

Minimizing Doctrinal Drift: The Role of Clarity in Protecting Supreme Court Opinions*

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Abstract

We address whether policymakers can attempt to prevent future decision-makers from subverting their policies. We do so by examining how the United States Supreme Court can protect its decisions from future courts that would seek to dismantle them. We argue that the Supreme Court can increase compliance with its decisions among future courts by writing clearer opinions. Clearly written majority opinions enhance the ability of external actors to detect non-compliance, thereby inducing greater future compliance among judges and courts that might concern themselves with the potential legitimacy costs of deviating from established precedent. To test this argument, we draw a random sample of Supreme Court precedents and analyze how subsequent Supreme Courts and federal circuit courts “treat” those decisions. The data show that a Supreme Court that articulates its precedents with greater clarity can increase the probability of compliance by future Supreme Courts and circuit courts, even among those courts that are ideologically predisposed to reject the precedents. Sitting justices, in short, can use opinion clarity to protect their policies. The study, overall, suggests that the transmission of legal information can serve as an important legal constraint in the federal judiciary.

Policymakers across systems of government face the difficult task of protecting the policy victories they win today from tomorrow’s potentially recalcitrant policymakers. Adopting policies and sustaining them over time are two very different dynamics. Success in establishing policies can be fleeting, since future office holders often stand ready to circumvent those decisions. For example, congressional majorities constantly face the threat of new majorities forming and subverting their policy victories. Presidents are likewise challenged, as future office holders can issue executive orders and reorganize the executive branch to reverse the policies of their predecessors. These, and other, institutional actors must beware the longevity of their own power, concerning themselves with ways to preserve preferred policies from the threat of future actors and their subordinates who might reverse them.

Supreme Court justices face similar limitations. Their majority status, when they enjoy it, can be fleeting and is often fragile. They may find themselves outnumbered as a result of changing judicial preferences (Epstein, Martin, Quinn and Segal 2007) or the addition of new justices joining the Court (Nemacheck 2007) with very different preferences from their own (Dahl 1957). Justices must achieve their legal and policy goals while they can, as their relative political strength may diminish over time. Moreover, the sanctity of the Court’s decisions in the judicial hierarchy is equally limiting, as lower federal court judges who interpret Supreme Court precedent often look to contemporary justices for cues rather than to the preferences of the contemporaneous Court that adopted the precedent (Westerland et al. 2010). Thus, current Supreme Court majorities face two interrelated problems. First, future Supreme Court majorities can directly undermine their policies by overruling them or treating them negatively. Second, future Supreme Courts can signal to lower courts that those judges may also treat a precedent negatively.

Accordingly, the central question we examine is whether the Supreme Court can use opinion clarity to protect its decisions from future Supreme Courts and federal circuit courts who might wish to dismantle them. We argue that increasingly clear opinions serve as a “drag” on future judges and justices who would like to subvert them. That is, clarity can

slow the movement of future courts away from a precedent. This is so because opinion clarity can illuminate instances when courts violate norms of stare decisis (e.g., Knight and Epstein 1996). Judges and justices are expected to follow past precedent and apply it where necessary, even when the precedent contradicts the judge’s policy goals (Powell 1990; Schauer 1987). Courts that systematically fail to follow precedent may jeopardize their institutional legitimacy (Bailey and Maltzman 2011; Hansford and Spriggs 2006). Opinion clarity, as a result, can slow doctrinal drift because deviations from clear opinions are easier to detect than deviations from ambiguous opinions (Staton and Vanberg 2008).¹ Thus, if a future Supreme Court or circuit court of appeals wishes to deviate from a clear precedent, it is likely to incur increased legitimacy costs. Even in those instances where both the lower court and contemporary Supreme Court would like to undermine the precedent, their non-compliance with a clear opinion will be easier to detect. And for fear of losing legitimacy, they should be more likely to follow the precedent.

To analyze whether the Court can use opinion clarity to protect its rulings and induce greater compliance, we examine two sets of data. First, we draw a random sample of 500 Supreme Court majority opinions that set precedents and then analyze the nearly 900 subsequent Supreme Court cases that “treated” those precedents. Second, we examine the approximately 9500 federal circuit court cases that interpreted those same 500 Supreme Court precedents. In both analyses, we examine whether the clarity of a precedent-setting opinion influences future Supreme Court and circuit court decisions involving the precedent.

¹Similarly, because it is easier to detect non-compliance from a clear ruling, the Court can use clear opinions to shift the costs of auditing to external actors (McCubbins and Schwartz 1984). Interest groups, the public, and even Congress will be better able to detect a court’s non-compliance. Once they detect non-compliance, they can alert relevant actors (e.g., the public, legal groups) of such behavior, with the possibility of reining in the offending judges or justices.

The empirical results offer substantial support for our argument. Increased opinion clarity significantly increases the probability that future Supreme Courts positively treat (i.e., make a ruling consistent with) given Supreme Court precedents, even while controlling for future Courts' ideological proclivities to reverse those precedents. More specifically, increasing the clarity of a Supreme Court precedent-setting opinion can produce up to a 0.17 change in the probability of a positive treatment of precedent. A clearer opinion can even induce greater compliance by a future Supreme Court that is ideologically predisposed to reject it. Moreover, increased opinion clarity can enable an enacting Court majority to induce compliance among lower courts even when those courts (later) face a Supreme Court that is ideologically predisposed against the precedent. As the clarity of an opinion increases from the most ambiguous level observed in the data to the clearest, the probability that the lower court will treat the precedent positively increases by approximately 0.12. Put plainly, opinion clarity serves as a drag on future courts by taking advantage of the legitimacy costs often associated with ignoring precedent and thereby slowing doctrinal drift. Opinion clarity, thus, may enable a sitting Court to lock in—or at least minimize the decay of—present policy gains. The results, overall, reinforce the notion that legal norms constrain the Court's decision making (e.g., Bailey and Maltzman 2008, 2011; Bartels 2009; Richards and Kritzer 2002), emphasizing the importance of the transmission of legal information in the federal judiciary.

A Theory of Policy Protection

A critical problem facing policymakers is how to preserve today's policy victories from tomorrow's recalcitrant institutional majorities. Political coalitions form and disintegrate, making it imperative that actors utilize their influence to adopt and execute their goals while they retain majority control. Majority coalitions must protect their policies, knowing that their time in power is fleeting. Policymakers, therefore, will seek to tie the hands of their successors and make it more difficult to subvert their decisions.

