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I. INTRODUCTION

Stare decisis has recently received a great deal of scholarly attention, with historical studies,[1] attitudinal studies,[2] rational choice studies,[3] and even formal models[4] addressing the subject. One aspect of the norm that has received little empirical inquiry, however, is the influence of horizontal stare decisis at the federal courts of appeals level. This Article examines how the three-judge panels of the United States Court of Appeals for the Sixth Circuit have treated their own precedents. During the period studied, panels of the Sixth Circuit tended to treat their own precedents positively, following them in over eighty percent of the cases. Sixth Circuit panels treated their own precedents negatively in less than twenty percent of subsequent citations, and most of these were "distinguishing" treatments. These findings suggest that circuit judges generally comply with horizontal

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[1] *See, e.g.*, Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999).

[2] *See, e.g.*, HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL (1999) [hereinafter SPAETH & SEGAL, MAJORITY RULE].

[3] *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998) [hereinafter EPSTEIN & KNIGHT, CHOICES].

[4] *See, e.g.*, Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755 (2002); Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605 (1995).

precedent at the courts of appeals level. The Article then tests several hypotheses regarding factors that make negative treatment more likely. Among other things, the ideological composition of the hearing panels does not explain variation in the negative treatment of precedents when other factors are controlled. The ideological composition of the hearing panels, however, is important in explaining the ideological direction of the decisions reached by the respective panels.

This examination of horizontal stare decisis on the courts of appeals contributes to the study of judicial behavior in at least two respects. First, it contributes to the debate over the influence of judicial norms such as stare decisis on judicial behavior. Judicial scholars have focused on the influence of stare decisis at the Supreme Court level, often asserting that the norm should have a greater effect at the courts of appeals level.[5] Judicial scholars have found that the courts of appeals generally do comply with binding Supreme Court precedent when it exists; thus, the premise holds true.[6] Similarly, J. Woodward Howard found that circuit judges report high levels of compliance with binding precedent, including circuit

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[5] *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 111 & n.80 (2002) [hereinafter SEGAL & SPAETH, ATTITUDINAL MODEL].

[6] *See generally* James C. Brent, *An Agent and Two Principles: 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) (finding that the federal courts of appeals follows Supreme Court precedent by comparing the number of free exercise claimants who prevailed prior to *Smith* with those who prevailed after *Smith*); John Gruhl, *The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 W. POL. Q. 502 (1980) (finding that the lower federal courts followed Supreme Court precedent in the area of libel law); Malia Reddick & Sara C. Benesch, *Norm Violation by the Lower Courts in the Treatment of Supreme Court Precedent: A Research Framework*, 21 JUST. SYS. J. 117 (2000); Donald R. Songer, *The Impact of Supreme Court Trends on Economic Policy Making in the United States Courts of Appeals*, 49 J. POL. 830 (1987) (finding that the courts of appeals followed Supreme Court precedent with regard to economic policy-making); Donald R. Songer et al., *The Hierarchy of Justice: Testing the Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994) (revealing a high degree of congruence and responsiveness by the courts of appeals to Supreme Court precedent with regard to search and seizure decisions); Donald R. Songer & Reginald 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) (finding high rates of compliance by the courts of appeals with the *Miranda* and *New York Times* decisions).

precedent.[7] This Article provides systematic evidence of circuit judge compliance with horizontal precedents.

Second, this Article studies one of the twelve regional courts of appeals rather than the United States courts of appeals considered as one court. Political scientists have often noted that circuit judges tend to cite the decisions of their own circuits[8] and have noted the reason for their doing so: the norm of horizontal stare decisis.[9] But these scholars have at times failed to understand fully the mindset of circuit judges with respect to circuit precedents. Each court of appeals is a separate court within the federal judicial hierarchy, and the judges of each circuit think of their courts in this way.[10] As a separate court, each circuit generates its own precedents, made binding in subsequent cases according to circuit rules. When considering what legal rules to apply to a case, circuit judges, and their clerks, first ask whether there is binding Supreme Court precedent, which of course would trump circuit precedent. Then, circuit judges ask whether there is binding circuit precedent. In many, if not most, cases, the precedents of other circuits will be surveyed only after the judge has determined that his own circuit has not previously decided an issue. To understand the behavior of circuit judges, one must understand the court of appeals context, including the influence of circuit precedent on circuit judge decision making.

II. PREVIOUS STUDIES

A. The Supreme Court

Previous empirical studies of the norm of horizontal stare decisis have focused on its influence at the Supreme Court level in the federal judicial

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[7] *See* J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 163-66 (1981).

[8] *See id.* at 165 (finding that thirty-four out of thirty-five judges reported that it was at least moderately important to follow circuit precedent).

[9] *See* DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 54, 136–37, 144 (2002). Klein states, for example, that "judges tend to cite rulings from their own circuit quite liberally—far more frequently than is strictly necessary." *Id.* at 44. From the circuit judge's point of view, however, the law of the circuit is the law. It is odd to find a scholar as sensitive to legal goals as Klein criticizing judges for citing the law too frequently.

[10] *See generally* JONATHAN M. COHEN, INSIDE APPELLATE COURTS 169–80 (2002).

hierarchy. Brenner and Spaeth conducted the first comprehensive study of the subject and concluded that the overruling decisions of the Supreme Court were largely explained by the attitudinal model.[11] Examining individual Justices' votes in decisions that formally altered precedent, they found that 97.6% of those votes (976 out of 1000 votes) were attitudinally consistent.[12] This finding suggests that the norm of horizontal stare decisis does not typically constrain the voting of Supreme Court Justices in overruling decisions. Similarly, Segal and Spaeth concluded, in a subsequent study, that stare decisis rarely influences the decisions of Supreme Court Justices.[13]

Segal and Spaeth devised a clever research design to measure the influence of stare decisis on justices' votes. First, they sampled Supreme Court precedents that included dissenting opinions and identified the "progeny" of these precedents.[14] They then examined these progeny to determine whether Justices who had dissented in the precedent adhered to the precedent in the progeny ("precedential" behavior) or continued to dissent from the precedent ("preferential" behavior).[15] Over the entire history of the Supreme Court, Segal and Spaeth found that only 11.9% of the votes and opinions sampled fell into the precedential category, while 88.1% of the votes and opinions fell into the preferential category.[16] From this, they concluded that "the justices are rarely influenced by stare decisis."[17] In a later study, these scholars have gone as far as to refer to "the phony world of precedent and history."[18]

The findings of attitudinal studies on the influence of stare decisis on Supreme Court Justices are not directly applicable to the courts of appeals. As Segal and Spaeth themselves point out, Supreme Court Justices occupy

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[11] *See* SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS (1995).

