The U.S. Supreme Court's Incorporation and Interpretation of Precedent

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What explains how and why the Supreme Court interprets precedent? We contend that Justices incorporate precedents into their opinions to maximize the extent to which the Court's legal policy reflects their own policy preferences and to increase the likelihood that their opinions will be efficacious. Thus, we expect the interpretation of precedent to be influenced by the Justices' policy preferences, the norm of stare decisis, and certain characteristics of precedents. To test this idea, we examined how, in all cases decided in the 1991 and 1995 terms, the Court's majority opinions chose to legally interpret the set of available Supreme Court precedents. While our results are not uniformly supportive of our hypotheses, they lend general support to our theoretical argument. First, we demonstrate that the Court is more likely to positively interpret (rather than not interpret) a precedent that is ideologically proximate to the Court, that is legally relevant, or that was previously positively interpreted by the Court. When considering negative treatment broadly construed, our data only demonstrate that the legal relevance of a precedent exerts any influence. However, when we restrict our analysis to "strong" negative interpretation of precedent, we uncover reasonable support for the influence of stare decisis in that both the legal relevance of precedent and prior negative interpretation of precedent affect strong negative treatment. Thus, one implication of this study is that, contrary to the attitudinal model's prediction, the Court's prior treatment of precedent does appear to influence the way Justices make decisions.

The explanation and prediction of Supreme Court policy outcomes endures as a topic of scholarly inquiry. For decades, scholars attempted to identify the factors that account for the disposition of Court cases, individual Justices' final votes on the merits, and aggregate patterns in Court outcomes (e.g., Baum 1988; Rohde & Spaeth 1976; Segal 1984). The policy set by the

Previously presented at the 1999 Annual Meeting of the American Political Science Association. Both authors contributed equally to this research. Spriggs recognizes funding from the U.C. Davis Institute of Governmental Affairs/IGCC Research Fellows Program for collection of the *Shepard's Citations* data. We appreciate comments provided by Paul Wahlbeck and Virginia Hettinger. We thank Dave Damore, Wes Duenow, Larry Eichele, Brian French, Randy Gee, Robin Hastings, Alex Mircheff, Danielle Perry, Brandon Reeves, David Richardson, Jamie Scheidegger, Sarah Schultz, and Danny Williams for their research assistance. Address correspondence to James F. Spriggs, II, Department of Political Science, University of California, Davis (e-mail: jfspriggs@ucdavis.edu) or Thomas G. Hansford, Department of Government and International Studies, University of South Carolina (e-mail: hansford@gwm.sc.edu).

Law & Society Review, Volume 36, Number 1 (2002)

Court, however, is not solely, or even mainly, a function of case dispositions. While case dispositions determine who prevails in a particular dispute, the Court establishes legal policy through the legal rules or precedents developed in its majority opinions. These precedents set up referents for behavior by providing decisionmakers with information necessary to develop expectations and by outlining sanctions for noncompliance (see Spriggs 1996; Wahlbeck 1997). As a result, scholars recognize that the interpretation of precedent represents one of the Court's central policy outputs (e.g., Knight & Epstein 1996; Landes & Posner 1976).

Despite the acknowledged importance of precedent, few scholars have attempted to explain systematically how or why courts choose to interpret it. The literature on the quantitative study of precedent can be broadly divided into two parts. First, a variety of studies examine either the citation of court opinions (e.g., Friedman et al. 1981; Landes & Posner 1976; Merryman 1977) or patterns of citations among state courts (e.g., Caldeira 1985; Walsh 1997). These articles shed light, for example, on the conditions under which one court will cite the opinions of another court. This line of research, however, does not seek to explain how court opinions actually interpret precedents. Second, a handful of studies examine how the Supreme Court substantively treats its own precedents (e.g., Brenner & Spaeth 1995; Johnson 1985, 1986). For instance, Spriggs and Hansford (2001) show in part that the Supreme Court is more likely to overrule one of its precedents when it is either ideologically distant from the precedent or when the Court has previously interpreted the precedent in a negative manner. Yet, despite this insight into the Court's overruling of precedent, we have little understanding of why the Court more generally chooses to interpret precedent positively, negatively, or not at all.

In this article, we examine how the U.S. Supreme Court legally interpreted its own precedents in all the cases decided in two recent terms, 1991 and 1995. For each of these cases, we determined which Supreme Court precedents were available to be interpreted by the Court, which were incorporated into the majority opinion, and whether these precedents were legally interpreted in a positive or negative fashion. While our results are not uniformly supportive of our hypotheses, they lend general support to our theoretical argument that Justices incorporate precedents into their opinions to maximize the extent to which the Court's legal policy reflects their own policy preferences and to increase the likelihood that their opinions will be efficacious.

Explaining the Interpretation of Precedent

A Supreme Court decision yields two products. First, there is the oft-studied case outcome, or disposition, in which the Court affirms or reverses the lower court's decision and in so doing rules in favor of one litigant over the other (e.g., Rohde & Spaeth 1976). The second, related product, is the Court's majority opinion, in which a specific legal policy or legal rule is articulated. One important component of the legal rule established in the majority opinion involves the link between the newly formed legal policy and the rules established by previous Court opinions. That is, when writing a majority opinion a Justice must consider whether to incorporate relevant precedents and, if incorporated, how to interpret or treat those precedents. Through the inclusion and treatment of precedent, the authoring Justice can both bolster and clarify the legal rule being developed as well as influence the applicability and vitality of the precedent in question. Thus the decision to incorporate and treat a precedent has important implications for both the majority opinion and the Court's precedents.