There is considerable evidence to suggest that legislators have policy protection on their minds when crafting policies. For example, McCubbins, Noll and Weingast (1987) argue that majority coalitions use administrative controls to protect their policies, especially in anticipation of losing power. Administrative controls serve as a backstop against the loss of power at some future date, ensuring that particular kinds of agency outcomes are more likely to occur in the future than others—even after the enacting majority coalition no longer has political control. Legislators use administrative procedures “to ensure that the bargain struck among the members of the coalition does not unravel once the coalition disbands” (McCubbins, Noll and Weingast 1987, 255). McCubbins, Noll and Weingast (1999) expand on the argument, claiming that Democrats (in the majority party) opted to pass the Administrative Procedure Act (APA) at a politically opportunistic time—they wanted to protect New Deal policies from a growing Republican movement that threatened their existence. As such, they created the APA to ensure that their progressive policies might have some protection in the future if (and when) they no longer held power. Similarly, O’Connell (2011) finds that when control of Congress changes hands, members and friendly agencies rush through rules before the new Congress takes power. And, de Figueiredo (2002) finds that conservative state legislators provide their governors the line item veto power when they expect to lose majority control of the government.²

Presidents, no less than legislators, seek to tie the hands of future office holders. Certainly, no student of history can forget John Adams’s “midnight appointments” to entrench Federalist influence in the government and constrain the newly-elected Democratic-Republican Thomas Jefferson (Balkin and Levinson 2001). Examining more recent political

²One additional, though blunt, method of limiting future Congresses is by passing legislative entrenchment statutes (i.e., statutes whose language specifically precludes future Congresses from changing a bill) (Posner and Vermeule 2002). There are very few instances of such statutes being passed because most people believe they are unconstitutional (see, e.g., Roberts and Chemerinsky 2003).

machinations, Black et al. (2007) find that presidents are much more likely to make recess appointments during their final weeks in office—especially after the White House has switched parties—in order to gain policy victories and impede their successors. Indeed, President Clinton issued “scads of executive orders” during his final days in office to protect policies and make President George W. Bush’s job more difficult (Cannon 2001, 274).

We argue that Supreme Court justices, likewise, can use the tools at their disposal to protect their decisions from future courts. Chief among these tools is the use of clear language in their opinions. Why would clarity protect the Court’s opinions? The logic, which we explain more fully below, is simple. Legal norms influence justices to follow precedent (e.g., Knight and Epstein 1996); when justices ignore precedent (or other legal considerations), the Court’s legitimacy often suffers (Hansford and Spriggs 2006). External actors are better able to detect non-compliance with a precedent when it is clear. Therefore, courts risk incurring higher costs when ignoring clear (versus ambiguous) precedent, and should be less inclined to deviate from it. Opinion clarity, thus, can slow doctrinal drift.

Judges and justices are expected to adhere to the norm of *stare decisis* (Richards and Kritzer 2002; Knight and Epstein 1996). Perhaps nowhere is this concept better illustrated than in the testimony of Chief Justice John Roberts before the Senate Judiciary Committee, when he declared: “Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them... Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath...” (Roberts 2005, 55). Likewise, Baum (1997, 2006) argues that judges are socialized in law school to internalize respect for precedent and are expected to adhere to it throughout their careers. Even in private conferences, away from the public, justices discuss how precedent constrains their actions (Knight and Epstein 1996). In fact, recent empirical findings strongly suggest that the institutional need to follow legal factors compels justices to deviate from sincere policy concerns and behave in ways they otherwise would not (Bailey and Maltzman 2008, 2011;

Bartels 2009; Black and Owens 2009). Put plainly, while justices do not slavishly follow precedent to the exclusion of all else, they are expected to respect it.

As a result, a Court that fails to follow *stare decisis* is likely to engender repercussions and could jeopardize its legitimacy (Bailey and Maltzman 2011; Epstein and Knight 1998; Hansford and Spriggs 2006). As Lindquist and Klein (2006) assert: “One of the Court’s most important claims to legitimacy is the proposition that its decisions are not determined solely by the justices’ personal policy preferences but are influenced as well by their understandings of what ‘the law’ requires in a given case” (135). Legitimacy, of course, is especially important for the Court. Scholars commonly argue that legitimacy concerns often motivate the justices’ decisions, as the Court lacks the capacity to execute its own opinions (e.g., Casillas, Enns and Wohlfarth 2011; Clark 2009; McGuire and Stimson 2004; Mishler and Sheehan 1993). It has, as Hamilton tells us, merely judgment. Judges and justices must follow certain procedures (such as adhering to precedent), then, to accumulate and retain legitimacy (Gibson and Caldeira 2011). As the Court itself once stated, its legitimacy “depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”³

In sum, the Court is expected to follow *stare decisis*, and a failure to do so can compromise its institutional legitimacy. How, though, does opinion clarity fit within this dynamic? Non-compliance with clear opinions is easier to detect (and punish) than non-compliance with ambiguous opinions. Opinions with greater clarity are more likely to articulate precisely what the Court wants and thus make the detection of non-compliance easier: “The more clearly an opinion states the policy implications of the decision, the easier it is to verify whether policy makers have faithfully complied, making it more likely that external actors

³*Planned Parenthood v. Casey*, 505 U.S. 833, 866 (1992).

can monitor and impose costs for non-compliance” (Staton and Vanberg 2008, 507).⁴ Extralegal actors such as Congress, interest groups, and the public will find it easier to detect such non-compliance. And once they detect such behavior, they can alert relevant actors to the shirking (Staton and Vanberg 2008; McCubbins and Schwartz 1984). In response, Congress might strip the Court of jurisdiction, refuse to follow its decisions, refuse to support the Court’s budget, override statutory construction decisions, or otherwise impede the Court. Similarly, the president might go public and attack the Court’s credibility, refuse to follow its decisions, or use the Solicitor General to influence judicial outcomes (Black and Owens 2011; Wohlfarth 2009). Therefore, justices can use opinion clarity to raise the costs of non-compliance on future courts and thereby protect their policies.⁵

We are not alone in asserting that opinion clarity could be an effective tool to protect Court policies and constrain future judges. A growing number of studies focus on the importance of clarity in the transmission of information. For example, Huber and Shipan (2002) find that legislatures can use broad or detailed statutory language to expand or limit executive discretion. The authors find that when the legislature does not trust an agency, it “will not want to give free rein over policy to the agency, but instead will prefer to constrain the agency by filling enacting legislation with specific policy details and instructions” (332). Randazzo, Waterman and Fine (2006) similarly find that Congress can pass detailed legislation to constrain lower court judges. “Members of Congress,” they argue, “can con-

⁴We should note that Staton and Vanberg (2008) argue that higher levels of clarity make the detection of non-compliance easier, but a court with low levels of legitimacy might not want such detection to be known publicly.