[12] *See id.* at 70. In other words, justices' votes in overruling decisions were consistent with measures of the justices' political ideology. *Id.*

[13] *See* SPAETH & SEGAL, MAJORITY RULE, *supra* note 2, at 288.

[14] *See id.* at 23–33.

[15] *See id.* at 33–40.

[16] *See id.* at 287.

[17] *See id.* at 288.

[18] *See* SEGAL & SPAETH, ATTITUDINAL MODEL, *supra* note 5, at 85. Segal and Spaeth quoted a statement made by Judge Richard Posner in a 1999 *New York Times* interview: " 'There is a tremendous amount of sheer hypocrisy in judicial opinion-writing. Judges have a terrible anxiety about being thought to base their opinions on guesses, on their personal views. To allay that anxiety, they rely on the apparatus of precedent and history, much of it is extremely phony.' " *Id.* (quoting Linda Greenhouse, *In His Opinion*, N.Y. TIMES, Sept. 26, 1999, at A13).

a unique position in the federal judicial hierarchy.[19] Without a higher court to reverse their decisions, and without, generally speaking, ambitions for higher office, Supreme Court Justices can "almost always . . . vote their sincere policy preferences in the decision on the merits."[20] Lower federal court judges may fear reversal by a higher court and may harbor ambitions for higher office; these factors limit the ability of such judges to pursue their policy preferences in as sincere a manner. Studies of court of appeals compliance with Supreme Court precedent suggest such a contention.[21] With respect to circuit precedent, circuit judges may also fear reversal by the en banc court if they deviate from binding circuit precedent.[22] Other scholars have questioned whether the attitudinal model can successfully explain lower court behavior.[23]

Furthermore, the norm of horizontal stare decisis is more strict at the court of appeals level than at the Supreme Court level, at least in a formal sense with respect to three-judge panels. Unlike the Supreme Court, which is free to reexamine the soundness of its own precedents, a three-judge hearing panel of a court of appeals is generally prohibited from overruling the decision of another panel of the same circuit, let alone the en banc court or the Supreme Court.[24] This is discussed further in the next section.

It also bears mentioning that a number of prominent scholars disagree with the conclusions of the attitudinalists with respect to the influence of stare decisis on Supreme Court decision making. Knight and Epstein, for example, present a great deal of evidence that stare decisis constrains policy-oriented Justices' pursuit of their policy preferences.[25] Most importantly, these authors argue that a societal belief in the rule of law may require Supreme Court Justices to follow precedent to preserve the legitimacy of the judicial function, even in cases where the Justices themselves disagree with the precedent in question.[26] In the same vein,

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[19] *See id.* at 19–30, 74–123.

[20] SPAETH & SEGAL, MAJORITY RULE, *supra* note 2, at 18.

[21] *See* sources cited *supra* note 6.

[22] *See* 6TH CIR. R. 35(c) (stating that rehearing en banc is appropriate where "an opinion directly conflicts with prior . . . [c]ircuit precedent").

[23] *See, e.g.*, ROBERT A. CARP & RONALD STIDHAM, THE FEDERAL COURTS 190–91 (4th ed. 2001).

[24] *See* discussion *infra* Part II.B.

[25] *See* Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1032 (1996); *see also* EPSTEIN & KNIGHT, CHOICES, *supra* note 3, at 163–77.

[26] *See* Knight & Epstein, *supra* note 25, at 1022.

circuit judges may be constrained in a similar way—perhaps not by public opinion, as few decisions of the courts of appeals receive public attention, but by elite opinion and professional reputation. A judge who deviates from the norm may risk such informal sanctions from her colleagues.[27]

B. The Courts of Appeals

Previous studies have noted the existence of the norm of horizontal stare decisis at the court of appeals level but have not studied it systematically.[28] A number of studies, however, have addressed the issue of court of appeals compliance with binding Supreme Court precedent.[29] These studies have concluded that, although courts of appeals may from time to time correctly anticipate the overruling of a Supreme Court precedent,[30] circuit judges generally comply with existing Supreme Court precedent.[31] Examining search and seizure decisions, Songer, Segal, and Cameron found a high degree of congruence between Supreme Court policy directives and court of appeals decisions as well as a high degree of responsiveness to changing Supreme Court policy on the part of circuit judges.[32] These authors also found, however, that circuit judges still had "room to maneuver"[33] in many cases and thus the ideology of circuit judges still mattered, despite the binding nature of Supreme Court precedent.[34] Other studies of

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[27] For other criticisms of an earlier version of Segal and Spaeth's study, Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971 (1996) [hereinafter Segal & Spaeth, *Influence*]; see Saul Brenner & Marc Stier, *Retesting Segal and Spaeth's Stare Decisis Model*, 40 AM. J. POL. SCI. 1036 (1996); Richard A. Brisbin, Jr., *Slaying the Dragon: Segal, Spaeth and the Function of Law in Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1004 (1996); Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1049 (1996). Like Knight and Epstein, *supra* note 25, these critics all argue that Segal and Spaeth give too little weight to the norm of stare decisis at the Supreme Court level.

[28] *See, e.g.*, COHEN, *supra* note 10, at 45–46.

[29] *See supra* note 6 and accompanying text.

[30] *See* Reddick & Benesch, *supra* note 6, at 124–27.

[31] *See id.* at 135.

[32] *See* Songer et al., *supra* note 6, at 684–85.

[33] *See id.* at 693.

[34] *See id.* at 692–93.

court of appeals decision making have found compliance with Supreme Court precedent in free exercise,[35] obscenity,[36] and libel cases.[37]

In theory of course, the high degree of congruence between Supreme Court policy and court of appeals decision making is consistent with different, even contradictory explanations. Songer, Segal, and Cameron[38] as well as Brent[39] apply principal-agent theory and thus rely on Supreme Court monitoring of lower court decisions to explain this phenomenon. Other judicial scholars have looked on this high degree of compliance as the result of judges' internalization of norms, including stare decisis.[40] Howard concluded that "nearly all" the judges he interviewed "felt strongly constrained by the norms of stare decisis."[41]

There can be little doubt that a norm of horizontal stare decisis exists at the court of appeals level in the federal judicial hierarchy. As Judge Cole of the Sixth Circuit observed in a recent (but ironically, since overruled) case, "[i]t is axiomatic that a court of appeals must follow the precedent of prior panels within its own circuit."[42] In the Sixth Circuit this norm is embodied in circuit rule 206(c), which states in relevant part: "Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel."[43] This rule is also stated in *Salmi v. Secretary of Health & Human Services*.[44] Often cited for this proposition, *Salmi* states: "A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior

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[35] *See* Brent, *supra* note 6.

