
New Directions in American Politics

The Routledge series *New Directions in American Politics* is composed of contributed volumes covering key areas of study in the field of American politics and government. Each title provides a state-of-the-art overview of current trends in its respective subfield, with an eye toward cutting edge research accessible to advanced undergraduate and beginning graduate students. While the volumes touch on the main topics of relevant study, they are not meant to cover the "nuts and bolts" of the subject. Rather, they engage readers in the most recent scholarship, real-world controversies, and theoretical debates with the aim of getting students excited about the same issues that animate scholars.

Titles in the Series:

New Directions in American Political Parties

Edited by Jeffrey M. Stonecash

New Directions in the American Presidency

Edited by Lori Cox Han

New Directions in Campaigns and Elections

Edited by Stephen K. Medvic

New Directions in Congressional Politics

Edited by Jamie Carson

New Directions in Public Opinion

Edited by Adam Berinsky

New Directions in Judicial Politics

Edited by Kevin T. McGuire

New Directions in American Politics

Edited by Raymond J. La Raja

New Directions in Media and Politics

Edited by Travis Ridout

New Directions in Judicial Politics

Edited by Kevin T. McGuire

Lower Court Compliance with Precedent

Sara C. Benesh and Wendy L. Martinek

Americans appear to be complacent in the belief that the courts—and the U.S. Supreme Court in particular—constitute a powerful branch of government. We rarely consider the degree to which the courts actually possess power, and the public continues to come to the courts with its problems assuming that an effective judicial remedy will be forthcoming (Scheingold 2004). Indeed, some even lament the “excessive power” that this unelectd branch wields in society (Ely 1980). However, as Hamilton famously put it, the Court has “no influence over either the sword or the purse . . . It may truly be said to have neither force nor will, but merely judgment” (Hamilton). Though there is a Supreme Court police force, the mission of that force is to protect the justices, the Court, and visitors to the Court, not to compel other actors to follow the will of the Court.¹ In other words, the Court makes decisions but those decisions are not self-executing; the Court’s rulings are given effect only through the actions of others, and the reaction of those other actors is not always perfectly in concert with the Court’s rulings (Baum 2002). This is reflected in the famous quote attributed to President Andrew Jackson regarding a decision of the Court under Chief Justice Marshall: “John Marshall has made his decision, now let him enforce it!” The historical evidence indicates that Jackson made no such statement (Boller and George 1989, 53). However, it persists in the political folklore, certainly in part because it reflects the Court’s predicament when it comes to enforcement of its decisions (if not the accuracy of the president’s words). How, then, in the absence of the usual carrots and sticks relied upon to induce others to “fall in line,” has the Supreme Court become such a significant player in American politics? How does it have impact in American society?

Our focus in this chapter is on one key dimension of the Court’s power: its ability to induce lower courts to abide by its precedents, hence increasing its influence and impact. As a preliminary matter, we note that the question of what *impact* the Supreme Court has is certainly much broader than the extent to which the nation’s high court can command lower court *compliance*. Understanding the impact of the Court requires understanding the ability of the Court to exert influence in society *writ large*.² Accordingly, alternative foci

for the study of the Court's impact include, for example, the Court's influence on congressional behavior (Martin 2001), the development and administration of higher education admissions policies (Taylor, Haynie, and Sill 2008), or the presence of small-town displays of religious symbols in late December (Segal, Spaeth, and Benesh 2005, 368).³ Scholars vigorously debate whether the Court can indeed exert a broad impact in society given its enforcement challenges (Hall 2011; Rosenberg 2008; cf. McCann 1994), and some even suggest that the Court, when it makes controversial decisions in a given issue area, can make matters worse by creating a backlash (Keck 2009). Nonetheless, lower court compliance certainly affects Supreme Court impact—without compliance by lower courts and other actors affected by Supreme Court decisions and without their responsiveness to changes in Supreme Court doctrine, the Court can have no impact.⁴ Thus, the appeal of focusing on lower court compliance lies in the fact that the lower courts constitute “the first link in the chain of events that gives a judicial decision its impact” (Canon and Johnson 1999, 29).

We begin our consideration of compliance by examining the leading models of lower court compliance. We then discuss the legitimacy of the Supreme Court and its power as derived from that support, considering the extent to which the mere moral force of Supreme Court authority might compel compliance with its rulings by the lower state and federal courts, its most important of agents. Our inquiry is ultimately directed at the compelling question of whether it is inevitable that the lower courts will faithfully implement the precedents of the Supreme Court.

Compliance with the Supreme Court

Scholars studying the Supreme Court originally paid little heed to how the Court's rulings were treated by lower courts. Lower court compliance was simply taken as a given. As students of the Court became aware that compliance was not, in fact, a given (perhaps prompted by the Court's efforts to desegregate public schools), they devoted increasingly more time and attention to understanding whether and how lower courts responded to the rulings of the nation's highest court. Not surprisingly, then, early analyses of lower court compliance centered on evident noncompliance on the part of lower courts with Supreme Court precedents in controversial areas of the law, such as civil rights and liberties (see, for example, Murphy 1959; Peltason 1961). In contrast, most contemporary research on compliance has found that lower courts (as well as other actors, for that matter) generally comply with Supreme Court rulings across a variety of issue areas and under a variety of circumstances (see, for example, Benesh and Reddick 2002; Luse *et al.* 2009; Songer and Sheehan 1990). Of course, a lower court need not completely or overtly thwart Supreme Court precedent in order to provide a less-than-faithful application of it. Indeed, the lower courts have several options available to

them should they find themselves faced with a Supreme Court precedent they find unappealing. They can interpret the decision narrowly, limiting the application of the precedent based on very specific factual differences between the precedential case and the case to which the precedent ostensibly applies (Canon and Johnson 1999, 92–114). They may cite their own opinions in lieu of citing the “offending” precedent (Manwaring 1968).⁵ They may attempt to distinguish their case from the one for which Supreme Court precedent is available (Caminker 1994). They may dispose of the case on procedural grounds (e.g., finding that the parties do not have standing to bring suit) (Canon and Johnson 1999, 92–114). They may criticize the Supreme Court while following it (Tarr 1977). Or, the lower courts may simply ignore the existence of the offending precedent (Reddick and Benesh 2000).

