

Lower Court Defiance of (Compliance with) the U.S. Supreme Court*

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Abstract

Why do lower courts defy (comply with) higher courts? To address this question, we assess two distinct and, to some extent, competing theoretical accounts. The first, suggested by prominent law professors, is a model based on the theory of teams, which assumes a shared conception of the judicial role. The other is a principal-agent model that assumes heterogeneous policy preferences among judges and examines the incentives and opportunities created by various institutional features of the modern judicial hierarchy.

So that there will be no mystery about it, we find that the answer lies neither exclusively in team theory nor in the agency model but rather in the intersection between the two: lower court judges engage in *dynamic hierarchical interpretation*, that is, they are far more attentive to the the sitting Supreme Court than to their own ideological preferences or even to the Supreme Court that enacted the precedent. This finding, as we sketch at the end of the paper, has important implications for the study of higher *and* lower courts.

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In its landmark decision in *Bakke v. California* (1978), the U.S. Supreme Court ruled that universities may, under certain circumstances, take race and other factors into account when they make admissions decisions. But even before the justices had the opportunity to reconsider *Bakke* in *Grutter v. Bollinger* (2003), the U.S. Court of Appeals for the Fifth Circuit took matters into its own hands. In *Hopwood v. Texas* (1996, 963), it held “that the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school’s poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school.” With these words, the judges of the Fifth Circuit, at least according to their colleagues in dissent, took the dramatic step of defying precedent established at the top of the judicial hierarchy, the Supreme Court of the United States.

Scholars and journalists alike have spilt much ink over *Hopwood*, as well as over the Fourth Circuit’s decision in *United States v. Dickerson* (1999), holding that states under its supervision need not follow *Miranda v. Arizona* (1966) and the Missouri Supreme Court’s overruling of *Stanford v. Kentucky* (1989) in *Simmons v. Roper* (2003). And, yet, these decisions are merely the most striking instances of a more general phenomenon, lower court deviation from precedents set by a higher court—a phenomenon that can take far subtler forms (e.g., distinguishing or limiting precedents). Indeed, as one observer noted well over half a century ago, “[Many] precedents have been rejected through the stratagem of distinguishment; others have been the subject of conscious judicial oversight. As a consequence, judicial discretion among ‘inferior’ judges is not so confined and limited as legal theorists would have it” (Comment 1941, 1448-9; see also Canon and Johnson, 1998; Murphy 1959).

This observation raises a question that, depending on one’s perspective, may be posed two different ways: *Why do lower courts defy higher courts*, or, given the minute percentage of lower court cases that are heard and reversed (these days, well under 1%), *why do lower courts comply with higher courts?*

Scholarly attempts to address these questions take several forms.¹ One is a line of inquiry aimed at identifying the circumstances that lead to deviations, subtle or overt. Baum (1978), for example, suggests that lower courts will be less responsive to the U.S. Supreme Court in controversial civil liberties cases, and that the clarity of the precedent, the perceived legitimacy of the Court’s ruling, and perception by lower court judges of the chances of review also affect the likelihood of compliance (see also Canon and Johnson, 1999). Another has focused on socialization and conformity to legal culture as the critical causal mechanism. Robert Cover’s (1975) noted study of the enforcement of the Fugitive Slave Act by abolitionist judges, for example, emphasizes the moral quandary posed by the judges’ twin commitments to abolition and rule of law (see also Howard, 1981).

¹This literature stresses, as we do, explanations for why lower courts defy higher courts. But there also are many, albeit “not comprehensive” (Songer, 1991, 43) studies seeking to describe or assess the extent of defiant (or compliant) behavior among lower federal court judges (e.g. Baum, 1980; Beatty, 1972; Beiser, 1968; Canon, 1973; Canon and Kolson, 1971; Gruhl, 1980; Johnson, 1987; Manwaring, 1968; Peltason, 1961; Reid, 1988; Tarr, 1977; Songer, 1987; Songer and Sheehan, 1990; Vines, 1969). These studies have reached mixed conclusions or, as Songer (1991, 43) notes, “the overall extent and frequency of noncompliance and evasion is unclear.”

More recently, scholarly efforts, conducted both by social scientists and legal academics, have shifted focus from individual socialization to structural incentives created by the design and operation of organizations. In broad terms, this move is part of the new institutionalism that swept the social sciences in the 1990s and continues to hold sway today. But scholars adopting a new institutional perspective have failed to converge on a singular model of lower court behavior in the hierarchy of justice. Quite the opposite: They have elaborated two distinct and, to some extent, competing accounts. The first, suggested by prominent law professors, is a model based on the theory of teams. The other is a principal-agent model that assumes heterogeneous policy preferences among judges and examines the incentives and opportunities created by various institutional features of the modern judicial hierarchy.

The goal of this research is to contribute to the burgeoning literature on new judicial institutionalism, empirically and theoretically, by deploying the two models to answer our primary research question— why do lower courts defy (comply with) higher courts? So that there will be no mystery about it, we find that the answer lies neither exclusively in team theory nor in the agency model but rather in the intersection between the two: lower court judges engage in *dynamic hierarchical interpretation*, that is, they are far more attentive to the the sitting Supreme Court than to their own ideological preferences or even to the Supreme Court that enacted the precedent. This finding, as we sketch at the end of the paper, has important implications for the study of higher *and* lower courts.

1 Theoretically Modeling Lower Court Defiance (Compliance)

Reflecting the usual, if not overdrawn, theoretical division between legal academics and political scientists comes two competing approaches to the study of the judicial hierarchy: team theory, which places emphasis on a shared conception of the judicial role and the agency model, which assumes pervasive value conflict among judges. In what follows, we describe both—though, owing to its less extensive airing in the political science literature, we dwell a bit more on team theory.