The Court has three basic ways it can deal with precedents that might bear on a case it is deciding. First, the Court can explicitly rely on a precedent as controlling authority and thereby treat it "positively." Second, the Court can "negatively" interpret a precedent by, for instance, distinguishing, limiting, or overruling it. Each of the latter forms of legal interpretation casts doubt on an opinion by avoiding application of the legal rule by finding it inapplicable, by restating a legal rule in a more limited way, or by declaring that the rule is no longer binding law (see Murphy & Pritchett 1979:491–95). Third, the Justices can choose not to legally interpret a precedent in an opinion.

The question then becomes the following: What explains why the Court chooses to interpret a precedent in a positive or negative fashion? To answer this question, we begin by positing that Supreme Court Justices are primarily motivated by their policy preferences (Epstein & Knight 1998; Maltzman et al. 2000). As the Justices craft majority opinions, they seek to promote policy outcomes consistent with their policy preferences. The incorporation of precedents established in previous Court decisions can facilitate this goal in two ways. First, Justices, by interpreting precedents, can alter the vitality of those precedents and broaden or narrow their applicability. Thus, policy-motivated Justices will interpret precedent based, in part, on the extent to which it is ideologically congruent with their preferences. Second, through the incorporation of precedent in majority opinions Justices can maximize the legitimacy of the legal rules established in those opinions. This practice, in turn, maximizes the ultimate impact

that an opinion will have. Therefore, Justices will also take legitimacy concerns into consideration when interpreting precedent.

From this broad framework, it follows that three distinct factors will influence the Court's interpretation of precedent: (1) the Justices' policy preferences, (2) the norm of stare decisis, and (3) certain characteristics of precedents. The first factor results from the Justices' desire to set legal policy that closely reflects their personal policy preferences, while the latter two factors flow from the Justices' recognition of the need to maximize the legitimacy, and thus ultimate impact, of their legal policy. We will discuss these factors in turn and explain how they arise from our conception of Supreme Court decisionmaking.

As the Justices craft the Court's majority opinions, they seek to establish legal rules that will promote policy outcomes consistent with their policy preferences. In doing so, Justices have an incentive to include a discussion of precedent in an opinion. Indeed, by interpreting a precedent a Justice can reshape an existing legal rule and thus impact legal or political outcomes. When formulating majority opinions, Justices can both create new legal rules and structure the way in which other decisionmakers interpret and implement the precedents established by prior opinions. It therefore follows that policy-motivated Justices will interpret precedents based on the extent to which the precedents are ideologically congruent with their policy positions. For example, a liberal majority opinion coalition will seek to bolster liberal precedents by treating them positively while weakening conservative precedents by treating them negatively.

Hypothesis 1: The greater the ideological disparity between a precedent and the Justices in the majority opinion coalition in the treatment case, the more likely the opinion in the treatment case will interpret the precedent negatively; and the smaller the ideological distance, the more likely the precedent will be interpreted positively.

Supreme Court Justices do not merely seek to establish legal policy consistent with their policy preferences; instead, they endeavor to create legal rules that are both consistent with their preferences and that actually influence legal and political outcomes in the intended manner. This distinction is important. A legal rule that reflects a Justice's preferences provides little utility if it is largely ignored by the communities that must implement it. Policy-minded Justices are therefore most concerned with the ultimate impact of an opinion on lower courts, future Supreme Court Justices, and decisionmakers outside of the courts. Because the Court has such a limited ability to implement its decisions, the Justices rely on the Court's perceived legitimacy to enhance the likelihood that other decisionmakers will implement or comply with their decisions.[1] If the Court (or a particular opinion) is

[1] A political institution is legitimate if the public perceives the institution as having the requisite authority to set the policies that it establishes. The greater the perceived

perceived as somewhat illegitimate then the prospects for compliance may decrease (Epstein & Knight 1998; Gibson et al. 1998; Mondak 1994).

The Justices can control the extent to which the Supreme Court is perceived as authoritative (see Caldeira 1986). In particular, the practice of stare decisis may exist to foster the legitimacy of the Court. Courts often justify their decisions by referring to precedent and thus linking current decisions to past rules of law (Gates & Phelps 1996; Johnson 1986; Walsh 1997). Indeed, the legal community (as well as the general public) expects courts to provide legally relevant justifications for their decisions. Thus an opinion in one sense represents an elaborate attempt by a court to provide persuasive reasons for why a particular outcome is "correct." Landes and Posner (1976:273) make this point when stating, "No matter how willful a judge is, he is likely to follow precedent to some extent, for if he did not the practice of decision according to precedent (*stare decisis*, the lawyers call it) would be undermined and the precedential significance of his own decisions thereby reduced." In other words, the use of and adherence to precedent can produce external legitimacy and thereby enhance the Court's ability to write opinions that have influence (see Knight & Epstein 1996).

Given the role of stare decisis in facilitating the legitimacy of the Court and enhancing the impact of its opinions, we expect it to influence how the Court interprets precedent. The classic view of the legal model suggests that legal reasoning consists of reasoning by example, with judges linking current decisions with those from the past that are similar to it (Levi 1949; Schauer 1987). Justices are not completely free to incorporate precedent in a random or haphazard fashion, however. The norm of stare decisis suggests that the Justices should look to *relevant* precedent when deciding a case and writing an opinion. While precedent may not fully constrain the Justices, it is difficult for the Court to avoid entirely precedents that directly bear on a case. Consistent with this idea, Johnson (1986) shows that the Court's interpretation of a precedent results in part from the similarity between the precedent and the treatment case. Thus, given a norm of stare decisis, we expect:

Hypothesis 2: The more legally relevant a precedent is to a treatment case, the more likely the precedent will be incorporated into the opinion of the treatment case and be interpreted either positively or negatively.

The norm of stare decisis will also manifest itself in the prior legal treatment that the Court has given a precedent. One of the enduring themes in the literature on precedent is that there is path dependency in the law (see Kornhauser 1989; Priest 1980;

legitimacy of an institution, the more likely an actor will comply with its decisions or policies, even if the actor does not agree with the specific nature of the policy (see Gibson & Caldeira 1995; Mondak 1994).