Given the wealth of tools at the disposal of lower courts to avoid adherence to Supreme Court precedents, the widespread compliance that has been documented seems like an enigma. To unravel that puzzle, scholars have employed a variety of frameworks for understanding the relationship between the Supreme Court and the lower courts and the dynamics of compliance. Communications theory, for example, draws attention to the clarity of the transmission of precedent from superior to inferior courts (Canon 1999, 442–443). An obvious prerequisite for compliance in that theory is that those responsible for complying are aware of the precedents with which they are to comply. Awareness of a decision, however, is unlikely to be problematic for lower court judges, as litigants (through their attorneys) and law clerks will likely call all relevant cases to the judges' attention. Judges also have enhanced abilities to conduct their own online searches for case law, making it quite unlikely that a judge will not know about an applicable precedent (Cross *et al.* 2010). Indeed, given modern technology, lower courts probably hear of Supreme Court decisions immediately, long before they consider cases to which they may apply.

Alternatively, organizational theories conceptualize the relationship between the Supreme Court and lower courts as an organization, applying theories of organizational behavior borrowed from the public administration literature. A key concept in this line of research is the notion of decisional (or organizational) inertia, which is the tendency of organizational routines and standard operating procedures to be sticky; i.e., slow to change (Baum 1976). In this framework, precedents from the Supreme Court can be seen as disruptive forces, requiring lower courts to change their own standard operating procedures. How compliant lower courts are, then, is a function of how different the edicts contained in new Supreme Court precedents are from those embedded in old Supreme Court precedents or the precedent of the lower court itself. The common law nature of the American legal system,⁶ however, means that courts (both inferior and superior) are always engaged in some level of adjustment in their decisions over time. Hence, a new precedent may well be adopted far more easily than a new regulation may be by an administrative agency.

Though theoretical frameworks drawn from communications theory and organizational behavior have appealing aspects to them, they do not explicitly take into account the hierarchical nature of the judiciary. The Supreme Court is the institution at the apex of the federal judiciary and the only court created explicitly by the Constitution.⁷ The most compelling frameworks for understanding compliance, then, pay particular attention to this hierarchy of justice.⁸ Principal-agent theory and team theory take this hierarchical perspective into account, and are the theories most employed in recent research on lower court compliance with Supreme Court precedent. We discuss each in turn.

Principal-Agent Theory

Principal-agent theory originated as a way of understanding the relationship between buyers and sellers in economic transactions (see, for example, Ross 1973). Buyers are the principals who wish to obtain the highest quality goods or services at the lowest possible cost. Sellers, on the other hand, wish to maximize profits. Profit maximization may take the form of selling more goods or services than the principal needs or maximizing prices while minimizing quality. Note that the principals and agents have different goals and that these goals may, in fact, conflict with one another. To illustrate this theory, consider the relationship between an individual in the market for a used car (a principal) and an individual who sells used cars (an agent). The buyer wants to obtain the best car possible for the lowest price possible, while the seller wants to obtain the biggest profit possible from the sale. The problem for the buyer is that she does not have access to the same information about the used cars for sale that the seller does. Given the differences in goals between the buyer and the seller—the buyer wants to get the best deal while the seller wants to make the most profit—that difference in information gives an advantage to the seller. The seller (the agent), after all, knows about the histories of the cars on sale while the buyer (the principal) does not. In short, there is an information asymmetry that benefits the seller.

This concept of information asymmetry led political scientists to adopt the principal-agent framework to illuminate the relationship between bureaucracies and the legislatures that create and maintain them (Mitnick 1975). Legislators delegate authority to bureaucrats to implement policies, but bureaucratic interests may diverge from those of the legislators because they develop independent expertise about policy implementation or attract constituencies with preferences that diverge from those of the legislators (Waterman and Meier 1998, 176). This permits bureaucratic agents to shirk, that is, to direct their efforts at goals that differ from those of their legislative principals (Brehm and Gates 1997, 21). Principals can reduce shirking by monitoring the behavior of their agents, but monitoring is costly in terms of time and energy. And, if taken to an extreme, monitoring can be costly enough to

obviate any benefit from delegation; if a principal must monitor each and every action of an agent, then the principal might as well do the tasks herself!

The first scholars to explicitly apply the principal-agent framework to the study of the judicial hierarchy were Songer, Segal, and Cameron (1994) but it has been used by numerous scholars since then (see, for example, Benesh 2002; Benesh and Martinek 2002; Brent 2003; Westerland *et al.* 2010). As Brent (2003) notes:

That judicial scholars should be attracted to principal-agent theory is not surprising, because it accurately describes many of the essential features of the American judiciary. The judiciary is a hierarchy in which the subordinate actors (agents) are charged with the responsibility of implementing policy devised by actors at higher levels (principals). Judicial principals engage in only sporadic, inconsistent oversight of their agents . . . permitting those agents to pursue their own goals when those goals conflict with those of the principal. (p. 560)

The Supreme Court—by both practice and design—is not intended to “right every wrong” or adjudicate every dispute. It explicitly disavows the role of error corrector. Indeed, it hears few cases each year and exercises virtually unrestricted discretion in determining which, of the thousands of appeals it receives, to hear (Pacelle 1995; H.W. Perry 1991). As a consequence, the Court has few opportunities to monitor the thousands of cases decided by the lower federal courts and state courts of last resort,⁹ and it embraces even fewer of the opportunities it does have. In short, lower courts may have a good deal of latitude to shirk in the application of Supreme Court precedents, should they choose to do so.¹⁰

