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CONTEXT AND COMPLIANCE: A COMPARISON OF STATE SUPREME COURTS AND THE CIRCUITS

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A host of scholars have argued that decision making in lower courts is at least partially determined by decision making in the U.S. Supreme Court. In other words, Supreme Court jurisprudence in a given area influences the way that the lower courts decide similar cases.[1] This may seem like an

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1. The literature regarding compliance on the part of inferior courts with superior courts is voluminous. It is, in fact, too voluminous to catalogue here. Representative examples of this literature include: SARA C. BENESH, THE U.S. COURT OF APPEALS AND THE LAW OF CONFESSIONS: PERSPECTIVES ON THE HIERARCHY OF JUSTICE (2002); BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (2d ed. 1999); FRANK B. CROSS, DECISION-MAKING IN THE U.S. COURTS OF APPEALS (2007); J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961); G. ALAN TARR, JUDICIAL IMPACT AND STATE SUPREME COURTS (1977); Lawrence Baum, *Implementation of Judicial Decisions: An Organizational Analysis*, 4 AM. POL. Q. 86 (1976); Lawrence Baum, *Lower Court Response to Supreme Court Decisions: Reconsidering a Negative Picture*, 3 JUST. SYS. J. 208 (1978); Lawrence Baum, *Responses of Federal District Judges to Court of Appeals Policies: An Exploration*, 33 W. POL. Q. 217 (1980); Jerry K. Beatty, *State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court*, 6 VAL. U. L. REV. 260 (1972); Edward N. Beiser, *A Comparative Analysis of State and Federal Judicial Behavior: The Reapportionment Cases*, 62 AM. POL. SCI. REV. 788 (1968); Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534 (2002); James Brent, *A Principal-Agent Analysis of U.S. Courts of Appeals Responses to* Boerne v. Flores, 31 AM. POL. RES. 557 (2003); James C. Brent, *An Agent and Two Principals: U.S. Court of Appeals Responses to* Employment Division, Department of Human Resources v. Smith *and the Religious Freedom Restoration Act*, 27 AM. POL. Q. 236 (1999); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994); Bradley C. Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision*, 8 L. & SOC. REV. 109 (1973); Bradley C. Canon & Kenneth Kolson, *Rural Compliance with* Gault*: Kentucky, a Case Study*, 10 J. FAM. L. 300 (1971); Pamela C. Corley, *Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions*, 37 AM. POL. RES. 30 (2009); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); Tracey E.

unremarkable assertion given the principle of stare decisis and the expectation that lower courts are bound by decisions made by higher courts.[2] Nonetheless, there are intriguing evidentiary omissions with regard to what we know about compliance with Supreme Court precedent. In particular, despite the voluminous expenditures of scholarly time and attention, we do not know how the High Court's influence on the federal circuit courts compares with its influence on the state courts of last resort.[3]

We might well assume that the Supreme Court has far greater impact on the U.S. Courts of Appeals since those courts are more closely constrained to follow Supreme Court precedent by virtue of their position in the federal judicial system. In contrast, state courts of last resort are not direct members of the federal judicial system and are therefore more divorced from Supreme Court influence. Further, while we know that the Supreme Court hears very few cases from the federal courts of appeals, it hears an even smaller percentage of cases most recently decided by the state supreme courts.[4] It

George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171 (2001); John Gruhl, *The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 W. POL. Q. 502 (1980); Charles A. Johnson, *Lower Court Reactions to Supreme Court Decisions: A Quantitative Examination*, 23 AM. J. POL. SCI. 792 (1979); Charles A. Johnson, *Law, Politics, and Judicial Decision-making: Lower Federal Court Uses of Supreme Court Decisions*, 21 L. & SOC. REV. 325 (1987); Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605 (1995); Jennifer K. Luse et al., *"Such Inferior Courts . . . ": Compliance by Circuits with Jurisprudential Regimes*, 37 AM. POL. RES. 75 (2009); Kirk A. Randazzo, *Strategic Anticipation and the Hierarchy of Justice in U.S. District Courts*, 36 AM. POL. RES. 669 (2008); Traciel V. Reid, *Judicial Policy-Making and Implementation: An Empirical Examination*, 41 W. POL. Q. 509 (1988); Donald R. Songer, *The Impact of the Supreme Court on Trends in Economic Policy Making in the United States Courts of Appeals*, 49 J. POL. 830 (1987); Donald R. Songer et al., *Do Judges Follow the Law when There Is No Fear of Reversal?*, 24 JUST. SYS. J. 137 (2003); Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court–Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994); Donald R. Songer & Reginald S. Sheehan, *Supreme Court Impact on Compliance and Outcomes:* Miranda *and* New York Times *in the United States Courts of Appeals*, 43 W. POL. Q. 297 (1990).

2. As the Supreme Court has asserted, stare decisis "is a basic self-governing principle within the Judicial Branch." Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

3. Most states have reserved the term "supreme court" for their highest courts and, accordingly, here we use that term interchangeably with "state court of last resort" and "state high court." We recognize, however, that there are notable exceptions (e.g., the state of New York, which uses "supreme court" to refer to its major trial courts and "court of appeals" as the appellation for its highest court).

4. During the 2007 term, for example, the U.S. Supreme Court took some action on 244 cases appealed from the federal courts, while it took action on only 22 from the state courts. By action, we include full opinions and memorandum orders. Looking only to full opinions, the difference is even more stark: The Court reversed twenty-six cases from the circuit or district courts, vacated eleven, and affirmed twenty, for a total of fifty-seven cases fully considered. In comparison, it reversed a paltry six from the states, vacated a mere three, and affirmed only an additional three for a total of twelve cases fully considered. *See The Supreme Court 2007 Term—The Statistics*, 122 HARV. L. REV. 516, 525 tbl.II(E) (2008).

seems, therefore, that the motivation to abide by Supreme Court rulings is dramatically reduced in the state courts and, accordingly, that a reasonable expectation is that Supreme Court precedent will fare worse in structuring decision making on state courts in comparison to decisions on the federal circuit courts.[5]

Contrary to these expectations, however, Martinek found that state court decisions actually *do* comport closely with Supreme Court policy in the area of search and seizure.[6] In fact, Martinek found that the state supreme courts decide their cases in greater accord with High Court prescriptions than do the federal circuit courts.[7] Benesh and Martinek's findings are also suggestive in the area of confession, the area of law we consider in this Article.[8] They found that state high courts are influenced by Supreme Court policy, even after controlling for the influence state elites (who are instrumental in staffing the bench) have on these courts.[9] They characterize this influence as a legal one, rather than one driven by a fear of reversal, because only those facts the Court deemed relevant to the decision whether to admit a given confession were significant, while the ideological predisposition of the Supreme Court, which a lower court looking to avoid reversal would consider, was not.[10] Motivated by these somewhat counterintuitive findings, we suggest an additional comparative analysis of Supreme Court impact on state and lower federal courts.

Here, we undertake a systematic comparison of decision making in state supreme courts and the U.S. courts of appeals in the area of criminal confessions. Prior work has demonstrated that the Supreme Court does indeed influence the federal courts of appeals in this area of law.[11] We provide additional evidence that all lower courts are constrained and that the

5. Though the U.S. circuit courts were abolished in 1912, the term "circuit court" remains in colloquial use to refer to the U.S. courts of appeals, which were created by the Judiciary Act of 1891. *See* ch. 517, 26 Stat. 826 (1891) (repealed 1912); Judicial Code of 1912, ch. 13, § 289, 36 Stat. 1167 (1911). We use "U.S. courts of appeals," "courts of appeals," and "circuit courts" interchangeably herein.

