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## Lower Court Compliance with Supreme Court Remands

Elise Borochoff

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## Lower Court Compliance with Supreme Court Remands

Cover Page Footnote

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## LOWER COURT COMPLIANCE WITH SUPREME COURT REMANDS

*Elise Borochoff\**

*While the Supreme Court issues the ultimate legal ruling in cases to which it grants certiorari, it often does not decide final outcomes. Instead, the Court remands cases to lower courts for their ultimate resolution. Scholars have paid relatively little attention to lower court decisions issued after remands from the Supreme Court. This Comment examines the ultimate outcome of Supreme Court decisions on remand.*

*Two questions are central to the study of Supreme Court remands. First, the degree to which lower courts choose to respond to the Supreme Court. And, second, the factors that motivate a lower court to comply with Supreme Court decisions. Using data from Supreme Court opinions issued during ten terms during the Burger and Rehnquist Courts, this Comment concludes that lower courts alter their previous decisions in the majority of remanded cases. However, lower courts do not always comply with the Supreme Court. Many different variables, including judicial ideology, influence lower courts' decisions to respond to Supreme Court remands.*

*Responsiveness, however, is not the only relevant measure of lower court compliance. This Comment also examines a lower court's decision to remand a case. Different factors influence a lower court's decision to remand a case than influence the court's responsiveness. Another measure of compliance is based on the lower court's reasoning. This Comment concludes that, even if a lower court does not change the outcome of its previous decision, a*

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\* J.D. Candidate, 2010, Harvard Law School; M.A. Political Science, 2007, Emory University; B.A. Political Science, 2007, Emory University. I would like to thank Thomas Walker and Micheal Giles for their guidance and support throughout the process of researching and writing this Comment. I would also like to thank Elizabeth Griffiths and Eric Reinhardt for their helpful suggestions.

*lower court is likely to change its reasoning to align with that of the Supreme Court.*

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## LOWER COURT COMPLIANCE WITH SUPREME COURT REMANDS

### INTRODUCTION

The Supreme Court's ruling in *Sochor v. Florida (Sochor II)*<sup>1</sup> appeared to save Dennis Sochor's life.<sup>2</sup> Sochor had been previously convicted of first degree murder and sentenced to death in Florida. The Supreme Court heard his appeal and ruled that the trial court judge's sentence violated the Eighth Amendment because he considered an unconstitutionally vague aggravating factor in imposing the death sentence.<sup>3</sup> The Court held that "[w]hile federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error."<sup>4</sup> The Court thus vacated and remanded the case to the Florida Supreme Court for reconsideration.<sup>5</sup>

On remand, the Florida Supreme Court reaffirmed the death penalty, calling the previous issue harmless error.<sup>6</sup> In his opinion, concurring in part and dissenting in part, Chief Justice Rehnquist

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<sup>1</sup> 504 U.S. 527 (1992).

<sup>2</sup> *Id.* at 529.

<sup>3</sup> *Id.* at 529-30. Under Florida law, the jury enters an advisory opinion recommending a sentence after a conviction for first degree murder. *Id.* at 529. The jury recommended a sentence of death after consideration of aggravating factors, one of which was whether the crime was particularly heinous. *Id.* at 530. On independent state grounds, the Florida Supreme Court held that the heinousness factor was unconstitutionally vague. The Supreme Court reversed the Florida Supreme Court's decision because it did not reweigh the aggravating factors leading to Sochor's death sentence. *Id.* at 540-41.

<sup>4</sup> *Id.* at 532.

<sup>5</sup> *Id.* at 540-41.

<sup>6</sup> *Sochor v. State (Sochor I)*, 619 So. 2d 285, 293 n.11 (Fla. 1993) (per curiam).

predicted this outcome:

It seems that the omission of the words “harmless error” from the opinion below is the root of this Court’s dissatisfaction with it. In all likelihood, the Supreme Court of Florida will reimpose Sochor’s death sentence on remand, perhaps by appending a sentence using the talismanic phrase “harmless error.” Form will then correspond to substance, but this marginal benefit does not justify our effort to supervise the opinion writing of state courts.<sup>7</sup>

The Supreme Court’s reversal of Sochor’s death sentence<sup>8</sup> did not preclude the lower court from defending its previous decision, as the Florida court reformulated its previous opinion to comply with the Supreme Court’s standards.<sup>9</sup> A Supreme Court ruling in Sochor’s favor did not save his life; Dennis Sochor still remains on Florida’s death row.<sup>10</sup>

*Sochor II* is an example of one of the many cases the Supreme Court remands to lower courts each term. On remand, the lower court is charged with faithfully implementing the Supreme Court opinion and applying the law to the facts at hand. This Comment examines lower courts’ reactions to Supreme Court remands over a broad range of issues. An examination of lower court compliance

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<sup>7</sup> *Sochor II*, 504 U.S. at 545 (Rehnquist, C.J., concurring in part and dissenting in part). Chief Justice Rehnquist argued that while the Florida Supreme Court’s opinion did not use the words harmless error, it clearly reweighed the aggravating factors and determined they were sufficient to justify the imposition of the death penalty. Justices Thomas and White joined in Rehnquist’s opinion. *See id.*

<sup>8</sup> *Id.* at 529-30.

<sup>9</sup> *Sochor I*, 619 So. 2d at 291.

<sup>10</sup> Florida Department of Corrections, Death Row Roster, <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp>.

raises two issues. First, the degree to which lower courts choose to respond to the Supreme Court. Second, the factors that motivate a lower court to comply with Supreme Court decisions. This Comment's focus on remands allows for a clear exploration of these issues. By chronicling the relative frequency with which lower courts alter their original opinion on remand, this research answers questions about the extent of Supreme Court influence. It also explores the most influential factors in determining lower court responsiveness.

## **I. LOWER COURT COMPLIANCE WITH THE SUPREME COURT**

After the Supreme Court decides a case, it often remands it to a lower court to issue the final decision. Lower court reactions to remands are a specific and direct form of compliance with Supreme Court decisions. The frequency with which lower courts alter the outcome and reasoning of their previous opinions is a concrete example of the degree of influence the Supreme Court exerts over lower courts.

Over time, scholars' views of the federal judiciary have changed. Lower courts were originally seen as faithful implementers of Supreme Court decisions.<sup>11</sup> Hence, lower courts would faithfully implement Supreme Court opinions when hearing cases. However, in the wake of controversial civil rights decisions and clear noncom-

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<sup>11</sup> See 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, 2155 (1998). See also John Gruhl, *The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 W. POL. Q. 502 (1980); 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, 673-74 (1994).



pliance with Supreme Court decisions, scholars began to doubt the accuracy of this depiction of the federal judiciary.<sup>12</sup> Thus, the degree to which lower courts followed the Supreme Court became a point of contention among legal scholars. Under the modern view of the federal judiciary, scholars do not assume that lower courts comply with Supreme Court opinions.

### A. The Hierarchical Model of the Federal Judiciary

The traditional model of the United States legal system envisions the relationship between federal district courts, appeals courts, and the Supreme Court as strictly hierarchical.<sup>13</sup> The district courts constitute the base of the judicial pyramid, the appeals court the middle, and the Supreme Court its peak.<sup>14</sup> This model implies the Supreme Court issues the final edict in any area of law, and the lower levels of the judicial hierarchy simply implement Supreme Court policy. Consequently, early legal scholars focused their research solely on Supreme Court decision making, and assumed that both federal and state lower courts strictly obeyed the Supreme Court's rulings.<sup>15</sup> Supreme Court decisions were viewed as the reigning law of the land

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<sup>12</sup> Gruhl, *supra* note 11, at 503. Political scientists examined lower court decisions in the area of school desegregation, police practices, and other civil liberties cases and determined that, in a large proportion of cases, lower courts did not adopt the Supreme Court's view on the subject. *Id.*

<sup>13</sup> *See id.* at 502.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* Professor Gruhl used Supreme Court libel decisions as his sample and examined all lower court cases citing the Supreme Court's opinion as indicated by Shephard's Citations. Using this empirical data, he found that district and appellate courts complied with Supreme Court libel decisions in the vast majority of cases. He thus concluded that the hierarchical model retains validity in the area of libel law and should not be completely discarded due to criticism of the model's accuracy in more salient issue areas, such as civil liberties. *Id.* at 504.

and compliance was a foregone conclusion.

Under the hierarchal view of the federal judiciary, Supreme Court remands would not be an issue. Lower courts are faithful implementers of Supreme Court decisions and their decisions are an extension of the Supreme Court's legal views. Thus, all lower court decisions would comply with the Supreme Court, whether heard on remand or for the first time.

### **B. Recognition of Noncompliance with the Supreme Court**

Beginning in the 1950s, legal scholars began to doubt the hierarchical model's validity.<sup>16</sup> First, some articles noted that state courts would often rely on state law, effectively ignoring the Supreme Court's reasoning.<sup>17</sup> Others soon noted that even federal courts, while relying on federal law, also ignored Supreme Court decisions.<sup>18</sup> While authors did not openly criticize the hierarchical model, the increasing profile of noncompliance shed doubt on its accuracy. Implicit critiques of the hierarchical model became more explicit after the Warren Court's decisions in *Brown v. Board of Education*<sup>19</sup> and other controversial civil rights cases.<sup>20</sup> Noncompliance

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<sup>16</sup> Decisions on remand provided a clear sample for easily examining this phenomenon, as a court's decision not to alter its previous decision is a clear case of noncompliance with the Supreme Court. See, e.g., Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941*, 67 HARV. L. REV. 1251, 1258-59 (1954) (chronicling numerous state court rulings whose outcomes differed from the controlling Supreme Court decision); Recent Case, *Appeal and Error—Remand—Supreme Court's Order Vacating Judgment and Remanding for Resentencing Construed to Permit Lower Court's Consideration of Errors in Conviction*, 68 HARV. L. REV. 537, 538 (1955) (criticizing a district court for evading a Supreme Court remand).

<sup>17</sup> Note, *supra* note 16, at 1251.

<sup>18</sup> Recent Case, *supra* note 16, at 538.

<sup>19</sup> 347 U.S. 483 (1954).

with the Supreme Court's decisions undermined the model of the Supreme Court as an apolitical institution ruling over the entirety of the judicial branch.

In response, judicial scholars suggested alternative models of judicial power. Professor Walter Murphy compared the relationship between the Supreme Court and lower courts to that of the President and administrative agents.<sup>21</sup> While the Supreme Court sits on top of the hierarchy within the judicial branch, lower courts maintain a significant degree of leeway in implementing the Court's decisions.<sup>22</sup> Murphy's model of bureaucratic decision making was especially applicable in the area of remands, because he argued that remands are an area in which lower courts exercise a significant amount of discretion.<sup>23</sup> Meanwhile, others suggested that Murphy's model attributed an excessive amount of influence to the Supreme Court. These critics held that, in a significant number of cases, lower courts were not in-

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<sup>20</sup> See Gruhl, *supra* note 11, at 503 (noting how political scientists were "prompted . . . by the [lower courts'] apparent lack of compliance with the Court's desegregation decisions.").