⁵Indeed, one benefit of clarity in this context is that, like the fire alarm argument made by McCubbins and Schwartz (1984), outside groups will find it easier to detect non-compliance and alert the public and political actors. By “deputizing” more actors via clear opinions, the current Court can delegate the auditing function and increase public awareness of non-compliance and, thereby, enhance the threat to the Court’s legitimacy from non-compliance.

strain judicial decision making over the long term by enacting detailed legislation” (1015).⁶ Likewise, Randazzo, Waterman and Fix (2011) find that detailed state statutes limit the discretion afforded to state court judges. And, Spriggs (1996) shows that clear Court opinions are much more likely than ambiguous opinions to generate major policy changes among federal agencies (*see also* Baum 1980, 1976; Dolbeare and Hammond 1971). The clarity of text thus has scholarly roots in a number of studies examining institutional decision making and, we believe, can protect Supreme Court opinions as well.

To be sure, this is not to say that future Courts will never undo precedent set by clear opinions. There will be times when those courts are able (and willing) to dismantle existing doctrine. Nevertheless, it is to say that, on average, the costs associated with reversing precedent will be greater when the Court’s precedent-setting opinions are clear. Justices, in short, will not be able to prevent future doctrinal drift, but they may be able to use opinion clarity to slow it.⁷ Thus, we expect the following:

Opinion Clarity Hypothesis: As a Supreme Court precedent-setting opinion becomes clearer, the likelihood that a future Supreme Court majority will treat it positively increases.

Not only must current Supreme Court justices concern themselves with how future Supreme Courts will treat their opinions, they also must worry about how lower court judges

⁶The authors make no theoretical claim about whether members intentionally passed detailed legislation in an effort to constrain lower courts, however.

⁷One reasonable question asks why, if clarity plays such a protective role, justices would ever author less-clear opinions. While the answer to this question is beyond the reach of this article, we direct interested readers to examine Staton and Vanberg (2008), who argue that opinion ambiguity may come in handy when courts in developing countries seek to build legitimacy in the face of political actors who may ignore their opinions. In this article, we examine merely one facet of opinion clarity.

will treat those opinions. Opinion clarity, though indirectly, is likely to induce greater compliance among lower court judges as well.

There are 94 federal judicial districts and 13 circuit courts of appeals, with a total of 865 Article III judges who are charged with interpreting and applying precedent set by the United States Supreme Court.⁸ These lower court judges supervise the vast majority of litigation in the federal judiciary. For a host of reasons, not the least of which are fairness, stability, and legitimacy, these lower court judges are expected to follow Supreme Court precedent—and they often do (Benesh 2002; Benesh and Reddick 2002; Songer and Sheehan 1990; Baum 1980; Gruhl 1980).

To determine how to interpret Supreme Court precedent, though, these judges look to a number of sources, the most important of which is the ideological composition of the current Supreme Court. As Westerland et al. (2010) find, circuit court judges who interpret and apply precedent are much more likely to look to the policy preferences of sitting Supreme Court justices than to the past, precedent-setting Court. That judges rationally anticipate current upper court review is not surprising. Lower court judges are constrained in their behavior by the threat of higher court review. That is, regardless of existing precedent, lower court judges face the threat of review from the current Supreme Court. When the Supreme Court no longer looks invested ideologically in a precedent (and thus as the threat of review decreases), lower court judges will be more likely to treat it negatively. As Westerland et al. (2010) state: “increasing ideological estrangement between the enacting and contemporary high courts has a substantial impact on the behavior of the contemporary lower court” (899). Simply put, as the current Supreme Court becomes more ideologically distant from the precedent, lower court judges become less likely to follow that precedent.

Opinion clarity can nevertheless constrain lower court judges in this dynamic. By using opinion clarity to tie the hands of future Supreme Courts, current justices can indirectly

⁸Data from <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtofAppeals.aspx>.

constrain judges down the judicial hierarchy. Again, a clear precedent makes non-compliance by all judges more detectable. Indeed, the circuit courts face an additional challenge from non-compliance that the Supreme Court does not. If the Supreme Court ignores clear precedent, Congress and relevant legal groups can try to rectify the problem or, at least, challenge the decision’s legitimacy. If a circuit court ignores clear precedent, it must worry about those responses as well as the threat of reversal from the Supreme Court. Circuit courts thus face perhaps even greater costs than the Supreme Court for ignoring Supreme Court precedent.⁹

Simply put, a Supreme Court majority worried about hierarchical non-compliance because of future Supreme Courts can use clarity to make it more obvious to Congress and others that neither the lower courts nor the Supreme Court are being faithful to the precedent. The hope for the enacting Court majority, of course, is that the public and other actors will generate enough pressure on the estranged courts to maintain the precedent, for fear of losing legitimacy if they do not.

Judicial Hierarchy Hypothesis: As a Supreme Court precedent-setting opinion becomes clearer, the likelihood that federal circuit courts will treat it positively increases.

Measures and Data

To analyze our theoretical claims, we examined a random sample of 500 Supreme Court opinions from the 1953 to 2004 terms and constructed two separate data sets. First, to examine whether opinion clarity constrains future Supreme Courts, we identified every Court decision between 1953 and 2005 that “treated” our random sample of precedents—producing 887 high court decisions. More specifically, the data measure how each subsequent Supreme Court decision treated the enacting Supreme Court’s precedent (Black and Spriggs 2008; Cross and Spriggs 2010; Cross et al. 2010; Fowler et al. 2007; Hansford and Spriggs 2006).

⁹And, unlike the Supreme Court, the circuit courts likely do not have the built-up stock of legitimacy to draw upon.

Second, to examine whether opinion clarity indirectly constrains lower courts, we identified every federal circuit court of appeals decision between 1953 and 2001, that “treated” our random sample of Supreme Court precedents.¹⁰ This data set consists of 9481 lower court treatments of Supreme Court precedents.

Our dependent variable in each analysis represents how the Supreme Court or circuit court treated a Supreme Court precedent. Using *Shepard’s Citations*, and following the coding procedure employed by Hansford and Spriggs (2006) and Westerland et al. (2010), the dependent variable in each model takes on one of three forms: positive treatment, neutral treatment, or negative treatment. A decision that “followed” a Supreme Court precedent is a positive treatment. A decision that “explained” or “harmonized” a precedent is a neutral treatment. Lastly, a decision that “overruled,” “criticized,” “questioned,” “limited,” “superseded,” or “distinguished” a precedent is a negative treatment. We code positive treatments as 1, neutral treatments as 0, and negative treatments as -1.

Opinion Clarity. We measure our main covariate, *Opinion Clarity*, using readability scores that are popular in a host of contexts and that have recently taken on more importance in political science scholarship (see, e.g., Law and Zaring 2010). Readability scores discriminate among texts to determine what makes some easier to read and interpret than others (DuBay 2004). They offer “quantitative, objective estimates of the difficulty of reading selected prose” (Coleman 2001, 489). Readability indexes have a long empirical history and were originally developed by reading specialists and those in the education field to define the appropriate reading level for school text books.