6. Wendy L. Martinek, Judicial Impact: The Relationship Between the United States Supreme Court and State Courts of Last Resort in Search and Seizure Decision-Making 88 (2000) (unpublished Ph.D. dissertation, Michigan State University) (on file with authors). *See also* Valerie Hoekstra, *Competing Constraints: State Court Responses to Supreme Court Decisions and Legislation on Wages and Hours*, 58 POL. RES. Q. 317, 320 (2005), for an analysis of the influence of Supreme Court decisions regarding minimum wage law on state supreme court behavior.

7. Martinek, *supra* note 6, at 89.

8. Sara C. Benesh & Wendy L. Martinek, *State Supreme Court Decision-Making in Confession Cases*, 23 JUST. SYS. J. 109, 110, 125 (2002).

9. *Id*. at 125.

10. *Id*.; *see also* David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 L. & SOC. REV. 579, 579, 582 (2003).

11. BENESH, *supra* note 1.

influence of the Supreme Court is seen throughout the lower courts, be they state or federal courts, and without regard to the fact that the High Court appears to do little to induce that compliance.

Further, an increasing number of decisions emanating from both state and federal lower courts are final. If one type of court—state high court or federal intermediate appellate court—more closely adheres to Supreme Court precedent than another, there are important ramifications for due process. Certainly, it is unremarkable to note that there are regional differences across the country—the federal nature of American government is both a product of and a reflection of this fact.[12] And it is also unremarkable to observe that these differences most likely manifest themselves in the policy making of various branches and levels of government. But the Supreme Court is charged with interpreting the Constitution for the entire nation, and its interpretation of the rights afforded to the accused in terms of representation and self-incrimination, which the Court has confirmed are constitutionally based,[13] must be effectuated in all criminal systems, not just in the one for which it is naturally the apex (i.e., the federal system). If Supreme Court decisions did not matter to the state supreme courts, there would be myriad cases decided in the legal systems of this country every day that may be inconsistent with (or perhaps downright abhorrent to) Supreme Court policy. Because the High Court is the final arbiter of the Constitution, surely we expect some attention to be paid to it by the state courts. Just how much attention, and how that attention compares with the attention paid by the U.S. courts of appeals, is the question of interest in this Article.

I. THE INFLUENCE OF THE SUPREME COURT

To understand the relationship between higher and lower courts, scholars have frequently utilized one of two theories: principal–agent theory[14] or team theory.[15] For our purposes here, the distinction matters little. Each theoretical perspective assumes that Supreme Court precedent matters. While some

12. The geographic organization of the courts of appeals suggests a sensitivity to regional influence as well. *See* RICHARD J. RICHARDSON & KENNETH N. VINES, THE POLITICS OF FEDERAL COURTS 21 (1970). Further, though these courts are charged with interpreting and applying the same federal law, "[t]he task to which the courts of appeals have called themselves is that of making the national law as applied to their geographical territories." Paul D. Carrington, *The Obsolescence of the United States Courts of Appeals: Roscoe Pound's Structural Solution*, 15 J.L. & POL. 515, 517 (1999).

13. *See* Dickerson v. U.S., 530 U.S. 428, 438 (2000).

14. *See, e.g.*, Songer et al., *The Hierarchy of Justice*, *supra* note 1.

15. *See, e.g.*, Kornhauser, *supra* note 1, at 1612–13; Chad Westerland et al., *Lower Court Defiance of (Compliance with) the U.S. Supreme Court* (Apr. 9, 2006) (unpublished paper, presented at the Midwest Political Science Association Meeting), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929018.

scholars argue that the Supreme Court, as an institution, really has very little impact and cannot single-handedly change the direction of any given policy,[16] the extant evidence demonstrates that the lower courts do pay at least some heed to the Supreme Court. Whether we say that a lower court does so because it is acting as an "agent" of its "principal" or because it is acting as a "member" of a "team" is immaterial for our purposes here. What matters is that the Supreme Court is posited, in each theory, to have some influence over decisions by the lower courts.

Baum offers yet another way to understand the role the Supreme Court's precedent may play in lower court decision making. In particular, Baum urges scholars to take into account the effect of audiences on judicial behavior.[17] While he considers personal audiences to be most influential, he also discusses the effect that other (more instrumental) audiences have on judicial behavior, including those responsible for a judge's tenure and a judge's colleagues on the bench.[18] Indeed, in discussing the idea of intra-court influences, Baum suggests that the desire to be perceived as a good judge may influence that jurist to, for example, hew more closely to precedent. The logic is that the quality of legal interpretation, arguably enhanced by citation of Supreme Court precedent, will determine whether judges' colleagues will see them as good judges.[19] Principal–agent theory discusses this idea as one of "standard operating procedures," whereby agents influence one another to behave in certain ways—here, to faithfully implement precedent.[20] In team theory, the discussion focuses on judges attempting to arrive at the "correct" decision, which is most cheaply obtained by complying with vertical precedent as handed down by a resource-rich group of experts that are on the team—namely, the Supreme Court.[21]

Regardless of the motivation, we expect lower courts to consider and apply Supreme Court precedent, but we also expect context to matter. There

16. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008).

17. LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR, at xi (2006).

18. *Id*. at 113. *See* also Cross & Tiller, *supra* note 1, at 2159. As a point of contrast, see Virginia A. Hettinger et al., *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. POL. SCI. 123 (2004).

19. BAUM, *supra* note 17, at 54, 113.

20. *See* JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC 50 (1997).

21. *See* Westerland et al., *supra* note 15, at 2–4. In economic terms, the efficiency of following precedent to arrive at the "right" outcome is enhanced when that precedent has been "solidified in a long line of decisions . . . . The rule then represents the accumulated experience of many judges responding to the arguments and evidence of many lawyers . . . ." William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 250 (1976).

are, as noted earlier, several reasons why one might expect a higher level of compliance from the U.S. courts of appeals than from the state courts of last resort. The first is the technical distinction over High Court jurisdiction and the fact that the state supreme courts are not a direct part of the federal court system. More specifically, it is only when what is at issue is a question of federal law or federal constitutional interpretation that the U.S. Supreme Court is formally the final arbiter and state supreme courts are considered bound by the applicable rulings of the nation's highest court.

The Supreme Court (via Justice Sandra Day O'Connor) made a strong statement to this effect in its decision in *Michigan v. Long*:

> It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.[22]

Obviously then, state supreme court judges can avoid Supreme Court precedent by basing their rulings on their own state constitutions or the precedent of their own courts, something that is unavailable to court of appeals jurists. In addition, the latter are supposed to have a greater level of professionalism due to their inclusion in the federal judiciary and, accordingly, might be expected to consider more carefully the rulings of their constitutionally proscribed superior.[23] The state supreme courts, however, may be inclined to separate themselves from the federal system, thereby strengthening their position as major players in their respective state governments.[24]

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22. Michigan v. Long, 463 U.S. 1032, 1040–41 (1983).

23. Canon, *supra* note 1; Gruhl, *supra* note 1; *see* Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017, 1022 (1959).