Rasmusen 1994; Schauer 1987). That is, the manner in which an opinion interprets a precedent depends on the way in which it was treated by the Court in the past. For a variety of reasons, judicial decisionmaking proceeds incrementally, with opinions building on previously decided cases (Shapiro 1965). For example, repeated positive treatments may institutionalize a precedent and make it more costly, in terms of legitimacy, for judges to later interpret the precedent in a negative fashion (Ulmer 1959). Landes and Posner (1976:250) note that "where, however, the rule has been, as it were, solidified in a long line of decisions, the authority of the rule is enhanced." Consistent with this idea, Wahlbeck (1997) shows that the Court is less likely to engage in restrictive legal change when there is a history of consistent rulings on the issue. Previous negative treatments, however, can weaken the vitality of a precedent and make it easier or less costly for the Court to treat it negatively in the future. Given this aspect of the norm of stare decisis, we expect that

Hypothesis 3a: The more often a precedent has been treated positively (i.e., followed) in previous Court opinions, the more likely a treatment case will positively interpret it and the less likely a treatment case will negatively interpret it.

Hypothesis 3b: The more often a precedent has been treated negatively (e.g., limited, criticized, or distinguished) in previous Court opinions, the more likely it is to be interpreted negatively in the treatment case and the less likely it is to be interpreted positively.

Third, the literature on judicial impact often suggests that particular characteristics of precedents structure how they are subsequently interpreted and implemented (Johnson & Canon 1984). The most commonly discussed opinion attribute is the level of consensus in a precedent's voting and opinion coalitions. The literature often notes that division within the Court affects the legitimacy or authority of an opinion, reducing its ability to send clear signals and maximize compliance (Wasby 1970:251). Opinions decided with a strong consensus on the Court are thus often viewed as being particularly robust because consensus indicates that the Court is credibly committed to a legal rule. For example, Pacelle and Baum (1992) demonstrate that lower court responses to Supreme Court remands are affected by the size of the Court's opinion coalition. Spriggs and Hansford (2001) further show that a precedent is more at risk of being overruled by the Supreme Court if it was accompanied by concurring opinions and was decided by a minimum winning coalition. For these reasons, precedent characteristics may affect the choices Justices make in choosing how to interpret precedent.

Hypothesis 4a: The larger the majority voting coalition in the precedent, the more likely the Court is to positively interpret the precedent (and less likely to negatively interpret the precedent).

Hypothesis 4b: The more "special" the concurring opinions published with a precedent, the more likely the Court is to interpret the precedent negatively and the less likely it is to interpret it positively.

Data and Methods

To recapitulate, we seek to explain how, in any one opinion, the Justices choose to interpret precedents that might bear on the case. The development of this dependent variable required two steps. First, for each of the 182 cases decided in the 1991 and 1995 terms (what we refer to as "treatment" cases) we compiled a list of available U.S. Supreme Court precedents.[2] To develop this list, we relied on the "Table of Authorities" section of all briefs on the merits (litigant briefs, litigant reply briefs, and amicus curiae briefs) filed in these cases. Specifically, we assumed that the available set of precedents in a case consisted of the Supreme Court cases referred to in the briefs.[3] Given the adversarial nature of the judicial process, one would expect relevant precedents to be mentioned by one of the two opposing litigants or the amici.[4]

We then restricted the set of Court precedents to those decided between 1946 and the decision date of the treatment case in question. This procedure resulted in a set of 10,842 precedents, or approximately 60 precedents for each treatment case. We restricted our set of precedents because we currently lack the necessary data on cases decided before the 1946 term. Given this research design, we can only generalize to precedents decided from the 1946 through the 1995 terms, and not to cases decided before this time period.[5] It is important to point out that this

[2] To generate these 182 opinions, we selected all cases decided by full opinion, orally argued per curiam opinion, or a judgment of the Court, using Spaeth (1997). We excluded four original jurisdiction cases from our analysis.

There is no particular reason we selected the 1991 and 1995 terms, other than the fact that they are two fairly recent Court terms. We see no reason why the Justices' behavior in these two terms would be significantly different than in other recent terms. Of course, our results may not generalize to earlier Court eras, but they should generalize at least to the Rehnquist Court.

[3] It is important to recognize that one should not just look at precedents the Court actually interpreted in an opinion, given that it is possible that other relevant precedents existed which the Court chose not to interpret.

[4] There were 26 instances in which a Supreme Court opinion legally interpreted a precedent that was not contained in any brief filed on the merits. To avoid selecting on the dependent variable, we excluded these precedents from our analysis. Of these 26 precedents, three could not have been cited in the briefs because they had been decided after the briefs for the treatment case had been filed. Thus, we encountered a total of 23 Court precedents (in 12 treatment cases) not discussed in any brief filed on the merits, but the Court legally interpreted them anyway. Of these 23 precedents, only three of them received discussion in the lower court opinion being reviewed by the Court (and all three occurred in the same treatment case). We should point out that the Court's use of these precedents does not appear to be a form of "issue expansion" (see McGuire & Palmer 1995), because the Court's treatment of these precedents generally coincides with the litigants' arguments, with the litigants citing different cases for the same point.

[5] We, however, have no theoretical expectation that our results will differ for precedents decided before 1946.

approach does not bias any of our findings for precedents decided during the time period under study because there is no selection effect for those precedents.

Second, we determined whether and how the majority opinions in the treatment cases legally interpreted each of the Supreme Court precedents. To do so, we utilized *Shepard's Citations*, which is a legal resource that reports citations of Supreme Court decisions in subsequent Court opinions, categorizing them according to the legal interpretation of the precedent. That is, for each U.S. Supreme Court decision, *Shepard's Citations* provides a list of all the subsequent Court cases that cite the decision.