[36] *See* 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 (1992).

[37] *See* Gruhl, *supra* note 6; Songer & Sheehan, *supra* note 6.

[38] *See* Songer et al., *supra* note 6.

[39] *See* Brent, *supra* note 6.

[40] *See* HOWARD, *supra* note 7, at 164.

[41] *See id.* Howard's study found that thirty-two out of thirty-five judges found precedent "very important" in influencing their decisions, two judges considered precedent "moderately important" and one judge did not respond. *See id.*

[42] *See* United States v. Humphrey, 287 F.3d 422, 452 (6th Cir. 2002), *overruled by* United States v. Leachman, 309 F.3d 377 (6th Cir. 2002), *and cert. denied,* 155 L. Ed. 2d 527.

[43] 6TH CIR. R. 206(c).

[44] *See* Salmi v. Secretary of Health & Human Servs., 774 F.2d 685 (6th Cir. 1985).

decision."[45] For three-judge hearing panels of the Sixth Circuit, prior panel decisions are binding horizontal precedent.

There are, at the outset, reasons to be skeptical of the efficacy of this norm. For one thing, circuit judges can be observed from time to time citing the norm of horizontal stare decisis in dissent. Judge Batchelder in *LeMarbe v. Wisneski*, for example, quoted from an earlier dissenting opinion authored by Judge Keith, "[i]t has been the policy of this circuit that one panel cannot overrule the decision of another panel absent either intervening Supreme Court authority to the contrary or other circumstances which render the precedent clearly wrong."[46] This defensive use of the rule to argue that the panel majority is illegitimately ignoring or undermining circuit precedent suggests that the norm is not always closely observed.

Moreover, like their Supreme Court counterparts, circuit judges may use various techniques to avoid or even undermine circuit precedents with which they disagree. For example, circuit judges can distinguish precedents, even where the norm of horizontal stare decisis prevents them, as "a matter of good form,"[47] from explicitly overruling them.[48] As noted above, previous studies have suggested that compliance with precedent is not inconsistent with the pursuit of policy preferences by circuit judges.[49]

In sum, there are reasons to believe that the norm of horizontal stare decisis exerts a strong influence at the court of appeals level, but without a more systematic effort to assess that influence, one is left only with statements of the norm and anecdotal support for it. Similarly, Supreme Court justices pay heed to the norm in their opinions; references to the norm are not unusual.[50] But the evidence for the efficacy of the norm is not

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[45] *Id.* at 689.

[46] *See* LeMarbe v. Wisneski, 266 F.3d 429, 442 (6th Cir. 2001) (quoting Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1267 n.6 (6th Cir. 1981) (Keith, J., dissenting)).

[47] SEGAL & SPAETH, ATTITUDINAL MODEL, *supra* note 5, at 81.

[48] *Id.* at 81–83; *see also* Lawrence Baum, *Lower Court Response to Supreme Court Decisions: Reconsidering a Negative Picture*, 3 JUST. SYS. J. 208, 212 (1978) ("The capacity of lower-court judges to reconcile obedience to higher courts with evasion of their commands through the device of distinguishing precedents is well known to observers of the judiciary.").

[49] *See supra* notes 33–34 and accompanying text.

[50] *See, e.g.*, Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 582 (2002). (exploring the evolution of the " 'special justification' approach to stare decisis in constitutional cases"); *supra* notes 11–27 and accompanying text.

exactly overwhelming at the Supreme Court level.[51] The remainder of this Article attempts to measure compliance with the norm of horizontal stare decisis at the court of appeals level in a systematic fashion.

III. RESEARCH DESIGN

Previous studies on the influence of the norm of horizontal stare decisis at the Supreme Court level have argued that the norm has little influence and that the overruling decisions of Supreme Court justices are explained by judicial ideology.[52] The research design employed by Segal and Spaeth to study the influence of the norm of horizontal stare decisis on Supreme Court decision making,[53] however, is not practical in the court of appeals context for at least two reasons. First, it is simply not practical to look at how dissenters in the precedent voted in the "progeny" of that precedent because dissent is more rare in the court of appeals than in the Supreme Court.[54] Moreover, the courts of appeals typically hear cases in three-judge hearing panels rather than en banc, so every current judge does not sit on every case that comes before the court.[55] For these reasons, the number of judges that dissented in a precedent sitting on the hearing panel deciding a "progeny" case would be too small to permit systematic analysis. Another research design must be employed to study horizontal stare decisis at the court of appeals level.

Second, the dependent variable of interest in studies of the Supreme Court overruling votes or decisions, or formally altering of precedent[56] is problematic at the court of appeals level, given the relative strictness of the norm of horizontal stare decisis.[57] Circuit judges rarely overrule their own precedents in panel opinions; the conditions under which they may formally

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[51] *See* SPAETH & SEGAL, MAJORITY RULE, *supra* note 2 at 288; SEGAL & SPAETH, ATTIDUTINAL MODEL, *supra* note 5 at 85.

[52] *See, e.g.*, BRENNER & SPAETH, *supra* note 11.

[53] *See* SPAETH & SEGAL, MAJORITY RULE, *supra* note 2, at 23–44 (describing the research design). Segal and Spaeth's research design is also discussed *supra* notes 13–18 and accompanying text.

[54] DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 104–05 (2000) [hereinafter SONGER ET AL, CONTINUITY].

[55] CARP & STIDHAM, *supra* note 23, at 23–24.

[56] *See, e.g.*, SPAETH & SEGAL, MAJORITY RULE, *supra* note 2, at 30–40; BRENNER & SPAETH, *supra* note 11.

[57] *See supra* notes 40–45 and accompanying text.

do so rarely occur.[58] Intervening Supreme Court precedent may enable a panel to note the abrogation of a precedent, as a panel of the Sixth Circuit did, for example, in *Goad v. Mitchell*.[59] *Goad* invalidated a heightened pleading requirement[60] that another panel of the Sixth Circuit had imposed on certain § 1983 plaintiffs in *Veney v. Hogan*.[61] But even if circuit judges cannot overrule panel decisions in most circumstances, they may be able to avoid complying with precedents with which they disagree through distinguishing them or other forms of negative treatment. Positive treatment, on the other hand, may be taken to indicate that the citing majority paid deference to the precedent, even if in the abstract the judges on the panel would have preferred a different rule of law. Thus treatment, either positive or negative, is the dependent variable employed in this study.