24. Indeed, Haas's comparative study of U.S. court of appeals and state supreme court treatment of Supreme Court rulings in the area of prisoners' rights found greater congruence between the Supreme Court and the courts of appeals in decision direction than between state supreme courts and the High Court. Kenneth C. Haas, *The "New Federalism" and Prisoners' Rights: State Supreme*

Perhaps more than the relative position of the U.S. courts of appeals in the American judicial hierarchy, the milieu within which state supreme courts operate provides ample reason to expect less faithfulness on the part of the state supreme courts than is manifested in the lower federal courts. Simply put, while a focus on the vertical relationship between the Supreme Court and the lower federal courts makes sense in light of the fact that they are operating within a single legal code and as part of a unified judicial system, such a singular focus in studying state supreme courts is untenable given the array of local forces with which state supreme courts must contend. State supreme courts are not only part of the American judicial system, they are constituent parts of individual state political systems as well. In other words, "[U]nlike judges in lower federal courts, state supreme courts are also embedded in state political environments that include other actors with the ability to influence their decisions."[25] We might then expect that the state courts ignore (or evade) Supreme Court policy (when they disagree with it or when their agreement is insufficient) more often than the federal circuit courts. State courts simply have more important things with which to deal. They have other audiences to consider; they have multiple principals to satisfy; they are not an explicit part of the team. Even agreement with the Supreme Court's policy prescriptions may not be sufficient to compel these courts to comply, given that they must also consider other actors' reactions to their compliance.

If we consider Baum's idea of audiences,[26] it becomes clear that the state supreme court judges are in a far more delicate situation. To be sure, they have a judicial audience and likely care what the federal courts think of their decisions in matters concerning federal law. However, they also have more direct audiences to consider: the voters or legislators (depending on the system of judicial retention) who determine whether they retain their position, and members of the state bar (who likely reflect the ideology of state elites) who will digest, utilize, and evaluate their decisions. In short, audiences for members of state supreme courts are varied, and ties to the federal judiciary may well seem remote by comparison. In the parlance of principal–agent theory, there are "multiple principals" to whom state high court judges are beholden, including the U.S. Supreme Court in matters of federal law, but also those responsible for the continued tenure of the judges of the court, including the public when the judges are elected and state elites when the judges are appointed. Their faithfulness to one set of principals may spell unfaithfulness to others. In terms of team theory, judges on state high courts simply may not

Courts in Comparative Perspective, 34 W. POL. Q. 552, 560–69 (1981).

25. Scott A. Comparato & Scott D. McClurg, *A Neo-Institutional Explanation of State Supreme Court Responses in Search and Seizure Cases*, 35 AM. POL. RES. 726, 729 (2007).

26. BAUM, *supra* note 17.

see themselves as members of the federal judiciary, and thus their attempts at maximizing their organizational effectiveness may not include consideration of what federal courts are doing, but rather focus on how best to organize their own court systems.

II. THE CONFESSION CASES

These ideas about the differential strength of Supreme Court precedent in models of decision making in the states versus decision making in the circuits are tested in this Article via the use of two existing datasets that code cases involving confessions. These cases fit the type of analysis to be employed here for several reasons. First, they are controversial cases involving the rights of the criminally accused, arguably a type of case that draws attention from several different sectors. Second, in this area of law, the Supreme Court itself has indicated that differences of fact should matter to the resolution of the case; hence, measuring Supreme Court precedent is more easily accomplished by coding for factual circumstances the Court has deemed relevant to the admission of a confession (e.g., whether *Miranda* rights were read, whether the accused was brought promptly before a magistrate, whether the accused was young, etc.).[27] In choosing this area of law, then, we are able to determine whether the facts indicated by the High Court as important factors in the determination of the voluntariness of a confession are the same facts considered by lower courts. In addition, this area of the law is useful for this type of analysis because there were changes over time in Supreme Court doctrine. Presuming that lower courts are attentive to the Supreme Court, they should move in a liberal direction (toward *Miranda*'s protective stance), as the Supreme Court did, and then in a conservative direction (away from *Miranda*) as the Court has done in creating numerous exceptions to *Miranda*'s proscriptions. This allows for a test of responsiveness as well as congruence.[28] Third, this set of cases is relevant to the states as well as to the federal courts, because both the Fifth and Sixth Amendments to the Constitution are binding on state governments as well as the federal government.[29] And finally, though our dataset does not extend to the present,

27. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 517–18 (1963).

28. Responsiveness implies that as the Supreme Court modifies its doctrine, so, too, the lower court modifies its doctrine in the same direction. Congruence, on the other hand, implies that a lower court and the Supreme Court, given the same facts, would decide the case in the same way. Congruence is time-dependent and specific to a given decision, while responsiveness is more a measure of trends and the propensity of the lower court to follow the Supreme Court ideologically. The former leaves minimal room for the lower court to exercise discretion (e.g., act in accordance with attitudinal predilections), while the latter does afford some leeway.

29. The right to counsel was incorporated fully in *Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963), and the protection against self-incrimination was incorporated in *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

this is surely an area of criminal law with which the state and the federal courts continue to contend, as evidenced most starkly by the Supreme Court's recent ruling in *Corley v. United States*.[30]

To measure precedent by identifying relevant case facts in confession cases, we draw on Benesh,[31] who applied a fact pattern model of confession cases to the U.S. courts of appeals, demonstrating the federal intermediate appellate courts' attention to the Supreme Court in this area of the law. In the next Part, we briefly recap what Benesh found and then discuss the application of her work to studying the state supreme courts, discussing as well the operationalization of the additional influences on the state court discussed above as competing with the Supreme Court's precedent for influence. We then explicitly compare decision making in confession cases in each court. We conclude with a discussion of what this means for the impact of the Supreme Court in this particular area of criminal law and for the state of criminal law itself.

III. SUPREME COURT PRECEDENT IN CONFESSION CASES

Benesh tested a model of confession cases in the U.S. courts of appeals and in so doing created a usable set of facts with a prima facie claim to being related to Supreme Court decision making in the confession cases.[32] These factors fall into three categories: coercion, characteristics of the accused, and procedural considerations.[33] We discuss each in turn and derive our measure of precedent from this categorization.

First, actual coercion is expected to be an important fact in the determination of voluntariness. Where coercion is present, manifested either physically or psychologically, courts will more likely suppress the confession. Where it is not, courts will be less likely to do so. Forms of coercion, other than those explicitly physical or psychological, also exist and are coded. These include deprivation of basic needs (including lack of food or sleep), length and place of detention, incommunicado detention, whether the

30. 129 S. Ct. 1558 (2009). This case concerned the timely presentment of an accused before a magistrate, as required by *McNabb v. United States*, 318 U.S. 332, 347 (1943), and *Mallory v. United States*, 354 U.S. 449, 455 (1957). The Court, in a 5–4 decision, held that an accused must be brought before a magistrate within six hours of arrest, unless police have an adequate reason for a delay, and that if he or she is not, any confession obtained before presentment must be excluded from evidence at trial. 129 S. Ct. at 1571. It is also an area of law that consistently attracts the attention of legal reformers and non-governmental organizations. *See, e.g.*, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009); AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004).

31. BENESH, *supra* note 1.

32. *Id.*

33. *Id.* at 61–62.

defendant is represented by counsel, and whether the defendant requested an attorney but was denied by his interrogators. Mitigating factors would serve to counter any existing coercion.

In addition to these coercive factors, Benesh discusses several characteristics of the accused that may lead an individual to be more or less affected by (overtly or subtly) coercive methods. These include mental status, intelligence, race, experience, youth, legal experience, and some other miscellaneous characteristics.[34] Other miscellaneous characteristics include, for example, situations in which the detainee is a mother of several small children, a drug addict, someone with high blood pressure, ill or under the influence of drugs or alcohol, or very slight of build.

Finally, there are several procedural defects that might taint the voluntariness of a confession. These include failure to read the *Miranda* rights, a lengthy interrogation, a coercive environment for that interrogation, the use of police relay tactics in questioning, courtroom procedural unfairness (including, for example, whether the court heard testimony as to voluntariness outside the presence of the jury), the determination that a given error was harmless, a confession that was the fruit of some prior illegality (an illegal arrest or an illegal search found to have induced the confession), and the failure to bring the defendant before a magistrate without unnecessary delay. Of course, a knowing and intelligent waiver of the *Miranda* rights would also affect the determination of voluntariness.