Of course, a principal's need to minimize shirking by monitoring agents is lessened the more information the principal has when it comes to picking agents. This leads to the concept of adverse selection, which refers to the conditions under which a principal selects the agent. Ideally, a principal should have complete information about the skills, abilities, and preferences of the agent(s) it is selecting. This would permit the principal to select the agent that is least likely to act contrary to the principal's interests (i.e., the lower court judges most likely to faithfully apply Supreme Court precedents, in the context of the judiciary). Here, the utility of the principal-agent framework for understanding superior-inferior court interactions is compromised in that the Supreme Court has nothing to do with the selection of its agents (the lower courts) at either the state or the federal level. Like their superiors on the Supreme Court, lower federal court judges undergo selection via a constitutionally-mandated process in which the president makes a nomination that must be confirmed by the Senate.¹¹ With regard to state court judges, the majority of such judges are elected by state or sub-state electorates, and

those that do come to the state bench via a non-elective mechanism are still in no way beholden to the members of the Supreme Court for their appointments (see American Judicature Society 2011). In short, the Supreme Court faces an extreme adverse selection problem: it must rely on agents chosen for it by others, and, additionally, it is powerless to remove wayward agents from office.

The fit of the judicial hierarchy to the principal-agent framework, while sometimes argued to be uncomfortable, nonetheless is of considerable value for understanding lower court compliance given the explicit hierarchical setup of the judiciary. The Supreme Court is “the boss” of the lower courts,¹² and it is an authoritative one at that. Accordingly, lower court judges should, for the most part, heed the policy prescriptions of the Supreme Court precisely because the Supreme Court is their superior. From this perspective, the judiciary is much like an administrative agency, with the lower courts acting as bureaucrats, implementing to the best of their ability the policy enactments of the Supreme Court, and using their expertise to fill in gaps where they arise.

Team Theory

An alternative to principal-agent theory is *team theory*. Like principal-agent theory, team theory has its origins in economics (Marschak and Radner 1972). Specifically, team theory was advanced as a model of decision-making in organizations. The basic logic of the team model is that different members of a team (an organization) possess different information relevant to the achievement of the team’s goals and, further, that different team members control different decisions of the organization. In short, both information and decision-making authority are decentralized. “But all team-theoretic models share one key feature: they ignore the interests of the team members—there is no shirking, free-riding, lying, lobbying or strategizing of any kind” (Gibbons 2003, 761). The interests of team members can be ignored because they are assumed to be identical (i.e., each member of the team desires the same thing—namely, the success of the organization). To illustrate the team theory framework, consider a firm with a central production manager and a set of unit managers. The central production manager controls the allocation of resources among the units, deciding, for example, how much manpower is allocated to each unit. Each unit manager, however, makes decisions regarding how the manpower allocated to his unit will be deployed. Further, each unit manager has specialized knowledge about his own particular unit and what is necessary for it to function best. That is, both decision-making authority (except for the resource allocation made by the central manager) and information are spread throughout the organization. All of the managers—including the central production manager—want the company to maximize profits across all units since performance bonuses at the firm are determined

by overall company performance. That is, each manager gets the same share of the available bonus money and the available bonus money is a straightforward function of the company’s total profits. In effect, all of the managers have an incentive to share information and take cues from one another to enhance the likelihood of each unit manager making the decisions for his unit that will reap the biggest profit for the company (and, hence, the biggest bonuses for the managers).

Various scholars—primarily, but not exclusively, legal scholars situated in law schools—imported team theory to describe and explain lower court compliance (Cross 2005; Kornhauser 1995; Staudt 2004). The basic assumption of the team model—the assumption of a shared organizational goal—is useful for thinking about the fidelity of lower courts to higher court rulings because it implies that adherence to precedent is simply a matter of enhancing the likelihood of correctly deciding a case. Judges at higher levels of the judicial hierarchy presumably have greater levels of expertise to select good vehicles for articulating guiding precedents and, given the luxury of discretionary dockets, more time and judicial energy to craft such precedents (Kornhauser 1995; Westerland *et al.* 2006). This allows lower court judges—with presumably less expertise and less time—to use precedents as a short cut that will permit them, on average, to render more “correct” rulings simply by relying on the relevant precedent in each case. Hence, while lower court judges comply with Supreme Court precedent because the Supreme Court is their superior under the principal-agent framework, lower court judges comply with Supreme Court precedent because that precedent is most likely to be the “correct” legal interpretation under the team theory framework. Of course, this perspective is sometimes criticized due to its lack of regard for the policy preferences of the lower court judges themselves, which have been shown to be influential on their decision-making.¹³

The Mechanism of Compliance

In both of the above accounts of how compliance works, there are a number of potential mechanisms through which the Supreme Court can gain compliance. In the framework of team theory, compliance is a natural consequence of clear precedents, as the only obstacles to compliance are a lack of understanding on the part of the lower courts as to the requirements of precedent.¹⁴ The key mechanism, then, is well-articulated and clearly communicated rules of law embedded in Supreme Court opinions, applied perfectly by lower courts desiring only to “get it right.”

