that lower courts may ignore, resist, or blatantly defy the standards established by the Supreme Court. Consequently, the substantive application of law may vary widely across jurisdictions. Variation across circuits, districts, or states can create uncertainty about the proper application of rules among trial court judges, legal professionals, police, and the public. Defiance or noncompliance with precedent in lower courts may also lead to possible equal protection issues under the Fourteenth Amendment, as individuals in different jurisdictions are subject to different standards of behavior.

The seriousness of this issue stimulates considerable interest in the nature of judicial conflict. How frequently do lower courts deviate? Do they defy these decisions outright or do they engage in more subtle forms of resistance such as accepting the doctrine's validity but finding reasons not to apply it consistently across cases? What political, institutional, cultural, and legal factors lead to defiant behavior by a lower court?

## Understanding the Judicial Hierarchy

In order to understand the differences in how state supreme courts apply precedent from the United States Supreme Court, it is first necessary to discuss the institutional structure of the court system. The hierarchical nature of the court system in the United States suggests that lower courts are bound to follow the dictates of those courts above them. The doctrine of *stare decisis* should provide some authority over the decisions of judges sitting on the same court over time, but it also requires that the decisions of higher courts be binding on those inferior courts in the system (but see Brenner and Spaeth 1995; Segal and Spaeth 1996, 1999, 2002). The question that arises in a system of this kind is whether, and under what conditions, lower courts make decisions that are inconsistent with the precedent of higher courts.

As the highest court in the nation, the Supreme Court makes decisions that are binding on all lower courts, both federal and state. But, unlike Congress and the president, who are able to influence the behavior of agencies through the allocation of funds and personnel changes, the Supreme Court's ability to "control" lower courts is substantially limited. The primary power available to the Court to enforce its decisions is the ability to review, and overturn, aberrant decisions of lower courts. Compounding the inherent difficulty in using such a blunt instrument to induce compliance among lower courts, the docket of the Supreme Court has shrunk to fewer than 100 cases a year, reducing the likelihood of review of aberrant lower court decisions. When viewed together, this implies that these lower courts may be able to determine legal standards that are the product, not of Supreme Court precedent, but of their own preferences. This is particularly true for state supreme courts.

State supreme courts serve a dual role in interpreting both the United States Constitution as well as their own state constitutions, and taking primary responsibility for reconciling the two. Despite the fact that the Judiciary Act of 1789 gives the Supreme Court the right to review decisions of state supreme courts, justices on those courts do entertain a level of flexibility unknown to judges on the federal courts of appeals. State supreme courts generate, in absolute terms, far more decisions than do courts of appeals, making it more difficult for the Supreme Court to identify rulings that deviate from precedent. And lastly, one of the Supreme Court's primary responsibilities is to review and maintain consistency among the federal courts, suggesting that they will be more attentive to the product of courts of appeals.<sup>7</sup>

## Explaining State Supreme Court Responses

Although there has been some attention given to the relationship between federal courts of appeals and the Supreme Court (Cameron, Segal, and Songer 2000; Johnson 1979; Songer 1987; Songer, Segal, and Cameron 1994), it is by

no means clear how state supreme courts comport with decisions of the Supreme Court.<sup>8</sup> This is a glaring shortcoming, given the evolving role of state supreme courts in recent years. Some of the changes are clearly the result of forces internal to the state or institution itself, while others are potentially traceable to the actions of the Supreme Court. State supreme courts have become more professionalized, with increased support staff and other resources to assist in processing cases. Additionally, judicial elections have become more costly and competitive with greater fundraising efforts required by judicial candidates. At the same time, the Supreme Court struck state-level restrictions on campaign speech by judicial candidates, opening the door for candidates to air their views on potentially salient and controversial issues.<sup>9</sup>

The Court may have further contributed to the autonomy of state supreme courts, particularly in the area of civil liberties, through decisions in a pair of *Miranda* rights cases, suggesting that if state supreme courts relied on their own precedent, the Supreme Court could not review them.<sup>10</sup> While all of these may have contributed to greater independence of state supreme courts, we know little about whether in fact that is the case.

## The Role of Precedent

Supporters of the legal model of decision-making assume that judges base their decisions on the facts of the case, using one or more of a number of accepted modes of adjudication, such as original intent, textualism, or precedent. One argument for such an approach is that it is value neutral—the judge does not invest any of her own prejudices or personal beliefs in determining the outcome. Proponents also point out that such an approach provides stability and continuity in the law; if judges are basing their decisions on precedent, they cannot deviate far from accepted and well-settled areas of law in deciding the case before them. Only through repeated decisions over time do we get incremental changes in the law.