We measure the influence of these various factors by considering them to be facts to be balanced by the lower courts in the three above-discussed categories. Hence, the lower court will determine whether, considering those aspects that weigh against admitting a challenged confession against those that weigh in favor of admitting a challenged confession, the confession in question was coerced, the defendant's will was overborne, or the arrest and trial were conducted in accordance with fair procedures. In other words, we expect the lower courts to consider all factors relevant to the Supreme Court's decisions over time as a sort of running tally of those factors favorable to an accused's challenge of the admission of his confession and those that run against it. So, for example, if the accused was not read her rights and was young, but she did volunteer some statements, the lower court will be less likely to exclude her confession than if she did not volunteer the statements. Likewise, the claims of an accused who was taken before a magistrate and read his rights will be treated differently from those of an accused who was

34. These characteristics (and others) are posited to affect the level of coercion likely to have been present during the interrogation. All affect the will of the accused to overcome such coercion. *Id*. For an informative discussion of the psychological mechanisms leading to these effects, see Saul M. Kassin, *The Psychology of Confessions*, 4 ANN. REV. L. & SOC. SCI. 193, 203–06 (2008).

only read his rights.

Accordingly, we create three variables to measure the weight of precedent in each case: one to take into account the balance of coercion (the number of factors that showed coercion less the number that showed a lack of coercion), one to measure the characteristics of the accused (the number of factors that would indicate vulnerability less the number that would indicate the ability to withstand pressure), and one to measure the procedures employed in the case (the number of factors that indicate problematic procedures less the number of procedural safeguards at issue in the case). All three of these variables are coded such that positive values are expected to enhance the likelihood that a confession will be excluded, and negative values are expected to decrease that likelihood (that is, are expected to increase the likelihood that a confession will be admitted).

In addition to these three key variables, we also measure change in precedent within the time frame under investigation. Both principal–agent and team theory accounts would suggest that a lower court heeds a change in policy and pays attention to the current policy preferences of the Supreme Court in making its decisions. A concern with audience would also suggest that a lower court judge should take note of changing circumstances with respect to Supreme Court preferences. Hence, as the Supreme Court becomes more conservative, we would expect the lower courts to be more likely to admit a challenged confession, especially as the Court makes exceptions to the central holding of *Miranda*.

During the time frame under investigation in this Article, the Court decided that it was acceptable to use un-Mirandized statements to impeach testimony should the accused decide to testify, even though such statements could not be introduced as evidence of guilt.[35] The Court also determined that evidence obtained from witnesses brought to light via an unwarned statement was still admissible, even though the police would not have known of the witness but for the accused's statement (which was not preceded by the *Miranda* warnings).[36] The Court also permitted the admission of statements taken from an accused who had earlier invoked his right to silence because both interrogations were preceded by *Miranda* warnings and were separated by a substantial time lapse.[37] All of these cases would lead an attentive lower court to believe that the Court was moving away from a strict adherence to *Miranda*, and so may have affected the propensity of the lower courts to

35. Harris v. New York, 401 U.S. 222, 225–26 (1971).

36. Michigan v. Tucker, 417 U.S. 433, 435, 451–52 (1974).

37. Michigan v. Mosley, 423 U.S. 96, 104–06, 107 (1975). The Court further retreated from *Miranda* subsequently, but as our analysis ends at 1981, no other exceptions are relevant to this analysis.

exclude confessions. Accordingly, we include a variable that increases as the Court makes accommodations for the use of uncounseled statements. It starts at 0, increases to 1 in 1971, to 2 in 1974, and to 3 in 1975. We expect this variable to be negatively signed; that is, as the Supreme Court moves away from *Miranda*, confessions will be less likely to be excluded by lower courts.

We also include a measure of Supreme Court ideology to account for the possibility that the lower courts use Court ideology as either a proxy for the direction of the law, giving the lower court the ability to anticipate these shifts, or as an indicator of the likelihood that a given decision will be reversed, which we assume judges avoid when possible. We measure this variable as the mean Segal and Cover score for the Supreme Court in the year of the lower court's decision.[38]

IV. SELECTING CASES

To compare the effects of Supreme Court precedent on the two different sets of lower courts, we use data collected by Benesh for the circuits and data collected by Benesh and Martinek for the state supreme courts.[39] To define the universe of cases for both the circuit courts and the state supreme courts, both sources used West's Key Number System and the Decennial Digest, considering cases under keys 516 through 538 and decided between 1970 and 1981. These keys are under the larger subject of "Criminal Law," under the heading "Evidence," and the subheading "Confessions." Given West's reputation, this listing should be considered exhaustive, as well as validly and reliably constructed. Any omitted cases are assumed to have no systematic fact patterns.[40] Because of the large number of cases produced at the state

38. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 560 (1989). The authors coded newspaper editorials in both liberally slanted and conservatively slanted outlets for mentions of a given Supreme Court nominee's ideological predisposition. *Id*. at 559. Their measure is the percentage of paragraphs in which the nominee is discussed that suggest he or she is liberal. *Id*. This is the standard measure employed by political scientists studying the Supreme Court, and numerous studies have demonstrated that this measure has a strong relationship with the voting behavior of the justices. *See, e.g.*, Richard C. Kearney & Reginald S. Sheehan, *Supreme Court Decision-Making: The Impact of Court Composition on State and Local Government Litigation*, 54 J. POL. 1008 (1992); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 90 (1993); Reginald S. Sheehan et al., *Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court*, 86 AM. POL. SCI. REV. 464, 465 (1992). See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 136 (2002), for a discussion of another common measure of the ideology of Supreme Court justices (albeit one with issues of endogeneity).

39. BENESH, *supra* note 1, considered the universe of confession cases from 1949 to 1981. Benesh & Martinek, *supra* note 8, at 110, considered a sample of confession cases from 1970 to 1991. We use the overlapping years, 1970–1981, in this analysis.

40. This is important for the purposes of inference because, assuming that omitted cases are

court level using this procedure, the state cases are a sample, stratified by state. All cases were coded trichotomously as follows: whether the fact is (1) mentioned as present; (2) mentioned as not present; or (3) not mentioned at all. This allows for an investigation of whether the mention that a factor is not present balances the fact that another is present. In turn, this allows us to measure the effect of precedent as the difference between the number of factors leading to a constitutional infirmity versus the number negating any such constitutional infirmity. We compare the results of a logit estimation of a model of circuit court decision making to results of a model estimating state supreme court decision making to ascertain whether one lower court is more sensitive to Supreme Court precedent.[41] Due to the variations in the institutional situations of the various state supreme courts and previous findings demonstrating the importance of several contextual and institutional factors on decision making, we also take into account additional contextual considerations, as detailed in the next section.

V. COMPARABILITY OF THE CASES

Before turning to the additional variables considered in modeling state supreme court decision making, we note that, given the multiple principals and audiences discussed above, an argument might be made that decisions rendered at the Supreme Court level and those made at the circuit or state supreme court level cannot be fairly compared. After all, the Supreme Court has total docket control, the circuits have basically none, and state courts of last resort vary on this dimension. However, we find, in looking at the number of factors considered in each case, that the cases look a lot alike. As seen in Tables 1–3, all three levels of courts consider cases with more than five factors at issue, and all three consider cases with warnings, coercion, and procedural issues more often than cases with other facts mentioned as relevant. This gives us a stronger basis on which to consider the differential effects of the various facts on decision making in both courts. In short, each court appears to be dealing with confession cases that are, if not identical, at least comparable.