In the principal-agent model, the Supreme Court can obtain compliance via monitoring, e.g., the lower courts will comply with the Supreme Court in order to avoid review and reversal. Songer and his colleagues examined this possibility in the context of compliance by the U.S. courts of appeals and found it to be an important consideration for lower courts (Songer, Segal, and

Cameron 1994). Indeed, these scholars found evidence that litigants make rational calculations as to the likelihood of Supreme Court review when they make decisions regarding appeals, and so the lower courts have an incentive to consider the Supreme Court's precedents to lessen the likelihood of appeal.¹⁵ The essential mechanism, then, would appear to be rational litigants who are willing to appeal cases to call to the Court's attention deviant behavior by the lower courts (coupled with lower courts that wish to avoid reversal).¹⁶

Other scholars argue that, to the contrary, the lower courts do not fear reversal—or, at least, not sufficiently to induce compliance against their will (Klein and Hume 2003). While it may be that lower court judges worry about the effects of reversal on their personal reputations or aspirations for elevation to a higher bench (Caminker 1994), or that they are concerned about having policies with which they disagree etched into the law of the land by the Supreme Court (McNollgast 1994–1995), reversal is such a rare event that it is difficult to see it as a threat with the teeth to induce compliance (Benesh 2002). The Supreme Court hears so few cases—a scant 100 cases per term in recent years—in comparison to the volume of cases heard in the U.S. courts of appeals and state courts of last resort that a lower court judge can assume that the likelihood of any particular decision being reviewed is minimal at best (Bowie and Songer 2009).¹⁷ Empirically speaking, Klein and Hume demonstrate that, in the cases most likely to attract the Supreme Court's attention, the circuit courts¹⁸ are no more likely to decide search and seizure questions as the Supreme Court would than they are in the cases least likely to attract the Court's attention; under both situations, circuit courts are very likely to comply.¹⁹

An alternative mechanism for inducing compliance—whether from the perspective of principal-agent theory or team theory—is the Court's legitimacy. The Court's power, as Hamilton suggests, rests in its authority to make decisions. Its legitimacy, as most call it, also has the potential to be *the* driving force in compliance by lower courts.²⁰

The Court is widely considered to be the most popular branch of American government. Indeed, Gibson and Caldeira (2011) go so far as to use the word “love” to label the high regard in which the public holds the Court. The potential reasons for the Court's legitimacy advantage over other institutions of government are many. Hibbing and Theiss-Morse (2002) suggest that the Court is more highly regarded due to its processes: it does not engage in open political debate the way that Congress does.²¹ Casey (1974) offers “myth” as the reason for the Court's strong performance on measures of public approval and support: people approve of the Court because they know little about it, and the information they do have is couched in its many symbols. As Perry (1999) documents, the Court is awash with symbols—from the black robes to the temple-like architecture—that contribute to the myth of the Court. Gibson and Caldeira (2009c) agree that symbols are powerful, but they also

find knowledge of the Court to be positively related to how individuals view the legitimacy of the Court. Further, the Court is seen as the embodiment of the rule of law, and Americans highly value the rule of law (Gibson 2007). Other scholars detail the ways in which the courts, because they are held in such high esteem, are not only legitimate policy-makers, but also make policy more legitimate by ruling on it (Clawson, Kessler, and Walternburg 2001; Stoutenborough, Haider-Markel, and Allen 2006).²²

The justices themselves note that both their association with “the law” and the fact that they are “above politics” are important to maintaining the Court's legitimacy (Clark 2010). Justices also frequently warn their colleagues (presumably to influence their choices) of the damaging consequences certain courses of action can have upon the Court's legitimacy (Farganis 2009). Recall, for example, Justice Stevens' dissent in *Bush v. Gore* (2000):

The endorsement of that position [that is, the position articulated in the opinion of the Court] by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

(pp. 128–129)

In fact, warnings about legitimacy by the justices have risen dramatically in recent years, meaning that it is not only political commentators and law professors who suggest that some of the decisions made by the Court may well influence perceptions of the authority of the Court. Indeed, the justices themselves are sensitive to (and work to protect) the Court's legitimacy (Farganis 2009).

Members of the Court care about legitimacy because it is a valuable resource. Clark (2010) argues that inter-branch relations are influenced by the amount of legitimacy the Court possesses at any given time, as well. To wit, Congress passes “court-curbing” legislation when the Court's legitimacy is comparatively low, which acts as a signal to the Court. The Court, in turn, responds to Congress' message and backs down from the legal policy that agitates Congress. Clark agrees that the Court is aware of its legitimacy, but argues that Congress is more so—by virtue of the close relationship between Congress and the public via the electoral connection—and so the Court uses congressional action against it as a signal that, should it continue on its course, it risks losing its legitimacy—something about which the Court cares

deeply. Hence, legitimacy, while seemingly an abstract concept, is quite real and has the potential to constrain very powerful institutional actors.

We argue that the Court's legitimacy is powerful enough to serve as another, perhaps the key, mechanism for inducing compliance. The Court is an extremely authoritative policy-maker, especially among judges of the lower courts, who are socialized—via their education at our nation's leading law schools and via their experience on the bench—into a legal culture that regards Supreme Court decisions as the source of the true meaning of the Constitution and precedent to require deference. Comparing monitoring and legitimacy as competing mechanisms of compliance under the principal-agent framework, Benesh argues, "The impetus to comply comes from what the Supreme Court is rather than what it *does*" (Benesh 2002; emphasis in original). This notion is corroborated by interviews with courts of appeals judges, who, in noting their constitutional position (as judges on "such inferior courts," as they are explicitly called in the language of the Constitution) characterize compliance with Supreme Court decisions as a given; they see it as their role to implement higher court precedents.²³ Indeed, this legitimacy (or acceptance of the Supreme Court as the arbiter of the Constitution) may be the mechanism for compliance in both the team model, in which getting it "right" is the operative value (Klein and Hume 2003),²⁴ and in the principal-agent model, as lower court judges defer to their authoritative boss. In the team model, the higher court's precedent is the best evidence of the correct legal ruling; in the principal-agent model, that precedent is a command as to how the lower court ought to make its decision in an applicable case.