Further, *Shepard's* determines whether the treatment case actually substantively interprets the precedent being cited. According to *Shepard's*, a precedent is legally interpreted by a treatment case when the treatment case interprets the precedent in such a way that it has a specific effect on the precedent. A precedent is not considered to be legally interpreted simply because the treatment case cites it. Instead, it is necessary for the treatment case to contain specific language that legally interprets the cited case (see Spriggs & Hansford 2000).[6] While *Shepard's* also codes treatments of precedent that occur in concurring and dissenting opinions, we focus only on the treatments that occur in majority opinions.

In accordance with *Shepard's* typology of legal treatment, we coded any treatment case that *Shepard's* indicates as having "Followed" a precedent (i.e., explicitly relied on the precedent as controlling authority) as having positively interpreted that precedent. Following *Shepard's* definition of negative treatment, we initially coded any situation in which the treatment case "Distinguished," "Criticized," "Limited," "Questioned," or "Overruled" the precedent as negative interpretation.[7] The "Distinguished" category constitutes the weakest form of negative treatment, and shortly we will consider the implications of including or excluding this category from our coding of negative interpretation. We coded any precedent that was not legally interpreted by a treatment case as having no legal treatment.[8] As we have previously

[6] For example, for *Shepard's* to assign the "Followed" code (meaning that the citing Court case follows the precedent), the majority opinion in the treatment case must have language that expressly indicates a reliance on the precedent in question. If, for instance, a majority opinion were to state that its conclusion is "required" by the precedent, then this would be coded as a "Follow" (Spriggs & Hansford 2000).

[7] As Spriggs and Hansford (2000) note, some "Questioned" codes may not actually signal that the Court negatively interpreted a precedent. We therefore read all treatment cases that questioned a precedent and removed the nine cases in which the Court indicated that Congress (or a past Court opinion) had previously overturned the precedent, but the treatment opinion did not actually negatively interpret the precedent.

[8] The "no legal treatment category" includes precedents that were not discussed in the treatment case, as well as precedents that *Shepard's* labels as "Explained." *Shepard's* Explained category denotes a treatment case that "clarifies, interprets, construes or otherwise annotates the decision in the cited case," without giving a precedent any legal treatment (Spriggs & Hansford 2000:331). We included Explained in the no legal treatment

demonstrated, *Shepard's Citations* data are quite reliable (Spriggs & Hansford 2000).[9]

Since our dependent variable is a three-category nominal variable (positive, negative, or no legal treatment of the precedent), we used multinomial logit to estimate our model (Long 1997). This statistical technique estimates the likelihood that an alternative will be chosen, relative to another option. Since we use "no legal interpretation" as our baseline category, we obtained two sets of estimates, one comparing a positive interpretation of a precedent with no interpretation, and one comparing a negative interpretation with no interpretation. In addition, since there may be some nonindependence among the interpretation of precedents in a single treatment case, we used a robust variance estimator (clustering on treatment cases) (White 1980). This technique provides corrected estimates of the standard errors if there is any within-treatment case correlation of errors.[10]

Independent Variables

Ideological Distance. To measure the ideological distance between a precedent and the Justices deciding a treatment case, we relied upon Spaeth (1995, 1997). We operationalized the ideological orientation of a precedent as the percentage of the time the median member of the majority opinion coalition voted liberally in the issue area of the case (e.g., civil rights, First Amendment, etc.) over his or her Court career (Epstein et al. 1996, Table 6-2). We relied on this same data source (and the percentage

category because it does not imply any substantive form of legal interpretation of a precedent. If we instead create a four-category dependent variable, with Explained as a separate category (81 precedents are coded as "Explained"), the results for positive and negative interpretation are essentially unchanged.

9 There are three components to our reliability study (Spriggs & Hansford 2000). First, we ascertained whether *Shepard's* lists all the cases actually cited in a Supreme Court opinion. After coding all 300 of the cited cases in 25 randomly selected Court cases, we found that *Shepard's* did not miss a single cite. Second, we assessed whether *Shepard's* reliably determines when a citing Court case legally treats or interprets a cited case—as opposed to only citing the case. Through a reliability analysis of the 252 cases that cite 25 randomly selected Court cases, we conclude (based on a Kappa statistic) that this aspect of *Shepard's* data is quite reliable. The final component of the study determined whether *Shepard's* coding of the different types of substantive legal treatment (e.g., Followed, Limited, Distinguished, etc.) is also reliable. After drawing a random sample of 602 instances in which *Shepard's* determined there was substantive legal treatment of a precedent case (cited case), we used the coding protocols outlined in *Shepard's* training manual to code these treatments of precedent. Reliability analysis revealed that all of the treatment codes are quite reproducible and thus reliable. For more details, see Spriggs & Hansford 2000.

10 While our data contain 10,842 precedents, many precedents appear in the data multiple times. Thus, there is the possibility of correlated errors within precedents across treatment cases. To test for this possibility, we used robust standard errors and clustered on the 3,551 unique precedents in our data. The standard errors change very little from those presented in Tables 1 and 2, and the only noticeable difference is that in Table 2 *Ideological Distance* becomes statistically significant at the 0.05 level. It appears that there is slightly more correlation of errors within treatment cases than precedents, and we therefore cluster on treatment cases in Tables 1 and 2.

of the time the median member of the majority opinion coalition voted liberally in the issue area of the precedent) to determine the policy position of the Justices deciding a treatment case. Our measure of *Ideological Distance* is the absolute value of the difference between the issue-specific ideology of the median of the majority opinion coalition in a treatment case and the median of the majority opinion coalition in the precedent.[11]

Prior Positive Treatment. To determine the number of times the Supreme Court has interpreted one of its precedents in a positive manner, we used *Shepard's Citations. Shepard's* considers "Followed" to be a positive treatment of precedent. We then took the total number of times that the precedent was "Followed" by subsequent majority opinions up to the year preceding the one in which the treatment case was decided, and we divided it by the age of the precedent. This procedure controls for the fact that some precedents in our sample are much older than others and have had more opportunity to be treated positively. This variable therefore measures the average number of positive interpretations per year up to the year preceding the one in which the Court decided the treatment case.