1.1 Team Theory

Within the legal academy, analytically-minded scholars who theorize about the logic of the judicial hierarchy have converged on an approach that draws on the theory of teams. A branch of economics, this theory is concerned with the efficient organization of individuals who share a common goal but control different decision variables and base their decisions on (possibly) different information (Radner 1987). As applied to the judiciary, the essential idea is to assume that judges have no value conflicts whatsoever; that is, they all share the same utility function. Hence, the object of judging is to decide as many cases “correctly” as possible. The point of the analysis is to see whether notable features of the judiciary (e.g., a hierarchy, *stare decisis*, and collegial courts) emerge endogenously in such a setting, as a logical consequence of the effort by the “judicial team” to organize itself effectively (e.g., Caminker, 1994b,a; Daughety and Reinganum, 2000; Dorf, 1995; Kornhauser, 1989, 1995; Rogers, 1995; Shavell, 1995). The flavor of the analysis is well-conveyed by Kornhauser’s summary of his 1995 study:

I have argued that one may derive several features of the federal judicial system in the United States from a relatively simple model. When one regards the judiciary

as a resource-constrained team that seeks to maximize the expected number of correct decisions, one would expect, under plausible assumptions about the “technology of legal deliberation,” a system with distinct trial and appellate courts. Moreover, one would expect a pattern of precedent similar to the one we observe: strict vertical precedent, no horizontal precedent at the trial level, and strict horizontal precedent at the appellate level. In this model, then, even if the judiciary has no substantive reason to promote certainty or uniformity, these qualities will emerge as collateral consequences of the organizational aim of getting decisions right.

Some of the results in team models are driven by resource scarcity. Vertical stare decisis, to provide but one illustration, is seen partly as a device for economizing on judicial time and effort, driving litigants to settle early and avoid pointless appeals. Other results are driven by information asymmetries. For example, when rule making in hard cases is delegated to a resource-rich group of experts (e.g., the U.S. Supreme Court), vertical stare decisis becomes an efficient way for less well-endowed and hence less knowledgeable judges in lower courts to make decisions cheaply and, on average, correctly. The best they can do is to follow the lead of thoughtful experts who supply the team with a public good in the form of a legal rule or doctrine.

Within this class of models, the phenomenon of “defiance” cannot arise, but a rather similar phenomenon, underruling, does. Underruling (in contrast with overruling) occurs when a hierarchically-subordinate court rejects a rule supplied by a hierarchically-superior court (Caminker, 1994b; Kornhauser, 1995; Bhagwatt, 2000). How can this occur in a team model? Primarily, circumstances may have changed so much since the original rule was announced that it is now antiquated and needs to be replaced by a new rule, or, additional evidence acquired after the articulation of the initial rule shows that the rule was made in error and now requires revisions.² At least prior to *Grutter*, this rationale might have been applicable to the *Bakke* “underruling.”

1.1.1 A Team Model: Stare Decisis as an Information Cascade

Team models of the judicial hierarchy are so new that formalization is rare and systematic empirical evaluation, even rarer.³ We remedy this situation by proposing a model that is in line with the existing conceptualization but capable of generating testable propositions. This model assumes stare decisis emerges endogenously in the judicial hierarchy as a result of information asymmetries and resource constraints. The key mechanism is an “information cascade,” which occurs when it is optimal for an individual, having observed the actions of those ahead of her,

²Another, though less interesting, possibility is that the case before the lower court may appear to be covered by the rule but in fact is sufficiently different that a new and different rule is required.

³Even so, several studies by social scientists and legal scholars are suggestive, if not definitive. Research by Songer and Reid (1989) shows that decisions produced by the Courts of Appeals and District Courts in economic cases became more liberal after the Supreme Court’s “switch in time that saved nine”—and not as a result of the influx of Roosevelt appointees to the federal bench between 1933 and 1936. Songer and Sheehan (1990) provide convincing evidence that the appointment of Democratic judges to the lower federal courts had no appreciable effect on their rulings in most areas of the law; rather, they tended to follow the Supreme Court’s decisional patterns. Eisenberg and Johnson (1991) and Ashenfelter et al. (1995) demonstrate that at the district and circuit court levels putatively liberal and putatively conservative judges decide cases the same way. This result holds even in ideologically-charged areas such as civil liberties and race discrimination. Finally, in a study of appellate court decision making, Klein and Hume (2003, 602) suggest that compliance with Supreme Court rulings, regardless of ideology, follows from “judges’ attempts to reach legally sound decisions.” This, the authors write, “is almost certainly the explanation judges would offer, and there is reason for scholars to take it seriously.”

to follow the behavior of the preceding individual without regard to her own information. Since publication of the seminal paper on cascades (Bikhchandani et al. 1992), models of this kind have been used to study many social phenomena, from democratic transitions in Eastern Europe to trends in fashion. And while they have yet to be invoked to study stare decisis, the application seems quite natural. The model specifies the conditions in which stare decisis—following the previous action of the Supreme Court—emerges as a result of an information cascade. It also indicates how a cascade can end, such that lower courts, under certain circumstances, will deviate from precedent.

Let us sketch the basic model. Assume n lower courts and two possible states of the world, $\Omega = \{1, 2\}$. Further assume the existence of two possible legal rules or doctrines, $D = \{1, 2\}$, one of which must be employed by a judge hearing a case of the given variety. For each judge, utility $U_i = 1$ if $\omega = d$ if (that is, the doctrine matches the state of the world), but 0 otherwise. (Recall that all judges have the same utility function in a team model. The subscripts index the judges.) In other words, if the true state of the world is 1, each member of the judicial team wishes to implement $d = 1$. But if the state of the world is 2, each will prefer $d = 2$. The prior probabilities of each state, $q(1)$ and $q(2) = 1 - q(1)$, are given positive numbers and common knowledge. Judges hear cases sequentially. Upon hearing a case, a judge receives a private, noisy signal about the state of the world, $s \in S = \{1, 2\}$. All the signals are conditionally independent. Given a state of the world ω , with probability $p_i > \frac{1}{2}$ $s = \omega$ and with probability $1 - p_i$ $s \neq \omega$. In other words, if $\omega = 1$ then with probability $p_i > \frac{1}{2}$ $s = 1$; but if $\omega = 2$ then $s = 2$ with $p_i > \frac{1}{2}$. Thus, having heard a signal, the expected utility of adopting Rule 1 is $\gamma \cdot 1 + (1 - \gamma) \cdot 0 = \gamma$, where γ is the Bayesian posterior belief that $\omega = 1$. Judges cannot see the signals observed by earlier judges, for to do so would require knowing all the material that emerged in the earlier proceeding. But the instant judge can see the rule used by the earlier judges, and *infer what their signals must have been if they ruled the way they did*. Thus, the Bayesian posterior belief of the instant judge reflects not only her private signal, but what she can infer about the private signals of judges who earlier had heard a similar case.

The critical feature of this model is that, quite rapidly, the information received from the prior judges “overwhelms” the value of the private signal heard by the instant judge. At that point, the instant judge will rule in a given way (reflecting the earlier signals) regardless of her private signal—an “information cascade” begins. And, from this point forward, no additional information will be revealed by the judges’ actions, since subsequent judges no longer can learn anything from looking at the actions of judges who ruled after the cascade began. Hence, they will all follow precedent. Bikhchandani et al. (1992) also show that more precise signals lead more readily to a cascade. They further demonstrate that publicly observable information—a common signal—can end a cascade.