Whatever the mechanism, even somewhat casual orders from the Supreme Court are considered carefully by the courts of appeals (Benesh *et al.* 2007),²⁵ and lower court judges, when interviewed, note quite simply that complying with the Supreme Court is their job (Baum 1978; Benesh 2008). Although one might expect different levels of courts to comply to a greater or lesser extent with Supreme Court decisions—given their differential distance from the Supreme Court, levels of professionalism, and positions in the system—even trial courts and state courts seemingly comply (Benesh and Martinek 2009; Stidham and Carp 1982). In short, nearly all of the scholarly evidence shows that courts are compliant with Supreme Court precedent. We spend some time in the next section discussing how scholars have come to this conclusion. More specifically, we examine the various ways one might measure compliance.

Measuring Compliance

How can a social scientist determine whether a given lower court decision is compliant with Supreme Court precedent? This is an admittedly difficult question given that the Court has many precedents, often on both sides of an issue, and that its precedents are not necessarily designed to completely structure decision-making by the lower courts under every circumstance. Indeed,

the Supreme Court sometimes muddles the issues because the nine justices themselves cannot agree over every aspect of the decision. Recent research shows that concurring opinions—that is, opinions written by those justices who agree with the disposition of the case (reverse or affirm) but disagree over the reason for that decision—can influence the likelihood of compliance by the lower courts.²⁶ And, the Court cannot possibly anticipate every factual situation that may arise.

In addition, the lower courts operate under different constraints than does the Supreme Court, and so comparing trends in decision outcomes between the Supreme Court and the lower courts—such as percentage of cases decided liberally—is not necessarily a relevant measure of compliance, given that the lower courts may simply be deciding different cases. For example, because the U.S. courts of appeals have little control over their dockets, they hear a good many of less-than-compelling appeals:

The common law principle that every litigant should have the opportunity for at least one review means that many of the cases that come before the U.S. Courts of Appeals, although no doubt terribly important to the litigants in the case, are legally frivolous in the sense of raising no important issues of law, a marked difference from the situation at the U.S. Supreme Court.

(Martinek 2009)

When it comes to the criminally accused or convicted, the stakes are sufficiently high for the defendant that most avail themselves of the right to an appeal. But, the vast majority of those appeals are, as a result, simply meritless. Because scholars generally consider decisions as being "conservative" if a court decides against the criminal defendant (Segal and Spaeth 2002; Songer, Sheehan, and Haire 2000), the circuits make far more conservative decisions, regardless of their own ideological preferences, than does the Supreme Court. If the Supreme Court is particularly liberal in its criminal cases, then the lower courts will look noncompliant without necessarily being so (Eisenberg, Miller, and Perino 2009).

One scholar offers a useful definition from which we may derive measures of compliance: Compliance entails the "proper application of standards enunciated by the Supreme Court in deciding all cases raising similar or related questions," while noncompliance "involves a failure to apply—or properly apply—those standards" (Tarr 1977, 35). How, then, have scholars implemented that definition, or, in social-science speak, how have they operationalized compliance? Some earlier studies, as mentioned previously, merely sought to discern whether liberal Supreme Court rulings were followed in time by liberal lower court rulings. More recently, scholars have found what appears to be a better tool to measure compliance in the legal research resource known as *Shepard's Supreme Court Citations*.

Shepard's Supreme Court Citations is a commercial service offered by LexisNexis and is widely used in the legal community. The attorney coders who work for *Shepard's* read every Supreme Court and lower court decision and compile a list of all the cases cited by those opinions, classifying them into one of several categories as to the legal treatment of the cited case.²⁷ Some decisions merely cite another case and are not classified as having legally treated the cited case. It is likely that these citations are more offhand, likely in a string of citations, and hence are not considered a substantive treatment of the cited case. Other cases are categorized as having "followed" the cited case. These are cases in which the second court considers the precedent and employs its logic, applying it faithfully to the facts of its case. Still others are categorized as "criticizing" the cited case, in that they express some disagreement with the resolution of and opinion in the cited case. Scholars have placed each of the nine ways *Shepard's* codes cases into "positive" and "negative" categories.²⁸ The positive group includes "followed," as discussed above. Negative treatments include "overruled," "questioned," "limited," and the above-mentioned "criticized." Hence, scholars can identify each lower court opinion that has been rendered after a Supreme Court decision, and then use the *Shepard's* code as a way to operationalize compliance; e.g., if the lower court "followed" the Supreme Court decision, it has properly applied the "standards enunciated by the Supreme Court" in a case "raising similar or related questions" (Tarr 1977, 35).

Several authors have used this approach. Benesh and Reddick (2002), for example, consider how long it takes a circuit court to start complying with a new Supreme Court precedent that overrules a previous Supreme Court decision. Using *Shepard's*, supplemented with additional independent coding, the authors ascertain whether, in its first case, a circuit complies with ("follows") the new precedent. The authors then trace the reaction of each circuit to each Supreme Court decision over time. They find that, although most circuits comply at their very first or second opportunity, some aspects of the Supreme Court's decision (unanimity, the age of the overruled precedent, complexity, and whether it was a criminal procedure case) and the Supreme Court's ideology (in particular, its ideological proximity from the Court when the precedent was set), as well as some aspects of the circuit itself (whether it was affirmed by the Supreme Court), influence the speed of compliance.

Westerland and his colleagues (2010) also employ *Shepard's* to determine why circuit courts positively or negatively treat Supreme Court decisions. They find that change in ideology from the Court that decided a given case to the contemporary Court depresses the likelihood of a positive treatment of precedent by the circuit court, as does the precedent's age. Interestingly, precedents with concurring opinions are more likely to be positively treated, as are those cases that have been positively treated by the Supreme Court over time. What their study most importantly adds, though, is that the lower court's own precedent also matters; the circuit's prior positive treatments of a

precedent increase the likelihood of subsequent positive treatment, while the circuit's own negative prior treatment decreases the likelihood of later positive treatment. The lower courts did, however, more frequently treat the Supreme Court's decisions positively, a finding that leads the authors to conclude that the principal-agent model works well to explain lower court compliance decisions.