This legal approach, long espoused by law professors, is not without some support in the field of judicial politics, at least insofar as one tenet of the legal approach is concerned—the role of case facts. There are numerous examples of empirical research finding that case facts play an important role in cases before the Supreme Court (George and Epstein 1992; Schubert 1965, 1974; Segal 1984; Segal and Spaeth 2002), courts of appeals (Songer and Haire 1992), and state supreme courts (Brace and Hall 1995, 1997; Emmert 1992; Emmert and Traut 1994). Clearly, the specific fact situation plays some role in determining the outcome of cases decided by courts at all levels.

More controversial is the role played by precedent generally. Supporters of the attitudinal approach suggest that precedent is hardly binding and serves only to disguise the unfiltered assertion of judicial preferences through the opinion writing process (see Segal and Spaeth 1996, 1999, 2002). Few would quibble with the idea that precedent is not determinative, dictating specific

and clear outcomes based on previous cases. Yet even were we to assume that justices are single-minded seekers of policy, we should not assume that precedent is unimportant (see Epstein and Knight 1998; Knight and Epstein 1996a; Landes and Posner 1976; Spriggs and Hansford 2000, 2001, 2002; Wahlbeck 1997). In part, this is true because precedent guides decision-making in cases with similar fact situations.

More important from our perspective is that precedent can also be seen as a normative constraint on the behavior of judicial decision-makers. For example, Knight and Epstein write that

justices have a preferred rule that they would like to establish in the case before them, but they strategically modify their position to take account of a normative constraint in order to produce a decision as close as is possible to their preferred outcome.

(Epstein and Knight 1996a, 1021)

This suggests that acknowledging and using precedent is important for understanding the decisions of even politically-oriented actors in courts. Equally as important, it implies that we should pay careful attention to how precedent is used and treated by these actors.

### The New Judicial Federalism and the Place of States in the Judicial Hierarchy

Though the Supreme Court can at least partly constrain the behavior of lower federal courts, it is not clear that it can have similar success in the states. This is true because the relationship between state courts and the Supreme Court is not strictly hierarchical. That is, not all decisions handed down by the Supreme Court—even in issue areas that overlap with its jurisdiction—are open to Supreme Court review. This means that, in addition to factors that may allow *all* lower courts to avoid implementing decisions of the Supreme Court, state supreme courts can also rely on their own state constitutions and laws to determine the outcome of cases.

Ironically, the foundation for this independence is based on precedent. The Supreme Court decided in 1875 that it would not accept cases from states for review unless federal law was somehow implicated in the state supreme court's decision.<sup>11</sup> Essentially, this allows states to interpret their own constitutions and statutes free from review by the Supreme Court, unless that interpretation concerns a matter on which the United States Constitution has spoken. Supportive of the independence of state courts, the Supreme Court established, in 1875 in the *Murdock* case, the "adequate and independent state grounds test" as a guide for lower courts.

The Court's decision in *Murdock* and the idea of "adequate and independent state grounds" has taken on a renewed vigor in recent years. Responding

to an increasing conservatism on the Supreme Court, Justice Brennan, in a dissenting opinion in *Michigan v. Mosley*, called on states that wanted to avoid Supreme Court review to rely on their own law and constitutions in reaching liberal decisions in civil liberties cases.<sup>12</sup> He would later expand on this reasoning in *Mosley*, arguing that "decisions of the [Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law ... such decisions are not mechanically applicable to state law issues."<sup>13</sup>

At first blush, this implies that the impact of Supreme Court precedent on state court decisions should be limited. But this is not necessarily the case. First, Supreme Court precedent can be a useful strategic tool for state judicial actors. Since a large majority of state supreme court justices are *not* lifetime appointees and are therefore subordinates in local state political hierarchies, they may seek opportunities to use their specialized knowledge of Supreme Court precedent in order to "shirk" locally. The Supreme Court itself has an interest in maintaining its own latitude for reviewing state decisions and using that to affect policy change on a broader scale. For instance, Justice O'Connor, writing for the majority in *Michigan v. Long*, largely in response to Brennan's call to the states, argued that the Court would assume that decisions of state supreme courts did not rest on adequate and independent state grounds unless explicitly stated in the opinion.<sup>14</sup>