1.1.2 Team Theory Hypotheses

From this sketch model and based on the results in Bikhchandani et al. (1992), we develop several clear predictions—all of which center on the notion of signals. Specifically, on a team account lower courts will be more likely to deviate from (underrule) Supreme Court precedent when:

H1.1: There were complex issues in the case such that the signals it generates may be imprecise.

H1.2: There were conflicting signals from the enacting Supreme Court over the doctrine in the

governing case.

H1.3: There are signals from subsequent Supreme Courts, observed by most judges, indicating that the precedent was mistaken or in error (so the precedent may require revision).

1.2 Agency Theory

While the legal approach encapsulated in the team model has gained momentum in law schools, it is agency theory that has attracted the attention of most political scientists (e.g. Moe, 1984; Songer et al., 1994; Cameron et al., 2000; Brent, 2003). The fundamental assumption of agency theory is that value conflicts are pervasive in organizations. The creation and application of rules—generic problems in bureaucracies—are occasions for political struggle. The outcomes of these struggles reflect the power of the bureaucratic contestants. In turn, the details of organizational design and operating procedures (“the rules of the game”) determine power. Theoretical investigations proceed by introducing agents (with value conflicts) into a game-theoretic rendering of an organizational procedure. Within the context of the model, the researchers deduce the consequences for organizational performance.

When applied to the federal judiciary, the agency perspective refuses to privilege one set of rulings as “correct” and another as “incorrect.” Rather, legal doctrine within the federal judiciary emerges from an unrelenting struggle between the few—the hierarchical superiors—and the many—the hierarchical subordinates. In turn, the details of the organizational design and the rules of legal procedure determine the power of the contestants. But which details are important in determining power? In broad terms, features that allow lower courts to take hidden actions, acquire private information, or otherwise evade sanctions will enhance their discretionary power; features that reveal hidden actions or information, or increase the sanctioning capacity of the higher courts will enhance their power.

With respect to sanctioning capacity, the U.S. federal judiciary is remarkable as a hierarchical organization to the extent that nominal superiors have almost no “high powered” incentives at their disposal. The justices of the U.S. Supreme Court cannot hire, fire, promote, demote, financially reward or penalize members of the Courts of Appeals or District Courts. Accordingly, agency analysis has focused on the one clear power the Supreme Court does have over lower courts; namely, the power to reverse their decisions. It is often posited that reversal itself is a sanction among federal judges.⁴

Although agency analysis too remains in its infancy, it has generated at least three strategic models⁵—all of which may differ in their details but nonetheless share a critical feature; namely, they draw a distinction between the preferences of the enacting Court (embodied in the existing legal doctrine), the policy preferences of the contemporaneous Supreme Court (i.e., the Court sitting at the time the lower court hears the case), and the policy preferences of the lower court hearing the case. In other words, in all principal-agent models of the judiciary, three configurations

⁴On the empirical plausibility of this assumption, see Caminker (1994b) and Cross and Tiller (1998); for a study questioning it, see Klein and Hume (2003).

⁵Two emphasize litigant policing by affected parties (see generally McCubbins and Schwartz, 1984; Lupia and McCubbins, 1994) and strategic auditing by the Supreme Court in settings of “adverse selection” (e.g., Cameron et al., 2000) while a third highlights implicit “tournaments” to avoid review among lower court judges in a setting of moral hazard (e.g. Cameron, 1993; Kornhauser, 2000). I.e., the first two models stress the importance of hidden information and the latter, hidden actions. In subsequent studies we intend to explore these variants; here we focus on their considerable overlap.

of the players in ideological space (depicted in Figure 1) are of particular interest. In Configuration 1, the lower court undertakes doctrinal deviation if it pursues its own preferences. But, by so doing, it engages in what we might call “hierarchical conformity,” as the lower court’s action actually conforms to the preferences of the contemporaneous Supreme Court. In Configuration 2, the lower court—if it pursues its own preferences—engages in doctrinal conformity but hierarchical “deviation” to the extent that it will reach a decision distant from the preferences of the sitting Supreme Court. In Configuration 3, a lower court that pursues its own preferences engages in both doctrinal and hierarchical deviation.

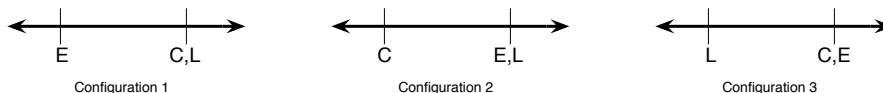


Figure 1: Preferences of the enacting Supreme Court (E), the contemporaneous Supreme Court (C), and the contemporaneous lower court (L).

Following from these configurations are four hypotheses common to all principal-agent models. Specifically, lower courts will be more likely to engage in the doctrinal deviation when:

H2.1: The spatial location of preferences conforms to Configuration 1 rather than to Configurations 2 or 3. That is, a lower court (L) is most likely to deviate from the enacting Court (E) when it is allied with the contemporaneous Court (C) against the enacting Court.

H2.2: The distance between E and C increases, controlling for configuration.⁶ Thus, even when the lower court prefers the enacting Court’s doctrine, increasing the distance from the enacting Court to the contemporary Court leads reversal-sensitive judges to shy away from the enacting Court’s doctrine.

H2.3: The distance from E and L increases, controlling for configuration (see note 6).

H2.4: The distance from C and L increases, controlling for configuration (see note 6).

2 Research Tasks

With the two accounts of lower court defiance (compliance) now sketched, we turn to our scheme for assessing their observable implications. In general terms, we confront a four-fold task: (1) generate a random sample of U.S. Supreme Court cases; (2) track the responses of lower courts to the doctrine established in these cases (the dependent variable for all the hypotheses); (3) collect the data necessary to animate the independent variables; and (4) implement statistical models, testing for the influence of theoretically-critical variables.

⁶This distance is large in Configurations 1 and 2, and small in Configuration 3. Thus, if one does not control for configuration, the hypothesis will not hold.

2.1 Dependent Variable

For all the hypotheses the dependent variable is the response of lower courts to precedent established by higher courts. While it would be possible and even desirable to study, say, the relationship between state supreme courts and the federal high court, we focus on the responses of the more obvious judicial inferiors, the U.S. Courts of Appeals, to their clear superior, the U.S. Supreme Court.