Not all of the extant research about compliance relies upon *Shepard's*, however. Much of it relies, instead, upon coding of case-specific facts to discern the extent to which Supreme Court precedent is relied upon by lower courts. The basic logic is that, by coding lower court decisions for facts influential to the Supreme Court in setting its precedent, one can measure the influence of those precedential facts on lower court decision-making. Benesh (2002), for example, compares the factors that structure decision-making in the Supreme Court in cases involving challenges to the admissibility of confessions to those that structure decision-making in the U.S. courts of appeals. (Was there physical or psychological coercion? Were *Miranda* warnings given? How old is the defendant?, and so on.) She then compares the patterns evident in the Supreme Court's confession jurisprudence with those evident in the courts of appeals and finds striking similarities. The preferences of the courts of appeals judges also matter, however, with more liberal judges inclined to strike challenged confessions and more conservative judges inclined to permit them to stand. Building on this work, Benesh and Martinek (2002) conduct a similar comparison of confession case decision-making between the Supreme Court and state courts of last resort; they find a high degree of correspondence between the factors that are influential on the Supreme Court and those that matter to the state supreme courts.²⁹

A more recent analysis that simultaneously considers the correspondence of both court of appeals and state court of last resort decision-making with Supreme Court precedent (also in the area of challenged confessions) led Benesh and Martinek (2009) to conclude that

both the federal courts of appeals and state supreme courts are compliant ... But state courts are evidently less compelled than the circuit courts to make certain decisions as a consequence of the factual configuration of the case under consideration. (p. 816)

These authors attribute the lesser "attentiveness" of state high courts to the fact that judges on those courts must be sensitive to their state political contexts—particularly if they are elected judges—as well as the Supreme Court. Indeed, elected judges may find themselves between the Scylla of upsetting their constituents and the Charybdis of frustrating Supreme Court precedent. Comparato and McClurg (2007), in their examination of decision making in search and seizure cases by state courts of last resort (i.e., cases involving

challenges to evidence claimed to have been obtained in violation of Fourth Amendment protections against unreasonable search and seizure), also find Supreme Court precedent to have a substantial influence on the choices of state supreme court judges. Of particular note is their finding that judges selected via appointment (rather than election) are more likely to conform their decision-making to Supreme Court precedent, regardless of their own personal ideology.

A variant of the basic fact pattern analysis relies upon the concept of jurisprudential regimes. Students of the courts have struggled for decades—some would say for over a century (Hettinger, Lindquist, and Martinek 2006)—to disentangle the relative influence of traditional legal factors and the preferences and attitudes of judicial decision-makers in the choices they make. Richards and Kritzer (2002) offer the concept of jurisprudential regimes as part of an effort to quantify legal influence and allow for an analysis of the relative impact of legal and extra-legal factors. Rather than seeing Supreme Court opinions as necessitating particular outcomes, the jurisprudential regimes approach conceptualizes precedents as enumerating relevant factors to be considered and indicating how those factors are to be weighed in the adjudication of future cases. In explaining this concept, Richards and Kritzer note that one reason the Supreme Court adheres to these blueprints is to guide lower courts in their decision-making in relevant cases, thereby promoting consistency in the law. In a similar vein, Luse and her colleagues (2009) investigated decisions in the U.S. courts of appeals to see whether the Supreme Court's decisions interpreting the First Amendment's clause on religious establishments structure decision-making in those lower courts. They ask, in effect, whether an appeals court would decide a given case in the same way that the Supreme Court would, if it were to consider the case. They found that, indeed, the courts of appeals were attentive to the Supreme Court's precedent in that they were influenced by the law's purpose, its primary effect, and the extent to which it induced government entanglement, even after accounting for the preferences of the court of appeals judges themselves. In addition, they present evidence that this reliance on the Court's jurisprudential regimes indicates compliance borne of a desire to make law well, since the ideology of the contemporaneous Supreme Court was not a significant influence on decisions of the circuit courts, it is unlikely that these judges were motivated by a desire to avoid reversal.³⁰

Conclusion

Stare decisis—literally translated as “to stand by things decided”—is a powerful principle that infuses common law legal systems with a sense of continuity and stability in the law. Not only does *stare decisis* mean that the Supreme Court's jurisprudence is generally marked by only slow and incremental change, it also means that lower courts should (at least in principle) be faithful

in their application of the law as interpreted by the Supreme Court. Accordingly, from a normative perspective, for *stare decisis* to be a robust legal principle, lower courts at both the state and federal level must be compliant. Compliance on the part of lower courts is also of abiding interest for two very practical reasons. First, if the lower courts are not obedient, then the meaning of the Constitution will literally vary from one jurisdiction to the next. Of course, the 50 separate state judiciaries are not intended to be the mere appendages of the federal judiciary; the principle of federalism prohibits that. And, the geographic organization of the federal courts also suggests at least some play for regional influences in the interpretation of the law (Carrington 1999). But ultimately, the Supreme Court is supposed to be the final arbiter as to the meaning of the Constitution. And, second, the Supreme Court as a governing institution is only as powerful as its ability to induce compliance with its judgments: “If the Supreme Court cannot instill its policy prescriptions in its own judicial agents, what influence can it have on society?” (Benesh and Reddick 2002, 535).