<sup>21</sup> Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017, 1017 (1959). Murphy applied many of the insights of administrative law to the study of the judiciary. As the President's power is limited due to the discretion exercised by bureaucrats within the executive branch, so too is the Supreme Court's power limited by lower courts. Murphy's thesis suggested that noncompliance with the Supreme Court was not a disobedient act but rather a natural result of the discretion built into the judicial hierarchy. *Id.* at 1017-18.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

Except in disputes between states or the rare litigation involving diplomats, the Supreme Court usually does not render either the initial or the final decision in a case. If it reverses a state decision, the Court remands the case to state courts for disposition "not inconsistent with this opinion"; and it frequently gives only slightly more precise directions in overruling federal tribunals. The Supreme Court typically formulates general policy. Lower courts apply that policy, and working in its interstices, inferior judges may materially modify the High Court's determinations.

*Id.*

fluenced by the Supreme Court.<sup>24</sup>

The debate concerning the judiciary had shifted. No longer did legal scholars assume that the Supreme Court had absolute control over lower courts' decision making. The debate now centered on the relative degree of freedom lower courts maintained in relation to the Supreme Court. Once scholars began to focus on lower courts' ability to evade Supreme Court decisions, compliance with Supreme Court remands became a significant issue. While the Supreme Court has issued a direct decision on the issue area, it has not provided the final answer to the conflict. Lower courts have the freedom to evade the Supreme Court's opinion or to implement the opinion in a manner not anticipated by the Court.

## II. INFLUENCES ON LOWER COURT DECISION MAKING

Lower court decisions can be attributed to legal or political considerations.<sup>25</sup> The legal model of judicial decision making assumes that legal factors, such as the similarities between the Supreme Court's decision and the case at hand, determine case outcomes.<sup>26</sup> In

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<sup>24</sup> Gruhl, *supra* note 11, at 503. These scholars argued that the small size of the Supreme Court's docket limited the amount of policy guidance or substantive review the Supreme Court could provide to lower courts. *Id.* Thus, lower courts made a vast majority of policy within the judicial branch with little or no guidance from the Supreme Court. Even in issue areas where the Supreme Court had previously issued a decision, lower courts could evade the Supreme Court's decision because the Court lacked the resources to supervise lower court implementation of its decisions. *Id.*

<sup>25</sup> See BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT 57 (2d ed. Congressional Quarterly Press 1999). Canon and Johnson surveyed the compliance literature and categorized the studies based on the implementing populations, for example, courts, police, or the public. While they looked at other institutions besides courts, they largely categorized the potential influences on all implementing populations as being either legal or political. *Id.*

<sup>26</sup> See, e.g., Charles A. Johnson, *Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions*, 21 LAW & SOC'Y REV. 325, 333 (1987)

this model, judges identify an unambiguous controlling precedent and faithfully apply it. In contrast, the attitudinal model considers judges' decisions an expression of their political preferences. Under this approach, precedent and legal reasoning serve as post-hoc rationalizations of judges' decisions.<sup>27</sup>

These models suggest differing rationales for compliance with Supreme Court opinions. In the legal model, legal issues, such as respect for the Supreme Court's authority or appreciation of judges' roles as impartial jurists, serve as motivating factors for compliance with Supreme Court precedent. In contrast, the attitudinal model assumes that judges' political preferences are determinative of lower court judges' decisions to comply or not to comply with Supreme Court precedent. Under this model, compliance is incidental to decision making; only if judges' preferences align with precedent will they comply.<sup>28</sup> This Comment looks at the influence of both legal and political factors on lower courts' decisions to comply with Supreme Court decisions on remand. By comparing both categories of variables, this Comment will directly compare the relevant influence of both legal and political factors on lower court implementation of Supreme Court decisions.

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(looking at lower court reaction towards fourteen randomly selected Supreme Court changes and finding that legal variables accounted for a greater amount of variation in compliance than did political variables).

<sup>27</sup> See JEFFREY A. SEGAL & HOWARD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 73-75 (2002). Segal and Spaeth's empirical work demonstrates that a vast majority of Supreme Court decisions can be predicted based only on the ideology of the justices. *Id.* Citations to precedent serve as legal rationales for their desired political outcomes. *Id.*

<sup>28</sup> See *id.*

### A. The Legal Model

While policy preferences are good predictors of Supreme Court decisions,<sup>29</sup> lower court decisions tend to give more weight to legal factors.<sup>30</sup> Lower court judges are subject to a complex set of influences. They must weigh their preferred policy outcomes against numerous constraints which weigh more heavily on courts of appeals than they do on the Supreme Court.<sup>31</sup> Thus, the appellate court may feel pressure to issue a decision that is compliant with the Supreme Court's decision. Furthermore, many cases heard by lower courts may not give judges enough discretion to implement their political preferences.<sup>32</sup> Thus, while the legal model has lost favor among empiricists studying the Supreme Court, it retains some validity in the study of lower courts.

Scholars have had difficulty studying the effect of legal factors on the Supreme Court. Legal influences, such as the strength of governing precedent or the socialization of judges, are not easily

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<sup>29</sup> See *id.* at 72-73.

<sup>30</sup> See Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 536 (2002).

<sup>31</sup> *Id.* Constraints on lower court decision making include the stigma of having a high reversal rate, socialization in the legal system, and a desire to maintain an image of impartiality. However, the principal-agent model suggests that the intensity of their political views may influence their decision to comply with the Supreme Court. In cases where they have strong feelings, their desire to alter the law may overcome these constraints. *Id.*

<sup>32</sup> See Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 389-90, 402 (1983-84). Judge Edwards argues that the majority of cases heard by appellate courts are cases in which the judges have no discretion. *Id.* at 390. In these "easy" cases, the outcome is clear based on the facts and applicable precedent. *Id.* at 389-90. In a minority of cases, the outcome is not clear due to conflicting precedent or a new issue. *Id.* at 390. In those cases, judges have the necessary discretion to allow their political preferences to influence the outcome of the decision. *Id.*

measured or ascertained for the purposes of empirical study.<sup>33</sup> Scholars have been better able to test for the influence of legal factors on lower court decision making. In the area of libel law, John Gruhl argues for the importance of Supreme Court precedent by showing that lower courts changed their decisions in accordance with Supreme Court reasoning.<sup>34</sup> Charles Johnson also concludes that legal factors explain a greater amount of variation in lower court compliance than political factors.<sup>35</sup> Thus, there is some empirical support for the legal model in the area of lower court compliance with Supreme Court remands.

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<sup>33</sup> Jeffrey Segal and Harold Spaeth have attempted to measure the impact of legal precedent on Supreme Court justices by looking at justices' votes on issues where they previously dissented from the majority opinion. They found that the justices do not change their previous vote based on the governing precedent. 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, 985, 987 (1996). However, this study does not definitively undermine the influence of legal factors on Supreme Court justices, as the justices may not have been voting based on their political preferences, but instead based on their understanding of the governing law as explained in their previous dissent. *Id.*

<sup>34</sup> Gruhl, *supra* note 11, at 517. Gruhl traces the evolution of the Supreme Court doctrine concerning public officials and libel law. He finds that lower courts consistently adopted Supreme Court doctrine in each phase of the steady development of libel law. He concludes that the hierarchical model of judicial decision making retains validity in less salient areas of concern. *Id.* However, compliance is likely to be uniquely high in the area of libel law as the Supreme Court produced a steady and clear stream of cases articulating its position. In many areas of law, Supreme Court doctrine may be more ambiguous and incite less compliance when the Supreme Court has not established a clear line of cases and tests governing the issue area. *Id.*

<sup>35</sup> Johnson, *supra* note 26, at 336-38. Johnson took a small random sample of Supreme Court cases and analyzed all lower court decisions citing the Supreme Court decision. He then compared the relative effect of both legal and political factors on compliance and concluded that legal factors explained a greater amount of variation in levels of compliance than did political factors. Specifically, he attributes most of the variation in lower court compliance to the degree of similarity between litigants at the Supreme Court level and litigants in lower courts. If the facts presented by the litigant are extremely similar to the litigant's case in the original Supreme Court ruling, lower court judges are constrained and do not have the option of expressing their policy preferences. *Id.*

## B. The Attitudinal Model

The attitudinal model assumes that legal factors do not influence decision making. This theory has received a great amount of attention in political science literature and is supported by empirical studies showing that measures of judicial ideology are the best predictors of judicial decisions.<sup>36</sup> When studying lower courts, empiricists have also had some success in demonstrating the predictive power of judicial ideology. Appellate court decisions in the area of administrative law are heavily influenced by the partisanship of the judges deciding the case.<sup>37</sup> However, it is difficult to generalize the influence of partisanship on administrative law decisions to all types of cases.<sup>38</sup> Other studies also conclude that lower courts are greatly influenced by ideology, while still subject to legal constraints. In the area of search and seizure law, appeals courts are significantly constrained by Supreme Court mandates, yet ideology still impacts outcomes.<sup>39</sup> The influence of ideology on lower court decision making,

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<sup>36</sup> See SEGAL & SPAETH, *supra* note 27, at 73-75.

<sup>37</sup> Cross & Tiller, *supra* note 11, at 2175. Cross and Tiller studied the implementation of administrative law in the District of Columbia Court of Appeals. They found that majority Republican panels are significantly more likely than Democratic majority panels to yield a conservative statutory interpretation. *Id.* Likewise, majority Democratic panels were much more likely to yield to liberal agency policies. *Id.*

<sup>38</sup> *Id.* at 2175-76. While Cross and Tiller's research does point to the importance of ideology in lower court compliance, the scope of the inquiry is limited. Cross and Tiller only looked at administrative law decisions which were implementing *Chevron*. The influence of judicial ideology may be higher in these administrative law cases. Deferring to an agency allows a court to institute a wider range of possible outcomes. Furthermore, Cross and Tiller conclude that panels are more likely to obey precedent when the panel is ideologically split, because a dissenting judge serves as a potential whistleblower who may alert others to the influence of political preferences in the decision. The role of a whistleblower illustrates the constraints on lower court judges and shows that political preferences cannot always play a determinative role in lower court compliance. *Id.*

<sup>39</sup> Songer et al., *supra* note 11, at 690. Songer, Segal, and Cameron utilize a principle-agent model of judicial decision making to trace court of appeals' decisions in search and



despite the potential constraints on lower court judges, illustrates the important effect of political orientation on lower court judges.