A. Hypotheses

Many factors may affect a hearing panel's treatment of precedent in subsequent citations. Given the findings of previous research, one such factor is the political ideology of the citing panel, especially when compared to the ideology of the cited panel.[62] Thus, the first hypothesis to be tested is that *conservative panels are more likely to treat precedents decided by liberal panels negatively than precedents decided by conservative panels, and vice versa.* This hypothesis attempts to gauge the influence of the norm when the policy preferences of the citing panel differ from the policy preferences of the precedent panel. As Segal and Spaeth and others have pointed out, precedent cannot be said to influence a decision where the judges would have reached the same decision regardless of the existence of the precedent.[63] Although the present study does not include a direct measure of the policy preferences of the citing panel with respect to the issues in the precedent decision, the ideological composition of the panel can serve as an indirect measure of policy preferences. All else being equal, I expect that liberal panels will be more likely to disagree with precedents decided by conservative panels than precedents decided by

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[58] *See supra* notes 47–48 and accompanying text.

[59] Goad v. Mitchell, 297 F.3d 497 (6th Cir. 2002).

[60] *See id.* at 502–03.

[61] Veney v. Hogan, 70 F.3d 917 (6th Cir. 1995), *overruled in part by Goad*, 297 F.3d at 505.

[62] Songer et al., *supra* note 6, at 692–93.

[63] *See* Segal & Spaeth, *Influence*, *supra* note 27, at 976.

liberal panels and that this will be reflected in the likelihood that such panels will treat precedents negatively.

To isolate the impact of judicial ideology, however, it is necessary to hold other factors constant. One such factor is the ideological direction of the case outcome. It is expected that liberal panels will be more likely to reach liberal case outcomes than conservative panels, and vice versa. But conservative panels will reach liberal case outcomes and liberal panels will reach conservative case outcomes, and this may affect the subsequent treatment of precedents. In reaching a liberal outcome in a subsequent case, for example, a conservative panel might distinguish a conservative precedent based on the facts of the citing case. Such an instance of negative treatment would be accounted for by the direction of the subsequent case outcome rather than the ideology of the panel. Thus, the second hypothesis to be tested is that *a precedent is more likely to receive negative treatment when the citing panel reaches a different case outcome (ideological direction) than the precedent panel.*

One must also consider whether the panels involved actually exercised discretion in deciding the cases. The literature on the courts of appeals makes clear that the majority of cases decided at the courts of appeals level are " 'easy' cases in which the legal texts are determinative so that judges, regardless of their personal preferences, will mechanically apply the law."[64] If the decision in the precedent involved the mere "mechanical"[65] application of law to facts, then it is likely that the citing cases also present similar "easy"[66] decisions. The presence of judicial disagreement on the panel deciding the precedent, on the other hand, provides evidence that the precedent case presented the court with "reasonable decisional alternatives."[67] Subsequent panels may be more likely to disagree with precedents representing the actual exercise of judicial policy-making discretion than those representing mechanical application of the law. Alternately, drawing an analogy to studies of Supreme Court opinions, unanimously decided precedents may be viewed as more "robust" than those decided by divided panels.[68] Thus, the third hypothesis to be tested is that *precedents in which*

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[64] SONGER ET AL., CONTINUITY, *supra* note 54, at 104.

[65] *Id.*

[66] *Id.*

[67] Donald R. Songer, *Consensual and Nonconsensual Decisions in Unanimous Opinions of the United States Courts of Appeals*, 26 AM. J. POL. 225, 225 (1982).

[68] *See* James F. Spriggs, II & Thomas G. Hansford, *The U.S. Supreme Court's Incorporation and Interpretation of Precedent*, 36 LAW & SOC'Y REV. 139, 144 (2002).

one judge writes separately (i.e., a concurrence or a dissent) are more likely to receive negative treatment than precedents without a separate writing.

Another possible indication of judicial discretion in a given case is whether the panel designates its opinion for publication or relegates it to unpublished status. Under circuit rules, only published opinions create binding precedents for subsequent cases.[69] Thus, it is not possible to look at the treatment of unpublished precedents, as there is no such thing, but publication can be treated as an indication of some level of judicial discretion in the citing case. Sixth Circuit rule 206(a) specifies various criteria for determining when panel opinions should be published, including "whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation."[70] It is likely that the establishment of a new rule or the modification of an existing rule involves, to some extent, the exercise of judicial discretion. As a result, it is likely that publication of the citing case will be correlated with negative treatment. Thus, the fourth hypothesis tested is that *published opinions are more likely to treat a precedent negatively than unpublished opinions.*

Intervening events and the passage of time may also affect how subsequent panels treat circuit precedents. For example, if a precedent has previously received support from other panels, then subsequent citing panels may pay it more deference.[71] Positive citations to a particular precedent might shore up its legitimacy and signal to other judges that deviation from it would be disfavored. Thus, the fifth hypothesis to be tested is that *the more prior positive citations to a precedent, the less likely it is that it will be treated negatively.*

Similarly, if a precedent has been undermined by prior negative treatments, panels may be less inclined to follow it. Such negative treatments might undermine the legitimacy of the precedent and signal to other judges that deviation from it would find favor, at least with certain other members of the court. This would be especially true in cases where a panel called a precedent into doubt or questioned whether it was still good law. Thus, the sixth hypothesis to be tested is that *precedents that*

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[69] *See, e.g.*, 5TH CIR. R. 47.5.1; 6TH CIR. R. 206(a); 8TH CIR. R. 4.

[70] *See* 6TH CIR. R. 206(a).

[71] Spriggs & Hansford, *supra* note 68, at 144, 151, 154 (analyzing the correlation between positive treatment of Supreme Court cases and subsequent positive interpretation of the precedent).

have received negative treatment in a prior decision are more likely to receive negative treatment in a subsequent decision.

The mere age of a precedent may also affect how it is treated by subsequent panels of the circuit, although it is not necessarily clear in the abstract whether increased age would make it more or less likely that the precedent would receive negative treatment. The age of a precedent, however, can be treated as a proxy for the changing composition of the court of appeals. As different judges sit on hearing panels, it becomes more likely that the precedents decided by previous judges will be treated negatively as new judges "make their mark" on the circuit, so to speak. Thus, I hypothesize that *older precedents are more likely to receive negative treatment than relatively newer precedents.*

B. Data Collection and Coding

To test these hypotheses, a sample of Sixth Circuit citations of circuit precedent was collected in the following way. Sixth Circuit precedents decided in 1995 and 1996 were identified from the *Federal Reporter*.[72] Landes and Posner found that the average "half-life" of a non-Supreme Court precedent was 4.3 years, meaning that half of the citations to lower federal court precedents in their study occurred within 4.3 years of the precedents' decision date.[73] Sampling precedents from eight and nine years ago, then, guarantees that most of the citations of the precedents that will occur are included in the sample. For each potential precedent, information was collected on the case number, the authoring judge, panel membership, whether there was a separate writing (concurrence or dissent), case outcome (ideological direction), and decision date. Precedents involving criminal procedure issues, including sentencing and civil rights claims based on race or sex discrimination or the violation of federally guaranteed rights[74] were selected because these issue areas (1) make up a significant part of the Sixth Circuit's docket and (2) allow for coding in terms of the ideological direction of case outcome.