Prior Negative Treatment. We measured this variable in the same manner as *Prior Positive Treatment.* Here, however, we counted the number of times majority opinions "Distinguished," "Questioned," "Criticized," "Limited," or "Overruled" the Supreme Court precedent and divided this total number by the age of the precedent. These are the treatment categories that *Shepard's Citations* considers as negative.

Legal Relevance. To our knowledge, there is no single extant measure that sufficiently captures the relevance of a precedent to a treatment case. However, there are several measures that bear on the degree to which a precedent is germane. Through factor analysis, it is possible to take this set of variables and explain shared variation with a smaller set of variables (see Kim & Mueller 1978). That is, the useful information regarding the relevance of the precedent that is contained in this set of variables can be

[11] Let us provide a substantive example. In *44 Liquormart v. Rhode Island* (1996), Justice Stevens, with a liberal voting score of 67.2 in the area of First Amendment (meaning he voted liberally in 67.2% of the cases in this issue area), represented the median voter in the opinion coalition. In a relevant precedent for this treatment case, *Bigelow v. Virginia* (1975), Potter Stewart represented the median Justice, with an ideological score in First Amendment cases of 63.9. Thus, the value for *Ideological Distance* between the majority opinion coalition in *44 Liquormart* and the precedent in *Bigelow* is 3.30.

We realize that there may be instances in which, for example, a liberal majority opinion coalition will establish a moderate or even somewhat conservative precedent. That is, our measure of ideological distance, like virtually all proxies, will have some degree of measurement error. Nonetheless, we believe that our measure of *Ideological Distance* is a reasonable one and currently see no superior alternatives. Epstein and Mershon (1996) show empirically that the approach we adopt is currently the best available way in which to measure the policy preferences of the Justices. Scholars have therefore measured the policy preferences of justices using this approach in a variety of recent studies (see Caldeira et al. 1999; Maltzman et al. 2000; Spriggs & Hansford 2001).

collapsed into a smaller set of variables. In our case, it can be collapsed into a single variable.[12]

To generate our measure of *Legal Relevance*, we factor analyzed five indicators of how relevant a precedent is for the case being decided. First, we counted the number of briefs in the treatment case that referred to a precedent, and we divided this number by the total number of precedents cited in these briefs. The larger the proportion of total cites referring to a precedent then, presumably, the more central that precedent is to the treatment case. Second, we ascertained whether the same broad legal issue (e.g., First Amendment, Privacy, Economics) was involved in both the precedent and the treatment case, as coded by Spaeth (1995, 1997). Third, we used Spaeth (1995, 1997) to determine whether the precedent and the treatment case shared the same specific issue area.[13] The fourth indicator is whether the precedent and the treatment case were both decided under the same authority (e.g., statutory interpretation, constitutional interpretation, etc.), as coded by Spaeth (1995, 1997). Finally, we also included a measure of whether both the precedent and the treatment case dealt with the same specific legal provision (i.e., the actual constitutional provision, statute, or court rule considered in the case) (Spaeth 1995, 1997).[14] We then used the factor loadings from the factor analysis of these five variables to generate our ultimate measure of *Legal Relevance*.[15]

Voting Margin in Precedent. From Spaeth (1995, 1997), we coded this variable as the number of Justices in the majority decision coalition minus the number in the minority coalition.

Concurring Opinions in Precedent. We measured this variable as the number of "special" concurrences accompanying the precedent, as taken from Spaeth (1995, 1997).

Results

Of the 10,842 precedents we have defined as available for interpretation in the 182 treatment cases decided in the 1991 and 1995 terms, the Court's majority opinions legally interpreted

[12] Only the first factor in our analysis has an eigenvalue greater than one. (See Kim & Mueller 1978.)

[13] Spaeth (1995, 1997) identifies approximately 260 separate issue areas representing the context in which the broad legal issue in the case appears. For example, within First Amendment cases, Spaeth identifies a variety of specific issues, including free exercise of religion, establishment of religion, government aid to religious schools, etc.

[14] The second and third factors are based on Spaeth's (1995, 1997) VALUE and ISSUE variables, respectively, while the fourth and fifth factors stem from his LAW and AUTHDEC1 variables.

[15] The factor loadings for the five included variables are: proportion of total cites referring to the precedent, 0.28; same broad issue area, 0.60; same specific issue area, 0.67; same authority, 0.31; and same legal provision, 0.58. *Legal Relevance* ranges from a minimum of -0.78 (not relevant) to a maximum of 3.08 (highly relevant).

2.3% (N = 250) of them.[16] More specifically, 145 of the precedents received positive treatment by the Court, while 105 of them received negative treatment. We present the results of our multinomial logit model of the Court's interpretation of precedent in Table 1.[17] The chi-squared statistic for the model allows us to reject the null hypothesis ($p \leq 0.001$) that our independent variables, taken as a group, have no influence on the Court's decision to treat a precedent positively, negatively, or not at all.