### C. Influences on Decision Making in Remanded Cases

Judges deciding cases on remand from the Supreme Court are subject to many legal constraints while still maintaining the discretion to implement their own political preferences. Constraints on lower court decisions are likely to be especially pronounced in remanded cases because the Supreme Court has previously articulated a legal rule directly applicable to the current case. Additionally, the more similar the facts of a lower court case are to the Supreme Court case, the more likely the lower court is to adopt the Supreme Court's reasoning.<sup>40</sup> Because the facts of the Supreme Court case and the case on remand are identical, lower courts are more likely to comply with the Supreme Court's decision. However, it is also likely that remanded cases constitute the category of cases that give lower court judges discretion to implement their political preferences.<sup>41</sup> The Supreme Court's initial decision to grant certiorari to the case indicates that the issue presented was not an easy issue for the appellate court to resolve. While the Supreme Court has issued a legal opinion on the case, it has refrained from applying it to the facts of the case. Its failure to issue the final opinion implies that there is still a significant

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seizure cases. They make important strides in ascertaining lower court compliance as they control the facts of the case at hand. However, the study's exclusive focus on search and seizure cases limits its applicability across different areas of Supreme Court doctrine. *Id.*

<sup>40</sup> Johnson, *supra* note 26, at 338-39. Johnson found that the similarity between the facts of the Supreme Court and lower court case and the similarity between the litigants had the greatest influence on lower court compliance with Supreme Court decisions. *Id.*

<sup>41</sup> See Edwards, *supra* note 32, at 402.

decision to be made in the case. Because the lower court is subject to conflicting pressures on remand, these cases make an ideal sample for studying the conflicting influences of both legal and political factors.

Empirical studies of compliance classify cases in which the lower court decides in a manner consistent with Supreme Court precedent as a compliant decision. However, compliance does not prove that lower courts are heeding the advice of the Supreme Court. Compliance may be incidental to lower court decision making. Lower court judges may possess similar policy preferences to those of the Supreme Court justices. In such a case, the lower court judges may decide a case in a manner consistent with Supreme Court doctrine due to their own preferences and not Supreme Court precedent. Implementation studies thus conflate two different instances of lower court compliance. The lower court may comply with the Supreme Court because it suppresses its own preferences to comply with ruling precedent. Alternatively, the lower court may happen to possess the same preferences or legal opinions as the Supreme Court and thus decide the case in a compliant manner, regardless of the Supreme Court precedent. Remands are a unique instance in which a lower court has previously issued its opinion without the benefit of Supreme Court precedent. On remand, the lower court's choice to alter its original decision is motivated only by the Supreme Court, as the facts of the case remain constant. This study of remands does not combine the two motivations for compliance. Only those cases in which the Supreme Court rejects the lower court's previously ex-

pressed opinions are under consideration. A study of remands allows a focus on the factors which may cause a lower court to disregard its previous decision.

A study of remands also overcomes another shortcoming in the compliance literature. Because the facts of the case remain constant between the Supreme Court's and the lower court's decision, remands control for the influential changes in the litigants, jurisdiction, or situation. One of the primary shortcomings in the compliance literature is that the vast majority of studies make no attempt to control for the differences in case facts between the original Supreme Court precedent and the lower court case under examination.<sup>42</sup> Remands naturally control for these differences because the exact same case is decided by both the Supreme Court and the lower court.

### III. MEASURING COMPLIANCE

Compliance is a fuzzy concept. The minimum definition of compliance is that a lower court decision is consistent with the applicable Supreme Court precedent. While this definition is a useful conceptualization of compliance, it does not lend itself to clear operationalization. Lower court decisions may be consistent or inconsistent with applicable precedent in terms of outcome or legal reasoning. This Comment will measure compliance in terms of the outcome of lower court decisions, which are lower courts' responsiveness to the

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<sup>42</sup> See Songer et al., *supra* note 11, at 677. Songer, Segal, and Cameron dealt with this shortcoming in the literature by attempting to control for the most relevant facts in their sample. By constraining their sample to search and seizure cases, they accounted for the location of the search and the possession of a warrant. *Id.* However, their study could not control for all differences between the cases and thus some inconsistent decisions may still be motivated by a change in facts. *Id.*

Supreme Court's remand.

Responsiveness refers only to the outcome of cases; it operates in the absolute term of winners and losers and does not speak to legal reasoning. Richard Pacelle and Lawrence Baum note that the outcome of cases on remand provides a clear indication of the Supreme Court authority's strength.<sup>43</sup> Pacelle and Baum caution that this outcome variable does not completely measure compliance with the Supreme Court, as the Court may leave issues open for reconsideration on remand.<sup>44</sup> A non-responsive lower court decision thus conflates two different situations. The Supreme Court may render a decision which necessitates a change in the previous outcome, and the lower court maintains its previous decision. In this situation, the lower court is not following the Supreme Court ruling. Alternatively, the Supreme Court may render a decision which leaves room for the lower court to maintain its previous outcome. In that case, the winner of the case may not change, but the lower court has followed the Supreme Court precedent. While responsiveness does not measure obedience to the Supreme Court in individual cases, it should illuminate trends in non-responsiveness. As Pacelle and Baum note,

All else being equal, the willingness of a lower court to change its ruling will reflect the extent of the Supreme Court's authority for it. Over a large number of

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<sup>43</sup> Richard L. Pacelle, Jr. & Lawrence Baum, *Supreme Court Authority in the Judiciary: A Study of Remands*, 20 AM. POL. Q. 169, 169 (1992). Pacelle and Baum's study is the only previous empirical study of Supreme Court remands. They measured compliance via responsiveness and found lower courts largely respond to the Supreme Court's decision. Their study only examined the effect of a limited number of legal factors on lower court compliance and did not examine the effect of judges' political ideology on lower court responsiveness. *See id.* at 174-76.

<sup>44</sup> *Id.* at 172.

remanded cases, therefore, a relationship should exist between the strength of the Court's authority and the frequency with which lower courts rule in favor of the Supreme Court winner after a remand.<sup>45</sup>

Thus, legal and political factors should influence the lower courts' decisions to reconsider their previous decisions. If the Supreme Court is able to effect a change in a lower courts' preferred policy outcomes, it has exerted its authority over lower courts. The responsiveness variable enables one to study the degree of influence that the Supreme Court exerts over lower courts and the factors which influence the outcomes of lower court cases.

#### **IV. INFLUENCES ON LOWER COURT RESPONSIVENESS**

This Part outlines the expected relationships between the independent variables and lower courts' responses to Supreme Court remands. The first section explicates the expected relationships between Supreme Court case characteristics and responsiveness. The second section presents the hypotheses regarding the relationships between the original lower court decision (source case) and the lower court response on remand. Both section one and two contain hypotheses concerning legal factors. The third section contains hypotheses concerning the impact of the political environment in which the remand occurs on lower court responsiveness.

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<sup>45</sup> *Id.* at 173.

### A. Supreme Court Case Characteristics

Hypothesis One: *The clearer a Supreme Court opinion, the more likely the lower court is to respond to the Supreme Court.*

Communication and clarity of a Supreme Court decision is one of the primary determinants of the degree of faithful implementation in the lower court.<sup>46</sup> There are two explanations for the relationship between opinion clarity and lower court compliance. First, lower courts cannot comply with a decision they do not fully understand.<sup>47</sup> Alternatively, an unclear precedent gives lower court judges leeway to evade the decision.<sup>48</sup> Thus, the cause of the relationship between clarity and compliance is unclear. The lower court may attempt to comply with the Supreme Court decision but fail due to the difficulty in interpreting the decision. Or, the lower court may utilize the lack of clarity in the Supreme Court decision to serve its political preferences. The measures of clarity do not distinguish between these two causes. Instead, these variables will test the strength of the rela-

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<sup>46</sup> See Traciell V. Reid, *Judicial Policy-Making and Implementation: An Empirical Examination*, 41 W. POL. Q. 509, 518 (1988). Reid focused on lower court implementation of Supreme Court decisions on First Amendment rights of access. In conducting her cross jurisdictional analysis of compliance, she noted that many studies have concluded that the relative clarity of Supreme Court decisions has an impact on the likelihood of lower court compliance. When the area of law contains clear rules and guidelines, lower courts are more likely to follow the Supreme Courts' line of precedent. Thus, studies which focus on a clearly explicated area of law, like First Amendment protections, should exhibit a greater degree of lower court compliance. *Id.*

<sup>47</sup> See *id.*; CANON & JOHNSON, *supra* note 25, at 30.

<sup>48</sup> 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, 967-68 (1992). Songer and Haire analyzed obscenity cases based on both legal and political factors and found the combination of influences on decision making explained a large amount of variation in lower court decision making. They note that legal and political variables do not exist in isolation. Rather, a lack of clarity in a Supreme Court opinion may lead to a noncompliant outcome either because a lower court cannot comply with an unclear decision or because the unclear decision gives the lower court discretion to implement its preferred political outcome. *Id.* at 978.

tionship between clarity and compliance. The following three measures are used to operationalize clarity.

### 1. *Multiple Legal Issues*

A case involving multiple legal doctrines is more difficult to interpret on remand.<sup>49</sup> In this Comment, a dummy variable is used to indicate whether or not a case deals with multiple issues.

### 2. *Word Count*

While word counts have no inherent meaning, they comparatively estimate the amount of support required to establish the opinion's reasoning. While the relationship is not perfect, a shorter case should be relatively clearer.<sup>50</sup>

### 3. *Supreme Court Instructions*

The Supreme Court can give the lower court guidance on how to proceed with the case on remand. The presence of instructions should increase the clarity of the opinion and thus the level of compliance. These instructions are unique to remanded cases. There are two alternatives to Supreme Court instructions; the Court may give no instructions or explicitly disavow the final nature of its decision

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<sup>49</sup> See Benesh & Reddick, *supra* note 30, at 538, 548. Benesh and Reddick utilized this indication of case complexity in an event history analysis of cases in which the Supreme Court altered its previous precedent. They hypothesized that cases involving multiple legal issues would take more time for lower courts to adopt. Contrary to expectations, they found the more legal provisions present in a case, the less time it took for a lower court to apply the precedent favorably. While the result is certainly puzzling, this variable has the potential to tap into the clarity of the case and is included in this analysis. *Id.*

<sup>50</sup> In this Comment, the word "count" includes the words in the majority opinion, concurrences, dissents and footnotes.

by giving negative instructions. Negative instructions indicate that the decision should be determined based on facts, state law, or an issue not determinatively decided by the Supreme Court. Two dummy variables measure the issue, one for instructions, and one for negative instructions, to indicate the different Supreme Court directions.<sup>51</sup>

Hypothesis Two: *The greater the level of support on the Supreme Court, the greater the likelihood of compliance on remand.*

The Supreme Court's level of support is measured by the ratio of justices voting for the majority in the Supreme Court decision. A high proportion of the Court voting for the majority may indicate the authoritativeness of the opinion.<sup>52</sup> A lack of consensus indicates divisiveness and lessens the support for the opinion.<sup>53</sup> Benesh and Reddick find that unanimity dramatically increases the speed with which lower courts apply Supreme Court precedent in a favorable manner.<sup>54</sup> In contrast, Johnson systematically reviewed the impact of various indications of Supreme Court support and found little relationship between the level of support for a Supreme Court opinion

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<sup>51</sup> In a Supreme Court remand with no instructions, the Supreme Court will remand the case for proceedings "not inconsistent with this opinion." In a case with instructions, the Supreme Court will explicitly tell the lower court how to proceed with the case. It may tell the court to reweigh relevant factors or to apply a new test to the facts. When the Supreme Court gives a lower court negative instructions, it explicitly disavows its final role in the process. It likely tells the lower court the decision should be based on facts or a legal issue not discussed by the Supreme Court.