VI. PUTTING STATE SUPREME COURT DECISION MAKING IN CONTEXT

As noted previously, any rigorous analysis requires that we consider the complex situation in which judges on the state courts operate. The judges on state high courts certainly must deal with and apply Supreme Court precedent.

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random with regard to the fact patterns they contain, there will be no effect on the parameter estimates obtained in the statistical analysis.

41. See JOHN H. ALDRICH & FORREST D. NELSON, LINEAR PROBABILITY, LOGIT, AND PROBIT MODELS 48, 65–66 (1984), for an accessible treatment of logit as a statistical estimator.

However, they also make decisions in a context that suggests further influences on their decisions. While most scholars agree that attitudes play some role in the decision making of courts,[42] law and courts scholars also recognize that "any attempt to explain behavior with reference to beliefs but not to contexts such as institutional settings will inevitably be incomplete," because contextual factors make enacting policy preferences either more or less difficult, and may even create certain goals and preferences related to the institution itself.[43] This role for context "means that the justices' behavior might be motivated not only by a calculation about prevailing opportunities and risks but also by a sense of duty or obligation about their responsibilities to the law and the Constitution and by commitment to act as judges rather than as legislators or executives."[44] These notions, put forward by "new institutionalists"[45] in political science, seem especially applicable to the situation in which the judges of the state courts of last resort find themselves.

Members of state supreme court benches, no less than U.S. Supreme Court justices, have their own ideological and policy preferences, and would likely wish to advance them in their decision making, given the appropriate

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42. The influence of judges' attitudes on their decision making has been carefully documented. The seminal work with regard to the influence of attitudes on decision making by the U.S. Supreme Court is C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937–1947 (1948). The voluminous subsequent work taking up this theme includes PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION-MAKING (2008); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002). Evidence as to the utility of judicial attitudes for understanding the choices judges of other courts make is also ubiquitous. For representative examples, see VIRGINIA A. HETTINGER ET AL., JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION-MAKING (2006); Micheal W. Giles et al., Research Note, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961–1964*, 60 AM. POL. SCI. REV. 374 (1966); Sheldon Goldman, *Voting Behavior on the U.S. Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491 (1975). *But see* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895 (2009). Debate continues unabated about the relative influence of attitudinal considerations vis-à-vis legal considerations.

43. Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 1, 3–4 (Cornell W. Clayton & Howard Gillman eds., 1999).

44. *Id*. at 5.

45. The term "new" included in the new institutionalist moniker is intended to distinguish these institutional scholars from previous institutional scholars who focused solely on the analysis of formal institutional structures and rules. *See* James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734, 734 (1984). The new institutionalism emerged in response to the ascendancy of the behavioral revolution and its exclusive focus on individuals and their behavior without regard for the context within which individuals behave. *See* Robert A. Dahl, *The Behavioral Approach in Political Science: Epitaph for a Monument to a Successful Protest*, 55 AM. POL. SCI. REV. 763 (1961).

opportunity. In addition, each state supreme court functions within its own unique environment in terms of the politics of its coordinate branches and the state in general. Further, there are institutional differences among state courts of last resort that are likely to affect the salience of these various influences. The literature is replete with examples of scholarship demonstrating the importance of understanding context to understand judicial behavior in state courts.[46] Little of it, however, explicitly tests the importance of context to determine the faithfulness of lower courts to superior courts.[47] Here we consider how the system by which judges are retained in office, the political environment, the legal institutional design, and the policy preferences of the judges on the state courts of last resort compete with Supreme Court precedent to explain the decision making of state supreme courts in confession cases.

A. Judicial Retention and Political Environment

State supreme court jurists ascend to their positions through a variety of appointive and elective mechanisms.[48] Regardless of the mechanism, dominant political values in the state come into play. Scholars have unequivocally demonstrated that elected judges display a definite sensitivity to their constituencies' preferences.[49] Judges who must face the electorate to remain in office have every incentive to avoid making decisions that can provide fodder for electoral opponents. There has been a special focus in the extant literature on death penalty decisions,[50] but there is no reason to suspect

46. *See* Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RES. Q. 5, 7, 12 (1995); Craig F. Emmert & Carol Ann Traut, *The California Supreme Court and the Death Penalty*, 22 AM. POL. Q. 41, 43, 58 (1994); Gregory N. Flemming et al., *An Integrated Model of Privacy Decision-Making in State Supreme Courts*, 26 AM. POL. Q. 35, 40–41 (1998).

47. A notable exception is Comparato & McClurg, *supra* note 25, at 727–29.

48. COUNCIL OF STATE GOV'TS, 40 THE BOOK OF THE STATES 277–78 (2008). To illustrate, judges (including incumbents) on the Alabama Supreme Court are selected in non-partisan elections every six years, while judges (including incumbents) on the Oregon Supreme Court are selected by the court every six years. *Id*. South Carolina, in contrast, relies on legislative appointment (and reappointment) for the selection of its high court judges, while members of the Rhode Island Supreme Court are appointed by the governor from the Judicial Nominating Commission for life terms. *Id*. Complete information as to the method of judicial selection and retention in the states is available from THE BOOK OF THE STATES. In addition, the American Judicature Society maintains an easy-to-use online tool to locate judicial selection and retention information. Am. Judicature Soc'y, Judicial Selection Methods in the States, http://www.ajs.org/selection/sel_state-select-map.asp (last visited Apr. 8, 2010).

49. *See, e.g.*, Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 428 (1992); Melinda Gann Hall & Paul Brace, *Justices' Responses to Case Facts: An Interactive Model*, 24 AM. POL. Q. 237, 242 (1996).

50. *See, e.g.*, Carol Ann Traut & Craig F. Emmert, *Expanding the Integrated Model of Judicial Decision-Making: The California Justices and Capital Punishment*, 60 J. POL. 1166, 1166–67

that the lessons learned will not travel to other areas of criminal jurisprudence. For example, search-and-seizure decision making has been found to be influenced by such considerations,[51] and we contend that confession cases are likely to be influenced as well.

We expect that state supreme court judges retained via elections should be more likely to uphold a challenged confession as the electorate becomes more conservative, *ceteris paribus*. The logic is simple: such judges are likely to wish to avoid being seen as soft on crime. To measure electorate preferences, we utilize Berry et al.'s measure of citizenry ideology, which relies upon interest group ratings and ranges from zero (most conservative) to one (most liberal).[52] Similarly, if state high court judges are strategic (which the extant evidence suggests they are),[53] there is reason to believe that when appointed judges act, they are likely to keep in mind the preferences of the political elites responsible for their accession to—and retention on—the bench. Indeed, in a recent analysis, Langer found that members of state supreme court benches do show concern for retaliation by other state political actors (the legislature and governor), as manifested by a lessened propensity to engage in judicial review, for at least some areas of law.[54] We similarly argue that justices will take ideology into account when deciding confession cases, basing their decisions to suppress confessions, in part, on the ideology of those responsible for their retention.[55] For judges who are retained by one of the branches of government or who serve life terms after being appointed by one or some combination of both of the other governmental branches, we expect that the referent for judges considering their environment will be the prevailing ideology in the coordinate branches. Berry et al. have a measure comparable to their citizen ideology measure that considers the ideology of

(1998).

51. Martinek, *supra* note 6, at 40–42.

52. In constructing their measure of citizen ideology for each state for each year from 1960 to 1993, William Berry and his colleagues began with interest group ratings for each member of Congress. *See* William D. Berry et al., *Measuring Citizen and Government Ideology in the American States, 1960–93*, 42 AM. J. POL. SCI. 327 (1998). Using those interest group ratings to locate congressmen in ideological space, they proceeded to estimate citizen ideology in each congressional district as a function of the ideology score for the incumbent congressman in the district, the estimated ideology score for a challenger (or hypothetical challenger to the incumbent), and the election results (to take into account the ideological divisions in the electorate). *Id*. at 330–31. To determine state-level citizen ideology, they then aggregated the district-level scores, weighting them on the basis of each candidate's share of support in his or her respective district. *Id*.