Readability measures offer at least three benefits. First, they provide a measure of clarity that can be replicated. Rather than relying on expert judgement or some other

¹⁰We ended our analysis of lower court treatments in 2001 because Hansford and Spriggs’s data on precedent vitality among the lower courts stops in that year. We thank Hansford and Spriggs for generously providing these data on lower court treatments of Supreme Court precedent, as well as their data on the Supreme Court’s treatment of precedent.

metric to determine a text’s clarity, the researcher can select a method that other scholars may easily replicate. Second, the measure is objective. Such tools “compute the readability of a given text using objective parsing rules that capture how difficult a text is to read from a grammatical and linguistic perspective. . . .” (Law and Zaring 2010, 1691), thus obviating the problems that could arise from a more subjective content analysis driven by human translation. Finally, the approach is efficient. Rather than personally having to pore over thousands of pages of text, a researcher can automate a program to read and estimate the readability of a text, allowing the examination of massive amounts of data.

Our use of readability measures to estimate the clarity of a Supreme Court opinion follows a growing trend in empirical legal scholarship. For example, Law and Zaring (2010) employ readability scores to measure the complexity of federal statutes in an effort to determine whether the United States Supreme Court relies on legislative history when interpreting complex laws. Coleman and Phung (2010, 103) examine the readability of over 9,000 party briefs spanning over three decades of U.S. Supreme Court decisions to find a “gradual historical trend towards plainer legal writing.” Coleman (2001, 491) uses readability scores to compare the writings of Justice Cardozo and Lord Denning with their contemporaries, and finds “strong empirical support for the widely-held claim that Cardozo and Denning’s judicial opinions are written in a style that is comparatively plain and clear.”¹¹

We employ the Coleman-Liau readability index. The Coleman-Liau index is a composite score of the length of words contained within a text—measured by the number of characters—and the number of sentences within that text. An advantage of the Coleman-

¹¹Using a variant of a readability test, Bligh, Kohles and Meindl (2004) examine the content of President Bush’s pre- and post-9/11 speeches to compare how he spoke to the American people. Hart (1984) uses readability scores to compare the complexity of presidential speeches to those delivered by other speakers. A number of federal laws even require that agencies conduct economic transactions in clear and simple English, and use readability scores to determine their clarity (DuBay 2004).

Liau index over other readability scores is its non-reliance on the number of syllables in a word, whereas other approaches tend to approximate the number of syllables based on a count of vowels. Relying on word length is advantageous because word length in letters is a better predictor of readability than word length based on syllables (Coleman and Liau 1975). Moreover, the formula has economical benefits. Characters are easy to count with a basic computer script, yet the number of syllables is not. The formula for the Coleman-Liau Grade Level Readability Index (CLI) is as follows:

$$CLI = 5.88\left(\frac{Number\ of\ Letters}{Number\ of\ Words}\right) - 29.6\left(\frac{Number\ of\ Sentences}{Number\ of\ Words}\right) - 15.8 \quad (1)$$

The formula provides a numerical score that reflects the grade level someone theoretically would have to complete in order to understand the text. High values, thus, traditionally reflect a text that is less readable by large audiences, whereas lower values imply a more readable one. In our sample, the median CLI score is 10.04, suggesting that the average Supreme Court opinion is written such that someone in the tenth grade could understand it.¹² It is important to note that the readability measure does not suggest that everyone with a high school education will be able to understand the legal concepts discussed in Supreme Court opinions. Indeed, the measure cannot examine legal concepts specifically—we do not examine the clarity of the law per se, but, rather, the clarity of the opinion text that sets the precedent. While determining the clarity of law itself would be an interesting examination, it is beyond the scope of this article. Rather, the measure approximates how well the reader, in general, can understand the text. Our approach follows a trend in recent scholarship which looks to the text of opinions to determine legal clarity (Owens and Wedeking 2011). That is, we examine the overall intelligibility of opinions that set out and explain the Court’s prece-

¹²The range of the measure among our sample of Supreme Court precedents is 5.78 to 12.79 with a standard deviation of 1.25.

dents. The strength of readability measures is their strong correlation with text difficulty (Huggins and Adams 1980).

To illustrate the measure's face validity, consider two texts: The Lord's Prayer and the Declaration of Independence. The Lord's Prayer, a passage commonly recited by millions around the world, has a CLI score of 4.33, which suggests that it is readable and understandable by those with even minimal formal education. Consider, next, the Declaration of Independence. The Declaration reflects a CLI score of 12.48, meaning that the text is considerably more complex and a reader essentially requires significantly more education to understand the text. For those who are interested in the readability scores of some contemporary cases, we provide the following results: The CLI index for *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004) was 8.08—well below the mean in our sample. *Ricci v. DeStefano* 557 U.S. (2009) observes a CLI score of 10.84, above the mean in our sample. *Grutter v. Bollinger*, 539 U.S. 306 (2003) has a CLI score of 10.2, while *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), has a CLI score of 10.74. For ease of interpretation, we recode the values of the CLI predictor so higher values reflect *greater* clarity.

Ideological Distance Between the Precedent and Supreme Court. We expect that future Supreme Court majorities will be more likely to treat Court precedents negatively when they are increasingly distant ideologically from that precedent (Hansford and Spriggs 2006). Furthermore, as the justification for our second hypothesis suggests, Westerland et al. (2010) demonstrate that the political composition of the current Supreme Court exerts a considerable degree of hierarchical control over lower court decisions. Circuit courts are less likely to follow a precedent when the sitting Court itself is ideologically distant from the precedent, largely irrespective of the circuit judges' own political preferences. Thus, we must measure the ideological distance between the precedent and the reviewing (i.e., treating) Supreme Court.

We follow three steps to measure the ideological distance between the reviewing Supreme Court and the precedent. First, we follow Carrubba et al. (2012) and assume that the policy content of each Supreme Court decision is best represented by the ideological location of the median member of the majority coalition (see also Clark and Lauderdale 2010). Thus, to measure the ideological content of each precedent, we look to the Judicial Common Space (JCS) score (Epstein, Martin, Segal and Westerland 2007) of the median member of the majority coalition on the Supreme Court that adopted the precedent. Second, to measure the ideological location of the reviewing Supreme Court, we calculate the JCS score of the median justice on the Supreme Court during the year in which the Supreme Court (or circuit court, for the lower court analysis) published the decision in which it interpreted the past Court precedent. Third, we calculate the absolute value of the distance between the two values. Thus, *Supreme Court-Precedent Distance* is the absolute value of the difference between the precedent and the JCS score of the median justice on the reviewing Court. We include this predictor in both the Supreme Court and lower court treatment models.

