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Dissertation Abstract

Chapter 1: Introduction

Given the hierarchical nature of the federal judiciary, the conventional wisdom is that judges at the Courts of Appeals are constrained by the Supreme Court. The number of cases handled at the circuit courts continues to grow while the Supreme Court caseload appears ever more anemic in comparison. This negative correlation between High Court and lower court docket size leaves an increasing number of cases final at the Courts of Appeals. As such, the degree of judicial discretion grows as well. Previous examinations find that lower courts in general comply with the Supreme Court, but the degree and time to which adherence is achieved vary. The literature, however, does not test for whether judicial decision-making at the circuit courts is constrained in a substantively meaningful manner and fails to account for the possible heterogeneity in the preference-behavior relationship. Moreover, prior research has not attempted to account for the different ways the Supreme Court can induce hierarchical constraint—preferences *and* legal considerations—on lower court decision-making. This dissertation develops and applies a theoretical framework specifying whether and to what degree lower court judges comply with the court of last resort. In doing so, it clarifies the role of ideology, hierarchical constraints, and their impact on the choices judges make.

Chapter 2: Meaningful Compliance and Heterogeneity in Decision-Making

This chapter outlines the theoretical framework through which I examine circuit court decision-making. Although previous research has done much to enhance the understanding of lower court compliance with the Supreme Court, two often missing components are examinations of the conditions under which judges are indeed constrained and the manner in which such constraint is evinced. Legal considerations—the pertinent factual circumstances and applicable doctrine derived from precedent—can operate as factors that mitigate the impact of ideology on the choices judges make, as do the Court’s preferences. When Supreme Court preferences, legal considerations, or both indicate positions that are aligned with a lower court judge’s ideology, the legal model, strategic model (Epstein and Knight 1998) and attitudinal model (Segal and Spaeth 1993, 2002) all predict the same outcome. In these instances, the conceptualization of constraint is not meaningful. Therefore, the true test of constraint is when circuit court judges’ ideologies are divergent from Court policy preferences or the relevant precedents. Truly meaningful adherence under this theoretical framework requires responsiveness to the Court’s ideology and legal considerations as well as evincing such behavior *in spite of* divergent preferences.

Moreover, previous examinations of judicial decision-making do not account for the possible heterogeneity in the preference behavior relationship. Simply put, the effect of ideology on the eventual vote choice is not constant as has been previously modeled. Rather, decision-making contexts may accentuate or attenuate the role of ideology on the eventual vote choice. For significant and meaningful hierarchical constraint to be present, Court preferences

and/or legal considerations must affect the final vote and, in doing so, can also mitigate the impact of a given judge's policy preferences on that vote choice.

Employing this theoretical framework, my dissertation examines the ability of Court preferences in the abstract as well as in the form of Court doctrine or jurisprudence to affect lower court decisions. If judges are responsive and thereby compliant with the Supreme Court, hierarchical constraints, again, impact the judicial vote choice in a manner consistent with the theory discussed above. This dissertation examines the impact of hierarchical constraints under four different circumstances—general Court preferences, structuring jurisprudence, shifting scrutiny levels, and conflicting congressional and Court enumerations. The studies progress from the most stringent of tests to the least stringent. This, however, does not mean that compliance is guaranteed. Rather, in each subsequent examination, the expectation of compliance does indeed increase, but each study still offers ample opportunity for deviation and outright defiance.

Chapter 3: The Role of Court Preferences on Decision-Making

The chapter (study) tests for whether and to what degree general trends in circuit court decision-making are sensitive to general trends and preferences of the Supreme Court. In order to do so, this study specifically sifts out for those possible “rogue agents.” Using the intuitions developed from a spatial model of judicial decision-making, the hierarchical constraint of Court preferences will be tested under the most stringent test of decision-making. There are no explicit enumerations or precedents to follow; this study only queries whether circuit court judges make decisions in accordance with Court ideology. Do judges, as principal agent theory would argue, decide cases with the Court's preferences in mind? Do those potential “rogue agents” adjust decision-making when they are ideologically distant from the Court or do they still vote in accordance with their own ideologies? If circuit court judges are truly faithful adjudicators of Supreme Court decision-making, sensitivity to Court preferences should be present across issue areas and case types.

I utilize the Songer Courts of Appeals database adding the recent contribution of the Kuersten and Haire extension. Combined, these datasets present a weighted, random sampling of cases at the circuit courts; the most stringent test is not adherence to Court preferences in a given issue area, but meaningful compliance across issue areas and case types. Given the hierarchical nature of the data where judges are nested within cases and, subsequently, within Supreme Court natural courts, this study employs a multilevel model. It is the appropriate method of estimation and subjects the predictions to one of the most empirically rigorous statistical approaches. Of course, simpler methodologies will be used including logistic regressions omitting specifications of random parameters that would control for unobserved heterogeneity in the response and causal heterogeneity from policy preferences.