53. *See, e.g.*, LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY 123 (2002).

54. *Id*. at 125.

55. We determined method of retention by consulting relevant editions of THE BOOK OF THE STATES, *supra* note 48, supplemented as necessary with information obtained from state "blue books," state government web sites, and the American Judicature Society.

state elites, and we use it to approximate state ideology when judges owe their office, tenure, or both, to those in positions of power in the state government.[56]

B. Legal Environment

The new institutionalists have also provided persuasive evidence in support of the thesis that institutional arrangements matter for judicial outputs. For example, some state supreme courts are relieved of the burden of a nondiscretionary docket, or at least have that burden ameliorated; others, however, must hear every case that comes to them, which lessens their ability to effectuate policy. We presume that the existence of an intermediate appellate court and a discretionary (rather than mandatory) criminal jurisdiction are indicators of at least some freedom from frivolous cases. When state supreme courts are able to rely upon intermediate appellate courts to resolve easy cases, they can restrict themselves to more important ones, providing them with the opportunity to decide more cases in which there may be a constitutionally defective confession. Having an intermediate appellate court also reduces the workload for the state supreme court, giving the members of that court additional room to make policy and take big cases.[57] So, too, discretion with regard to criminal appeals (i.e., a discretionary docket) allows judges to focus on policy content in selecting the cases they will hear.[58] Therefore, we expect that, *ceteris paribus*, state supreme courts with an intermediate appellate court and those with discretionary criminal jurisdictions will be more likely to overturn challenged confessions. Each of these conditions are coded dichotomously, i.e., the state either has it (1) or does not (0).

Also likely to be relevant is a state's constitution. As one state supreme court jurist remarked, "[S]tate charters offer important local protection against the ebbs and flows of federal constitutional interpretation."[59] In most instances states have adopted, more or less word for word, the language of the U.S. Constitution's Bill of Rights in guaranteeing protection against self-

56. Berry et al., *supra* note 52, at 332. The Berry et al. measure of government (or elite) ideology for each state is based on the ideology scores for the governor and the major party delegations in each chamber of the state legislature, combined on the basis of specified assumptions regarding the relative power of the governor, the minority party in each legislative chamber, and the majority party in each legislative chamber. *Id*.

57. As with information about methods of selection and retention, information about the presence or absence of an intermediate appellate court is available in the various editions of THE BOOK OF THE STATES, *supra* note 48, at 286–88.

58. *See* NAT'L CTR. FOR STATE COURTS, INTERMEDIATE APPELLATE COURTS: IMPROVING CASE PROCESSING, at v–vi (1990), *available at* http://www.ncsconline.org/WC/Publications/KIS_DiffCMIntAppCts.pdf.

59. People v. Houston, 724 P.2d 1166, 1174 (Cal. 1986).

incrimination (the protection relevant to confession cases). There are, however, a few instances in which the language of a state constitution is more protective of individual rights than the U.S. Constitution and others where it is less so.[60] Presumably, the language of the state constitution should affect the decisions a state supreme court jurist can make. When the state constitution provides more expansive protections than those afforded by the federal Constitution, it enhances the likelihood that a confession will be invalidated as involuntary. Conversely, when the state constitution provides less expansive protections than those afforded by the federal Constitution, the likelihood of invalidating a confession as involuntary is likely to be diminished. This variable is coded 0 for a state constitution with no self-incrimination provision, 1 for one less protective than the federal Constitution, 2 for one identical to those found in the U.S. Constitution, and 3 for state constitutions that are more protective of self-incrimination.[61] We expect this variable to be positively related to the exclusion of a challenged confession.

State courts also have the liberty to rely upon independent state grounds in writing their opinions. We expect that state courts may plausibly avoid the thrust of U.S. Supreme Court doctrine by resting their decisions on independent state grounds, as *Michigan v. Long* made clear they could do.[62] Accordingly, we code each case as to whether (1) or not (0) the decision rests on independent state grounds.[63] We expect this variable to really matter only in tandem with the variable measuring the protections afforded to the accused by the state constitution.[64] Accordingly, we also include a variable that measures the interaction: Those state courts operating under more protective state constitutions are expected to be more likely to exclude a confession when reliance is placed on state rather than federal grounds than those with less protective state constitutions.

Considered collectively, these variations in external environment, institutional features, and legal context allow us to compare the state courts with the circuit courts in terms of their faithfulness to Supreme Court precedent, while remaining sensitive to the decision making influences unique

60. For a detailed and informative discussion of constitutional development in the fifty states, including their convergence with and divergence from the federal Constitution, see generally G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (1998).

61. We obtained information as to the relevant state constitutional provisions by consulting the various state government web sites.

62. Michigan v. Long, 463 U.S. 1032, 1041 (1983).

63. We relied on the language of the state high court opinions themselves to code this variable.

64. In other words, we have no reason to believe that whether a decision rests on independent state grounds will make a state court more or less likely to admit a challenged confession into evidence. However, when the state constitution specifically affords greater protection and the state court decision rests on independent state grounds, the court should be less likely to admit the challenged confession (i.e., more likely to exclude the challenged confession).

to the state context.

VII. MODELS OF DECISION MAKING

We seek to test similar models of decision making on a set of cases decided by the state courts of last resort with one decided by the circuit courts to ascertain, within a given area of criminal appeals, whether one level of court is more cognizant of, or compliant with, Supreme Court precedent on point. Hence, we include the aforementioned measures of Supreme Court precedent in each model (three measuring confession precedent, one measuring the ideology of the U.S. Supreme Court, and one taking into account the cases decided during the period that relaxed *Miranda*'s requirements). In addition, we control for murder/manslaughter, expecting that judges will be less willing to overturn cases involving the most serious of crimes for reasons relating to how a confession of guilt was obtained. We also control for the lower court decision, because, at least at the circuit level, appellate courts are often deferential to the lower trial courts. And, of course, no model of judicial decision making is complete without attention to preferences. Currently, the best available measures of state supreme court judge ideology are the PAJID scores, developed by Hall and Brace.[65] For the circuit courts, we employ a blunter measure, that of the percentage of any given panel appointed by a Democratic president.[66]

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65. Brace and his collaborators develop an individual-level measure of judicial ideology with the aid of the Berry et al. citizen and government ideology measures discussed before. See *supra* notes 52, 56. Specifically, for appointed judges, Brace et al. use the government ideology score at the time of a judge's appointment as that judge's ideology score, weighted by the party affiliation of the judge. Paul Brace et al., *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387, 396–97 (2000). For elected judges, Brace et al. use the citizen ideology score at the time of a judge's election as that judge's ideology score, weighted by the party affiliation of the judge. *Id*.

66. Blunt though this measure may be, it reflects the fact that the President nominates court of appeals judges. Though the Senate has the constitutionally granted prerogative to confirm or reject a presidential nominee, the Senate may not substitute its own nominee for that of a President. In other words, when an individual nominated by the President is not confirmed by the Senate, it is the President who retains the authority to make a subsequent nomination. The evidence with regard to the utility of the party of the appointing President as a measure of judicial attitudes is extensive. *See, e.g.*, Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 970 (1992); Donald R. Songer & Sue Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals, 1955–1986*, 43 W. POL. Q. 317, 319 (1990). *See generally* Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 242 (1999). For a thorough consideration of the debate over appropriate statistical measures and an explicit evaluation of the party of the appointing President, see Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 782–83 (2005).