Given the importance of lower court compliance, then, it is not surprising that a host of scholars have expended considerable time and energy to better understanding both the extent of compliance (and noncompliance) and what accounts for the patterns of lower court compliance that are evident. All of the various methods of measuring compliance we detail above, even those that use the most imprecise measures, have come to a similar conclusion: lower courts do a pretty good job of complying with the Supreme Court. Hence, the Court does indeed have impact; at least among its judicial compatriots. But, to return to the question posed at the start of the chapter, is such compliance *inevitable*? Given our argument that the strongest mechanism for compliance is the Supreme Court's legitimacy, it is unlikely that the extent to which the lower courts comply will change much over time. The Court is and has been the most legitimate institution of national government for most of its history. Were that to change, then perhaps the impetus to comply would be lessened. But none of the scholars who study the Court's legitimacy see it slipping away any time soon (Gibson, Caldeira, and Spence 2003; Kritzer 2001). Even considering other potential mechanisms of compliance—clear communication (Canon 1999), organizational inertia (Baum 2002), the desire to avoid reversal by the Supreme Court (Baum 1978), professional socialization into a norm of compliance (Tarr 1977), self-interest to preserve integrity and enhance respect (Baum 1976; Caminker 1994), simple ideological compatibility between inferior and superior courts (Baum 1976; Reddick and Benesh 2000)—there is no reason to expect levels of compliance to decrease. This does not, of course, mean that compliance will be perfect, and commentators will continue to notice those aberrant cases of noncompliance. But compliance will surely remain the norm, and the Supreme Court will continue to exert a strong influence over decisions made by inferior courts. Whether the Supreme Court has or will continue to have influence in other circles and on

society in general is a question that has also been considered by many scholars, but is here left to the reader to explore.

Notes

- 1 The Supreme Court of the United States Police was created in 1949, its precursor being a Supreme Court security force selected from among the ranks of the U.S. Capitol Police. The Supreme Court Police was originally only given the authority to patrol the Supreme Court building and grounds. The protection of the justices remained the responsibility of the U.S. Marshals Service (as it was in the infamous case of *In re Neagle* [1890]) until the early 1980s.
- 2 Canon and Johnson (1999) identify four primary populations or audiences that the Court, by necessity, relies upon for the implementation of its decisions and, hence, its impact: the interpreting population, which tells others what the decision means (e.g., judges and attorneys); the implementing population, which puts decisions into action on a day-to-day basis (e.g., bureaucrats and school officials); the consumer population, which includes virtually every citizen of the country at one time or another, depending on the issue area under consideration (i.e., the affected population of a specific decision); and the secondary population, which includes anyone who knows about and learns about, and perhaps debates the merits of, a Supreme Court decision (e.g., public office holders, interest groups, the media, the public at large).
- 3 The existence of such displays demonstrates one roadblock to impact noted by Baum (2002, 229): either no citizen is offended by the religious symbol, or none is willing to incur the personal and financial costs of challenging it.
- 4 With regard to compliance, scholars have distinguished between compliance as congruence and compliance as responsiveness. Congruence is simply the extent to which the lower courts act consistently with the dictates of the Supreme Court. Responsiveness refers to the situation in which decisional trends in the Supreme Court are mirrored in the lower courts. Of course, a lower court that is perfectly congruent with the Supreme Court (i.e., one that makes decisions exactly as the Supreme Court would) will also be perfectly responsive. However, a lower court may be responsive without being entirely congruent if, for example, the lower court makes more conservative decisions as the Supreme Court renders more conservative precedents but does not faithfully apply those precedents exactly as the Supreme Court would (Songer, Segal, and Cameron 1994).
- 5 Interestingly, the Supreme Court itself readily acknowledges and accepts this as a possibility, as evidenced in the opinion in *Michigan v. Long* (1983, 1040–1041).
- 6 A common law legal system is one in which judges make law in the decisions they render, law that is considered binding on later and lower courts.
- 7 The Supreme Court is created by Article III of the Constitution. Congress has the authority to create additional courts under the auspices of both Article I and Article III.
- 8 But see Baum (1976, 232), who argues that hierarchy may have little to do with compliance with Supreme Court precedent.
- 9 The majority of states designate their highest state-level court as a “supreme court.” There are notable exceptions, however, including New York, whose court of last resort is the New York Court of Appeals, while the New York Supreme Court is the major trial court in the state judiciary. Here, we use “court of last resort” and “supreme court” interchangeably to refer to the highest court in a state’s judicial system.

- 10 In the language of principal-agent theory, the Supreme Court faces the challenge of moral hazard in that it cannot observe all of the actions of its agents (i.e., the lower courts) and therefore runs the risk of the agents behaving contrary to the interests of the Court (i.e., not faithfully applying Supreme Court precedents).
- 11 The exception to this procedure is for nominations to courts created by Congress under its authority specified in Article I, rather than in Article III. The selection of judges for so-called Article I courts can be arranged however Congress sees fit. While the major trial courts (U.S. district courts) and major intermediate appellate courts (U.S. courts of appeals) at the federal level are Article III courts, the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Armed Forces, for example, are Article I courts.
- 12 Technically, on issues involving the interpretation of state statutes or state constitutional provisions, the high court of the respective state is the final authority. However, state high court interpretations are subject to review by the Supreme Court if federal regulations, rules, or constitutional provisions are implicated.
- 13 Though the so-called “attitudinal model” has received the most definitive support in the context of the Supreme Court (Segal and Spaeth 1993), there is ample evidence that judicial attitudes matter considerably for decision-making in lower federal (e.g., Hettinger, Lindquist, and Martinek 2006) and state courts (e.g., Hall and Brace 1999), as well.
- 14 In this regard, the team theory shares the logic of communication theories of compliance that focus on clarity in the transmission of precedent.
- 15 This fear of reversal is also assumed to drive compliance in other scholarship, for example Baum (1978). On rational litigants, see also Cameron and Kornhauser (2006).
- 16 An alternative that shares the same logic is the existence of fellow appellate court judges who are willing to invest the time and energy into serving as “whistle-blowers” and alerting the Supreme Court to unfaithfulness on the part of their fellow judges through separate opinions (e.g., dissenting opinions) (Cross and Tiller 1998).
- 17 Of course, not all lower court cases are equally likely to be selected for review, and several scholars have argued that the Court can and does engage in strategic monitoring; see, for example, Cameron, Segal, and Songer (2000), Lax (2003).
- 18 The U.S. courts of appeals are colloquially referred to as circuit courts, reflecting the fact that the precursors to the U.S. courts of appeals (created in 1891) were the U.S. Circuit Courts (which finally ceased to operate on January 1, 1912) as well as the fact that they are organized into 11 geographically-based circuits.
- 19 Klein and Hume (2003) use “importance,” inter-circuit conflict, circuit caseload, the number of cases heard by the Supreme Court in the two previous terms, and the propensity of the circuit to be reviewed by the Supreme Court in the past to define the likelihood of review.
- 20 This linkage between legitimacy and compliance or impact was made by Canon, but was not vigorously pursued by other scholars (Canon 1999). Some of Vanberg’s (2005) intuitions, however, are quite similar, as are those of Clark (2010). Baum (2002) also speaks of institutional authority as driving compliance.
- 21 Concerns about eroding the legitimacy of the Court in the eyes of the public have been a strong motivating force behind opposition to introducing cameras into Supreme Court proceedings (Cohn 2007–2008).
- 22 These (and other) scholars have shown that policies emanating from the Supreme Court are perceived to be more legitimate than policies emanating from other institutions. In other words, regardless of the content of the policy, the language used in making it, or the ideological preferences of the individual judging the