Reinforcing the call for a "new judicial federalism" are two types of political factors that encourage state court independence. As noted earlier, the ability of the Supreme Court to monitor and check lower courts is minimal. The sheer number of cases decided in both federal and state lower courts makes it impossible to recognize all instances where precedent is not followed or, even if this is recognized, to alter those decisions. Even more germane for the study of state courts is the fact that they *are* clearly embedded in local political hierarchies. In other words, state judges typically face political pressures from either voters or the political elite who influence their ability to retain office. Under some circumstances, these pressures may encourage the states to make decisions that are inconsistent with the policies outlined in Supreme Court decisions.

### Evidence of Judicial Impact and Unanswered Questions

While these arguments are persuasive, it is not entirely clear that state supreme courts ignore relevant Supreme Court precedent. Most simply, the ability of states to deviate from Supreme Court precedent on civil liberties issues is clearly truncated at one end of the political spectrum. Although they can offer *more* freedoms to individuals than are provided in the Court's interpretations of the Constitution, they technically are not allowed to make decisions that provide for *less* individual protection. One implication of this

for understanding the impact of precedent in the states is that *noncompliance* in search and seizure can only occur when state supreme courts limit freedoms and expand state power. This indicates that lower court latitude is restricted to one side of the political scale.

### Measuring State Court Behavior

From a theoretical standpoint, the lines of debate in judicial impact research are clearly drawn. On one side are scholars, primarily from law schools, who emphasize the importance of legal factors. To simplify the argument considerably, proponents of this perspective suggest that higher and lower courts seek to coordinate their behavior in such a manner that it produces coherent application of the law. The primary mechanism for implementing this coordination is the standards and guidelines embedded in precedent, particularly that issued by the United States Supreme Court. The idea here is not that lower courts are unthinking automatons that always make decisions that mimic the Supreme Court's, but that lower courts try to behave in a manner consistent with those decisions. Consequently, state supreme court justices look to precedent to guide their decision-making. And the clearer, more applicable precedent is to the cases they decide, the more impact it will have on their decisions. Based on such assumptions, there is a clear emphasis in this work on legal understandings and explanations of compliance.

On the other side are those scholars who see political factors underlying judicial compliance. While this side does not believe legal factors lack in importance, the assumption underlying this perspective is that political preferences and institutional context are fundamentally important to understanding judicial behavior. Thus this perspective sees the compliance with judicial precedent as being constrained by political conflict and enhanced by political agreement. Further enriching this perspective is an emphasis on the political institutions that can influence decision-makers. Therefore, some scholars investigate the ability of the Supreme Court to encourage lower courts to take their precedent seriously through review of their cases (Songer, Segal, and Cameron 1994). At the state level, others have sought to determine the extent to which mechanisms for selecting judges influence their responsiveness to the Supreme Court's precedent (Brace and Hall 1993, 1995, 1997).

Though proponents of both positions would accept that the other side has merit, they would also argue that the variables favored by their theoretical perspective have primacy. Is compliance driven mostly by legal factors, such as understandings of the law and applicability to new situations? Or, is it a decision driven principally by the ideological interests of legal actors operating in political context? Obviously, answers to these questions depend upon empirical evidence.

One method of evaluating impact used by scholars is to pick a specific case, or small set of landmark cases, in a specific issue area decided by the Supreme

Court, identify relevant lower court cases following that decision in the same issue area, and conduct in-depth analyses of those cases. Usually, this means that the researcher reads those lower court decisions and makes qualitative judgments about the applicability of the precedent, and how the lower court responded to the precedent. This method can be quite useful in understanding how specific cases in highly salient areas are interpreted and applied by lower courts. It provides us with rich descriptions of the interpretation and application of the Court's precedent by specific courts at a specific time. We are often able to learn much about the legal, political, and social forces that shape the lower courts' behavior, but we are not able to extrapolate beyond that case to understand whether the conditions that led to the response by those lower courts in that instance are generalizable to other cases, issue areas, and contexts.

A different approach to understanding compliance evaluates responses to Supreme Court decisions by gathering data on legal, political, and institutional variables and assessing impact across a large number of lower court cases. These studies complement the case study approach by providing theoretical and methodological approaches that can be applied to the study of judicial impact in other issue areas (Benesh and Reddick 2002; Brace and Hall 1997; Johnson 1987; Songer 1987; Songer and Sheehan 1990; Songer, Segal, and Cameron 1994).