In the criminal procedure area, the case outcome variable was coded "liberal" when relief, even partial relief, was granted to the defendant on

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[72] The sampled precedents were contained in volumes 50–102 of the *Federal Reporter*, 3d Series.

[73] *See* William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 255 (1976).

[74] In other words, civil rights cases were sampled when they involved either Title VII of the Civil Rights Act of 1964 or 42 U.S.C. § 1983. The latter category includes several important cases on the issue of qualified immunity.

the relevant issue and "conservative" when relief was denied. In the civil rights cases, the case outcome variable was coded "liberal" when the panel held in the plaintiffs' favor on the relevant issue and "conservative" when the panel held in the defendants' favor. The panel membership variables were coded to account for the party of the appointing president of both the authoring judge and the other judges on the precedent panel. Although this measure of appellate judge ideology has its limitations, previous studies have shown "that the party affiliation appears to account for a substantial portion of the variation in judicial voting."[75] Using this measure, a liberal panel is one on which a majority of the judges was appointed by a Democratic president, and a conservative panel is one on which a majority of judges was appointed by a Republican president.

Subsequent citations to these precedents in panel opinions were then obtained through the use of Westlaw's Keycite service. Subsequent citations were included in the sample if the treatment of the precedent was negative, including "distinguished," or if the treatment was positive and the citing case either "explained" or "discussed" the precedent. Subsequent cases that merely cited the precedent without discussion, as in a string citation, were omitted from the sample of citing cases. The positive citations included in the sample generally represent more than a sentence of discussion of the cited precedent; and, in many cases, the citing case discusses the cited precedent at great length.[76] Unpublished opinions, including per curiam opinions, were included in the sample of citing cases.[77]

The following information was collected on the citing cases: case citation, the treatment of the precedent, whether the citing case was published, party of the president appointing the judges on the panel, case outcome (ideological direction), decision date, the number of months between decision in the citing case and decision in the precedent, and the

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[75] *See* SONGER, CONTINUITY, *supra* note 54, at 118; *see also* CARP & STIDHAM, *supra* note 23, at 97–107; 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).

[76] Keycite indicates the depth of a precedent's treatment in a subsequent citation with the following categories: explained (more than a page of discussion of the precedent); discussed (less than a page, but more than a sentence of discussion); cited (a sentence of discussion); and mentioned (usually a citation in a string citation). Only the first two depths of treatment were included in the sample.

[77] Subsequent opinions designated unpublished "orders" were excluded from the sample, however. Such orders are typically found in extremely easy cases, often involving pro se prisoner appeals.

number of times the cited precedent had previously received negative and positive treatment in published Sixth Circuit opinions. The variables for panel membership and case outcome were coded in the same way as the corresponding variables for the precedent cases.[78] In multiple issue cases, case outcome was coded to represent the case outcome on the issue or issues for which the precedent was cited. The variables accounting for previous treatments of the precedent case were coded using only other published cases in the sample because only such citations carry precedential weight. In other words, each time a precedent case was treated negatively by the Sixth Circuit in a published opinion, prior to decision in the citing case, the variable for number of prior negative treatments was increased by one; and each time a precedent case was treated positively in a published opinion and either explained or discussed, the variable for number of prior positive treatments was increased by one. Moreover, these variables were coded only to reflect intervening citations on the issue being determined in the citing case and not simply the number of times the precedent was cited for any reason.

Once the data were collected, additional variables were computed comparing the ideological direction of the precedent and citing case (Same Direction) and the ideological composition of the majorities on the precedent and citing panels (Same Majority). Because the unit of analysis is the citation of precedent rather than the case, subsequent cases represent more than one case in the sample if they cited more than one of the precedents selected in the sampling procedure. Few citing cases are included in the sample more than once, however; there are 422 distinct citing cases in the sample, accounting for 499 observations, or citations to precedent.

III. FINDINGS AND DISCUSSION

Circuit judges rarely treat their own precedents negatively, and even when they do so, they are much more likely to distinguish precedents based on factual differences ("distinguishing treatment") than to engage in other, "harsher" forms of negative treatment, such as limiting a precedent to its facts or calling it into doubt. As shown in Table 1, negative treatment occurred in only 18.8% of the cases in the sample (94 cases out of 499), with distinguishing treatment accounting for 77.7% of the observed instances of negative treatment (73 cases out of 94). The twenty-one other cases of negative treatment include subsequent cases limiting precedents,

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[78] *See supra* notes 74–75 and accompanying text.

calling them into doubt, recognizing their abrogation based on intervening legal developments, and even one instance where a panel declined to follow a precedent.

Table 1: Incidence of Negative Treatment in Sample of Sixth Circuit Citations of Its Own Precedents.

	N	%
All Negative	94	18.8
Distinguishing	73	14.6
Other Negative	21	4.2
All Positive	405	81.2
Discussing	338	67.7
Explaining	67	13.4
Total	499	100.0

The data summarized in Table 1 indicate that circuit judges generally treat their own precedents positively. Indeed, eight times out of ten they followed the precedents cited, and this figure would be much higher if the sample included citations to precedent without discussion. Thus, it is safe to say that the overwhelming majority of panel citations to circuit precedent are positive. It is possible, of course, that the judges of the Sixth Circuit choose not to cite precedents with which they disagree and that this explains, at least in part, the observed tendency toward positive treatment. Whether the panel opinions actually cited the relevant binding precedents is not part of this analysis. The majority of the citing panels in the sample (70.8%), however, comprised of two judges appointed by a president of one party and one judge appointed by a president of the other party. The presence of potential "whistleblowing" judges on most of the panels suggests that efforts to evade disfavored precedents by failing to cite them would have only limited success.[79]

[79] *See* Cross & Tiller, *supra* note 75. Cross and Tiller concluded that "[t]he minority member acts as a whistle blower, ready to expose any cheating by the majority." *See id.* at 2175. It is also possible that there are contrary precedents in many areas of the law allowing circuit judges to choose to cite only precedents with which they agree. I am unaware of any systematic support for the existence of such contrary precedents, in general. *See also* Stephen L. Wasby, *Inconsistency in the*

Table 1 may be taken to suggest that circuit judges enjoy little discretion in about eighty percent of the issues that they decide because of the existence of binding circuit precedent. This would be an overly hasty conclusion, however, because in certain cases a panel may "follow" a precedent by extending its reach.[80] Positive treatment alone cannot be taken as evidence that the panel decision in a citing case was mechanical.