legitimacy of it, things the Supreme Court says are paid more heed than things said by other institutions.

23 Anonymous interview with circuit judge, conducted by Sara Benesh on April 16, 2007. For a more detailed discussion, see Benesh (2008). This idea is corroborated by earlier interviews conducted by Baum (1978) and in surveys of trial judges conducted by Gibson (1977).

24 Klein's (2002) interviews suggest that the goal of getting cases "right" in a legal sense is an important one to judges. Baum (2006), however, notes that, for any given case, another audience may be of greater concern than the Supreme Court and legal commentators.

25 The term "GVR" refers to a decision by the Supreme Court to grant certiorari, vacate the lower court's decision, and remand the case to the lower court in light of some intervening event, usually a related Supreme Court decision. These orders are no more than five lines long, most often, but occasion a great deal of consideration by the circuit courts. Indeed, in some circuits, briefs are filed and oral arguments made over the applicability of the "in light of" case to the original case result. That these short orders are paid such attention lends credence to the seriousness with which the lower courts regard Supreme Court actions.

26 The influence goes both ways: concurrences critical of the majority opinion lessen compliance, while concurrences that reaffirm the majority opinion enhance compliance (Corley 2010). Elsewhere, Corley (2009) demonstrates that plurality decisions—e.g., those that do not enjoy majority support—are especially vulnerable to noncompliance. Baum (1976) similarly discusses the influence of decisional clarity on implementation (but see Johnson 1979; Benesh and Reddick 2002).

27 *Shepard's* also indexes federal and state laws and regulations. The widespread usage of *Shepard's* for legal research has led to the use of the term "to Shepardize" as a generic verb that refers to the process of determining if a given precedent, law, or statute remains "good law."

28 Spriggs and Hansford (2000) find that the *Shepard's* coding is quite reliable (e.g., it includes all cases cited in a given case, includes nearly all subsequent cases that legally treat an earlier case, and nearly always assigns the same treatment code that the authors of the article would have assigned) and, in most cases, also valid (e.g., the categories measure the kind of legal treatment they purport to measure).

29 Benesh and Martinek also find, however, that state legal factors matter as well. In particular, they find that challenges to the admissibility of confessions are less successful in states in which the state constitution provides less protection against self-incrimination.

30 If fear of reversal were driving compliance, presumably the ideology of the Supreme Court would have affected the circuit court's decision; as the Supreme Court became more conservative, the lower court would be less likely to strike down laws as violating the Establishment Clause; e.g., they would have been more likely to rule in an accommodationist (conservative) direction (Luse *et al.* 2009).

Chapter 15

Why Strict Scrutiny Requires Transparency

The Practical Effects of *Bakke*, *Gratz*, and *Grutter*¹

Richard Sander

As the 2002–2003 term of the United States Supreme Court unfolded, few if any of its pending cases received as much media attention as the twin bill of affirmative action cases. In *Grutter v. Bollinger* and *Gratz v. Bollinger*, the Court had taken on two distinct challenges to affirmative action policies at the University of Michigan (UM). Barbara Grutter was challenging a racial preference system built into UM's School of Law, and Jennifer Gratz was challenging the use of racial preferences by UM's undergraduate admissions. Through the briefing, oral argument, and subsequent Court deliberations, most of the betting ran against the university. Recent Supreme Court decisions had struck down affirmative action plans in employment and contracting; a majority of the justices had records hostile to racial preferences in nearly all contexts. Moreover, most elite colleges and professional schools had been using racial preferences to favor minorities in admissions for over 30 years, and nearly everyone conceded that such programs should not persist indefinitely. On June 27, 2003, the Court announced both decisions. In *Gratz v. Bollinger*, a 6–3 majority of the Court ruled that UM's undergraduate admissions system was patently unconstitutional; in *Grutter v. Bollinger*, the Court held by a slender 5–4 vote that the law school's system survived constitutional scrutiny, but only subject to a number of constraints and only temporarily. On its face, this seemed like a stinging rebuke to the university's policies and a considerable narrowing of the scope of affirmative action. Yet the front pages of newspapers across the country the next day showed a gleeful Mary Sue Coleman—the president of the university—literally jumping for joy on news of the decisions. The question must be asked: why was this woman smiling?

The remarkably simple answer is this: President Coleman knew that, in practice, the *Grutter* and *Gratz* decisions would have little effect on the scale and effects of the university's affirmative action policies. Indeed, as I will discuss in this chapter, *Grutter* and *Gratz*—along with their progenitor, *Bakke v. University of California*—have collectively had effects almost directly opposite to those articulated in the decisions. At least among public law schools in the United States, and at the University of Michigan's undergraduate college