These studies suffer from a different problem than that of the case studies—it is difficult to generalize about the effect of a Supreme Court decision to the hundreds and thousands of progeny generated by that decision without a tremendous loss in information that is specific to those cases. Legal issues are often quite complex and even with the inclusion of variables to capture the status of the litigants, the institutional environment, and the case facts, much information is lost that might be crucial to understanding the decision of the lower court judges.

Answers to substantive questions about judicial compliance depend deeply on methodological assumptions. Yet, that does not provide clear ground for moving the empirical discussion forward. As each side has different methodological predilections that can be justified on different epistemological grounds, there is the temptation to dismiss or downgrade evidence presented by the other side as unscientific (in the case of legal scholars) or de-contextualized (in the case of political scientists). Consequently, the methodological divide between the two arguments makes it difficult to make progress in understanding the substance of compliance. In short, resolution of debates about the factors that underlie compliance cannot be accomplished by looking solely at the empirical record as both sides can marshal considerable empirical support for their arguments.

## Defining Compliance

Existing definitions of compliance treat it as a two-dimensional concept with a legal dimension centered on the treatment of precedent, and a policy dimension focused on winners and losers (Benesh and Reddick 2002; Dickson 1994; Gruhl 1980). We advocate a definition that further refines this concept into four dimensions, each of which is grounded in existing research: the treatment of legal principle; the application of precedent by lower courts according to fact patterns; the relationship between precedent and policy change; and the extent to which the lower court relies on either federal or state law in making its decision. A graphical representation of the concept, along with the definitional elements that can be used to assess compliance for each, is shown in Figure 6.1. As a methodological matter, the four conceptual dimensions displayed in this graph may be considered as different types of compliance or as different elements of the same concept.<sup>15</sup>

### The Treatment of Legal Principle

One way to understand compliance is to assess the degree to which a lower court accepts the Supreme Court's interpretation of a statute or the Constitution (e.g. Spriggs and Hanford 2000). We restrict our definition of this dimension so that it only refers to lower court reactions to the *nature* of precedent, but not its *applicability* to the facts of the cited case. Such a distinction allows for the possibility of a greater range of behaviors in judicial compliance, giving us more leverage over understanding variation in the application of the law across jurisdictions. A lower court can react in three ways to the legal principle set by the Court. First, it may comply fully. Full compliance would

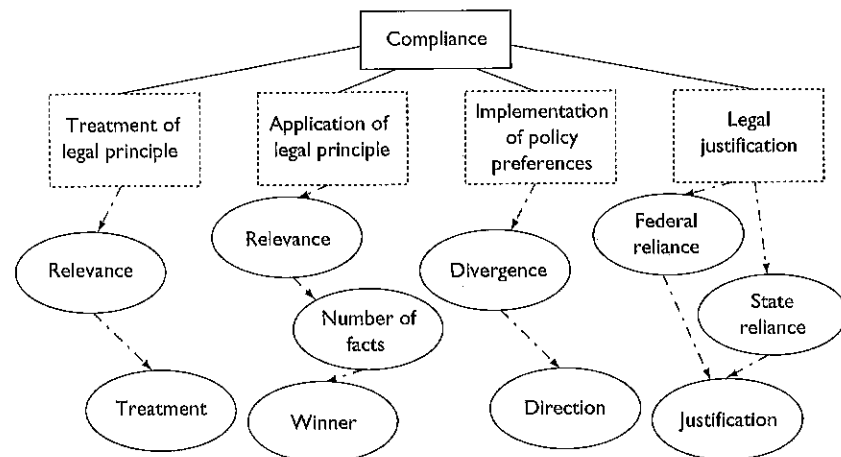


Figure 6.1 Dimensions of compliance and their attributes.

be characterized by the state supreme court embracing the legal reasoning of the Court. Second, it may signal its noncompliance openly. This would include some outright criticism of the legal standard's validity, applicability, or breadth of interpretation. Finally, a lower court could remain neutral, refusing to discuss the merits of the legal principle outlined in the precedent and remaining silent on the legal principles involved.