Moreover, negative treatment alone does not mean that a panel of the court exercised policy-making discretion. If, for example, the relevant statute or Sentencing Guidelines provision has been amended since a precedent was decided, a citing panel may have no choice but to treat a precedent negatively, regardless of its collective policy preferences. The same is true of intervening Supreme Court precedent or circuit (en banc) precedent. Of the twenty-one negative treatments that are not "distinguishing" treatments in the sample, at least four can be explained by reference to such intervening legal developments beyond the court of appeals itself,[81] and at least one more can be explained by reference to a decision of the en banc court.[82] In other words, even negative treatment at the court of appeals level may be the result of compliance with the norm of stare decisis.

United States Courts of Appeals: Dimensions and Mechanisms for Resolution, 32 VAND. L. REV. 1343–73 (1979) (alleging that intracircuit inconsistency is a problem in the Ninth Circuit). *But see* Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 544 (1989) (finding that "intracircuit inconsistency" in the Ninth Circuit was less common than sometimes thought, but that "precedents pointing in different directions" were not unusual).

[80] For example, a panel of the Sixth Circuit "followed" the Supreme Court precedent *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by extending the rule of *Apprendi* to mandatory minimum discussion of this line of cases in the Sixth Circuit. *See* Emery G. Lee, *Policy Windows on the U.S. Courts of Appeals*, 24 JUST. SYS. J. 307, 321–24 (2003).

[81] *See* United States v. Alexander, 59 F.3d 36 (6th Cir. 2000) (citing amendment to relevant Sentencing Guidelines provision); Veney v. Hogan, 70 F.3d 917 (6th Cir. 1996), *abrogation recognized by* Goad v. Mitchell, 297 F.3d 497, 503 (6th Cir. 2002) (citing Crawford-El v. Britton, 523 U.S. 574 (1998)); United States v. Riascos-Suarez, 73 F.3d 616 (6th Cir. 1996), *abrogation recognized by* United States v. Nance, No. 00-6444, 2002 WL 1359325, at *5 n.6 (6th Cir. June 20, 2002) (citing Muscarello v. United States, 524 U.S. 125 (1998)); Schilling v. White, 58 F.3d 1081 (6th Cir. 1995), *called into doubt by* Shamaeizadeh v. Cunigan, 182 F.3d 391, 396 n.3 (6th Cir. 1999) (citing Spencer v. Kemna, 523 U.S. 1 (1998)).

[82] United States v. Weaver, 99 F.3d 1372 (6th Cir. 1996), *limitation recognized by* United States v. Leaster, 2002 WL 1147343, at *7 n.3 (6th Cir. May 28, 2002) (citing United States v. Allen, 211 F.3d 970 (6th Cir. 2000) (en banc)).

The distinguishing treatments may actually represent genuine policy-making discretion, in that the finding of dispositive factual differences between a subsequent case and the relevant precedent may be influenced by the subsequent panel's policy preferences. A liberal panel, for example, may be more likely to find that factual differences between a citing case and a cited case justify a prodefendant result, and a conservative panel may be more likely to find that such factual differences justify a progovernment result. To test this conjecture and the other hypotheses described above, logistic regression analysis was performed with treatment, either positive or negative, as the dependent variable.[83] Prior to examining the results of the logistic regression, however, it may be helpful to examine bivariate relationships between treatment and some of the independent variables included in the logistic regression model. Table 2 presents the results of various crosstabulations of treatment with selected independent variables and controls.

Table 2: Percentage of Cited Cases in Sample Receiving Negative Treatment, by Selected Explanatory Variables.

Category	% Negative	N
Overall	18.8	499
By Citing Case Majority Ideology		
Same as Cited Case Majority	18.7	235
Different than Cited Case Majority	18.9	264
Conservative Precedent Majority		
Liberal Majority	18.7	150
Conservative Majority	16.8	107
Liberal Precedent Majority		
Liberal Majority	20.3	128
Conservative Majority	19.3	114
Conservative Precedent Direction		
Liberal Majority	20.0	137
Conservative Majority	10.2*	175
Liberal Precedent Direction		
Liberal Majority	18.4	103
Conservative Majority	31.0*	84

[83] Because the dependent variable –treatment– is dichotomous (it can take only two values: zero or one) linear regression is inappropriate. *See generally* JOHN H. ALDRICH & FORREST D. NELSON, LINEAR PROBABILITY, LOGIT, AND PROBIT MODELS Ch. 3 (1984).

Category	% Negative	N
By Citing Case Direction		
Same Direction	9.2	303
Opposite Direction	33.7***	196
Conservative Precedent Direction		
Liberal Direction	36.0	75
Conservative Direction	9.3***	237
Liberal Precedent Direction		
Liberal Direction	9.1	66
Conservative Direction	32.2***	121
Conservative Precedent Majority		
Liberal Direction	25.3	79
Conservative Direction	14.6*	178
Liberal Precedent Majority		
Liberal Direction	21.0	62
Conservative Direction	19.4	180
By Publication		
Published	24.8	262
Unpublished	12.2***	237
By Separate Writing		
Cited Case Includes	17.6	51
Cited Case Does Not Include	19.0	448

Percentage differences are not statistically significant unless otherwise noted.
*** $p < .001$
** $p < .01$
* $p < .05$

The data summarized in Table 2 indicate that differences in the ideology of the citing and precedent panels alone do not explain the observed variation in negative treatment. Negative treatment was observed in 18.9% of the cases in which a majority of the citing panel was of a different ideological persuasion than a majority of the precedent panel, and in 18.7% of cases in which the two panels had the same ideological majority. Breaking the composition of the panel out into conservative and liberal precedent majorities does not yield a different result. Liberal citing majorities treat precedents decided by conservative majorities negatively in 18.7% of cases, and conservative citing majorities treat precedents decided by conservative majorities negatively in 16.8% of cases. Conservative citing majorities treat precedents decided by liberal majorities negatively in 19.3% of cases, and liberal citing majorities treat precedents

decided by liberal majorities negatively in 20.3% of cases. None of these rates of negative treatment is substantively different from the overall rate of negative treatment, 18.8%.