Ideological Distance Between the Precedent and Circuit Court. In the lower court treatment model only, we account for the possibility that a circuit court will be less inclined to treat an ideologically distant precedent positively. We take three steps to measure the ideological distance between the Supreme Court precedent and the circuit court panel. First, we retain our measure of the ideological value of each precedent as described above. Second, we measure the policy preferences of the circuit judges who treat the precedent. To do so, we identified the names and JCS scores of the judges who sat on the circuit court that treated the precedent.¹³ We then determined, within each of these 9481 cases, which circuit judges joined the majority coalition. We then coded the circuit panel's ideological preferences as the JCS score of the median judge in the majority coalition in each case. In a unanimous

¹³We thank Tom Hansford for graciously providing the identity of the circuit judges sitting in each circuit court panel.

three-judge circuit court panel decision, circuit court ideology is coded as the JCS score of the median judge on the panel. In cases with a dissent or a special concurrence, we look to the midpoint between the two judges in the majority coalition. If the lower court decision was en banc, we code circuit court ideology as the median judge in the en banc majority. When district court judges sit by designation on the circuit panel, or when the appeal is from a three-judge district court panel, we follow Giles, Hettinger and Peppers (2001).¹⁴ Third, after we retrieve those two scores, we simply calculate the absolute value of the difference between the two values. Thus, *Circuit Court-Precedent Distance* is the absolute value of the ideological distance between the precedent and the circuit panel majority.

Precedent Vitality. Recent empirical work shows that the strength of Supreme Court precedent influences the Supreme Court's treatment of it, as well as lower court compliance with those precedents. Hansford and Spriggs (2006) discover that the strength (i.e., vitality) of the precedent plays a role in how the Supreme Court interprets it. At the same time, the authors find that precedent vitality influences lower court treatment of Supreme Court precedent. The more favorably the Supreme Court has treated one of its precedents, the more likely it is that lower federal courts will do the same. As such, we measure *Precedent Vitality* as the number of previous positive Supreme Court interpretations of a precedent minus the number of previous negative Supreme Court interpretations of that precedent (up to, but not including, the year in which a case was decided). Positive values indicate that the Supreme Court has largely treated the precedent positively, while negative values indicate that the Supreme Court has largely treated the precedent negatively over time.

Precedent Characteristics. We also control for a host of characteristics, in both analyses, related to the original Supreme Court decision. First, we expect that the Supreme Court and lower courts will be more likely to treat precedent positively when the enacting Court was unanimous. Thus, *Unanimous Precedent* equals 1 for precedents that attracted

¹⁴More specifically, we measure district judges' preferences by looking at the common space scores of the home state senators associated with their appointments.

unanimous support from the enacting Supreme Court; 0 otherwise. Next, because the likelihood of a positive treatment might diminish with a precedent’s age, we create a variable that measures the number of years the precedent has survived. *Precedent Age* is a count of the number of years between the precedent’s creation and the subsequent treatment of it. We also include a variable in both analyses accounting for those Supreme Court precedents that formally altered a previous Court precedent. *Precedent Alteration* equals 1 if the precedent under consideration was one that formally altered previous Supreme Court precedent; 0 otherwise. We also control for those Supreme Court precedents that formally struck down an act of Congress. Since such decisions are highly salient and often controversial, we might expect justices and lower court judges to be less likely to follow such precedents. We code *Judicial Review* as 1 if the Supreme Court precedent being interpreted struck down an act of Congress; 0 otherwise.¹⁵ Lastly, we look to the number of organized interests that filed amicus curiae briefs in the original Supreme Court opinion. Since amicus participation could highlight the salience of the original precedent, we might expect courts to issue a positive treatment given the likelihood of increased scrutiny from external actors and organized interests. Thus, *Amicus Participation* is a count of the number of amicus curiae briefs filed in the initial precedent-setting case.

Results

Since our two dependent variables represent trichotomous, ordered outcomes, we estimate two ordered logit regression models. A standard (or proportional odds) ordered logit model specification is inappropriate, however, because the data in each analysis vio-

¹⁵We utilize the “minVotes” variable in the Supreme Court Database (available at: <http://scdb.wustl.edu/>) to identify those decisions with unanimous support. We use the “precedentAlteration” variable to identify decisions that overturn a prior Supreme Court precedent. And, we use the “declarationUncon” variable to identify those decisions striking an act of Congress.

late the parallel regression assumption, as several predictors display significantly different effects across the two ordered configurations of the dependent variable.¹⁶ As a result, we utilize a generalized ordered logit model to estimate a separate parameter for each predictor and ordered combination of the dependent variable. Tables 1 and 2 report these regression results.

We first examine the Supreme Court’s treatments of its own precedents. We hypothesized that opinion clarity induces greater compliance by future Supreme Court majorities with a precedent. The results, as shown in Table 1, support our hypothesis. When the Court writes a clearer majority opinion, it can significantly increase the probability that a future Supreme Court will treat the precedent it set positively. Figure 1(a) displays the magnitude of this general effect.¹⁷ When shifting the degree of opinion clarity from the most ambiguous to clearest opinion observed in the sample, the expected probability of a positive treatment increases from 0.26 to 0.43—a 65% change.¹⁸ Stated otherwise, holding all else equal, the Court is over 1.5 times more likely to treat positively a precedent articulated in a clear opinion than one set in an unclear opinion.

What is more, opinion clarity can blunt the negative effects of ideological distance from a precedent. As Figure 1(b) displays, the ideological distance between the precedent and Supreme Court exhibits the expected negative effect. When the future Supreme Court diverges ideologically from the precedent, it becomes significantly less likely to treat it positively. In particular, a one standard deviation increase in ideological distance yields an expected 0.10 decrease in the probability of a positive treatment. The results suggest, how-

¹⁶The results of a likelihood-ratio test of the proportionality of odds across the outcome categories confirms this conclusion ($p < .001$).

¹⁷We compute all predicted probabilities using the SPOST program in Stata while holding all control predictors at their mean (or modal) values (Long and Freese 2006).

¹⁸A one standard deviation increase in opinion clarity yields an expected 0.04 increase in the probability of a positive treatment.

ever, that clearer opinions can mitigate the negative effect of ideology and induce greater compliance in the future. Indeed, a Supreme Court that is ideologically distant (i.e., one standard deviation away from the mean) from a precedent reflecting the maximum degree of clarity has a 0.06 higher probability of treating it positively than a Court that is only moderately distant (i.e., at the mean) from an unclear precedent (i.e., minimum level of clarity). Clarity, in short, can attenuate the negative effects of ideological distance.

Among the other predictors in the model, the Supreme Court is more likely to treat a precedent positively when it exhibits greater vitality—that is, when the original precedent is stronger and has been interpreted by the Court more favorably over time. The Court is less likely to treat older precedents positively as well as those that attracted greater amicus participation. We should note that the results of the Supreme Court treatment analysis are limited, to some degree, by the sensitivity of how to configure the “neutral” treatment category as part of the ordered dependent variable. Yet, at least when considering the likelihood of a distinctly positive treatment (versus combining positive and neutral), the evidence suggests that opinion clarity can lead to greater compliance by future Supreme Courts.