<sup>52</sup> See Songer & Haire, *supra* note 48, at 978. Songer and Haire note that, like clarity, the relationship between vote count and compliance may have two causes. A low level of unanimity on the Supreme Court may indicate that the opinion lacks the legal support necessary to compel strict compliance by lower courts, or a lack of unanimity may allow lower court judges to decide cases based on their political preferences due to the decreased likelihood of a Supreme Court reversal. *Id.*

<sup>53</sup> See Reid, *supra* note 46, at 518-19. Reid notes that much of the empirical literature on lower court compliance and implementation of Supreme Court opinions has acknowledged the potential impact of vote count on lower court decision making. *Id.*

<sup>54</sup> Benesh & Reddick, *supra* note 30, at 534.



and lower court compliance.<sup>55</sup> These contradictory findings concerning the influence of the Supreme Court vote on lower court compliance make it a variable worthy of further exploration.

Hypothesis Three: *Supreme Court opinions which reverse and remand a lower court case are more likely to incite compliance than those which vacate and remand or affirm in part and remand a case.*

Reversing a lower court decision indicates a “more basic disagreement” with the lower court’s opinion than vacating a decision.<sup>56</sup> The Supreme Court’s decision to vacate a decision to be reconsidered in light of its opinion does not necessarily express complete disapproval of the previous decision. Lower courts, however, are more likely to evade the Supreme Court when a decision is vacated.<sup>57</sup> The lower court should be most likely to alter its previous opinion in the case of a reversal. The likelihood of lower court compliance is at an intermediate level when the Supreme Court vacates its previous decision.<sup>58</sup> Compliance is least likely when its decision is affirmed in part and remanded.<sup>59</sup>

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<sup>55</sup> Charles A. Johnson, *Lower Court Reactions to Supreme Court Decisions: A Quantitative Examination*, 23 AM. J. POL. SCI. 792, 802 (1979). Johnson utilized five different measures of support for a Supreme Court analysis in his opinion: number of justices voting with the majority, number of justices supporting the majority opinion, number of dissenting opinions, number of dissenting justices, and the author of the majority opinion. He found no statistically discernable relationship between any of his indicators of Supreme Court support and the level of compliance in subsequent lower court decisions. *Id.* at 801-02.

<sup>56</sup> Pacelle & Baum, *supra* note 43, at 175. Pacelle and Baum hypothesized that lower courts were more likely to alter the previous outcome of their decision when a case was reversed rather than vacated. In their final analysis, the outcome variable did not have a statistically significant impact on lower court responsiveness. Pacelle and Baum did not conduct any tests to measure the substantive impact of Supreme Court disposition on lower court responsiveness. *Id.*

<sup>57</sup> See CANON & JOHNSON, *supra* note 25, at 70-71.

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

Hypothesis Four: *The presence of intercircuit conflict makes a lower court more likely to comply with a Supreme Court decision than if intercircuit conflict is absent.*

In cases involving intercircuit conflict, the Supreme Court has issued a statement meant to settle a controversy across the circuits.<sup>60</sup> Should a lower court choose a path of noncompliance, it would lead to a lack of national legal uniformity. Lower court judges are more likely to comply with a case if departure from the Supreme Court's decision would violate the norm of national uniformity across the courts of appeals.<sup>61</sup>

Hypothesis Five: *A Supreme Court case decided on constitutional grounds is more likely to produce compliance than a case decided on non-constitutional grounds.*

The Supreme Court is viewed as the final arbiter of constitutional disputes. Congress can only negate the Supreme Court's constitutional opinions through a constitutional amendment, an unwieldy and uncommon process.<sup>62</sup> In contrast, the Supreme Court is not the final authority in statutory disputes. After a Supreme Court ruling concerning a statute, Congress can pass a law effectively overruling the Supreme Court.<sup>63</sup> Supreme Court influence should thus be

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<sup>60</sup> See S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901, 903 (1984).

<sup>61</sup> Cf. *id.* ("[T]he uniformity of court rulings on federal questions is important to the functioning of our legal and political systems.").

<sup>62</sup> See Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 596 (2001) ("It is within Congress's power to overturn the interpretations the Court gives to statutory law but, according to the Supreme Court, it is not—at least not by a simple majority—within Congress's power to overturn the Court's constitutional decisions; Congress must propose a constitutional amendment.").

<sup>63</sup> See *id.*; see also William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 335-41 (1991) (examining Congress's reaction to

higher in constitutional cases than in statutory cases.

## B. Source Case Characteristics

Hypothesis Six: *A case which was heard en banc is less likely to produce a compliant outcome than a case which was not heard en banc.*

Federal courts of appeals can choose to have all of the judges sitting on the circuit hear a case and take part in writing the opinion. In these en banc decisions, a majority of the circuit, not just a majority of a panel, has supported the lower court's opinion.<sup>64</sup> The circuit has also invested a greater amount of time and energy into the decision.<sup>65</sup> Because the majority of judges on the circuit agreed with the previous decision and invested a great deal of time in the process, the judges will be less likely to alter their previous decisions.<sup>66</sup>

Hypothesis Seven: *A case which was decided unanimously by the lower court is less likely to produce a compliant outcome than a case which had a dissent.*

When a lower court decides a case unanimously, it has placed its full support behind one interpretation of the legal issues at hand. In a split decision, the lower court judges have differed over the best way to decide the case. A lower court that differed over the correct resolution of the case is more likely to comply with a Supreme Court

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the Supreme Court's statutory interpretation decisions).

<sup>64</sup> See Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1018-19 (1991).

<sup>65</sup> Ginsburg and Falk estimate that the D.C. Circuit invests an amount of time greater than four panel decisions in issuing one en banc decision. *Id.* at 1019.

<sup>66</sup> See *id.*

remand.<sup>67</sup> For a court of appeals panel, only one of the two judges who voted with the majority needs to alter his or her opinion to produce a compliant outcome.<sup>68</sup> In contrast, when the lower court previously decided the case unanimously, at least two judges must change their previous positions to produce a compliant outcome.<sup>69</sup>

Hypothesis Eight: *If the same judges hear a case before and after the Supreme Court's remand, the lower court is less likely to issue a compliant decision than if different judges heard the case after the Supreme Court's decision.*

The same judges typically hear a case both before and after

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<sup>67</sup> Benesh & Reddick, *supra* note 30, at 539-40 (arguing that lower courts will be less likely to comply with Supreme Court precedent that is inconsistent with its previous decisions).

<sup>68</sup> This perception of judges changing their vote after a remanded case assumes that all cases are simple yes/no decisions; the dependent variable in this study, responsiveness, only measures a change in terms of winner and loser, and not smaller changes in the court's reasoning. See *supra* Part III. In contrast, Lindquist, Martinek, and Hettinger, *infra* note 81, at 429, 430, argue this view of appellate decision making is overly simplistic. In many cases, appellate courts may reach mixed outcomes, ones that are not wholly in favor of one party. This argument suggests that appellate judges may be more likely to change their vote on remand, as the judge may already have reached some conclusions in favor of the losing party. *Id.* But, this argument only implies that the magnitude of this hypothesis should be smaller than one may expect, not that the judge's previous vote should not have an impact on her decision on remand. The judge must still alter the outcome of her previous decision, and, a judge is less likely to vote for one outcome, when she previously expressed its preferences for the opposite party.

<sup>69</sup> Another possible explanation for this effect is that a change in the panel's composition is actually a reflection of the amount of time between the original panel decision and the opinion on remand. As the time between the first and second opinion increases, so too do the chances of the panel's composition changing: a judge on the original panel may no longer be serving on the circuit. Thus, a variable measuring the panel's composition may also be reflecting the time between the first and second lower court decision. Pacelle & Baum, *supra* note 43, at 176, argue that as more time elapses between these decisions, the chances of compliance decrease, because "[t]he authority attached to a decision might atrophy over time . . . ." The authors' results confirm that a time lag does decrease the likelihood of lower court compliance. See *id.* at 181-82. Pacelle and Baum, however, did not measure whether the same panel decided both cases. By measuring a change in the panel's composition, this Comment may help to clarify whether a change in the panel's composition affects the court's likelihood of compliance.

the Supreme Court remand.<sup>70</sup> This arrangement is advantageous for logistical reasons. The judges are already familiar with the facts and legal issues of the case so they do not need to learn the information.<sup>71</sup> Occasionally, a different panel may hear a case on remand. The panel is most likely to change because one of the judges who previously heard the case is no longer serving on the circuit.<sup>72</sup> When a case is heard by the same panel both before and after the Supreme Court remand, the judges have committed to a position contrary to the Supreme Court's decision.<sup>73</sup> Compliance is less likely in this scenario because the judges must deviate from their previously held positions to produce a compliant outcome.<sup>74</sup> When a case is heard by a different set of judges on remand, at least one of the judges on the panel has not committed to an opinion at odds with the Supreme Court decision, thus, fewer judges must decide to abandon a previously articulated position.<sup>75</sup>

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<sup>70</sup> See *supra* note 68 and accompanying text.

<sup>71</sup> When a judge sits on a panel before and after the Supreme Court decision, none of the facts have changed. Instead, the judges should be familiar with the facts and are applying the Supreme Court's decision to the same case. See DONALD R. SONGER ET AL., *CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS* 8-9 (2000).

<sup>72</sup> See *supra* note 69 and accompanying text.

<sup>73</sup> See Pacelle & Baum, *supra* note 43, at 179.

<sup>74</sup> Cf. Benesh & Reddick, *supra* note 30, at 539-40 (arguing that a circuit is more likely to comply with a Supreme Court's alteration of precedent that affirmed the circuit's cases rather than reversed its cases).