For our independent variables, we first argued that divergence between the preferences of the Justices in a treatment case and the legal rule in a precedent would influence the treatment of that precedent. Specifically, we anticipated that the more congruent a precedent was with the preferences of the majority opinion coalition of a treatment case the more likely the precedent would be interpreted positively. The negative and statistically significant *Ideological Distance* coefficient for positive treatment indicates that when Justices deciding the treatment case are ideologically compatible with a precedent, they are more likely to interpret it positively than to not interpret it. Conversely, the Court is less apt to treat a precedent positively when the Court is ideologically distant from that precedent. Our data analysis fails to demonstrate any relationship between the Justices' policy preferences and the negative interpretation of precedent.

The second set of variables in our model pertains to the influence of the norm of stare decisis on legal interpretation. First, the positive and statistically significant estimates for *Legal Relevance* clearly indicate that the Court is more likely to legally inter-

[16] While some may be surprised by the small number of precedents interpreted in each Court opinion, these results are consistent with prior research. Prior research indicates that the Court cites approximately 12 to 15 precedents in each opinion (Landes & Posner 1976; Johnson 1985), but it only substantively interprets approximately 20% of those citations. Thus, like prior studies, our data show that the Court legally interprets relatively few precedents in an opinion. While no one has yet to explain why the Court interprets far fewer cases than it cites, this pattern might occur for a variety of reasons. One reason that the Court legally interprets few of the precedents cited by the written briefs in a case may be because litigants and amici adopt a "scattershot" approach when writing their briefs and include citations to a large number of precedents, many of which are not particularly relevant to the case at hand (we control for this behavior with our *Legal Relevance* variable). The Court might cite such cases without legally interpreting them. This behavior is therefore likely to drive down the proportion of precedents that are actually interpreted by the Court. Second, the Court may treat few of the cases it cites because of its use of so-called "string citations"; that is, the Court legally interprets one case, but cites (without legally treating) a variety of other precedents dealing with the same issue.

[17] With "rare events" data, standard logit estimates can exhibit substantial bias (King & Zeng 2001). In order to assess the extent to which our multinomial logit estimates may be biased as a result of the skewed distribution of our dependent variable, we estimated two separate binary logit models using King and Zeng's rare events logit model (in the first model the dependent variable is whether the Court treated the precedent positively, and in the second the dependent variable is whether the Court treated the precedent negatively) and compared these estimates with the estimates of our multinomial logit model. There is very little difference between the sets of estimates, which indicates that the distribution of our dependent variable is not leading to any significant bias in the multinomial logit model estimates.

Table 1. Multinomial Logit Model of the Supreme Court's Interpretation of Precedent

	Parameter Estimates (robust standard errors)	
Independent Variables	Positive Treatment	Negative Treatment
Ideological Distance	−0.024*	0.007
	(0.009)	(0.012)
Legal Relevance	1.082*	0.814*
	(0.143)	(0.173)
Prior Positive Treatment	1.072*	0.201
	(0.333)	(0.669)
Prior Negative Treatment	−0.090	−1.145
	(0.711)	(1.807)
Vote Margin in Precedent	−0.045	−0.016
	(0.033)	(0.040)
Concurring Opinions in Precedent	−0.021	−0.036
	(0.118)	(0.158)
Constant	−4.349	−4.818
	(0.342)	(0.275)
Number of Observations	10,842	
χ^2	145.66*	

NOTE: The baseline category for the model is no legal treatment of the precedent.
* $p \leq 0.05$ (one-tailed test).

pret a precedent—either positive or negatively—when it is legally relevant to the treatment case. For instance, when a precedent is not legally relevant for a case, the Court has only a 0.30% probability of positively interpreting it. However, when a precedent is legally relevant, this percentage increases substantially to 15.1%.[18]

Our empirical results are partially consistent with our other stare decisis hypotheses. The coefficient for *Prior Positive Treatment* indicates that the likelihood of the Court positively interpreting one of its precedents increases if the Court has frequently relied on that precedent as authority in the past. *Prior Positive Treatment*, however, does not appear to have a statistically significant influence on the decision to treat a precedent negatively, as opposed to not treating it at all. The estimate for *Prior Negative Treatment* is statistically insignificant for both choices.

It is interesting that the substantive effect of *Prior Positive Treatment* on the decision to interpret a precedent positively is considerably greater than the effect of *Ideological Distance*. For a relevant precedent, the probability of being treated positively is 7.6% if the precedent has not been treated positively in the past. This probability jumps to 40.7% if the Court has positively interpreted the precedent twice per year (the maximum value found in the data set). When *Ideological Distance* is at its maximum value (57.1), the probability of positive treatment of a relevant prece-

[18] To calculate these predicted probabilities, we altered *Legal Relevance* from its minimum value for a nonrelevant precedent (−0.78) to its maximum value for a relevant precedent (3.08), while holding the other independent variables constant at their mean (or mode, for a categorical variable).

dent is 2.9%. This probability increases to 10.9% when *Ideological Distance* is at its minimum value (0).[19]

Our final set of factors consisted of precedent characteristics. This model provides no empirical validation for any of these variables.[20] The data do not suggest that the level of consensus in the voting or opinion coalitions in a precedent influences its later interpretation.

Based on these results, it appears that our theoretical conception of the Court's decision to interpret precedent applies more to the decision to treat a precedent positively than the decision to treat a precedent negatively. It is quite possible, however, that the lack of success in explaining negative treatment is a result of including the distinguishing of a precedent with the other "stronger" forms of negative treatment. Often, the distinguishing of a precedent is a less serious form of negative interpretation than when a precedent is criticized, limited, questioned, or overruled. As Spriggs and Hansford (2000:337) note, "[I]t is likely that some of the citing cases coded as Distinguished do not cast much doubt on the cited cases. In fact, the *Shepard's* manual indicates that Distinguished is the weakest form of negative treatment, and at least two *Shepard*'s letter editors described it as relatively 'unimportant' when compared to the stronger negative treatments."