VIII. ANALYSIS

Tables 4 and 5 present our findings. The former (Table 4) shows the same model estimated on the basis of state supreme court data and on the basis of circuit court data; the latter (Table 5) takes into account the contextual features of decision making by the state supreme courts. As seen in Table 4, Supreme Court precedent heavily influences both courts in this area. Measures of precedent in all three categories are signed as predicted, and highly statistically significant. However, neither court seems particularly concerned with the Supreme Court's ideology at the time they are making their decision, nor are they overly attentive to the changes made in Supreme Court doctrine over the time period examined. The latter is most likely due to the short time frame—neither court really had much of an opportunity to apply the new exceptions, and all three exceptions were somewhat limited in their nature.

The lack of a significant relationship between the decisions made and the ideological makeup of the Supreme Court suggests that the lower courts seek only to apply Supreme Court precedent as they understand it and not to anticipate the future behavior of the High Court or attempt to avoid its review.[67] Interestingly, the only other variable significant to the circuit courts is the decision of the district courts, while the only other significant influence on state supreme court decision making is their own ideology. This difference could be due to the difference in docket control enjoyed by the two courts, through which the circuits are hearing a greater number of easy cases. Alternatively, this difference could be due to their concomitant difference in terms of hierarchical level (the state supreme court being the highest in each system and the circuits being but an intermediate court) or some real difference between the two in the way that decisions are made. This analysis cannot distinguish among these options.

This difference, however, largely disappears once we place the state supreme courts into their proper context, as reported in Table 5. There, we continue to see a tremendous influence by the Supreme Court's precedents on the lower courts' decisions, with all three direct measures of precedent again both signed as expected and highly statistically significant. The state supreme courts, however, do react to their environments, as courts are attentive to the ideology of the actor responsible for obtaining or retaining their seats (though the variable just misses conventional levels of significance). Further, state supreme courts are less likely to exclude a confession from evidence in a murder case, though this finding obtains a lower significance level than generally considered to be definitive ($p < 0.08$). Also at that lower, but still

67. Notably, this comports with interviews one author has conducted with circuit court judges.

substantial, level of statistical significance is the variable measuring whether the state enjoys discretionary jurisdiction over criminal appeals. As can be seen in Table 5, states with greater discretion over their dockets are more likely to exclude a given confession than states that lack such docket control. Importantly, this attention to state ideology and the influence of jurisdiction comes at the expense of the effectuation of their own policy preferences; the mean PAJID score for the majority in any given case is no longer relevant to the outcome of the case.

In short, we find the Supreme Court's precedents to matter to both state high courts and the federal courts of appeals. To which set of courts is it more important? Table 6 considers the influence of the Court's precedent on the state courts of last resort and on the circuit courts, respectively, as measured by the change in the probability that a confession will be excluded for various levels of the independent variables measuring the effects of the factual considerations deemed relevant by the Supreme Court. As shown in Table 6, while Supreme Court precedent in all three categories does exert influence on both courts, the circuit courts seem to be more consistently and strongly attentive to the Court's decisions in these cases. While the state courts are largely influenced by the balance of factors concerning coercion, they are less sympathetic to characteristics of the accused than the circuit courts. Further, the state courts are less likely to exclude a confession based upon procedural defects than the circuits. It is interesting to consider the state courts' context when thinking about these results. One could surely make the case that excluding a confession extracted via some type of coercion is less likely to garner public disapproval than excluding a confession because of procedural considerations, or because an accused was somehow more susceptible to police influence. Interestingly, the state courts change more drastically with changes in the coercion variable than they do in response to changes in either of the other two precedent categories. The circuits, on the other hand, behave differently. They are far more influenced by susceptible defendants than the states; indeed, the influence of this variable is nearly as strong as the variable measuring the degree to which the accused was coerced.

IX. CONCLUSION

As is the nature of a common-law system, courts in the United States subscribe to a view of decision making that includes a large role for the decisions made by past courts and for decisions made by courts higher in the judicial hierarchy. Indeed, the U.S. Supreme Court is the self-declared final arbiter of the Constitution. It is uncontroversial to suggest, then, that lower courts ought to be influenced by the decision of courts "higher" than they. However, that notion does not resolve the issue of Supreme Court impact for at least two reasons. First, judicial decisions are made by people, not

machines. That is, judges are individuals whose cognitive processes are not without vulnerabilities, and those vulnerabilities can lead even judges who are the most earnest in their commitment to faithful compliance with the Court to render decisions that are not perfectly compliant.[68] Second, the Supreme Court expects compliance by all lower courts, including state courts of last resort, when they decide questions of federal law. After all, the Constitution's Supremacy Clause unequivocally asserts that the U.S. Constitution is superior to any other law, and the Court's decision in *Dickerson v. United States* makes clear that its confession jurisprudence is its interpretation of rights guaranteed by the Constitution.[69] Despite this expectation, however, the Court is faced with the task of inducing compliance on the part of a heterogeneous group of courts, and a one-size-fits-all approach is unlikely to be useful.

In this Article, we have demonstrated that there are notable differences in the decision making context that lead to differential force of the Supreme Court's proclamations in the area of confessions. To be clear, both the federal courts of appeals and state supreme courts are compliant: The variables directly measuring Supreme Court precedent are highly significant and correctly signed in the models of decision making for both sets of courts. But state courts are evidently slightly less compelled than the circuit courts to make certain decisions as a consequence of the factual configuration of the case under consideration. This finding is interesting from the perspective of empirical theory building. Our objective here was not to engage in strictly theoretical testing, but rather to uncover systematic differences in compliance on the part of these two different categories of courts. Our models were obviously informed by the extant scholarship and, in that sense, were theoretically motivated. But our findings with regard to compliance on the part of state and federal lower courts are perhaps most important from the perspective of normative theory. The Supreme Court has interpreted the Constitution to forbid the use of confessions that are compelled by coercion and not preceded by procedural protections in a criminal prosecution. Yet, while it is likely that the lower courts (both federal and state) will so decide, it is more likely that the circuits will do so than that the states will do so. Hence, due process protections (of which protection against coerced confessions is one) are not uniformly enforced across the judicial system.

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68. Commenting more generally about judges' cognition, Guthrie et al. observe, "[W]holly apart from political orientation and self-interest, the very nature of human thought can induce judges to make consistent and predictable mistakes in particular situations." Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780 (2001). For a recent consideration of the psychology of judging, see THE PSYCHOLOGY OF JUDICIAL DECISION MAKING (David Klein & Gregory Mitchell eds., 2010).

69. 530 U.S. 428, 444 (2000).

In short, the Constitution does not mean the same thing for all accused of crime but, rather, varies depending upon the venue. Surely, this is neither an intended nor a desirable feature of the federal nature of American government. It suggests that the Supreme Court should do more to reign in its judicial inferiors, whether conceived of as members of a judicial team or as judicial agents. Taking more than a handful of cases from the state courts, thereby providing more guidance to the lower courts and ensuring greater uniformity, would be a good first step.

Table 1[70]
U.S. Supreme Court Precedent Mentions Per Fact, 1949–1981[71]

Fact	Number of Cases Mentioned[72]	Percentage of Cases
Silence Warning	32	56
Attorney Warning	32	56
Psychological Coercion	28	49
Miranda Warnings	27	47
Length of Interrogation	25	44
Incommunicado Detention	23	40
Magistrate Hearing	19	33
Intelligence	17	30
Procedural Fairness	17	30

70. Benesh & Martinek, *supra* note 8, at 117.

71. Because the Supreme Court decided only ten confession cases in the time span we consider here, we offer this generalized portrait of the Court's decision making in this area of law.