<sup>75</sup> The magnitude of this independent variable's effect will likely be smaller than the impact of the judge's vote. See *supra* Hypothesis Seven and accompanying text. When the panel previously disagreed about the correct outcome, at least one judge has expressed a preference for the outcome reached by the Supreme Court. When the panel has changed between the source case and the decision on remand, at least one of the judges has not expressed a preference for an outcome. In this case, one judge may agree with the Supreme Court's opinion, and, thus, a responsive outcome is more likely. Alternatively, the judge that did not sit on the original panel may disagree with the Supreme Court's outcome. In this scenario, the effect of this variable should be small; while the judge has not previously committed to an outcome contrary to the Supreme Court's decision, it shares the same view as those judges who have committed to a contrary position and may hesitate before deciding

Hypothesis Nine: *The effect of a unanimous lower court decision will increase when the same panel hears the case both before and after the Supreme Court remand.*

When a case was originally heard by the same panel and decided unanimously, a lower court panel is the most committed to its previous decision.<sup>76</sup> If a different panel unanimously decided the case, the judges are not necessarily united in their commitment to the previous decision.<sup>77</sup>

### C. Political Factors

Hypothesis Ten: *A salient case is less likely to produce compliance than a non-salient case.*

Saliency indicates that a case is inherently controversial or deals with a subject of great importance.<sup>78</sup> Due to the heightened impact of these decisions, salient cases are more likely to produce non-compliant outcomes.<sup>79</sup> Many empirical studies of compliance have concluded that the prevalence of lower court noncompliance is likely overestimated due to a scholarly focus on highly publicized Warren Court decisions.<sup>80</sup> However, salient cases may have the opposite ef-

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a remanded case in a manner contrary to his or her preferred outcome. See generally SEGAL & SPAETH, *supra* note 27, at 388 (positing that judicial behavior is largely determined by judges' political preferences).

<sup>76</sup> See *infra* Part V.C.2. In this situation, all three judges who agreed on the original outcome are forced to revisit their opinion after the Supreme Court's decision to the contrary.

<sup>77</sup> In this case, a maximum of two judges reached the original outcome of the case. Hence, fewer judges need to change their previous opinion to issue a responsive opinion. See generally SONGER ET AL., *supra* note 71, at 107.

<sup>78</sup> See Lawrence Baum, *Lower-Court Response to Supreme Court Decisions: Reconsidering a Negative Picture*, 3 JUST. SYS. J. 208, 208-09 (1977-1978) (discussing that compliance studies have focused on a small number of highly visible Warren Court decisions).

<sup>79</sup> See *id.* at 210.

<sup>80</sup> See *id.* Baum noted that scholars choose to study topics where they expect to find non-

fect on compliance. The saliency of a case may encourage the public and the Supreme Court to monitor lower court decisions.<sup>81</sup> It may also indicate an increased likelihood of the Supreme Court granting certiorari, making the threat of reversal more likely. In such a scenario, the lower court would be more likely to comply with existing precedent.<sup>82</sup> In non-salient cases, the lower courts can refuse to comply with Supreme Court precedent with fewer concerns of reversal.<sup>83</sup>

While both explanations of the impact of saliency are convincing, the first scenario is more likely in remanded cases. The Supreme Court has already decided a case heard on remand. The likelihood of reversal is relatively low as the Supreme Court is less likely to grant certiorari to the same case twice.<sup>84</sup> The punishment attached

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compliance with the Supreme Court. When Baum reexamined lower court compliance over a wide range of issues, he concluded that lower courts typically do comply with the Supreme Court. Salient issue areas, such as civil liberties, are disproportionately represented in the literature and lead scholars to believe that lower courts comply with the Supreme Court to a lesser extent than they do in most areas. *Id.* at 209-10; *see also* Reid, *supra* note 46, at 518. Reid also notes that salient issue areas receive a high amount of attention in the literature on judicial decision making. To rectify this problem, Reid chose to focus on First Amendment public access cases and showed that compliance is significantly higher in this area of law than in the more controversial civil rights areas. *Id.*

<sup>81</sup> *See* Stefanie A. Lindquist et al., *Splitting the Difference: Modeling Appellate Court Decisions with Mixed Outcomes*, 41 LAW & SOC'Y REV. 429, 437 (2007) ("Salient (or controversial) cases are those that will garner the greatest attention from other political actors and be placed more squarely in the public eye.").

<sup>82</sup> *Cf. id.* at 438 (arguing that appellate judges are more concerned with the court's legitimacy when deciding a salient issue). Interestingly, the authors suggest that appellate judges are not equally affected by the saliency of a case. Instead, chief judges should be especially concerned with the court's legitimacy and, thus, be especially influenced by a case's saliency. *Id.*

<sup>83</sup> *See* Benesh & Reddick, *supra* note 30, at 539 ("Lower court judges may also consider the likelihood of Supreme Court reversal if they deviate from Court doctrine.").

<sup>84</sup> In this sample, the Supreme Court only heard one case twice. The Supreme Court first issued an opinion in 1978. *See* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 558 (1978). After the lower court issued a nonresponsive and non-congruent opinion, *Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n*, 685 F.2d 459, 545 (D.C. Cir. 1982), the Supreme Court once again granted certiorari and reversed the appellate court's decision. *See* Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 108 (1983). It may take more than a nonresponsive and non-congruent

to the monitoring of salient cases is thus less probable. With a decreased likelihood of punishment and enflamed passions, noncompliance becomes increasingly likely.<sup>85</sup> This hypothesis has not been empirically tested.<sup>86</sup> The potential ambiguous impact of saliency is important to note when interpreting the impact of the salience variable on compliance.<sup>87</sup>

Hypothesis Eleven: *As the ideological distance between the median judge on the lower court and the median judge on the Supreme Court increases, the likelihood of compliance decreases.*

Supreme Court justices and lower court judges with different

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decision for the Supreme Court to grant certiorari twice. In the lower court's decision on remand, Judge Wilkey dissented and pointed out that

[a] close examination of the majority's opinion today reveals that it has taken no more than a giant step sideways from an analysis rejected unanimously by the Supreme Court in Vermont Yankee II. It matters little that Judge Bazelon's latest approach has taken on a slightly different form or is presented under a different banner than his analysis in Vermont Yankee I. Its focus and effect are unchanged. Vermont Yankee III does not cure the first-round defects of Vermont Yankee I; it compounds them.

*Vt. Yankee*, 685 F.2d at 545. After the District of Columbia Circuit issued its noncompliant decision, the Nuclear Regulatory Commission asked for a rehearing en banc. The rehearing was denied; however, Judge Wilkey explicitly stated that he voted to deny the en banc request so that he would not delay a rehearing by the Supreme Court. *Id.* at 546. It may take this explicit argument about noncompliance to justify the Supreme Court's decision to grant cert twice to the same conflict.

<sup>85</sup> But see Donald R. Songer et al., *Do Judges Follow the Law When There Is No Fear of Reversal?*, 24 JUST. SYS. J. 137, 155 (2003) (arguing that appellate judges do not vote based on attitudes even in tort diversity cases, a category of cases where the threat of reversal is very small).

<sup>86</sup> See *id.* at 137-38 (noting scholars have posited that institutional constraints prevent appellate judges from voting based on their preferences but have not empirically tested the effects of these institutions on decision making).

<sup>87</sup> In this Comment, two measures of saliency are utilized. Salient cases are determined by the *New York Times* scores, which chronicle whether or not the Supreme Court opinion appeared on the first page of the *New York Times*, and the *Congressional Quarterly* score, which indicates whether or not news of the opinion appeared in the *Congressional Quarterly*. See generally LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 2 (2d ed. Congressional Quarterly Press 1996) (using National Opinion Research Center data, the Gallup Poll, the Harris Survey, and unpublished *New York Times* press releases to gather information on public opinion).



ideological orientations are unlikely to have similar policy preferences. If judges act to further their sincere policy preferences, lower court judges are less likely to comply with a Supreme Court decision issued from justices with different ideological orientations.<sup>88</sup> While the relationship between ideology and compliance appears relatively straightforward, judicial ideology is likely to interact with numerous other variables.

Hypothesis Twelve: *The effect of judicial ideology on compliance will increase when the Supreme Court fails to issue clear instructions to the lower court.*

A lower court is more likely to comply with a Supreme Court decision when the Supreme Court issues explicit instructions to the lower court directing the judges how to implement the decision.<sup>89</sup> Varying levels of instructions also give lower court judges differing levels of flexibility to implement the Supreme Court decision. When the Supreme Court issues explicit directions to the lower court, lower court discretion is at a minimum.<sup>90</sup> In this situation, the ideology of

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<sup>88</sup> Judicial ideology is measured using Segal-Cover scores for Supreme Court justices and Judicial Common Space ("JCS") scores for lower court judges. Segal-Cover scores are based on the editorial content about Supreme Court justices published before the justice joins the Supreme Court. JCS scores are based on the ideology of the appointing president and the senator, if senatorial courtesy is used. See Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 813 (1995) (evaluating editorial scores as a predictor of voting). See also Micheal W. Giles et al., *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 631 (2001) (utilizing JCS scores). Because these scores are not vote based measures, there is no potential endogeneity problem. When using vote based measures of judicial ideology, one risk is that measuring a particular judge's or justice's view about the legal issue through voting history does not reveal his or her political ideology. By utilizing external perceptions of their political ideology, these measures do not conflate the legal and political causes of decision making. *Id.* at 630.

<sup>89</sup> See *supra* text accompanying note 46.

<sup>90</sup> When it issues instructions, the Supreme Court circumscribes the possible outcomes by the limitations placed on the implementing court.

lower court judges plays a minimal role in influencing a decision. When the Supreme Court does not issue instructions in a case, the lower court has discretion to further its policy preferences in its decision.<sup>91</sup> When the Supreme Court explicitly leaves issues open for consideration on remand, lower court discretion is at a maximum; the lower court has the freedom to implement the Supreme Court ruling in a manner consistent with the panel's political preferences.<sup>92</sup>

Hypothesis Thirteen: *The effect of judicial ideology on compliance will increase when the Supreme Court decision is salient. Alternatively, the effect of judicial ideology on compliance will decrease when the Supreme Court decision is not salient.*

A widely publicized case is more likely to be viewed as a landmark decision by both supporters and opponents of the decision. A salient case where the lower court differs from the Supreme Court ideologically is less likely to produce a compliant outcome due to the importance of the issues involved.<sup>93</sup> Conversely, a non-salient case where the lower court differs from the Supreme Court ideologically is more likely than a salient case to produce compliant results because the issues involved are seen as less monumental.<sup>94</sup>

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<sup>91</sup> When the Supreme Court has instructed the lower court to issue a decision "not inconsistent with" the Supreme Court opinion, the lower court is only bound by the law laid out by the Supreme Court. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2665 (2008).

<sup>92</sup> When the Supreme Court issues negative instructions, the lower court is free to decide the facts or apply a new legal standard to the case. In this scenario, the Supreme Court's opinion has less applicability to the ultimate outcome of the case and, thus, the lower court maintains a greater amount of discretion in its decision to respond to the Supreme Court. See Deborah W. Denno, *Testing Penry and its Progeny*, 22 AM. J. CRIM. L. 1, 2-3 (1994).