As a result, we removed this type of legal treatment from the negative treatment category of our dependent variable. The resulting dependent variable has three categories: Positive Treatment, *Strong* Negative Treatment, and No Legal Treatment. We also removed the Distinguished treatments from the *Prior Negative Treatment* variable and then estimated our multinomial logit model with the recoded dependent variable and the recoded *Prior Strong Negative Treatment* variable. We present the results of this model in Table 2. We should point out that by removing the distinguished precedents from the negative treatment category, we end up with only 14 instances of strong negative treatment. For this reason, the results of this model should be interpreted with some caution.[21]

Not surprisingly, the results for the Court's choice to treat a precedent positively manifest little change. The estimates for the

[19] In this simulation, as well as in those that follow, we hold *Legal Relevance* constant at three standard deviations above its mean (2.42) and hold the remaining independent variables constant at their means (or mode, for a categorical variable).

[20] It is possible that a precedent that has been overruled by the Court will be less likely to be interpreted by the Court. We controlled for this possibility by censoring any precedent that had previously been overruled by the Court (as defined by Brenner and Spaeth [1995] and as updated by Spriggs and Hansford [2001]). The results in Table 1 are not influenced by this change.

[21] Again, we are cognizant of the issues involved with highly skewed categorical data. As with the previous model, we also estimated two logit models using the rare events logit model (King & Zeng 2001). The results are quite similar to those presented here. See footnote 17.

Table 2. Multinomial Logit Model of the Supreme Court's Interpretation of Precedent (Positive and Strong Negative Treatment)

	Parameter Estimates (robust standard errors)	
Independent Variables	Positive Treatment	Strong Negative Treatment
Ideological Distance	−0.024*	0.037
	(0.009)	(0.023)
Legal Relevance	1.071*	1.253*
	(0.142)	(0.333)
Prior Positive Treatment	1.050*	−0.562
	(0.339)	(2.146)
Prior Strong Negative Treatment	0.510	6.694*
	(3.003)	(1.272)
Vote Margin in Precedent Case	−0.045	−0.128
	(0.033)	(0.084)
Concurring Opinions in Precedent Case	−0.021	0.305
	(0.119)	(0.355)
Constant	−4.362	−7.449
	(0.333)	(0.602)
Number of Observations	10,842	
χ^2	638.45*	

NOTE: The baseline category for the model is no positive or strong negative legal treatment of the precedent.
* $p \leq 0.05$ (one-tailed test).

decision to treat a precedent in a strongly negative manner do exhibit a substantial change and fit more closely with our theoretical expectations than the estimates reported in Table 1. There are two notable differences. First, the coefficient for *Prior Strong Negative Treatment* is positive and statistically significant, suggesting that, in a given case, the Justices are more likely to interpret a precedent negatively if it has been treated negatively in the past. Second, the estimate for *Ideological Distance* hovers near statistical significance ($p = 0.053$), suggesting that the policy preferences of the Justices may influence the strong negative treatment of precedent.[22]

It is worth noting that *Prior Strong Negative Treatment* has a greater substantive effect on the decision to treat a precedent negatively than does *Ideological Distance.* The predicted probability of a relevant precedent being interpreted in a strongly negative manner is 0.5% when there have been no previous strong negative treatments of the precedent and 80.2% when the precedent has been interpreted negatively at a rate of once

[22] Although they are far from dramatic, the results for the precedent characteristic variables also improve in Table 2. Regarding the decision to treat a precedent in a strongly negative manner, the coefficient for *Voting Margin in Precedent* increases substantially in magnitude and the estimate for *Concurring Opinions in Precedent* is now in the predicted direction. It is interesting to note that when Spriggs and Hansford (2001) examine the strongest form of negative treatment, the overruling of precedent, they find that precedent characteristics do exert a significant effect. Thus, it appears that precedent characteristics play more of a role as the type of negative treatment analyzed becomes "stronger." At this time, we have no theoretical explanation for this observation.

per year (the maximum value of this variable). Moving the *Ideological Distance* variable from its minimum to its maximum value yields predicted probabilities of 0.5% and 3.9%, respectively.[23]

Even if they are interpreted only tentatively, the results of this second model imply that our theoretical model of the Court's decision to interpret precedent applies more to the decision to treat precedent in a strongly negative fashion than to the decision to simply distinguish a precedent. At least in this context, it appears that the decision to distinguish a precedent is more similar to the decision to not interpret a precedent than to the decision to actually affect the vitality of the precedent in an adverse manner.

Discussion and Conclusion

We have argued that when Supreme Court Justices write opinions for the Court they incorporate and interpret precedents in an effort to maximize the extent to which their opinions ultimately move policy outcomes closer to their preferred positions. Through the incorporation of precedent, the Justices can affect the usage and vitality of the legal rules established in prior Court decisions. In addition, the appropriate use of precedent can increase the perceived legitimacy of the Court's opinions. Based on these ideas, we expected the decision to interpret precedent in a positive or negative manner to be based on the policy preferences of the Justices, the norm of stare decisis, and certain characteristics of the precedents in question.

While our results do not confirm each of our individual hypotheses, they support elements of our broader theoretical argument. When Justices are determining whether to treat a precedent positively or to not treat it, past positive treatment and the legal relevance of the precedent exert a significant substantive effect. The ideological distance between the Court deciding the case and the precedent, while statistically significant, has a much smaller substantive influence. Regarding the decision to treat a precedent negatively, the results are less straightforward. If the distinguishing of a precedent is included as negative treatment, then only the legal relevance of the precedent appears to matter. When examining the decision to treat a precedent in a strongly negative fashion, we also find empirical support for the influence of prior negative treatment and, to a lesser extent, the ideological distance of the Court from the precedent.