We next examine circuit court treatments of Supreme Court precedents. We hypothesized that opinion clarity induces greater compliance with Supreme Court precedent among lower courts. Table 2 supports this hypothesis as well. As the coefficient on *Opinion Clarity* shows, when a Supreme Court majority articulates a precedent with greater clarity, it can induce greater compliance among circuit courts. Figure 2(a) displays the predicted probability of a positive lower court treatment across the observed range of opinion clarity. As the degree of opinion clarity of a given precedent changes from the most ambiguous level observed in the data to the clearest, the probability that the lower court will treat the original precedent positively increases by approximately 0.13. When an opinion is patently unclear, the circuit courts have a 0.51 probability of treating it positively. Conversely, when the opinion that set

the precedent was a model of clarity, the circuit courts have a 0.64 probability of treating it positively—a 25% change.

As expected, the results also show that the sitting Supreme Court’s ideological preferences significantly affect lower court treatments. As the high court increasingly diverges from the precedent, circuit courts are less likely to treat the precedent positively. Increasing the ideological distance between the precedent and sitting Supreme Court by one standard deviation yields an approximate 0.05 decrease in the probability of a positive circuit court treatment. This result accords with previous studies showing that lower courts take their cues from the political composition of the sitting Supreme Court (Westerland et al. 2010).

What is more, once again we observe that greater opinion clarity can mitigate the negative effects of ideological distance. Figure 2(b) illustrates this additive effect. The expected probability that the lower court will positively treat the clearest precedent is 0.60, even when the Supreme Court is ideologically predisposed to reject the original precedent (measured as one standard deviation away from its mean). This expected probability is 0.08 greater than when the circuit court treats an ambiguous precedent that is only moderately distant from the Supreme Court. It is even 0.04 higher than when the circuit courts treat an ambiguous precedent to which the Supreme Court is ideologically proximate. Table 3 reports the predicted probabilities of a positive treatment across these and other hypothetical configurations of opinion clarity and the Supreme Court-Precedent ideological distance measure using intervals of one standard deviation from their respective means. Importantly, the data suggest that a precedent with high clarity in the presence of high ideological distance yields nearly the same probabilistic expectation of a positive circuit treatment compared to a configuration with low clarity and the mean level of ideological distance. Thus, the positive effect of a move from low to high clarity (a shift of two standard deviations) can nearly cancel out the negative impact of shifting ideological distance from the mean to high level. In other words, a meaningful increase in clarity can, to some extent, balance the countervailing impact of Supreme Court-Precedent ideological distance.

The lower court treatment analysis also displays several significant effects among the control variables. First, a circuit court is less likely to issue a positive or neutral treatment as the precedent diverges ideologically from the majority coalition of the lower court panel. Furthermore, a precedent with greater vitality significantly increases the probability of a positive lower court treatment. Among the numerous characteristics of the original precedent, a unanimous precedent enhances the expectation of a positive treatment while older precedents or those that overturned an act of Congress yield a decrease in the likelihood of a more positive treatment.

Overall, we argued that since lower court judges take cues from sitting Supreme Court majorities when determining how to treat precedent, the enacting Court can tie the hands of future judges (and justices) by writing clearer opinions. Even though the Supreme Court may have drifted from the precedent, lower court judges know that the sitting Court will have a more difficult time discarding the clear precedent. External actors can more easily detect the Court's move away from its precedent and, subsequently, the potential for enhanced scrutiny facing the Court may be problematic. As such, an enacting Court majority, in the end, may be able to use opinion clarity to protect its decisions from both future Supreme Courts and lower courts that might seek to undermine its policies.

It is possible, of course, that judges and justices simply try to interpret the law faithfully and that increased opinion clarity eases their abilities to do so (see, e.g., Kornhauser 1995). This "team theory" argument is, in some respects, reasonable. Quite aside from ideology or strategy, clear instructions are likely to induce more compliance. Yet, the fact that our ideological variables turned out to be significant suggests that ideological considerations are strong. Increased Supreme Court distance from the precedent-setting opinion diminishes positive treatment. And there is evidence to suggest that increased ideological distance between the circuit court and the precedent diminishes positive treatment. If judges and justices simply tried to get the law right, these coefficients would not be significant. Thus, we agree completely with the argument that clearer opinions are easier to follow. Indeed,

that is a crucial part of our argument (along with the notion of detecting non-compliance). In short, we believe that clearer opinions are easier to comply with, and that justices can use that dynamic to increase compliance with their opinions and to protect them from future courts that may be disinclined to apply them.

Conclusions and Implications

Attempting to ensure that future actors do not undercut policies is a persistent, difficult dilemma for policymakers. Political actors generally recognize that while they may be in the majority today, tomorrow's political climate may not be as favorable. Thus, they might often take steps to protect their policies from future officeholders and their subordinates. Accordingly, many institutional actors can imbed their decisions with features that make future compliance more likely. While these problems likely exist for all policymakers, we examined how Supreme Court justices protect their decisions and decrease doctrinal drift.

The results support our hypotheses. A clearer opinion is, on average, more likely to induce both Supreme Courts and lower courts to interpret the original Court's precedent in a positive manner. More importantly, the results suggest that greater opinion clarity continues to mitigate the negative effects of ideological distance and can slow politically-driven doctrinal drift. When a future Supreme Court becomes ideologically hostile to a precedent, greater opinion clarity (and the potential legitimacy costs that a court might incur if undermining a clear precedent) can dull the edge of their ideological motivations. For similar reasons, lower courts will be less inclined to treat the precedent negatively. Simply put, courts have a more difficult time discarding clear precedent versus unclear precedent.

A vast body of empirical scholarship on the U.S. Supreme Court has long established that the justices' personal policy preferences are central to (or perhaps the only consistent predictor of) judicial decision making (e.g., Segal and Spaeth 2002). Scholars, however, have increasingly offered compelling empirical evidence to illustrate how legal norms involved in the judicial process regularly constrain the justices' ability to exercise their political predis-