To assess these responses, we drew a random sample (from Spaeth, 2006) of size 500 of all orally-argued Supreme Court cases decided between the 1953 and 1990 terms.⁷ Next, following the lead of many other judicial specialists (e.g., Johnson, 1979; Spaeth and Segal, 1999; Spriggs and Hansford, 2000, 2001, 2006), we relied on *Shepard's Citations* to determine how circuit court *panels* responded to each U.S. Supreme Court case (through 2000).⁸ *Shepard's* (which we accessed via LEXIS) identifies every decision produced by a U.S. Court of Appeals that “treated” the Supreme Court case. It also typically specifies the nature of circuit court’s treatment (e.g., whether the court “followed” “explained,” “criticized” the precedent) —thereby enabling us to capture deviations from (compliance with) extant rules in ways reliable, valid, and accessible.⁹

In our sample each U.S. Supreme Court case generated, on average, 20.49 circuit court citations that fell into one of *Shepard's* treated response categories (N=10,244). In line with Spriggs and Hansford (2000), we collapsed the more particularized responses into the three categories of *comply*, *neutral*, and *deviate*, as indicated in Figure 2.¹⁰ Perhaps not so surprisingly, the compliant “Followed” was the modal response. Note, though, that roughly one out of every three responses was defiant, whether out-and-out reversals (“Overruled”) or more subtler forms of evasion, such as “Distinguished” and “Criticized.”

⁷The random sample of size 500 represents about 10% of all orally argued cases (N=4879) during the time frame and using `dec_type=1, 6, or 7` and `anal=0` in Spaeth (2006). We end with the 1990 term in order to provide a sufficient time horizon for lower court response.

⁸We emphasize “panels” to indicate that we exclude en bancs from our analysis.

⁹At the same time, we, like others who have invoked *Shepard's*, recognize that it does not supply a perfect rendering of judicial treatment of Supreme Court cases (e.g., Johnson, 1979; Spaeth and Segal, 1999). But, also like our predecessors, we know of no other method for classifying responses to U.S. Supreme Court cases that is, at the very least, as *reproducible* and *efficient* as *Shepard's*—especially when dealing with large numbers of cases. Even more to the point, work by Spriggs and Hansford (2000) demonstrates a surprising degree of reliability in the case treatment analyses conducted by *Shepard's*, thus countering the chief criticism of it.

¹⁰These categories indeed follow from Spriggs and Hansford (2000, 2001) but we considered several alternatives. E.g., we created a five-category variable (Followed, Explained, Distinguished, Criticized, and Overruled); a different three-category version, which eliminated the potentially problematic treatment of Explained (Followed, Distinguished, Criticized/Overruled); and a dichotomous variable (Comply, Deviate). Though increasing the categories occasionally required us to use multinomial, rather than ordered, logit, our substantive findings are robust to these alternative specifications.

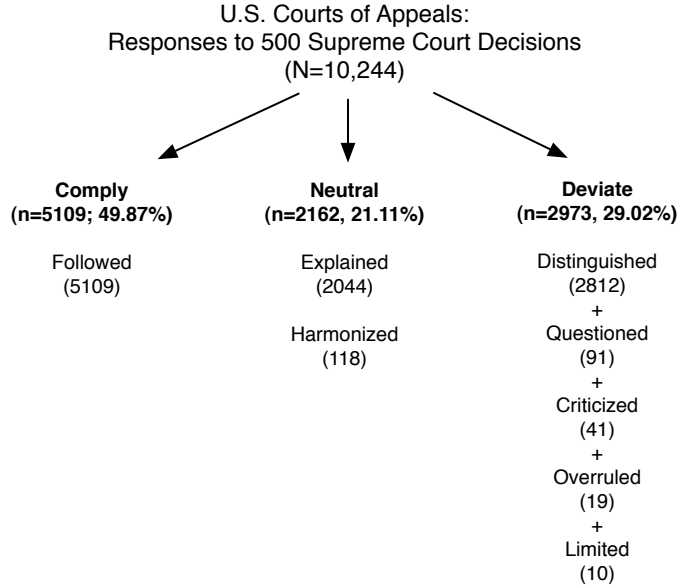


Figure 2: *Shepard's* classifications of circuit court responses to 500 randomly selected U.S. Supreme Court decisions. In bold we place the three values of our dependent variable; below each value are the subcategories of which the three values are composed (with their ns in parentheses). In the “Overruled” subcategory, we include 11 “Not Followed” responses.

2.2 Independent Variables

Table 1 lists the key independent variables for each of the working hypotheses, as well as the measures and the sources of the data we used. Because some are entirely transparent or conventional in the field (e.g., the number of dissents and special concurrences in the enacting case as an indicator of “conflicting signals from the Supreme Court”), they require little elaboration.

Hypothesis	Measurement of Independent Variable/Data Source
Team Theory	
H1.1: There are complex issues in the case.	Issue Complexity , following (Maltzman et al., 2000), is the number of issues and laws involved in the case, as coded by Spaeth (2006).
H1.2: There are conflicting signals from the enacting Supreme Court	Conflicting signals are the number of dissents and special concurrences (Extra Opinions) filed by the enacting Supreme Court justices, as coded by Spaeth (2006).
H1.3: There are signals from subsequent Supreme Courts, observed by most judges, indicating that the precedent was mistaken or in error.	Subsequent signals are represented by two variables: Negative Treatment (total number of negative Supreme Court citations to the precedent, as coded by <i>Shepard's</i> , preceding the circuit court's decision) and Positive Treatment (total number of positive Supreme Court citations to the precedent, as coded by <i>Shepard's</i> , preceding the circuit court's decision). See, generally, Spriggs and Hansford (2001).
Principal-Agent Model	
H 2.1: The lower court is allied with the contemporaneous Court against the enacting Court	Preferences of the circuit courts and the enacting and contemporary Supreme Courts are represented by Judicial Common Space scores from Epstein et al. (2006) (see the text for a description).
H 2.2. The distance from the enacting Court and the contemporaneous Court increases, controlling for configuration	See H 2.1.
H 2.3. The distance from the enacting Court and lower court increases, controlling for configuration	See H 2.1.
H 2.4. The distance from the contemporaneous Court and lower court increases, controlling for configuration	See H 2.1.

Table 1: Hypotheses and measures of the independent variables. In all cases, we expect the probability of lower court deviation to increase when the hypothesis holds. See the Appendix for a statistical description of the variables.