Chapter 4: Structuring Adjudication in the Area of Free Speech

The chapter (study) investigates the Supreme Court-circuit court judge relationship in a specific issue area thereby allowing for a test of judges' sensitivity to Court preferences as well as the ability of legal considerations to constrain the choices judges make. Specifically, I will

examine First Amendment free speech cases within the jurisprudential regime framework established by Richards and Kritzer (2002). The purpose of this study is not only to sift out for sensitivity to the Court's preferences, but also to examine whether or not the Court's decisions in *Grayned v. Rockford* (1972) and *Chicago Police Department v. Mosely* (1972) provided formal guidance to the lower courts to adjudicate free speech cases. Specifically, under this examination, I test for whether and to what degree circuit court judges' decision-making comports with the conceptualization of a jurisprudential regime. In other words, did the Court, in establishing a jurisprudential regime, structure the manner in which free speech cases are decided? The examination of First Amendment free speech cases provides an issue area that not only has significant Supreme Court rulings and landmark precedents in order to test for lower court adherence, but as Richards and Kritzer (2002) note, it offers ample opportunity and "room for attitudes to operate" (310). As such, it is an appropriate issue area to examine whether the Supreme Court—through its preferences and its precedents—can meaningfully constrain the choices judges make in this issue area.

Original data will be collected from Lexis/Nexis to obtain free speech cases at the Courts of Appeals. The examination will cover cases from 1953 to 2007, offering a large sample as well as a comprehensive data set in an issue area. This chapter employs a variety of statistical methods ranging from simple aggregate analyses and simple linear models to a multilevel model.

Chapter 5: Shifting Jurisprudence in the Area of Abortion

Chapter 5 tests responsiveness when the Supreme Court shifts doctrine or policy in a specific issue area while still controlling for sensitivity to Court preferences. Here, I examine abortion cases from 1973 to 2006 at the Courts of Appeals. I argue that *Webster v. Reproductive Health Services* (1989) established a jurisprudential regime for the lower courts to decide abortion cases. *Webster* represented a shift in jurisprudence in 1989, where the test of constitutionality moved from strict scrutiny (*Roe v. Wade* 1973) to the undue burden standard. This change allows for a prediction that circuit court cases post-*Webster* should be decided more conservatively under a less stringent standard, *ceteris paribus*. While *Grayned* and *Mosely* established a jurisprudential regime, it does not offer a clear shift in Supreme Court policy when compared to the change from *Roe* to *Webster*. There is another dynamic that makes examining this issue area fascinating. *Webster* did not achieve a majority. Therefore, it was Justice O'Connor's special concurrence that arguably kept *Roe* from being overturned. As such, adjudication in this issue area is subject to strategic action by circuit court judges. While the Supreme Court offers guidance for lower courts to apply plurality opinions (see *Marks v. U.S.*, 1977), the lack of a majority opinion opens the door for possible shirking. Also, most examinations of a particular issue area have focused on the eventual outcome, not the eventual vote choice, as the unit of analysis. In an area that is arguably heated and polarizing, it is most interesting to test the conceptualization of constraint in this issue area. Lastly, an examination of another issue area only provides another test of the theoretical framework detailed above.

More specifics regarding the theoretical framework, hypotheses and methodologies in this chapter are in the writing sample included in the application.

Chapter 6: Congressional versus Judicial Enumerations in the Area of Religious Free Exercise

The Supreme Court shifted jurisprudence with its decision in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), which shifted the level of judicial scrutiny from the compelling interest test to something akin only to rational basis. As Brent (1999) finds, cases at the Courts of Appeals were indeed responsive to the change in jurisprudence; this is evinced by the decreased support for free exercise claims post-*Smith*, which makes intuitive sense since judges adjudicated under a less stringent test for government regulations to survive constitutionality. The innovation in the Brent (1999) examination, however, is not the finding that Courts of Appeals applied the doctrine announced in *Smith*, but the suggestion that Congress, too, serves as a principal of the lower courts. With the passage of the Religious Freedom Restoration Act (RFRA), Congress attempted to explicitly overturn the Court's decision by stipulating that religious free exercise questions must be adjudicated using the compelling interest test. In deciding the constitutionality of a regulation that impedes on free exercise, the Court was instructed by Congress to determine whether the regulation serves a compelling governmental interest and that regulation is the least restrictive of means.

Brent finds that, post-RFRA, Congress was able to increase circuit court support of free exercise claims; the levels of litigant success in this issue area actually increased to levels almost identical to the pre-*Smith* era. Brent concludes that legal socialization to follow Supreme Court decision-making and the institutional mechanisms that make the Court a functioning principal (oversight, review and possible reversal) were not enough to maintain compliance with *Smith* when contradicted by congressional legislation.

This chapter seeks to apply the theoretical framework of meaningful compliance and heterogeneity in the preference-behavior relationship to this time period between *Smith* and RFRA. Moreover, this chapter attempts to decipher other possible explanations—ideological and legal—for such an oddity, where the Courts of Appeals appear to deviate from the Supreme Court. To investigate this question, original data will be collected from searches on Lexis/Nexis for the time periods examined in the Brent (1999, 2003) examinations. Moreover, the methodologies employed in this chapter will also range from parsimonious aggregate analyses to multilevel models.