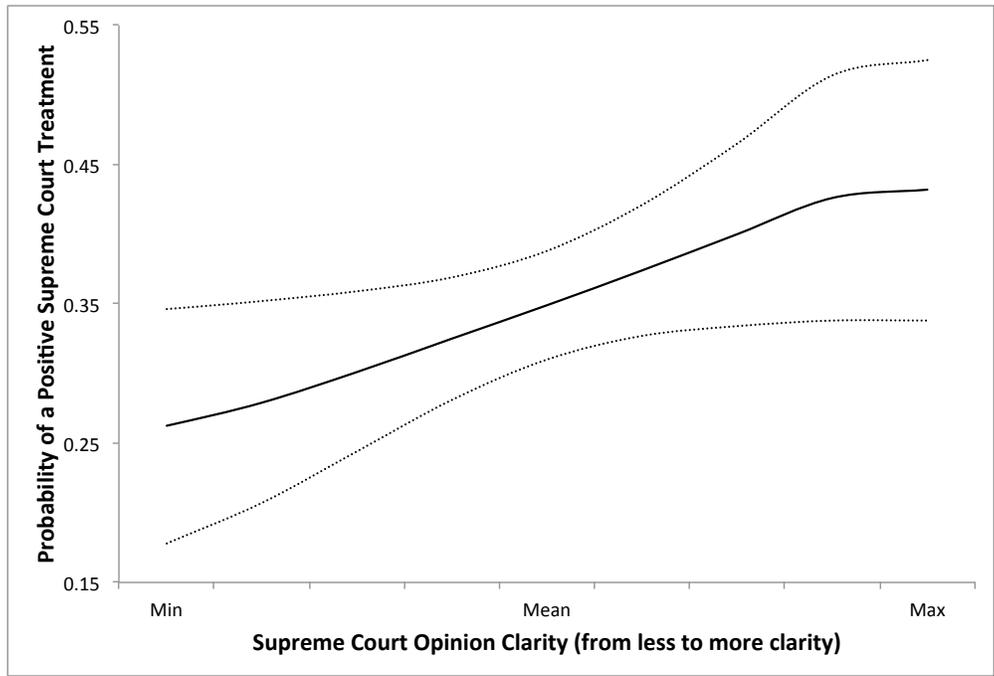
positions (e.g., Bailey and Maltzman 2008, 2011; Bartels 2009; Richards and Kritzer 2002). We believe that this study offers theory and empirical evidence to further highlight the importance of law and precedent on the Court. In particular, the manner in which the justices craft majority opinions to transmit legal information, to both future high courts and down through the judicial hierarchy, can also operate as a meaningful constraint on the political determinants of judicial policy and doctrinal drift.

While we believe that this study presents meaningful evidence to document the impact of opinion clarity on the Court, it has several limitations and implications for future research. In particular, we believe that examining the clarity of opinion text and how the Supreme Court conveys its decisions can generate fruitful insight into a number of additional research questions and political interactions. For example, we do not consider the potential determinants of varying degrees of opinion clarity. Staton and Vanberg (2008) argue that courts might use opinion ambiguity to evade separation of powers considerations. Researchers might use our approach to examine this question empirically and the potential that the justices strategically evade a politically recalcitrant Congress. Additional scholarship might also consider that a tipping point (or threshold) exists at which the desire to dismantle precedent overcomes the potentially negative costs associated with doing so. Similarly, the internal dynamics of the Court's opinion-writing process, such as coalition building and maintenance, might influence the degree of opinion clarity we have observed. Future scholars may even consider whether opinion clarity can, itself, increase the Court's standing among the public. In short, while we believe we have contributed to our understanding of the Court and justices' desires to protect their policies, there is considerable work to be done to examine the language of Court opinions and its subsequent consequences. At a minimum, though, this study helps to show how the nature of legal information figures into conventional models that emphasize political interactions in the judicial hierarchy.

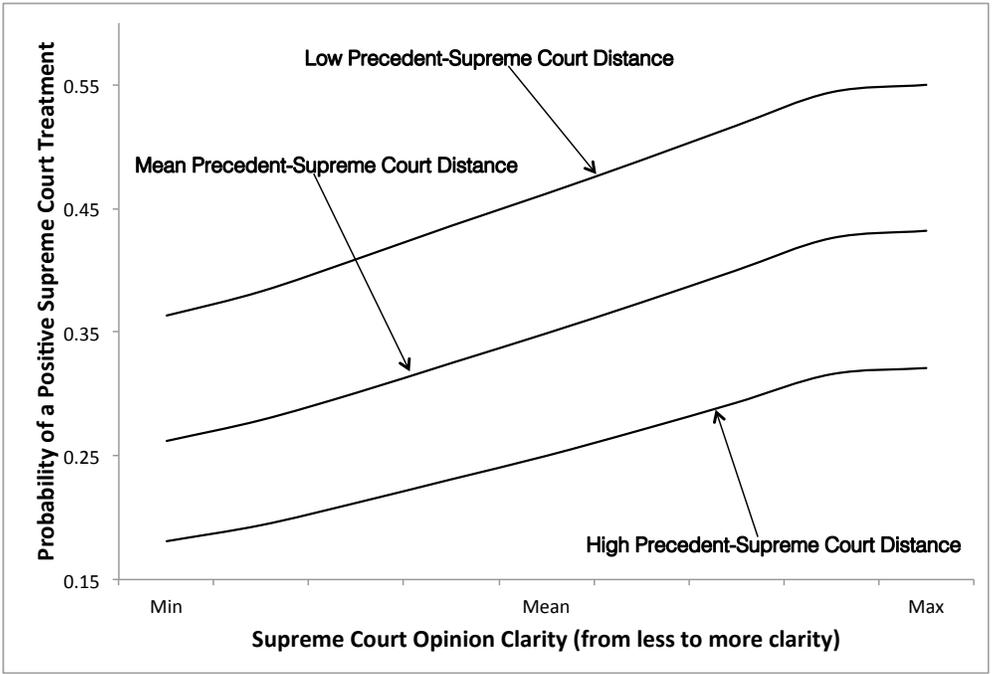
Table 1: The Impact of Opinion Clarity on Supreme Court Compliance with Supreme Court Precedent

	Pos./Neut. vs. Negative	Positive vs. Neut./Neg.
Opinion Clarity	0.01 (0.05)	0.11* (0.05)
Supreme Court–Precedent Distance	-1.70* (0.41)	-2.46* (0.38)
Precedent Vitality	0.13* (0.04)	0.15* (0.04)
Unanimous Precedent	-0.07 (0.15)	0.004 (0.16)
Precedent Age	-0.01* (0.007)	-0.01 (0.008)
Precedent Alteration	0.48 (0.34)	0.18 (0.31)
Judicial Review	-0.10 (1.11)	0.41 (0.88)
Amicus Participation	-0.07* (0.03)	0.004 (0.02)
Constant	1.21* (0.51)	0.97* (0.48)
<i>N</i>	887	887
Pseudo- R^2	0.04	0.04

Note: Table entries are Generalized Ordered Logit coefficients with standard errors in parentheses. * $p < .05$; one-tailed. The dependent variable represents each individual Supreme Court treatment of existing precedent (1 = positive; 0 = neutral; -1 = negative), 1953-2005.