Somewhat more novel is our strategy for assessing hypotheses flowing from the principal-agent model—all of which center on the idea of ideological distance (whether between the contemporary and enacting Court or between the Court and the panel). To facilitate these comparisons, we adopt the approach set out by Epstein et al. (2006).

In brief, Epstein and her colleagues developed a measurement strategy designed to place Supreme Court justices and Court of Appeals judges into the same policy space—a space they deem the “Judicial Common Space” (JCS).¹¹ To assess the preferences of justices, the Epstein team relied on the Martin-Quinn scores (see Martin et al., 2005; Martin and Quinn, 2005); for circuit court judges, they invoked the state-of-the-art measure developed by Giles et al. (2001, 2002), which readily maps into the Poole and Rosenthal Common Space scores. The final step taken by Epstein et al. was to transform the theoretically unbounded Martin-Quinn scores into bounded Common Space scores, thus resulting in a common metric for the ideology of Supreme Court justices and Court of Appeals judges (and, as a bonus feature, members of Congress as well).

Our study, of course, requires several additional steps: identifying the preferences, first, of the

¹¹We need not provide too many more details because Epstein et al. have made their work (and data) available at <http://epstein.wustl.edu/research/JCS.html>.

enacting Supreme Court (embodied in the existing legal doctrine) and second, of the contemporaneous Court and of the panel hearing the case. For the former, we rely on the JCS score of the median member of the majority coalition;¹² for both sitting courts (Supreme and circuit panel) we make use of the JCS score of their median member.

Figure 3 houses a simple illustration of (our deployment of) the Epstein et al. strategy, depicting the JCS for a lower court deviation we referenced at the paper’s outset: *Dickerson* (a departure from *Miranda*). Note that the JCS resembles Configuration 1 in Figure 1: the enacting (*Miranda*) Court is well to the left of the Fourth Circuit *and* to the Supreme Court (in 1999, when the Fourth decided *Dickerson*).

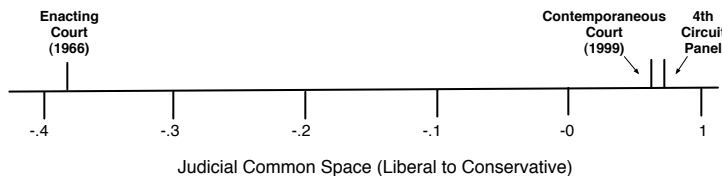


Figure 3: Enacting and contemporaneous judicial regimes in the Judicial Common Space for the Fourth Circuit in *U.S. v. Dickerson* (1999). The Enacting Court is the median of the majority coalition in *Miranda* (1966). The Contemporaneous Court is the median of the Supreme Court at the time the circuit decided *Dickerson*.

Seen in this way and at least on the agency account, it is not particularly surprising that the Fourth engaged in doctrinal deviation but hierarchical conformity. Equally plausible, though, is that the lower court “underruled” in *Dickerson*, as team theory might suggest. Perhaps, as a good team player, it acted on signals from both the enacting and contemporaneous Supreme Courts that the initial rule was problematic and so required revision or even eradication. *Miranda* was, after all, a 5-4 decision replete with three dissents in part or in full. Moreover, in the years leading up to *Dickerson*, the Supreme Court had not been entirely unwavering in its allegiance to the 1966 rule.¹³

3 Results

This is but arm-chair speculation on our part. Only by systematically and simultaneously assessing the two accounts of lower court deviation from (compliance with) Supreme Court precedent can we reach conclusions of a higher and more certain quality.

To do so, we require a statistical model that attends to the ordinal characterization of the dependent variable: circuit court treatment of Supreme Court precedent (ranging from “compliant” to “neutral” to “defiant”). The ordered logit model naturally came to mind (McKelvey and Zavoina, 1975), and because the data passed the considerable diagnostic tests through which we put them,¹⁴

¹²For variables relying on the enacting Court, we checked an alternative measure: the median member of the Court rather than the median member of the majority coalition. The results (as depicted in Table 2) do not change in any meaningful statistical or substantive way.

¹³*Shepard’s* lists several instances of negative treatment, including, e.g., *Illinois v. Perkins* (1990), *Oregon v. Elstad* (1985), and *Roberts v. United States* (1980). See also the Fourth Circuit’s decision in *Dickerson*.

¹⁴The ordered logit model assumes that the effects of the estimated coefficients are constant across the choices (known as the proportional odds assumption). While political scientists rarely invoke them, straightforward Wald

we deploy it here— with Table 2 displaying the estimates.¹⁵

Variable	Coefficient	(Std. Err.)
Equation 1		
Issue Complexity	0.006	(0.028)
Extra Opinions	-0.076**	(0.023)
Negative Total	0.030**	(0.009)
Positive Total	-0.053**	(0.007)
Distance between Enacting & Contemporaneous Court	0.723**	(0.140)
Distance between Enacting Court & Panel	0.023	(0.098)
Distance between Contemporaneous Court & Panel	0.014	(0.124)
Equation 2 : cut1		
Intercept	0.002	(0.076)
Equation 3 : cut2		
Intercept	0.911**	(0.076)
N		10206
Log-likelihood		-10498.948
$\chi^2_{(7)}$		101.51

Table 2: Ordered logit estimation results. ** $p \leq .01$. Robust standard errors are in parentheses. The dependent variable captures circuit court responses (ranging from positive to neutral to negative) to precedent established in Supreme Court decisions. Variables associated with Team Theory are: **Issue Complexity** (the number of issues and laws in the enacting Court’s decision); **Extra Opinions** (the number of dissents and special concurrences filed by the enacting Supreme Court justices); **Negative Treatment** (total number of negative Supreme Court citations preceding the circuit court’s decision); **Positive Treatment** (total number of positive Supreme Court citations preceding the circuit court’s decision). We expect all but **Positive Treatment** to be positively related with the dependent variable. Variables associated with the Agency Model are **Distance between Enacting & Contemporaneous Court** (ideological distance between the Supreme Court that decided the case and the Supreme Court sitting at the time the circuit court makes its decision), **Distance between Enacting Court & Panel** (ideological distance between the Supreme Court that decided the case and the circuit court panel at the time it makes its decision); and **Distance between Contemporaneous Court & Panel** (ideological distance between the Supreme Court at the time of the circuit court’s decision and the circuit court panel at the time it makes its decision). We expect all three variables to be positively associated with the dependent variable.

As we can observe, the results lend partial support to both accounts of lower court defiance (compliance). Turning first to the theory of teams, note that neither feature of the enacting Court’s decision operates in the hypothesized direction. The relative complexity of the case (i.e., the number of issues and laws) fails to achieve statistical significance and the presence of conflicting signals (i.e., the number of multiple opinions) is incorrectly signed.