<sup>93</sup> CANON & JOHNSON, *supra* note 25, at 37. Canon and Johnson note that political ideology is more likely to influence decision making in controversial issue areas, like civil liberties. In these cases, judges may view their decisions as being especially important and thus more influenced by their political orientation. *Id.*

<sup>94</sup> *Id.*

#### D. Control Variables

The previously explicated hypotheses do not exhaust all important influences on lower court compliance. The different types of issues involved in the cases or differences between the lower courts may cause systematic differences in the level of compliance.<sup>95</sup> Thus, dummy variables for the issue area of the case and the circuit court hearing the case are included in the regressions.<sup>96</sup> These variables serve as controls for differences which may be inherent in different cases and courts.<sup>97</sup> However, this Comment does not test any specific hypotheses concerning these variables.

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<sup>95</sup> To account for multiple theories about the types of cases that are and are not likely to produce compliant lower court decisions, this Comment includes dummy variables for each issue area. One of the categories of cases numerous scholars have suggested is less likely to engender compliance is the civil rights area. *See, e.g.,* Baum, *supra* note 78, at 208; Reid, *supra* note 46, at 518. Benesh & Reddick, *supra* note 30, at 538, suggest that courts are less likely to comply with criminal procedure decisions. In contrast, Gruhl, *supra* note 11, at 518 argues that lower courts are likely to comply with Supreme Court precedent in the area of libel law, because it is clear and not particularly salient. These studies are only some examples of numerous suggestions in the literature that the character of a case may impact lower courts' rates of compliance with Supreme Court decision making.

<sup>96</sup> Data on issue areas was obtained from the Spaeth Supreme Court dataset. The issue areas included in these control variables are: criminal procedure, civil rights, first amendment, due process, privacy, attorneys, unions, economic activity, judicial power, federalism, interstate relations, federal taxation, miscellaneous, and issue area unable to be identified. Harold J. Spaeth, The Original United States Supreme Court Judicial Database 1953-2005 Terms, <http://facweb.knowlton.ohio-state.edu/pvito/support/codebook-c.html> (last visited Aug. 31, 2008). *See also* SARA C. BENESH, BECOMING AN INTELLIGENT USER OF THE SPAETH SUPREME COURT DATABASES (2002), [http://www.as.uky.edu/academics/departments\\_programs/PoliticalScience/PoliticalScience/FacultyResources/Resources/Ulmer/Documents/benesh\\_handout.pdf](http://www.as.uky.edu/academics/departments_programs/PoliticalScience/PoliticalScience/FacultyResources/Resources/Ulmer/Documents/benesh_handout.pdf).

<sup>97</sup> These differences may be caused by explicit factors, like the clarity of Supreme Court precedent in a particular area of law. *See, e.g.,* Gruhl, *supra* note 11, at 518 (arguing that lower courts are likely to comply with Supreme Court decisions in the area of libel because the Court has developed a series of relatively clear standards governing the area); *see also* Pacelle & Baum, *supra* note 43, at 179 (noting that the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), was so clear that lower courts were practically required to reverse all pending death sentences). Or, these differences may be less tangible. *See, e.g.,* Benesh & Reddick, *supra* note 30, at 538 (suggesting that lower courts are less likely to comply with the Supreme Court's criminal procedure decisions).

## V. THE EMPIRICAL STUDY

This study looks at cases remanded by the Supreme Court for a select number of years during the Burger and Rehnquist Courts. The sample is based on a comprehensive list of all cases which were orally argued, had a fully signed opinion, and remanded during the 1977-1979, 1983-1984, 1990-1992, and 1997-1998 Court terms.<sup>98</sup> This information was obtained from the Spaeth dataset.<sup>99</sup> Of the total number of cases, only those cases that led to further litigation on remand (as indicated by Shephard's Citations) are included in the final sample.<sup>100</sup> The data also includes relevant characteristics of the original (source) lower court case, the Supreme Court case, and the second lower court case to test the independent variables' influence on lower court compliance.<sup>101</sup> The impact of these variables helps to explain the factors influencing lower courts' decisions to comply with Supreme Court decisions.

### A. The Sample

The Supreme Court decided 1,138 cases with oral arguments and signed opinions during the terms under consideration.<sup>102</sup> The

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<sup>98</sup> These terms were selected to ensure that the sample sufficiently covered the Burger and Rehnquist terms of the Court.

<sup>99</sup> SEGAL & SPAETH, *supra* note 27, at xviii.

<sup>100</sup> Lower courts do not always hear remanded cases. The parties may decide to settle or may simply decide that further litigation is not in their best interests. See STEPHEN L. WASBY, *THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES* 187 (1970).

<sup>101</sup> For a description of the variables, see *supra* Part IV and accompanying text.

<sup>102</sup> Per curiam decisions were not included in this sample. Because these decisions may deal with questions of law that are more clear than a decision issued after oral argument, lower courts' responses to per curiam decisions may differ from their responses to a fully argued and signed opinion.

Supreme Court remanded 451, approximately forty percent, of those cases.<sup>103</sup> Approximately sixty-one percent (275 cases), were heard on remand as indicated in their subsequent history.<sup>104</sup> For the remaining twenty-nine percent of the cases, there was no record of subsequent court action.<sup>105</sup> The cases not heard on remand were excluded from the sample. The 275 cases heard on remand constitute the final sample under investigation in this thesis.

### **B. The Results: Lower Court Responsiveness on Remand**

The lower court altered its previous outcome in a plurality of the cases in the sample. In approximately forty seven percent of the sample (128 cases), the lower court decision was labeled responsive, indicating that the party winning at the Supreme Court level was also victorious on remand.<sup>106</sup> The lower court refrained from issuing the final decision in approximately thirty-three percent of the sample

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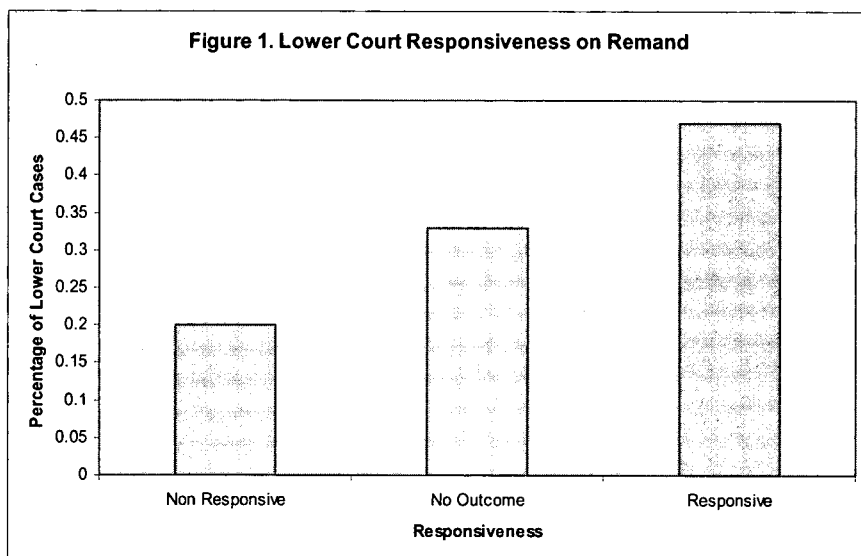
<sup>103</sup> While this study did not look at why the Supreme Court chooses to remand some cases and not others, it is a subject worthy of further scholarly examination. The Court should remand cases that require further fact finding or an extensive application of the law to the facts. However, the Court may also be motivated by strategic factors, such as its desire to issue an opinion in an area of law without deciding a particular outcome.

<sup>104</sup> The subsequent history was determined by looking at a case's direct history as indicated on Westlaw. Interestingly, Westlaw's direct histories for cases before 1970 indicate that they were heard less frequently on remand than those heard after 1970. It is unclear whether lower courts chose to hear less cases on remand before 1970 or if the records for these cases are not as complete as more recent decisions. Because there is no clear method of determining if this phenomenon is caused by a change in lower court practices or record-keeping, this Comment only examines cases heard after 1970.

<sup>105</sup> This Comment does not examine what happens to the cases that lower courts did not hear on remand. They may have settled, or one, or both, of the parties may have decided not to pursue a further appeal. Because there is not a centralized manner of recording settlements or a decision to drop a case, it is difficult to determine why these cases are not pursued after a Supreme Court remand.

<sup>106</sup> See *infra* Figure 1.

(ninety-three cases).<sup>107</sup> These cases are primarily situations where the federal court of appeals or state supreme courts remanded the case to a lower court.<sup>108</sup> In the remaining twenty percent of the sample (fifty-four cases), the lower court did not alter the outcome of the previous decision. In these cases, the winner in the source case won again; more significantly, the winner in the Supreme Court lost on remand.<sup>109</sup> Figure 1 illustrates the distribution of the responsiveness variable in the sample.



Including the cases in which lower courts failed to reach a final decision in the model assumes that the decision to remand a case is influenced by the same factors that influence responsiveness and congruence. However, it is equally plausible that the lower court decided to remand cases based on procedural concerns. To minimize the assumptions in the model, the cases in which the lower courts

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

failed to issue final opinions are excluded from the following regression.

### C. Influences on Lower Court Responsiveness

Responsiveness measures whether the lower court altered the outcome of its previous decision. In simplistic terms, it answers the question of whether the “winner” of the previous decision won again? Table 1 shows the probit regression simultaneously testing the previously explicated hypotheses. (See Appendix A).

#### 1. *Supreme Court Case Characteristics*

The presence of negative instructions is the only indicator of clarity that is individually statistically significant.<sup>110</sup> The presence of negative instructions also has a large substantive effect on the probability of a responsive outcome.<sup>111</sup> Table 2 shows the results of a Monte Carlo simulation using Gary King’s Clarify program.<sup>112</sup> As shown in the table, when the Supreme Court issues negative instructions, the lower court is approximately thirty-three times more likely to name the same winner as the previous case.<sup>113</sup> The Supreme

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<sup>110</sup> See *supra* Table 1. The negative instructions variable is statistically significant when using a two tailed .01 test of significance.

<sup>111</sup> See *infra* Table 2.

<sup>112</sup> This program generates a large dataset based on the probit regression in Table 1. It then calculates the average value of the dependent variable by using different values of the independent variable of interest, while holding all other independent variables to their average. The resulting response is based on a simulation of the probit regression. It tells the reader, holding all other variables constant, the change that would occur in the dependent variable based on a change in the independent variable.

<sup>113</sup> This result is consistent with Hypothesis One, which predicted that the presence of negative instructions would increase the likelihood of a noncompliant lower court decision. See *supra* text accompanying note 46.

Court's choice of instructions has a tremendous influence on lower court responsiveness.<sup>114</sup>

None of the remaining Supreme Court characteristics are statistically significant. The proportion of the Supreme Court voting for the majority opinion does not have a statistically discernable impact on responsiveness.<sup>115</sup> The Supreme Court's disposition and the presence of intercircuit conflict also do not have a statistically significant impact on responsiveness.<sup>116</sup>

**Table 2. Simulated Impact of Negative Instructions on Responsiveness**

	No Negative Instructions	Negative Instructions
P (not responsive)	0.02	0.66
P (responsive)	0.98	0.33

Results from a Monte Carlo Simulation using Clarify

## 2. *Source Case Characteristics*

Whether a case was heard en banc before it went to the Supreme Court does not have a statistically significant impact on responsiveness.<sup>117</sup> However, the en banc variable may not have enough statistical power to reveal any relationship between itself and respon-

<sup>114</sup> See *infra* Table 2.