This definition focuses our attention on two attributes of a cited precedent in a lower court decision. The first is what we label the *legal relevance* of the standard outlined in the precedent; does the state supreme court discuss the validity of the legal standard enunciated in the precedent? Assuming that the standard is discussed, the second step is to determine how that standard is *legally treated*. Using *Shepard's Citation Service* rules, usage of key words like "controlling" and "followed" implies a compliant treatment, while a narrow interpretation of the statute or outright criticism suggests noncompliance.

### The Application of a Legal Principle

One definition of compliance relates to how precedent is applied to a particular set of case facts (Cameron, Segal, and Songer 2000; Segal 1984; Songer, Segal, and Cameron 1994). This view of compliance does not focus on a lower court's discussion of a particular legal principle's validity, but instead focuses on how similar the case before a lower court is to the case decided in the precedent. Thus this is a distinct, but nevertheless important, way in which lower courts can treat precedent based on the facts of the case. Such a definition has a clear basis in legal reasoning, where precedent is seen as a guide applied to varying fact patterns. In this context, compliance implies that a greater overlap in fact patterns between the case under consideration and the precedent-setting case should result in a higher probability that the lower court will make the same decisions as found in the precedent.

There are again three possible relationships between a higher court's decision and the behavior of the lower court relevant to this dimension of compliance. A compliant lower court decision would favor the same party as the higher court in the presence of the same facts whereas noncompliance occurs when the lower court favors a different party. The third situation is one of neutrality, where the facts highlighted by the higher court are not central to the primary legal controversy discussed in the lower court decision.

To determine which outcome applies to a particular case, we examine two attributes of state supreme court decisions. The first is *factual relevance* (which is different than *legal relevance*), which requires that the facts relevant to the lower court's decision at least be a subset of those highlighted by the Supreme Court precedent. For example, if a lower court is deciding on the legality of a search (a Fourth Amendment question), the presence or absence of *Miranda* warnings (a Fifth Amendment question) would not be appropriate for assessing this form of compliance. The second attribute is the extent to

which the facts in the lower case are congruent with those in the precedent, which we label *factual overlap*. As overlap increases, we assess compliance by comparing the outcome of the lower and higher court decisions.

Using the Supreme Court's decision in *Illinois v. Gates*—a Fourth Amendment case that established that search warrants could be issued based upon “the totality of the circumstances”—we coded for the following facts:

- 1 the presence of an informant;
- 2 if an informant existed, whether s/he was anonymous;
- 3 the presence of a warrant; and
- 4 a trial court finding of sufficient police corroboration of the informant's tip.

Finally, we judge compliance by examining the degree of factual overlap between the lower court case and the Supreme Court precedent and by comparing the identity of the winner in both cases. When most of these facts exist, compliance occurs when the lower court favors the state and upholds the search; when most of these facts do not occur we should see the state court more favorable to defendants, which is also compliant.

### **The Implementation of Policy Preferences**

Another crucial element of compliance revolves around the central question of politics—who wins and who loses? This is motivated by the belief that judicial actors are driven as much by their policy preferences as they are by legal considerations and political pressures. By treating this as a distinct form of compliance, we are implying that lower courts can engage in behavior that is *politically* noncompliant though it may be *legally* compliant.

Our definition takes advantage of the fact that qualitative examinations can go a step further. Generally, we begin by asking whether the lower court substantively changed the policy position set forth in the precedent (*policy divergence*) and evaluate it by examining the practical consequences of the state supreme court decision. In the context of *Gates*, this means asking whether the decision made the job of police easier or more difficult for establishing probable cause than in the standard set forth in *Gates*. Having established whether significant divergence exists, we also code the direction of that policy shift as being favorable to the police or favorable to defendants (*policy direction*).

### **The Legal Justifications for Lower Court Decisions**

The final form of compliance seeks to allow for varying behavior on the basis of how decisions are justified by different bodies of law. This is particularly important for the study of state courts because they can justify their decisions on state constitutions and statutes, potentially insulating themselves from

reversal. In order to properly conceptualize compliance, we must therefore consider what we call the legal justification for decisions.