On the other hand come two findings in strong support of team theory—both of which center tests can be used to test this assumption (Brant, 1990). In our model, **Negative Total** is the only variable indicating some evidence of a violation of the proportional odds assumption but it nonetheless passed the iterated Wald test.

Still, to err on the safe side, we estimated a series of models in which the proportional odds assumption was relaxed: a constrained and unconstrained generalized ordered logit and a multinomial logit models. Based on this diagnostic work, we need not alter any of the substantive conclusions we offer.

¹⁵Note that the N is 10206, not 10244 as depicted in Figure 2, owing to missing data (typically JCS scores) on a handful of lower court judges.

on signals sent by subsequent Courts. Not only are the coefficients on **Positive Treatment** and **Negative Treatment** statistically significant (and in the expected direction) but, more importantly, as we show in Figure 4, their substantive effect is rather impressive. If the justices had never negatively referred to an extant precedent prior to the panel’s decision, the predicted probability of a compliant response is nearly .50.¹⁶ That figure reduces to .363 when **Negative Treatment** (indicated by the solid circles) is at its maximum of 16.¹⁷ Alternatively, the odds of deviation (not depicted in the figure) under those extreme circumstances increase to .414 (the 95% confidence interval is [.352, .475]).

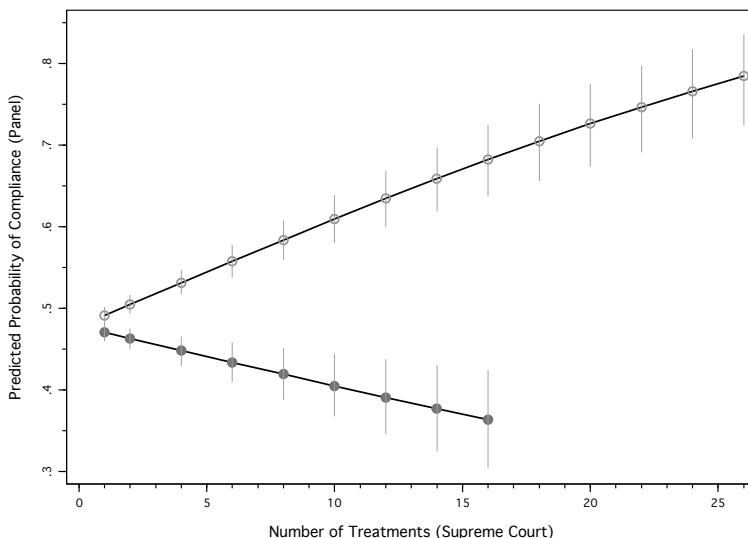


Figure 4: Predicted probability of a circuit court panel complying with a Supreme Court precedent by Supreme Court responses to that precedent. On the vertical axis we display the predicted probability of a circuit court panel complying with (as opposed to defying or treating neutrally) a Supreme Court precedent; on the horizontal axis we plot the number of Supreme Court responses to that precedent prior to the time of the circuit court panel’s decision. The hollow circles indicate the number of positive Supreme Court responses (i.e., **Positive Treatment**), from 1 to 26 (maximum in our data); the solid circles show the number of negative Supreme Court responses (i.e., **Negative Treatment**), from 1 to 16 (maximum in our data). The vertical gray lines are 95% confidence intervals. To generate the predicted probabilities we used Clarify (King et al., 2000), setting **Negative Treatment** (**Positive Treatment**) at its minimum and all other variables at their means. Note that even small increases in **Positive Treatment** (**Negative Treatment**) result in rather markedly higher (lower) levels of compliance on the part of lower court panels.

Positive Treatment, as Figure 4 shows, also exerts a strong substantive effect on the lower court panels. Precedents receiving two positive references from subsequent Supreme Courts (the hollow circles) are at even odds to fare favorably in the circuits.¹⁸ But when the justices repeatedly

¹⁶The predicted probability is .478, with a 95% confidence interval of [.466, .490]. This predicted probability, and all others to follow in this paragraph, results from setting **Positive Treatment** at its minimum (0) and all other variables at their mean. Computed using Clarify (King et al., 2000).

¹⁷The 95% confidence interval is [.305, .424].

¹⁸The predicted probability is .505, with a 95% confidence interval of [.494-.517]. This predicted probability, and all others to follow in this paragraph, results from setting **Negative Treatment** at its minimum (0), and all other

lend their support to a past decision, nearly eight out of every ten subsequent panels comply with it.¹⁹ Conversely, the chances of defiance fall precipitously, to .100 [.073, .133].

Moving to the agency model (see Table 2), an equally mixed picture emerges. While the circuits are not altogether concerned about their own ideological position vis-à-vis the Supreme Court, they do seem to attend to the changing preferences of the justices. As the distance increases between the Court that established the precedent and the Court sitting at the time of the panel’s decision, the panel is significantly more likely to act in defiance. And once again the substantive effect is rather large. Setting **Distance between Enacting & Contemporaneous Court** at its minimum level (and all other variables at their mean), we would expect compliance in about 5 out of every 10 circuit court decisions,²⁰ and deviation in fewer than 3 out of 10.²¹ Moving to maximum distance levels decreases those odds substantially, from a reasonable likelihood of compliance (.539) to a reasonable likelihood of deviation. (The predicted probability of compliance drops to .390, while the odds of deviation increase from .256 to .387.)

4 Dynamic Hierarchical Interpretation: A Conjecture

No doubt the findings lend some confirmation to team and agency theories, and equally without doubt they provide some ammunition to question both. Either way, though, it may be the commonalities, not the differences, that are the more interesting. Primarily, we find that circuit court panels are less attentive to their own ideological preferences (relative to the Court’s) and to the preferences of the enacting justices (and features of their decisions) than they are to the contemporaneous Court. Put another way, our results echo claims by Eskridge (1991, 1994), among others, that Supreme Court justices interpret statutes dynamically—paying far more heed to the sitting Congress than to the one that enacted the legislation. Circuit court judges, when they treat Supreme Court precedent, apparently do likewise. Only, naturally enough, they look to a different set of “superiors”—justices, not legislators.²²

That panels seem to engage in what we might call “dynamic hierarchical interpretation” should not be so surprising.²³ Even if we question Eskridge’s empirics (see Segal, 1997), at least theoretically we recognize that the separation-of-powers system provides stronger incentives for Supreme Court justices to interpret laws in line with contemporary political thinking rather than to conduct “archeological digs” into the intent of past legislatures (See, e.g., Aleinikoff, 1988; Eskridge, 1994). Likewise, the hierarchy of justice creates its own incentives, here for lower courts to attend to the thinking of the contemporaneous, and not the enacting, Supreme Court. Whether to maximize their own preferences or to reach correct decisions, acting on what the Court *says* and not what it *said* seems an efficient strategy for circuit courts as well.²⁴

variables at their mean. Computed using Clarify (King et al., 2000).