<sup>115</sup> To check that the vote count variable is properly specified, the above regression was also run with different measures of vote count, once with a dummy variable for a unanimous opinion and once with the dummy variable for a minimal winning coalition. None of the measures of vote count were statistically significant.

<sup>116</sup> See *supra* Table 1. Neither of the independent variables measuring the Supreme Court's disposition ("Affirm in Part" or "Reverse"), nor the variable measuring intercircuit conflict were statistically significant at either the .05 or the .01 level.

<sup>117</sup> See *supra* Table 1. The en banc variable is not statistically significant at the .05 or the .01 level.



siveness. Only twelve cases in the model were heard en banc before going to the Supreme Court.<sup>118</sup>

Whether the source case was decided unanimously does have a statistically significant impact on responsiveness. A source case decided unanimously is less likely to produce a responsive result on remand; this result corroborates Hypothesis Seven.<sup>119</sup> Table 3 shows the substantive impact of a unanimous decision in the source case. If the source case is decided unanimously, the lower court is approximately ten times more likely not to change the outcome of the previous case.

**Table 3. Simulated Impact of a Source Case Unanimous Opinion on Responsiveness**

	Not Unanimous	Unanimous
P (not responsive)	0.02	0.19
P (responsive)	0.98	0.81

Results from a Monte Carlo Simulation using Clarify

### 3. *Political Variables*

The salience scores are neither individually nor collectively statistically significant. However, the salience scores may lack the

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<sup>118</sup> Another possible reason for the en banc variable not having statistical significance is that it may be improperly specified. The en banc hearing may not be the reason a lower court is less likely to comply with a Supreme Court decision, but rather the type of cases which engender strong feelings amongst judges may be more likely both to go en banc and to lead to noncompliant outcomes. For example, in *Vermont Yankee*, the lower court issued a noncompliant response to the Supreme Court, and, after the decision on remand, considered hearing the case en banc. While this request was not granted, this case shows that judges consider such a hearing when they have a case that generates conflict, like a noncompliant decision. Because the denial of an en banc hearing occurred after the noncompliant decision, the en banc debate did not cause the noncompliant decision, but, rather, the subject matter of the case caused both the noncompliant decision and the debate over an en banc hearing. *Vt. Yankee*, 435 U.S. at 543-45.

<sup>119</sup> See *supra* text accompanying note 67.

statistical power to properly test Hypothesis Seven. Although there are forty-one cases which are salient by the *New York Times* score in the sample, only fifteen of them are included in the regression (many of the salient cases are remanded to state courts and thus have missing data for ideological distance).<sup>120</sup> Similarly, the *Congressional Quarterly* score only includes twelve salient cases in the regression.<sup>121</sup>

The ideological distance between the Supreme Court justices and the lower court judges exerts a statistically significant impact on responsiveness. As the ideological distance between the Supreme Court justices and the lower court judges increases, so does the likelihood of a nonresponsive result on remand. Table 4 shows the substantive impact of ideological distance on responsiveness. The results from the simulation are striking. If the ideological distance between the Supreme Court justices and the lower court judges is at a minimum, the lower court has a one percent probability of non-

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<sup>120</sup> It is not surprising that there are only a few salient cases in the sample. After all, in order for a case to be salient and noteworthy, it must be an exceptional and unusual decision. This sample included ten terms from the Burger and Rehnquist Courts and, thus, excluded the Warren Court years where the Court issued an unusually high number of salient decisions. See Baum, *supra* note 78, at 208-09 (suggesting that compliance studies focus on a small set of highly visible and controversial Warren Court decisions).

<sup>121</sup> The *New York Times* and *Congressional Quarterly* salience scores both measure retrospective salience; that is, these measures are based on the reaction to the Supreme Court's decision. See Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 68 (2000). Epstein and Segal note, however, that the *Congressional Quarterly* score has a greater time lag and is thus less able to measure how justices view a case. *Id.* at 70-71. Because this study focuses on lower court reactions to the Supreme Court's decisions, the retrospective nature of these measures does not prove to be a problem, as the appellate courts would be aware of a case's salience when deciding it on remand. Yet, there are significant differences between these measures. The *New York Times* score measures salience with the general public, as a case that lands on the front page of the *New York Times* should deal with a subject that is interesting to newspaper readers. In contrast, the *Congressional Quarterly* score may indicate cases that are more interesting to a more select group of readers. Yet, because of the small-n problem with both of these variables, this Comment cannot ascertain whether these variables have a differing impact on lower court compliance.

responsiveness. When the ideological distance between the Supreme Court justices and the lower court judges is at a maximum, the lower court has a seventy percent probability of non-responsiveness. While ideology has a large substantive impact on responsiveness, neither of the interactive variables (ideology & negative instructions or ideology & salience) have a statistically significant impact on responsiveness.

**Table 4. Simulated Impact of Ideological Distance on Responsiveness**

	Minimum	Mean	Maximum
P (responsivness=0)	0.01	0.07	0.7
P (responsivness=1)	0.99	0.93	0.3

Results from a Monte Carlo Simulation using Clarify

#### 4. *Issue Area*

The issue areas of unions, attorneys, federal taxation, federalism, and the First Amendment are not included in the model.<sup>122</sup> When compared to the suppressed categories, the issue areas collectively do not have a statistically significant impact on responsiveness. However, judicial power, individually, does have a statistically significant impact on responsiveness. A responsive result is less likely when the case deals with issues of judicial power. This area is likely to be one of heightened sensitivity because these cases directly evaluate the court's authority to act in the previous proceedings. Table 5 shows the substantive impact of the judicial power issue area on re-

<sup>122</sup> These areas were suppressed due to small-n and multicollinearity problems.

sponsiveness. The likelihood of responsiveness dramatically decreases when the case deals with an issue of judicial power.<sup>123</sup>

**Table 5. Simulated Impact of a Judicial Power Issue Area on Responsiveness**

	Not a Judicial Power Issue	Judicial Power Issue
P (responsiveness=0)	0.04	0.62
P (responsiveness=1)	0.96	0.38

Results from a Monte Carlo Simulation using Clarify

### 5. *Courts of Appeals*

The variables testing the First, Tenth, and Eleventh Circuits, along with district and state courts, are not included in the model.<sup>124</sup> When compared to the suppressed categories, the circuits, collectively, do not have a statistically significant effect on responsiveness.<sup>125</sup> The Second and Third Circuits are significantly less likely to respond to Supreme Court opinions than the suppressed categories.<sup>126</sup> While this comparison has little meaning in and of itself, it does show that there are some systematic differences in the way in which the circuits respond to remands.

<sup>123</sup> See *infra* Table 5.

<sup>124</sup> A large number of categories are suppressed in this model due to small-n and multicollinearity issues.

<sup>125</sup> Conducting a test of collective statistical significance, the circuit variables are not statistically significant at the .05 or the .01 level.

<sup>126</sup> See *supra* Table 1. The dummy variables for the Second and Third Circuits are significant at the two tailed .05 level.

### D. The Model as a Whole

The model of lower court responsiveness to Supreme Court remands reveals a number of important issues. First, lower court responsiveness is obviously neither random nor determined only by facts unsusceptible to quantitative examination. The independent variables utilized in this Comment pass all collective tests of statistical significance. And, the independent variables explain nearly half (forty-eight percent) of the variation of the dependent variable—responsiveness.<sup>127</sup> Thus, the independent variables in this Comment seem to have isolated many, if not most, of the systematic factors affecting lower court response to Supreme Court remands.

Furthermore, a few independent variables seem to exert a substantively large amount of influence over lower court compliance. Most strikingly, the ideological difference between the median judge on the lower court and the median justice on the Supreme Court has a dramatic influence on lower court responsiveness.<sup>128</sup> The likelihood of responsiveness is high (ninety-nine percent) at the minimum amount of ideological distance and remains high at the mean (ninety-three percent) amount of ideological distance. However, the likelihood of responsiveness plummets to thirty percent at the maximum amount of ideological distance. While judicial ideology is important in lower court responsiveness, its influence becomes extreme only when there is an exceptionally large ideological gulf between the lower court and the Supreme Court.

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<sup>127</sup> See *supra* Table 1. The value of Pseudo  $R^2$  is .48, thus, the model explains approximately forty-eight percent of the variation in the dependent variable.

<sup>128</sup> See *supra* Table 4.

## **VI. DECIDING TO DECIDE: THE LOWER COURT'S DECISION TO REMAND A CASE**

While the lower courts' decision to remand a case may not be influenced by the same factors which impact responsiveness, it is likely not random. To test the impact of the previously explicated hypotheses on the lower courts' decisions not to decide, the independent variables were tested against a new variable: "remand." The remand variable is a dummy variable constructed from the responsiveness score. In approximately thirty-four percent of the sample (ninety-three cases), the lower court failed to issue the final decision in the case.<sup>129</sup> In the remaining sixty-six percent of the sample (182 cases), the lower court issued the final decision in the case.<sup>130</sup>

Table 6 shows the probit regression testing the independent variables' impact on the lower courts' decisions whether to issue the final decision on remand. The model passes the minimal test of fit and the independent variables explain approximately twenty-eight percent of the variation in the independent variable. (See Appendix B).

### **A. Supreme Court Characteristics**

None of the indicators of clarity have a statistically significant impact on the lower courts' decisions whether or not to issue the final decisions in the cases on remand. Using a collective test of significance, the null hypothesis that clarity has no impact on the lower court's decision to remand a case cannot be rejected. The proportion

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<sup>129</sup> See *supra* Part V.B. and Figure 1.

<sup>130</sup> See *id.*

of Supreme Court justices voting for the decision and the constitutional issue dummy variable also do not have a statistically discernable impact on the lower court's decisions to remand cases.

The Supreme Court's disposition of the case has a statistically significant impact on the lower court's decision to remand. Both a reversal and an affirmation in part, when compared to the suppressed category of vacated, decrease the odds of a remand.<sup>131</sup> The Supreme Court takes a clear position on a case when it reverses or affirms a case in part.<sup>132</sup> When the Supreme Court vacates a case, it provides a complete opinion but gives the lower court a blank slate on which to proceed.<sup>133</sup> In these cases, the case may be more likely to require a retrial or additional fact finding at the trial court level.<sup>134</sup> This relationship shows that the decision to remand is not an intermediary between responsiveness and nonresponsiveness. Instead, the decision to remand a case may be based on the logistics of deciding a case.<sup>135</sup> Because the courts of appeals only decide questions of law,<sup>136</sup> circuit judges may feel that they are required to remand cases which hinge on questions of fact.