Interestingly, a statistically significant difference in terms of negative treatment is observed when one looks at the composition of the citing panel majority and the ideological direction of the precedent. Liberal panels treated conservative-direction precedents negatively 20.0% of the time, while conservative panels treated conservative-direction precedents negatively only 10.2% of the time. Conservative panels treated liberal-direction precedents negatively 31.0% of the time, compared to only 18.4% for liberal panels. In other words, even if liberal citing panels are not more likely than conservative citing panels to treat precedents decided by conservative panels negatively, liberal panels are more likely than conservative panels to treat precedents decided in a conservative direction negatively, and the same is true of conservative panels and precedents decided in a liberal direction.

This relationship between the ideological direction of the precedent and the ideological direction of the subsequent case is even stronger when considering the direction of the case outcome alone. Panels deciding the issue in the citing case in the opposite ideological direction from the direction of the precedent treated the precedent negatively 33.7% of the time, while panels deciding the issue in the citing case in the same ideological direction treated the precedent negatively only 9.2% of the time. The same relationship holds when considering precedents decided in a conservative and liberal direction only. Thus, panels deciding issues in citing cases in a liberal direction treated conservative precedents negatively 32.2% of the time, and panels deciding issues in citing cases in a conservative direction treated liberal precedents negatively 36.0% of the time.

The ideology of the judges on the precedent panel was only correlated with negative treatment, however, when the citing case was decided in a liberal direction and the precedent was decided by a conservative majority. These findings indicate that the ideological composition of panels explains some variation in the treatment dependent variable, but that the relationship between ideology and negative treatment is conditioned by the ideological direction of the decisions involved. The interplay between these variables is discussed further below.[84]

Table 2 also indicates that the subsequent panel's decision to publish was correlated with negative treatment. This makes sense given that

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[84] *See infra* pp. 789–91.

publication is reserved for substantively important cases under circuit rules, and judges are more likely to determine that a case distinguishing or undermining a precedent is substantively more important than one merely following precedent.[85] Given these rules, however, it is surprising that so many negative treatments go unpublished (29 cases out of 94, or 30.9%). Table 2 also indicates that the presence of a separate writing in the precedent did not affect whether the precedent was treated negatively.

The results of the logistic regression, with treatment as the dependent variable, are similar to the results presented in Table 2. The expected signs for the variables in the regression are as follows: Same Majority, positive; Same Direction, positive; Separate Writing, negative; Published, negative; Negative Citations, negative; Positive Citations, positive; and Months Elapsed, negative. Table 3 presents the regression results. The coefficient for Same Majority is not statistically significant, and the sign is negative rather than positive, the opposite of the expected direction.[86] From this, one might conclude that the composition of the citing and precedent panels did not affect the nature of the treatment received by the precedent, all else being equal. The coefficient for Same Direction, however, is statistically significant, and the sign is in the expected direction. As seen in Table 2, the effects of the ideological composition of the panels involved are conditioned on the ideological direction of the holdings in the cases.

Table 3: Logistic Regression Results, Treatment as Dependent Variable.

Variable	B	Exp(B)
Constant	1.751***	5.761
	(.367)	
Same Majority	-.182	.834
	(.251)	
Same Direction	1.601***	4.960
	(.261)	
Separate Writing	.057	1.059
	(.422)	
Published	-.762**	.467
	(.265)	
Negative Citations	-.129	.879
	(.222)	

[85] *See, e.g., supra* note 69 and accompanying text.

[86] It should be noted that the results do not differ in any meaningful way if the comparison is between the ideology of the judge authoring the citing opinion and the ideology of the judge authoring the precedent.

Variable	B	Exp(B)
Positive Citations	.205*	1.227
	(.096)	
Months Elapsed	-.016**	.984
	(.005)	

Standard errors in parentheses
Observations 499
Model $x2=68.349$***
-2 Log likelihood=414.543
Reduction in error=6.4%
*** $p < .001$
** $p < .01$
* $p < .05$

The other hypotheses described above[87] find support in Table 3, with two exceptions. As in Table 2, publication is negatively correlated with treatment, even when the other variables are controlled. All else being equal, a published opinion is more likely to treat the cited precedent negatively than an unpublished opinion. As stated above, this reflects compliance with the circuit rule regarding publication.[88] The coefficients for previous positive citations and the age of the precedent, as measured by the number of months elapsing between the precedent decision and the citing decision, are both statistically significant and take the expected signs. All else being equal, then, intervening positive citations make it more likely that a precedent will be cited positively in a subsequent case, and the older the precedent, the more likely it is to receive negative treatment. Previous negative treatments of the precedent, on the other hand, do not appear to influence subsequent treatment in a systematic fashion. This makes sense, given that the overwhelming majority of negative treatments in the sample are distinguishing treatments. The fact that a prior panel distinguished a precedent factually does not necessarily undermine the precedent's applicability under different fact patterns. Similarly, the finding with respect to the age of the precedent can be stated in the following way: the longer a precedent exists, the greater the chance that it will be distinguished, all else being equal. Finally, the presence of a separate writing in the precedent did not make negative treatment more likely.

[87] *See supra* Part III.A.

[88] 6TH CIR. R. 206(a); *see also supra* text accompanying note 85.

To further analyze the effects of the independent variables included in the logistic regression model, the predicted probabilities of negative treatment for various values of the independent variables were calculated.[89] Setting the categorical independent variables Same Majority, Separate Writing, Negative Citations, and Positive Citations at their modal value (zero) and the value of Months Elapsed at the sample median, thirty-seven months, the predicted probability of negative treatment where the citing panel reaches a conclusion in the direction opposite the precedent direction is .402 in a published opinion and .239 in an unpublished opinion. The predicted probability of negative treatment of a cited precedent where the citing panel reaches a conclusion in the same direction is .119 in a published opinion and only .06 in an unpublished opinion. Changing the values so that the precedent has one prior positive citation and doubling the median value on Months Elapsed to seventy-four, the predicted probability of negative treatment where the citing panel reaches a conclusion in the direction opposite the precedent direction increases to .497 in a published opinion and .316 in an unpublished opinion. The predicted probability of negative treatment where the citing panel reaches a conclusion in the same direction, under the same circumstances, is .166 in a published opinion and only .085 in an unpublished opinion.

The most striking aspect of Tables 2 and 3 is the weak direct relationship between the ideology of the panel majorities and the incidence of negative treatment. One would expect, all else being equal, that conservative panels would treat precedents decided by liberal panels negatively, and vice versa, but that does not appear to be the case.