¹⁹Setting **Positive Treatment** at its (near) maximum of 26 results in a predicted probability of .785 [.725-.836].

²⁰The predicted probability of compliance is .539 [.522-.557].

²¹The predicted probability of deviation is .256 [.242-.270].

²²See, e.g., Brent (2003) demonstrating that the circuits sided with the Supreme Court, rather than Congress, in the aftermath of *Boerne v. Flores* (1997).

²³Some law professors have referred to this as anticipatory, predictive, or forward-looking behavior on the part of lower courts. See, e.g., Caminker (1994a); Bradford (1990); Kniffin (1982).

²⁴See, e.g., Caminker (1994a), who proposes a proxy model of lower court decision making, in which the lower court is forward looking and predicts the Court’s ruling. He argues that such an approach may promote judicial economy and efficiency.

That this conjecture of dynamic hierarchical interpretation—really a merging of elements of team and agency accounts—sits comfortably with contemporary theories of judging is one thing. Whether it bears out against future empirical analysis is another. Nonetheless, hints from other studies, not to mention our own data, leave room for optimism. As we noted earlier (see note 3), Songer and Sheehan (1990) show that the appointment of liberal (Democratic) judges had no meaningful effect on their behavior in in most areas of the law; instead, they tended to follow the Supreme Court’s decisional patterns. Likewise, Brent (1999, 2003) demonstrates that the lower courts, regardless of their ideological propensities, grew increasingly reluctant to rule in favor of free exercise claimants after the Supreme Court’s rulings in *Smith* and *Boerne*. Finally, Caminker (1994a) provides evidence that federal courts have adopted a “predictive” approach when discerning state law pursuant to the Erie doctrine.²⁵

Turning to our data, while we cannot launch a full-scale test of the conjecture of dynamic hierarchical interpretation against the data set we used to develop it, our results are, at the least, consistent with its observable implications. To provide but one example, consider Figure 5, in which we focus on the likelihood of compliance among the circuits based on the three key “dynamic” variables: the distance between the circuit panel and the contemporaneous Court and subsequent Supreme Court treatment of the extant precedent. Setting all the variables in our model at their mean, we estimate the likelihood of compliance at .499 [.489-.509]; that figure for defiance is .288 [.280-.297].²⁶ Note, though, how that probability increases (or decreases) depending on the reaction and preferences of subsequent Courts. When the justices overwhelmingly lend their support to a past precedent (that is, when **Positive Treatment** is at its maximum; the solid line in Figure 5), and when the distance between the enacting and sitting Courts is minimal (0), circuits are extremely unwilling to act in defiance of the Court: over 80% of the time they will comply; in fewer than 10 percent will they deviate.²⁷ Those percentages decrease (increase) to about 71 and 14 as the distance variable moves to maximum levels. Now, consider the extreme willingness of the circuits to deviate from a precedent as antedating justices express misgivings about it (the dotted line), that is, when **Negative Treatment** is at its maximum. Moving to the most extreme levels of distance between the enacting and sitting Court, the odds of defiance are about 50-50;²⁸ compliance falls to less than 30 percent (predicted probability of .268 [.216-.322]).

²⁵On the other hand, Cross (2005) asserts that appellate courts are more likely to follow their own ideological inclinations and the preferences of the enacting Supreme Court when deciding whether to adhere to precedent. He bases this assertion, however, on a rough-and-ready test modeling the ideological direction of lower court’s decision, and not on its compliance with (defiance of) Supreme Court precedent.

²⁶The predicted probability for neutral treatment is .213 [.205-.221].

²⁷The predicted probability of compliance is .818 [.762, .865]; predicted probability of defiance is a negligible .082 [.059-.112]. In the remaining .099, we predict a neutral response.

²⁸The predicted probability is .525 [.460, .592].

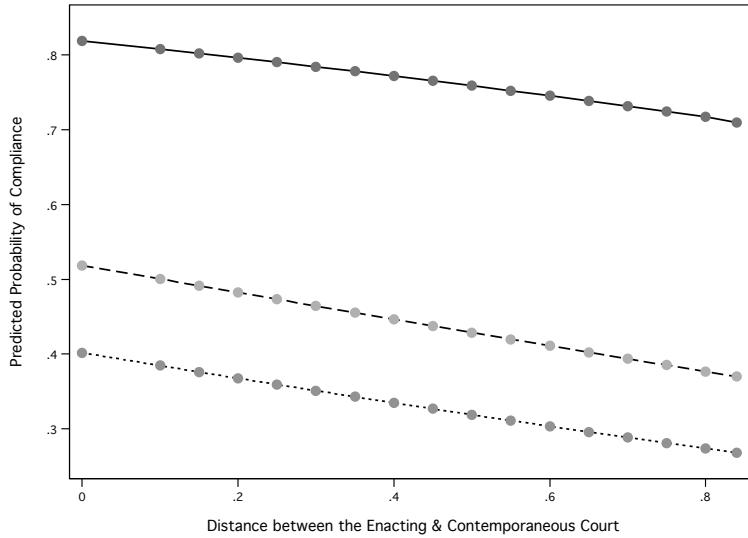


Figure 5: Predicted probability of a circuit court panel complying with a Supreme Court precedent over the range of the distance between the enacting and contemporaneous Supreme Court. On the vertical axis we display the predicted probability of a circuit court panel complying with (as opposed to defying or treating neutrally) a Supreme Court precedent; on the horizontal axis we plot the the distance between the enacting and contemporaneous Supreme Court. The solid line is the number of positive Supreme Court responses (i.e., **Positive Treatment**), set at its maximum value of 26 when **Negative Treatment** is set at its minimum (0) and all other variables are set at their mean. The dashed line sets both **Positive Treatment** and **Negative Treatment** at their minimums (0) and all other variables are set at their mean. The dotted line is the number of negative Supreme Court responses (i.e., **Positive Treatment**), set at its maximum value of 16 when **Positive Treatment** is set at its minimum (0) and all other variables are set at their mean. To generate the predicted probabilities we used Clarify (King et al., 2000).