The key consideration here is whether a lower court relies on federal law in its decision and, if it does not, whether there is reason to believe that the federal standard *should* have been considered. Even if a state court were to make a decision consistent with both the legal and policy principles of the Supreme Court, a decision to ignore the Court's standard is an assertion of independence and thus a form of noncompliance that can reflect variance in judicial behavior. Along these lines, there are three possible types of outcomes for this dimension. Compliance occurs when federal law applies to the controversy being addressed and the lower court justifies its decision in those terms. In this instance, using state law as part of the justification is not in and of itself inconsistent with compliance as long as the appropriate federal law is used in the decision. Conversely, a lower court is noncompliant when federal law appears to apply but is not the basis for the state supreme court's decision. If there is no reason for the federal statute to be controlling given the specific legal controversy before the lower court, then there is a neutral outcome.

To measure this dimension of compliance, we consider first whether both federal and state legal standards are applicable to the citing case (*federal applicability, state applicability*). We ask whether, according to the opinion writer in the citing case, federal law or the federal Constitution applies, and whether the state constitution or statutes apply. If federal law is considered to be applicable, we then examine the decision to establish whether the primary justification for the lower court's decision uses the standards established in the applicable federal statute or Constitution (*federal reliance*).

### **Explaining State Court Behavior**

The use of Supreme Court precedent by state supreme courts is complicated by the difficulty state judges have in reconciling state and federal law. While the Supreme Court has substantial power to review state courts, the relationship is not strictly hierarchical for reasons discussed above. Second, unlike judges on lower federal courts, state supreme courts are embedded in state political environments that include other actors with the ability to influence their decisions. Governors, state legislatures, and the public have means at their disposal to alter policy in response to the written decisions of state supreme courts. In that respect, state supreme courts are not much different than their federal counterparts. But unlike federal judges, the vast majority of state supreme court judges must stand for re-election or retention on a regular basis. Thus, there is an electoral component that may operate to constrain the decision-making process of state supreme court justices, further complicating their relationship with the Supreme Court.

We think that a more accurate representation would be what we call “an agent with two principals,” though even that understates the independence

and responsibility of state supreme courts. State supreme court justices are likely to be mindful of the importance of Supreme Court precedent, but they will also consider the implications of their decisions on the state level and the potential political consequences that may follow from these decisions. This is not to suggest that state supreme court justices are simply instruments of those at the state level with the power to retain those judges, but it does have profound implications for understanding how state supreme courts make use of Supreme Court precedent.

Consistent with theories of judicial behavior, we believe that state supreme court justices are driven by policy goals. However, we note that their ability to affect policy depends on their ability to remain on the court. As a result, state supreme court justices, most of whom do not enjoy life tenure, are driven by electoral as well as policy goals. We consider it axiomatic that state supreme court justices do not wish to be overturned by the Supreme Court. Further, we contend that they will respond differently to both state political forces and the Supreme Court as a result of how it relates to the probability of retaining their seat. Altogether this suggests that the decision-making of state supreme court justices is a function of three factors:

- 1 monitoring in the state political system;
- 2 monitoring by the Supreme Court; and
- 3 their own political preferences.

Our baseline expectation is that, in the absence of monitoring by any external actor, the decisions of state supreme court justices are largely a function of ideology, and Supreme Court precedent would have little, if any, impact. However, state supreme court justices are embedded in both legal and political environments. And for state supreme court justices the more relevant, and potentially harmful, monitoring comes from the state political system. Moreover, we argue that there is a key distinction in monitoring based upon whether judges must face some form of retention election. Because political elites are more likely to be interested in, and informed about, the actions of the state supreme court we expect them to exercise closer scrutiny of justices than will state electorates.

Although the state justices' retention motives and the Supreme Court's limited control over state courts should limit the impact of Supreme Court precedent on state decisions, we argue that monitoring by the Supreme Court still matters. What differs from the Court's monitoring of federal courts is that its impact depends upon the political position of the state court. When ignoring the Supreme Court benefits the ability of lower courts to signal their quality to the appropriate decision-makers at the state level, we wholly expect them to ignore precedent. However, there may be situations where conflict with the Court draws unwanted attention and hurts the chances of state judges retaining their seats, thus creating a situation where judges may be

more willing to follow precedent. The question, of course, is when monitoring by the Supreme Court interacts with local monitoring to create a situation in which they follow precedent.

Figure 6.2 shows how the probability of a pro-government decision changes with frequency of reversal. We compute probabilities for courts that are relatively liberal, moderate, and conservative and engage in this exercise for Supreme Court precedent that is both pro-individual (labeled as "Liberal" in the graph) and pro-government (labeled as "Conservative"). (These probabilities are derived from a set of statistical models, which for reasons of brevity we do not discuss here. Interested readers, however, may consult these models in the Appendix at the end of this chapter.)