72. Cases in which the Supreme Court either mentioned the fact as present or not present. Presumably, each mention should influence the lower courts to at least consider the fact.

Request for Attorney Denied	17	30
Had No Attorney	16	28
Deprived of Basic Needs	16	28
Police Relays	15	26
Physical Coercion	14	25
Minority Race	14	25
Mental Illness/Deficiency	11	19
Experience with Law	11	19
Length of Detention	10	17
Mitigating Circumstances	10	18
Youth	9	16
Other Characteristics	9	16
Fruit of Illegality	7	12
Prior Coerced Confession	6	11
Place of Detention	5	9
Waiver of *Miranda* Rights	4	7
Volunteered Information	4	7
Harmless Error	4	7
Co-Defendant Confession	3	5
Place of Interrogation	3	5
Total Mentions: 408		Facts Per Case: 7

Table 2[73]

State Supreme Court Comparison Mentions Per Fact, 1970–1981

Fact	Number of Cases Mentioned[74]	Percentage of Cases
Miranda Warnings	378	84
Attorney Warning	243	54
Silence Warning	233	52
Psychological Coercion	223	49
Waiver of *Miranda* Rights	192	43
Procedural Fairness	141	31
Had No Attorney	108	24
Request for Attorney Denied	96	22
Physical Coercion	94	21
Youth	74	16
Fruit of Illegality	66	15

73. Benesh & Martinek, *supra* note 8, at 120.

74. Cases in which the state supreme court either mentioned the fact as present or not present. Presumably, each mention should influence the lower courts to at least consider the fact.

Magistrate Hearing	60	13
Mitigating Circumstances	59	13
Mental Illness/Deficiency	48	11
Deprived of Basic Needs	45	10
Length of Interrogation	43	10
Volunteered Information	41	9
Intelligence	41	9
Other Characteristics	38	9
Incommunicado Detention	34	8
Experience with Law	21	5
Co-Defendant Confession	19	4
Place of Detention	15	3
Length of Detention	15	3
Harmless Error	10	2
Prior Coerced Confession	7	2
Minority Race	4	1
Police Relays	3	1
Place of Interrogation	3	1
Total Mentions: 2,354		Facts Per Case: 5

Table 3[75]
U.S. Court of Appeals Comparison Mentions Per Fact, 1970–1981

Fact	Number of Cases Mentioned[76]	Percentage of Cases
Silence Warning	274	86
Attorney Warning	271	85
Miranda Warnings	247	78
Waiver of *Miranda* Rights	145	45
Psychological Coercion	127	40
Procedural Fairness	122	38
Mitigating Circumstances	85	27
Magistrate Hearing	83	26
Physical Coercion	66	21
Other Characteristics	62	20
Request for Attorney Denied	61	19
Fruit of Illegality	57	18

75. BENESH, *supra* note 1.

76. Cases in which the circuit court either mentioned the fact as present or not present. Presumably, each mention should influence the lower courts to at least consider the fact.

Length of Interrogation	44	14
Intelligence	40	13
Had No Attorney	39	12
Incommunicado Detention	32	10
Volunteered Information	30	10
Deprived of Basic Needs	30	9
Youth	30	9
Mental Illness/Deficiency	25	8
Experience with Law	23	7
Harmless Error	21	7
Minority Race	15	5
Length of Detention	11	4
Prior Coerced Confession	11	3
Police Relays	11	3
Co-Defendant Confession	9	3
Place of Interrogation	6	2
Place of Detention	4	1
Total Mentions: 1,981		Facts Per Case: 6

Table 4
Circuits and States and Supreme Court Precedent
(Robust Standard Errors)

U.S. Circuit Courts of Appeals

Variables	Coefficients	Significance Levels (two-tailed)
Supreme Court Precedent		
Coercion	1.3299	0.001
Characteristics of the Accused	1.5084	0.000
Procedural Issues	0.5180	0.000
Precedent Change	0.0821	0.813
Ideology		
U.S. Supreme Court Mean Segal/Cover	-4.5046	0.097
Percent Democrat on Panel	0.7770	0.350
Controls		
Lower Court Excluded	2.2655	0.000

Confession		
Case Involved Murder or Manslaughter	-0.6621	0.337
Constant	-1.9295	0.049

Pseudo R2 = 0.5835; Percent Correctly Classified = 91.59%; Reduction in Error = 49%

State Courts of Last Resort

Variables	Coefficients	Significance Levels (two-tailed)
Supreme Court Precedent		
Coercion	1.5687	0.000
Characteristics of the Accused	0.6825	0.000
Procedural Issues	0.2655	0.000
Precedent Change	0.0142	0.964
Ideology		
U.S. Supreme Court Mean Segal/Cover	-0.8384	0.691
Mean PAJID Score of Majority	0.0279	0.007
Controls		
Lower Court Excluded Confession	0.1330	0.854
Case Involved Murder or Manslaughter	-0.4001	0.185
Constant	-1.3703	0.098

Pseudo R2 = 0.3431; Percent Correctly Classified = 86.28%; Reduction in Error = 31%

Table 5
Putting State Court Decision Making in Context
(Robust Standard Errors)

Variables	Coefficients	Significance Levels (two-tailed)
Supreme Court Precedent		
Coercion	1.6543	0.000
Characteristics of the Accused	0.6230	0.002
Procedural Issues	0.2505	0.001
Precedent Change	0.1065	0.735
Ideology		
U.S. Supreme Court Mean Segal/Cover	-0.5721	0.783
Mean PAJID of Majority	0.0138	0.266
Context		
Grounds for Decision	0.1894	0.370
Constitution Protective	-0.0403	0.840
Constitutional Grounds	0.1429	0.640
Jurisdiction	0.4628	0.077
Intermediate Appellate Court	0.1867	0.592
State Ideology	0.0200	0.061
Controls		
Lower Court Excluded Confession	0.3080	0.693
Case Involved Murder or Manslaughter	-0.5266	0.085
Constant	-2.6643	0.008

Pseudo R2 = 0.3620; Percent Correctly Classified = 86.89%; Reduction in Error = 34%

Table 6
The Influence of Supreme Court Precedent

	Probability Y = 1 Confession Excluded (Confidence Interval)	Change from Mean
U.S. Courts of Appeals		
All variables at mean	0.044 (0.017, 0.092)	
Three more coercive than noncoercive facts	0.783 (0.334, 0.978)	+ 0.739
Three fewer coercive than noncoercive facts	0.004 (0.000, 0.026)	- 0.040
Three more sympathetic accused characteristics	0.756 (0.403, 0.952)	+ 0.712
Three fewer sympathetic accused characteristics	0.001 (0.000, 0.005)	- 0.043
Three more procedural problems than procedural protections	0.393 (0.199, 0.613)	+ 0.349
Three fewer procedural problems than procedural protections	0.031 (0.010, 0.069)	- 0.013
State Supreme Courts		
All variables at mean	0.087 (0.057, 0.124)	
Three more coercive than noncoercive facts	0.962 (0.894, 0.992)	+ 0.875
Three fewer coercive than noncoercive facts	0.003 (0.001, 0.010)	- 0.084
Three more sympathetic accused characteristics	0.419 (0.182, 0.693)	+ 0.332
Three fewer sympathetic accused characteristics	0.014 (0.003, 0.041)	- 0.079
Three more procedural problems than procedural protections	0.300 (0.156, 0.494)	+ 0.213
Three fewer procedural problems than procedural protections	0.077 (0.049, 0.112)	- 0.010