(a) General Impact of Opinion Clarity



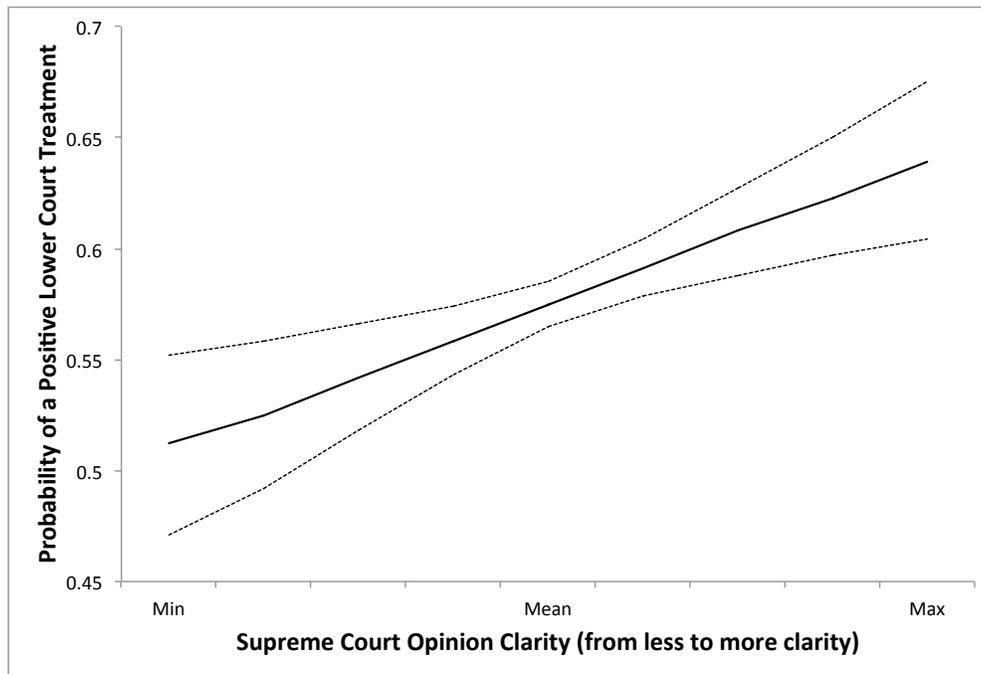
(b) Additive Impact of Opinion Clarity & Supreme Court-Precedent Distance

Figure 1: The Impact of Opinion Clarity on Supreme Court Treatments of Supreme Court Precedent. Estimates generated from Table 1 using SPOST (Long and Freese 2006). The dotted lines in subfigure(a) represent 95% confidence intervals. High and Low distance intervals in subfigure(b) are measured as one standard deviation away from the mean.

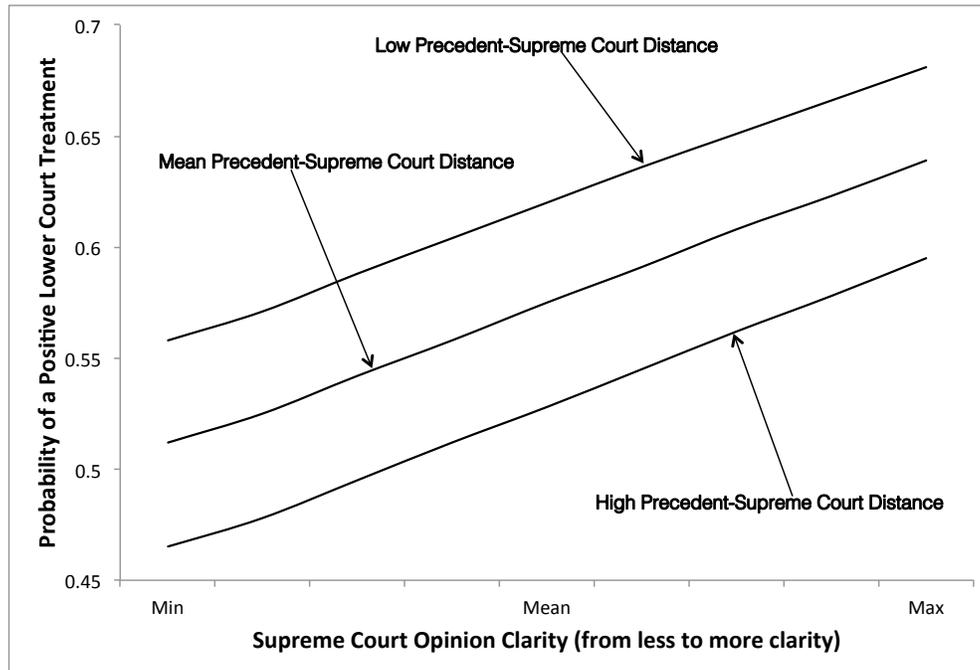
Table 2: The Impact of Opinion Clarity on Lower Court Compliance with Supreme Court Precedent

	Pos./Neut. vs. Negative	Positive vs. Neut./Neg.
Opinion Clarity	0.06* (0.02)	0.07* (0.02)
Supreme Court–Precedent Distance	-1.17* (0.17)	-1.32* (0.16)
Circuit Court–Precedent Distance	-0.24* (0.12)	-0.15 (0.11)
Precedent Vitality	0.14* (0.02)	0.19* (0.02)
Unanimous Precedent	0.15* (0.05)	0.08* (0.04)
Precedent Age	-0.01* (0.003)	-0.003 (0.003)
Precedent Alteration	-0.02 (0.15)	-0.61* (0.14)
Judicial Review	-1.97* (0.45)	-1.81* (0.55)
Amicus Participation	0.01 (0.01)	0.03* (0.01)
Constant	1.90* (0.20)	1.07* (0.18)
<i>N</i>	9481	9481
Pseudo- R^2	0.03	0.03

Note: Table entries are Generalized Ordered Logit coefficients with standard errors in parentheses. * $p < .05$; one-tailed. The dependent variable represents individual circuit court treatments of Supreme Court precedent (1=positive; 0=neutral; -1=negative), 1953-2001.



(a) General Impact of Opinion Clarity



(b) Additive Impact of Opinion Clarity & Supreme Court-Precedent Distance

Figure 2: The Impact of Opinion Clarity on Circuit Court Treatments of Supreme Court Precedent. Estimates generated from Table 2 using SPOST (Long and Freese 2006). The dotted lines in subfigure(a) represent 95% confidence intervals. High and Low distance intervals in subfigure(b) are measured as one standard deviation away from the mean.

Clarity	Distance	Pr(positive treatment)
low	low	0.61 (.589, .624)
low	mean	0.56 (.546, .575)
low	high	0.51 (.495, .533)
mean	low	0.62 (.610, .638)
mean	mean	0.58 (.569, .589)
mean	high	0.53 (.517, .548)
high	low	0.64 (.624, .659)
high	mean	0.60 (.583, .612)
high	high	0.55 (.533, .569)

Table 3: The Additive Effects of Clarity and Supreme Court-Precedent Ideological Distance on Circuit Court Treatments. Table entries report the predicted probability of a positive circuit court treatment with values to reflect the 95% confidence interval in parentheses. Clarity reflects the readability of the precedent-setting opinion. Distance reflects the ideological distance between the enacting Supreme Court and the current Supreme Court. “Low” values are one standard deviation below the mean value while “high” values represent one standard deviation above the mean.

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