The graph shows that in elite selection systems—regardless of whether the original Supreme Court decision favors the individual (Liberal) or the state (Conservative)—the frequency of reversal by the Supreme Court results in a decrease in the probability that the state will win. On its face, this result is somewhat surprising, though it might be understood as an indication that state supreme courts in states where the justices do not face the voters may believe that elite actors will be more aware of instances where they are in conflict with the Supreme Court, and therefore more likely to sanction them as a result for such deviance. Moreover, there is little evidence that the ideology of the state supreme courts is a factor, as the lines for liberal, moderate, and conservative courts are all quite similar.

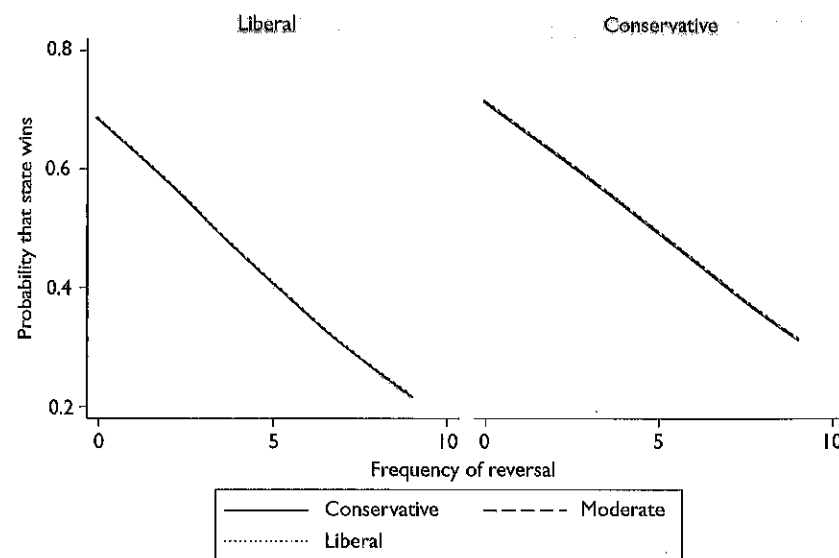


Figure 6.2 Impact of frequency of reversal, state court ideology, and the direction of Supreme Court precedent in elite selection systems.

Figure 6.3 shows the results for states that use competitive election systems to retain state supreme court justices. Here, there is a substantial difference in responses depending on the direction of the original Supreme Court precedent. When the precedent is liberal, the effect of increasing reversals is stark, as the probability of the state winning declines from a high of over 80%, regardless of the state court ideology, when there are no reversals, to less than 50% for states that have been overturned five or more times, and less than 30% for those reversed eight or more times. The picture is quite different for conservative precedent, as increased reversal has only a small impact on the probability of the state winning. The results suggest that there is more resistance to conservative precedent in these states, which is consistent with the idea that the Constitution sets a floor for individual rights and that states are free to grant greater protections to individuals.

## Conclusion

Our results have important implications for the understanding of Supreme Court–state supreme court interactions. The findings suggest that state supreme courts do often operate quite independently of the Supreme Court and that they use precedent of the Supreme Court instrumentally—generally in circumstances to further their own policy preferences or to improve their electoral fortunes. But the relationship is even more complicated. Though

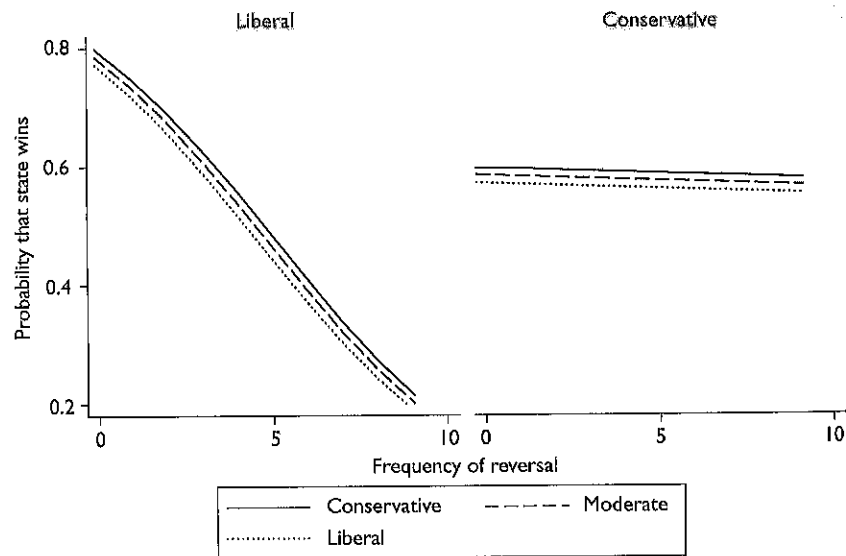


Figure 6.3 Impact of frequency of reversal, state court ideology, and the direction of Supreme Court precedent in competitive electoral systems.