Finally, observe that even if subsequent Supreme Courts fail to send any positive or negative signals about an existing precedent (the dashed line in Figure 5), the circuit court panels continue to take cues from their “superior” by attending to the ideological distance between the enacting and sitting Courts. Indeed, when they perceive that distance to be minimal, they are far more likely to comply than to deviate (a predicted probability of .519 versus .272). But as that distance increases, the odds of compliance decrease to the point, at the most extreme levels, where circuits are more likely deviate than to comply (.409 versus .369). This is the very essence of dynamic hierarchical interpretation.

5 Discussion

In the 1991 case of *Planned Parenthood v. Casey* Judge Samuel Alito joined his colleagues on the the Third Circuit to uphold part of a Pennsylvania law that required doctors to inform women of the potential “medical dangers” of abortion but dissented from the panel’s decision to strike down a provision that would have required married women seeking abortions to notify their husbands. When Supreme Court candidate Alito was asked to explain his dissent, he responded

that he recalled “wrestling with the problem [of spousal notification].” “Part of the problem,” Alito continued, was that

the law just was not very clear at that time. The undue burden standard had been articulated by Justice O’Connor in several of her own opinions, and there were just a few hints in those opinions about what she meant by it. [But] based on the information that I had from Justice O’Connor’s opinions, it seemed to me that [spousal notification] was not what she had in mind [as an undue burden]. Now, that turned out not to be a correct prediction about how she herself would apply the undue burden standard to that statutory provision, but that was the best I could do under the circumstances.

Some commentators balked. To them, when Alito voted in favor of spousal notification, he was following his own (conservative) policy preferences, and not Supreme Court precedent.

Our account suggests otherwise. Even controlling for the ideological predilection of panels, we find that lower court judges do seem to “wrestle” with the preferences of and signals sent by the contemporaneous Supreme Court. In his thinking over *Casey* Alito barely paid heed to the *Roe* majority; at least according to his testimony and to the objection of no senator, his focus was exclusively on the sitting justices.

We might conjecture as much about the lower courts in *Hopwood*, *Dickerson*, *Roper*, and countless other seeming deviations from Supreme Court precedent. In each the majority appeared to engage in dynamic hierarchical interpretation, placing comparatively greater weight on the justices’ subsequent treatment of precedent than to the enacting Court’s ruling.²⁹

Should our conjecture withstand further empirical scrutiny—and we certainly commend that task to others³⁰—its implications are nearly uncountable. It shores up yet another reason, for example, to question whether the decisions of circuit court judges reveal much about how they will behave upon elevation to the Supreme Court (see generally Epstein and Segal, 2005a). Actually, if, as we suspect, judges are engaging in dynamic hierarchical interpretation, “lower court records can provide disinformation about a nominee’s true preferences” (Epstein and Segal, 2005b).

Even more startling are the implications for legal change. Because our results indicate that lower court judges are quite sensitive to even incremental alterations in the Court’s ideology—typically alterations brought about by membership changes—presidents and senators who desire legal change may be able to achieve their goal via the appointments process: The mere presence of justices who are ideological distinct from an extant rule could induce judges to deviate from it. Likewise, the justices too may well be able to inaugurate meaningful legal change—and do so without ever making the dramatic, rare, and perhaps even risky move of overturning prior rulings

²⁹In *Hopwood*, the majority wrote “Since *Bakke*, the Court has accepted the diversity rationale only once in its cases dealing with race. Significantly, however . . . in no case since *Bakke* has it accepted diversity as a compelling state interest under a strict scrutiny analysis.” According to the *Dickerson* panel: “Since deciding *Miranda*, the Supreme Court consistently (and repeatedly) has referred to the warnings as ‘prophylactic, and ‘not themselves rights protected by the Constitution.’” Likewise, in *Roper* the Missouri Supreme Court noted that “Last year, in *Atkins v. Virginia* the Supreme Court held that a national consensus had emerged against the execution of mentally retarded offenders since *Penry*. . . . Applying the approach taken in *Atkins*, this Court finds that, in the fourteen years since *Stanford* was decided, a national consensus has developed against the execution of juvenile offenders.”

³⁰We can imagine future tests tackling not only the relationship between the circuits and the Supreme Court but also between state courts of last resort and the Supreme Court and even between the circuits and the federal trial courts. See, e.g., Haire et al. (2003).

(Epstein and Knight, 1996). Generating a (negative) information cascade, by repeatedly critiquing or distinguishing their own rules, not only could lead to defiance in the circuits. It also could produce broader judicial erosion and perhaps, eventually, complete eradication of the doctrine in question (see generally Spriggs and Hansford, 2001, 2006).

Whether this is a cost or benefit of dynamic hierarchical interpretation, we leave to others to debate.³¹ But it is surely an implication that deserves further contemplation if only because it gives new meaning to the idea of vertical *stare decisis*. Should our account bear out, no longer ought we conceptualize, measure, and assess it as lower courts adhering to precedent established by past Supreme Courts; rather it is about lower courts adhering to the preferences and responses of the sitting Court.

Appendix. Description of the Variables (N=10206³²)

Variable	Standard			
	Mean	Deviation	Minimum	Maximum
Issue Complexity	2.26	.74	1	11
Extra Opinions	1.27	.89	0	6
Negative Total	1.34	2.76	0	16
Positive Total	2.32	3.59	0	27
Distance between Enacting & Contemporaneous Court	.23	.16	0	.84
Distance between Enacting Court & Panel	.31	.22	0	1.25
Distance between Contemporaneous Court & Panel	.24	.16	0	.86
Lower Court Response	1.79	.86	1	3

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³¹Law professors, we hasten to note, have already taken up this debate with a vengeance. On some accounts (see, e.g., note 24; see also, Bratz, 1984; Gely, 1998; Kniffin, 1982) dynamic hierarchical interpretation (or what others deem anticipatory behavior) promotes judicial efficiency, among other virtues. On others, the potential consequences for vertical *stare decisis* may be too serious to be ignored (e.g., Bhagwatt, 2000).

Even the U.S. Supreme Court has opined on the subject. On the one hand, in the 1989 case of *Rodriguez de Quijas v. Shearson/American Express*, the majority held that "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." On the other hand, it has affirmed any number of lower court decisions explicitly overturning its own precedent, including the Missouri Supreme Court's decision in *Roper* (for other examples, see Caminker, 1994a; Bhagwatt, 2000; Colby, 1987).

³²See note 15

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