Although not uniform, our empirical results have important implications for understanding Supreme Court decisionmaking. First, this research contributes to one of the central debates in

[23] These probabilities were calculated in the same manner as described in footnote 19.

the literature on judicial politics: Does precedent influence the Justices' decisions? While scholars adhering to the attitudinal model—which argues that Justices' votes are exclusively determined by their ideological orientations—assert that precedent has no influence at the Court (e.g., Segal & Spaeth 1993), researchers working in a variety of other theoretical traditions contend that precedent does influence Court outcomes (e.g., Knight & Epstein 1996; Dworkin 1978). Yet, the few empirical studies attempting to test systematically for the influence of precedent provide mixed and even contradictory evidence (e.g., Phillips & Grattet 2000; Spaeth & Segal 1999; Spriggs & Hansford 2001; Wahlbeck 1997).

Though we do not test a rigorous conception of the norm of stare decisis, we show that elements of this norm appear to play a role in determining how the Court uses precedent. There is no formal requirement that the Court's majority opinion utilize the precedents that are most relevant to the treatment case, yet Justices are considerably more inclined to interpret the most relevant of precedents while ignoring the less relevant. Indeed, based on the results of our multinomial logit model, legal relevance is a strong predictor of a precedent being treated either positively or negatively. We also show that the past legal treatment of a precedent by the Court exerts some influence on how it is interpreted in a treatment case. But, like previous studies, we find that the effect of this feature of stare decisis appears somewhat mixed. Despite this result, one of the important implications of this study is that, contrary to the prediction of the attitudinal model, prior treatment of precedent does somewhat influence the Justices' decisions. Thus we empirically demonstrate that ideology is not a sufficient explanation for the Court's interpretation of precedent.

Second, this study has implications for understanding legal change at the Court. While case dispositions determine who wins and loses at the Court, it is the legal rule established by a Court opinion that exerts broader influence on the behavior of decisionmakers throughout the political system. It is therefore essential that scholars explain why and when legal change occurs. Although a small but growing literature offers a valuable source of information about legal change, the empirical results, when taken as a whole, appear somewhat inconsistent. For example, Wahlbeck (1997) shows that Supreme Court Justices' policy preferences influence legal change in the area of search and seizure, while Epstein and Kobylka (1992) argue that such a relationship does not exist for abortion or death penalty doctrine.

These conflicting findings may stem, first, from the research designs employed by past studies. In particular, most studies are based either on narrow issue areas or on the overruling of precedent, an important but infrequent form of legal interpretation.

Thus, to broaden our ability to generalize about legal change we need to study all issue areas dealt with by the Court and multiple forms of legal interpretation. Second, previous work on legal change tends to trace the development of a specific legal rule over time. While such an orientation can generate a precise understanding of how a particular rule broadens or narrows in scope, it does not fully reflect the process of legal change. Instead, legal change, we suggest in this study, results from the Justices' case-by-case decisions to incorporate and interpret precedents into majority opinions

This study contributes to this question through its conception and measure of legal change. We contend that one way legal change occurs is through the Justices' choices to incorporate and interpret precedents into their opinions for the Court. The development of the law, therefore, results as the Justices decide how to use precedents in answering the legal questions before them. Thus, in contrast to prior research focusing on how one legal rule changes over time (e.g., Wahlbeck 1997; Epstein & Kobylka 1992), we provide an analysis of how the Justices' decisions to utilize precedent result in legal change. Our approach thus emphasizes that legal change is at least partially a function of the Justices' choices in each case to incorporate and interpret precedents.

We recognize that this study represents an initial attempt to plumb our theoretical notions regarding legal change and the influence of precedent, and as such we leave many questions unanswered. First, the past literature, as well as this study, examines *whether* precedent influences Court decisions, but our results suggest that a more appropriate question to ask is *when* precedent matters. In other words, future research must develop hypotheses that predict the circumstances under which precedent will have greater or lesser influence. One reason that our results for the positive and negative interpretation of precedent are somewhat inconsistent may be because we assume that all treatments of precedent are equally influential. We think the best way to proceed is for scholars to develop more refined theoretical arguments about the conditional nature of the influence of precedent. In doing so, we can generate a more precise understanding of how, when, and why precedent constrains the Court.

Second, we put forward a strategic conception of precedent, but we do not empirically falsify the alternative notion that it matters because the Justices feel professionally or morally obligated to follow it. Though our research design is capable of testing for whether the prior interpretation of precedent matters, it does not explicitly test for why it matters. Thus, future studies should develop research designs that can distinguish between these two types of causal mechanisms. One way of doing so is by developing predictions that are unique to each conception of

precedent and then empirically testing for those different predictions.

Third, our view of stare decisis suggests that precedent influences the Justices' choices by constraining the alternatives they can consider in a case to those that are legally defensible. Although precedent does not necessarily lead to a particular result, it can either eliminate certain outcomes from consideration by the Court or can introduce others. Our research design, however, does not explicitly test for this type of effect. While we show that the past negative interpretation of precedent matters even after controlling for judicial ideology, we do not conclusively demonstrate that the Court chose outcomes that it otherwise did not prefer because of precedent. To test definitively for such a relationship, one would need to identify the Justice's preferred legal rule and show that precedent leads him or her to some other alternative. (See Spaeth & Segal 1999.) Future research should therefore design analyses that permit the detection of such effects.

In conclusion, this study moves us one step closer to understanding Supreme Court decisionmaking. By focusing on how Supreme Court opinions legally interpret precedent, we get a more complete picture of how law develops. Yet, like other past research on this topic, our empirical results are not entirely consistent with our theoretical expectations. One inference we draw from the literature's somewhat inconsistent empirical results is that legal change and the influence of precedent are theoretically more complex than previously depicted. Thus, scholars must continue to develop more sophisticated explanations and measurement strategies to ultimately understand what is the most important aspect of judicial decisionmaking—the formation of law.

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