This does not mean, however, that the ideology of the panel majorities does not affect the direction of the case outcomes involved. Instead, the ideology of the citing case panel majority is positively correlated with the direction of the citing case on the relevant issue ® = .112, $p < .05$), and the ideology of the precedent case panel majority is positively correlated with the direction of the precedent ® = .127, $p < .01$). Liberal panel majorities reached liberal results in 32.7% of the citing cases and 43.8% of the precedents, as opposed to conservative panel majorities, which reached liberal results in only 22.6% and 31.5%, respectively. From this, building on Table 2, it is clear that liberal citing panels are more likely to treat precedents decided in a conservative direction negatively and that these conservative-direction precedents were more likely to have been decided

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[89] *See* TIM FUTING LIAO, INTERPRETING LINEAR PROBABILITY MODELS 16–18 (1994) (explaining how to calculate predicted probabilities of the dependent variable for given values of the independent variables).

by conservative panels. The same holds for conservative citing panels and liberal-direction precedents. Indeed, of the conservative-direction precedents included in the sample, 56.4% were decided by conservative panels (176 out of 312), and almost the same proportion of the liberal-direction precedents were decided by liberal panels, 56.7% (106 out of 187). In sum, the ideological composition of the panels involved is important because of its consequences for the direction of the precedent; however, the ideological composition of the panels, alone, does not explain variation in the negative treatment of precedents.

The lower liberalism figures for citing cases compared to precedents described in the previous paragraph reflect the inclusion of unpublished cases in the sample of citing cases. Unpublished cases often, but not always, involve routine appeals, especially direct criminal appeals, that are often without merit.[90] The conservative (progovernment) decisions in these cases thus decrease the observed level of liberalism in the sample. To further examine this, I aggregated the data to the discrete case number and looked at panel decisions with respect to publication of opinions instead of citations. I found that publication is positively correlated with direction ® = .240, $p < .001$). This means that a liberal outcome makes publication

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[90] Judge Posner, for example, discusses how "the greatly expanded availability of lawyers for indigent claimants, especially . . . indigent criminal defendants" has resulted in an increased rate of appeals since 1960, and how the Sentencing Reform Act of 1984 "greatly expanded the appealability of federal sentences." *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 96–97 (1996). Thus, "[g]iven a free lawyer, the cost of appealing drops to zero, and the defendant will have no reason not to appeal even if the chances of winning are slight—as they are." *Id.* at 118. In a similar vein, Wasby notes that "direct criminal appeals" are more likely to involve "'simple'" issues and thus are less likely to be published than cases involving more complex issues. *See* Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROC. 325, 338 (2001). I do not mean to suggest that all unpublished cases (or criminal appeals) are routine and/or frivolous. *See* Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307–13 (1990).

> [T]he official criteria for publication do not provide an adequate description of the differences in practice between decisions which are published and those which are not. A significant number of the unpublished decisions of the courts of appeals appear to involve cases which are non-routine, sometimes politically significant, and which are nonconsensual appeals which present the judges on the panel hearing the appeal with an opportunity to exercise substantial discretion in their decision-making.

Id. at 313.

more likely, and that both liberal panels (which publish 76.7% of liberal decisions) and conservative panels (60.0%) are more likely to publish liberal decisions than conservative decisions (44.7% and 43.4%, respectively).

The most likely reason for this, again, is adherence to circuit rules regarding publication. Sixth Circuit rule 206(a)(5) identifies "whether it reverses the decision below" as a factor for consideration in determining whether an opinion should be published in the *Federal Reporter*.[91] In criminal cases, a prodefendant, liberal decision typically involves the reversal of a lower court decision, and thus one would expect more liberal decisions among published cases. Even conservative panels are more likely to publish cases decided in a liberal direction than those decided in a conservative direction. This finding suggests that circuit norms and rules reflecting legal values, such as the rules with respect to publication and precedent, influence the decision making of circuit judges, even where those norms cut against their policy preferences.

IV. CONCLUSION

Negative treatment of Sixth Circuit precedent occurred in less than twenty percent of subsequent citations. The overwhelming majority of these negative treatments were distinguishing treatments rather than potentially "harsher" forms of negative treatment. Panels of the Sixth Circuit rarely applied such harsh forms of negative treatment to their own precedents and generally follow the precedents that they cite in their opinions. These findings provide some support for the view that the norm of horizontal stare decisis constrains decision making on the Sixth Circuit.[92] A number of factors made negative treatment more likely, all else being equal. The most significant of these was that a citing panel reaching a conclusion in the opposite ideological direction from the precedent is more likely to treat the precedent negatively; in most of these cases, the panel opinion will distinguish the precedent to reach the opposite outcome. The ideology of the citing and precedent panels was important to the extent that it affected the direction of case outcomes but did not explain the observed variation in negative treatment on its own.

Furthermore, negative treatment is more likely to occur in opinions designated for publication than in unpublished opinions. This too suggests

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[91] *See* 6TH CIR. R. 206(a)(5).

[92] It is possible, of course, that the judges on other courts of appeals behave differently with respect to their circuits' precedents. This Article's focus on one circuit limits my ability to speak to how the judges on these other courts behave.

that circuit rules and norms constrain circuit judge decision making, especially when one considers that publication is more likely in liberal (procriminal defendant, procivil rights plaintiff) decisions even when conservative judges make up the majority of the hearing panel.

This study suggests several possible avenues for additional research. It would be interesting, for example, to examine only "harsher" forms of negative treatment of circuit precedent, especially those cases in which panel majorities effectively overrule circuit precedent, to determine if those instances of negative treatment can be explained by judicial attitudes and ideology. Such alterations of precedent are not likely to be explained in the panel opinion with the factual distinctions referenced when a precedent is merely distinguished. Under what circumstances, and how often, do hearing panels overrule their own precedents, without recourse to the en banc procedure?

Scholarship could also be conducted on whether the precedents receiving negative treatment are raised by the parties in their briefs and oral arguments, or whether hearing panels seek out circuit precedents to distinguish or even to undermine. Based on the distinguishing treatments included in the sample, it appears that the typical distinguishing treatment is less a matter of a policy-oriented panel majority attempting to undermine precedents with which it disagrees and more a matter of the opinion author attempting to explain to one party or the other why the precedent that it has cited in support of its position is inapposite. Further research might show that negative treatment is better understood as the result of the dialogue between the appellate panel and counsel, a dialogue largely about the meaning and applicability of circuit precedents. Such a finding would provide additional support for the view, advanced in this Article, that one cannot understand the behavior of circuit judges without accounting for legal variables, especially circuit precedent.