states are bound by the Court's decisions in the area of search and seizure, they do often "shirk" from applying that precedent, suggesting that the application of Supreme Court precedent is not uniformly applied across the states, and that the reason for such variation is the result of institutional differences. The salience of a case to the Supreme Court and the degree of conflict that a state supreme court has experienced with the Supreme Court in the recent past condition the response by the state supreme court, though not always in the manner expected. Our research sheds light on the role of state institutional mechanisms as intervening factors in the application and use of Supreme Court precedent. Hopefully, this will lead to further research on the application of precedent in the states in other issue areas, taking account of further institutional differences among the states.



## Appendix

Table 6A.1 Models of State Judicial Decision-Making across Institutional Contexts

Independent variables	Elite selection		Competitive election		Merit retention election	
	$\beta$	Std. error	$\beta$	Std. error	$\beta$	Std. error
Search and seizure case facts	0.62	0.17***	0.28	0.15**	0.40	0.18**
Median state court ideology	0.00	0.01	-0.01	0.01	-0.02	0.01**
Supreme court decision direction	0.14	0.33	-1.20	0.41***	-0.91	0.61
Saliency	0.04	0.03	0.01	0.01	0.02	0.02
Frequency of reversal	-0.23	0.06***	-0.31	0.09***	-0.61	0.25**
Reversal * supreme court decision direction	0.04	0.09	0.30	0.10***	0.72	0.25***
Constant	-1.54	0.65**	0.90	0.50*	0.35	0.81
N	186		389		179	
Pseudo-R <sup>2</sup>	0.10		0.04		0.06	
Likelihood $\chi^2$	89.24***		22.74**		140.39***	
Log likelihood	-111.47		-252.82		115.30	

## Notes

These logit coefficients show the effect of political and legal variables on state judicial decisions across the three types of selection systems used in American states.

\*\*\* p < 0.01, two-tailed test. \*\* p < 0.05, two-tailed test. \* p < 0.10, two-tailed test.

## Notes

- 1 *Powell v. State of Georgia*, 510 S.E. 2d 18 (1998).
- 2 *Bowers v. Hardwick*, 478 U.S. 186 (1986).
- 3 *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).
- 4 See *Commonwealth of Pennsylvania v. Labron*, 690 A. 2d. 228 (1997), *Commonwealth of Pennsylvania v. Matos*, 749 A. 2d. 468 (1996), *Florida v. White*, 664 So. 2d. 442 (1995), *Montana v. Bullock*, 901 P. 2d. 61 (1995), and *Sitz v. Michigan Department of State Police*, 506 N.W. 2d. 209 (1993).
- 5 *Illinois v. Gates*, 462 U.S. 213 (1983).
- 6 *State of Connecticut v. Kimbro*, 496 A. 2d. 498 (1985), 507-508.
- 7 Rule 10 suggests that criteria for granting writs of certiorari include decisions of courts of appeals that are incongruent with federal law and Supreme Court precedent, and inconsistency among courts of appeals in applying that precedent.
- 8 Beiser (1968) focused on responses to a single reapportionment case by state and federal courts, though his study was limited to a very narrow time frame (1962-1964).
- 9 *Republican Party of Minnesota v. White*, 536 US 765 (2002).
- 10 See *Michigan v. Mosley*, 423 US 96 (1975) and *Michigan v. Long*, 463 US 1032 (1983).
- 11 *Murdock v. City of Memphis*, 20 Wall. 590 (1875).
- 12 *Michigan v. Moseley*, 423 US 96 (1975).
- 13 *Ibid.*, p. 502.
- 14 *Michigan v. Long*, 463 US 1032 (1983).
- 15 See Collier and Mahon (1993) for a discussion of different ways that concepts can be related.