The presence of intercircuit conflict also has a statistically significant impact on the lower courts' decisions to remand cases. In-

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<sup>131</sup> See *supra* Table 6. The dummy variables for "Reverse" and "Affirm In Part" are both statistically significant at a two tailed .05 level.

<sup>132</sup> See *supra* text accompanying note 51.

<sup>133</sup> See *supra* text accompanying note 58.

<sup>134</sup> *Id.*

<sup>135</sup> Cf. *Pacelle & Baum, supra* note 43, at 173 (noting that lower courts need only take the Supreme Court's decision into account when deciding a case on remand, not alter its previous outcome).

<sup>136</sup> See, e.g., *Sparf v. United States*, 156 U.S. 51, 65 (1895) ("[I]t is the province of the jury to decide questions of fact, and of the court to decide questions of law . . .").

tertcircuit conflict increases the chance of a lower court remanding the case.<sup>137</sup> If a remand was akin to noncompliance, Hypothesis Four would predict that lower courts would be less likely to remand cases which implicate matters of intercircuit agreement. However, the decision to remand a case appears substantively different than the decision not to respond to a Supreme Court decision. Lower courts may be more likely to remand intercircuit conflict cases because the source case may have focused on the proper law to adopt amongst competing circuit views. A new hearing may be necessary to apply the Supreme Court's rationale to the facts of the case.

### **B. Source Case Characteristics**

None of the original lower courts' characteristics exert a statistically discernable impact on lower courts' decisions to remand cases. Using a collective test of significance, the null hypothesis that the source case characteristics collectively have no statistically significant relationship with the lower courts' decisions to remand also cannot be rejected.

### **C. Political Variables**

None of the political variables have a statistically significant effect on lower courts' decisions concerning whether they would issue the final decisions on remand. The null hypothesis that political variables collectively have no statistically significant impact on the

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<sup>137</sup> See *supra* Table 6. The independent variable, intercircuit conflict, is statistically significant at a two tailed .05 level. Its coefficient is positive, thus, the presence of intercircuit conflict increases the chances of a lower court remanding a case. *Id.*



lower court's decision to remand a case also cannot be rejected. The fact that the judicial ideology variable is not statistically significant in this regression demonstrates that a different variable influences the lower courts' remand decisions and case outcomes.

#### D. Issue Area

The suppressed issue areas are privacy, attorneys, federal taxation, and federalism.<sup>138</sup> Criminal procedure, judicial power, union, and economic activity cases are more likely than the suppressed cases to be remanded. I hypothesize that criminal and judicial power cases may be remanded as a form of avoidance by the lower court: these types of cases often evoke stronger opinions than the suppressed issue areas.<sup>139</sup> Criminal cases elicit feelings of right and wrong that transcend the legal issues being considered, and judicial power cases directly confront the authority of the lower court judges.<sup>140</sup> In these cases, lower courts may remand cases to avoid issuing decisions contrary to their desired policy outcome.<sup>141</sup> In less

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<sup>138</sup> These categories were suppressed due to colinearity and small-n issues.

<sup>139</sup> Interestingly, these two sensitive areas converge when courts consider judicial power issues in criminal cases. For example, the Supreme Court's recent decision in *Carey v. Musladin*, 127 S. Ct. 649 (2006), held that the trial judge's decision to allow spectators to wear buttons with pictures of the victim did not cause unfair bias towards the victim. *Id.* at 654. This case dealt with both judicial power and criminal law and would thus be an especially sensitive decision for the lower court. This decision, however, is not included in the sample as it was a Roberts Court decision. And, while the Supreme Court did vacate and remand, the Ninth Circuit has not heard the case on a remand. *Id.*

<sup>140</sup> See Benesh & Reddick, *supra* note 30, at 538. Benesh and Reddick argue that "[t]he issue raised in the case may affect the level of compliance." *Id.* Specifically, the authors point to the Warren Court's decisions in the area of criminal procedure as an area where lower courts may be less likely to comply with the Supreme Court's alteration of precedent and, thus, include a dummy variable for criminal procedure. See *id.* While this Comment does not include data from the Warren Court years, appellate courts may still be less likely to comply with decisions made in criminal cases.

<sup>141</sup> Cf. Lindquist et al., *supra* note 81, at 438 (arguing that appellate courts will be more

sensitive issue areas, lower courts may have less trouble deciding cases despite their opposition to the Supreme Court opinions.<sup>142</sup> Alternatively, criminal and judicial power cases may require a rehearing in a greater number of cases. If a mistake was made in the proceedings of a criminal trial, it is not unusual for the defendant to be tried again.<sup>143</sup> If a judge overstepped the bounds of judicial discretion, a rehearing at the trial court level should remedy the situation. Union and economic activity cases are also more likely to be remanded than cases in the suppressed issue areas. These areas of economic concern are not often considered issues of increased sensitivity.<sup>144</sup> It is unclear why these issue areas are remanded at a higher frequency than the suppressed issue areas, but one possibility is that additional fact finding may be needed more often in these types of cases.

### E. Circuit Courts

The suppressed circuits are the First and District of Columbia Circuits along with all state and district courts.<sup>145</sup> The circuit court hearing a case influences the lower courts' decisions to remand.<sup>146</sup> Using a test of collective significance, the null hypothesis that the

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likely to issue opinions with mixed outcomes when hearing cases dealing with salient issue areas).

<sup>142</sup> Cf. *id.*

<sup>143</sup> But see *Sochor I*, 619 So. 2d at 291 (holding that the trial court did not need to rehear the case despite faulty jury instructions); but cf. *Pacelle & Baum*, *supra* note 43, at 179 (noting that lower courts' decisions following the Supreme Court's disapproval of the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972), were "virtually preordained").

<sup>144</sup> See *Lindquist et al.*, *supra* note 81, at 437 ("As a general rule, for example, cases dealing with First Amendment rights regarding freedom of speech or freedom of religion garner more attention than those dealing with arcane aspects of the tax code, no matter how important the latter may be in terms of its consequences for the public.").

<sup>145</sup> See *supra* Part V.C.5.

<sup>146</sup> *Supra* Table 6. Using a two-tailed .05 test of significance, dummy variables for the Fifth, Ninth, and Eleventh Circuits are statistically significant. *Id.*

circuit in which a case is heard does not have an impact on the lower courts' decisions to remand is rejected. The Fifth, Ninth, and Eleventh Circuits are all more likely to remand a case than the suppressed circuits.<sup>147</sup> This finding shows that circuits have different manners of dealing with cases on remand. Failure to issue the final decision on remand may be more common in some circuits than in others.

## VII. BEYOND RESPONSIVENESS: OTHER INDICATORS OF LOWER COURT COMPLIANCE

This study is only a starting point for an inquiry into lower court compliance. Responsiveness is not a perfect measure of compliance because outcome is only one important indication of a lower court's decision. A shift in reasoning also demonstrates a court's response to a Supreme Court opinion. A possible dependent variable, congruence, could measure whether or not lower courts adopt the Supreme Court's reasoning in their decision. Other empirical studies have adopted a measure of compliance in terms of legal reasoning.<sup>148</sup> Responsiveness has one major advantage over congruence: its objective nature. The ease of ascertaining a case's loser and winner decreases the error involved in empirical work.<sup>149</sup> Despite this advan-

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<sup>147</sup> *Id.*

<sup>148</sup> See, e.g., CANON & JOHNSON, *supra* note 25, at 57. Canon and Johnson utilize similar definitions of compliance. They label decisions as noncompliant if the lower court rejects or does not utilize the Supreme Court rationale, evasive if the lower court limits the applicability of the Supreme Court decision, or compliant if they utilize the Supreme Court's reasoning. This division is a common definition of compliance and has been utilized (with minor modifications) in numerous studies. See also Gruhl, *supra* note 11, at 504; Reid, *supra* note 46, at 518.

<sup>149</sup> See Pacelle & Baum, *supra* note 43, at 173-74. Pacelle and Baum note that compliance is notoriously difficult to measure. The fact that a lower court changed the outcome of its previous decision, however, is clear evidence of the Supreme Court's influence. *Id.*

tage, a systematized manner of measuring congruence would provide additional information about lower court compliance with a Supreme Court decision.

In future studies, congruence and responsiveness can be combined to provide a more complete picture of lower court compliance. Table 7 shows how the combination of these variables allows for a clearer conceptualization of lower court compliance.

**Table 7. Compliance in Terms of Responsiveness and Congruence**

		Responsiveness	
		Yes	No
Congruence	Yes	Compliant	Intermediate level of compliance
	No	Intermediate level of compliance	Noncompliant

When the lower court alters its previous outcome and its legal reasoning, it is compliant. When a lower court does not alter its previous outcome and does not adopt the Supreme Court's legal reasoning, it is noncompliant. These labels are the two extremes. When the lower court is either responsive and not congruent or congruent and not responsive, it is complying with the Supreme Court to an intermediate degree. These categories are not ordered, as it is unclear whether responsiveness or congruence represents a more fundamental shift in lower court compliance. Instead, the two extremes, compliant and noncompliant, act as bookends to a set of different outcomes that represent intermediate levels of compliance.<sup>150</sup>

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<sup>150</sup> See *supra* Table 7.

This conceptualization allows for a clearer understanding of the case *Sochor I*.<sup>151</sup> If one were to look at the case utilizing only a responsiveness variable, the decision would be labeled nonresponsive as the Florida Supreme Court upheld Sochor's execution on remand.<sup>152</sup> However, Chief Justice Rehnquist's prediction that the lower court would reword their decision to comply with the Supreme Court<sup>153</sup> reveals a more complex picture of the lower court's decision. It did not refuse to heed the advice of the Supreme Court but instead adopted the Supreme Court's reasoning while maintaining its previous outcome.<sup>154</sup> This is not "noncompliance." While the Florida Supreme Court was unresponsive, it issued a congruent decision on remand. The case falls into the upper right hand corner of Table 7. By combining these two variables, one determines that the Florida Supreme Court was compliant to an intermediate degree in Dennis Sochor's case.

In this sample, the lower court issued an opinion containing legal reasoning consistent with the Supreme Court's in a majority of the cases in the sample. Approximately fifty-seven percent (156 cases) are coded as congruent. The lower court refrained from issuing any legal reasoning in thirty-three percent of the sample (ninety-two cases). In approximately six percent (fifteen cases), the lower court explicitly minimized or criticized the Supreme Court opinion. In the remaining four percent (twelve cases) of the sample, the lower

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<sup>151</sup> *Sochor I*, 619 So. 2d at 285.

<sup>152</sup> *Id.* at 293.

<sup>153</sup> See *Sochor II*, 504 U.S. at 545. (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>154</sup> See *Sochor I*, 619 So. 2d at 288-89.

court failed to utilize the Supreme Court's legal reasoning. A very small percentage of cases fail to adopt the Supreme Court's legal reasoning. Figure 2 shows the relative frequency of each congruence score in the sample.

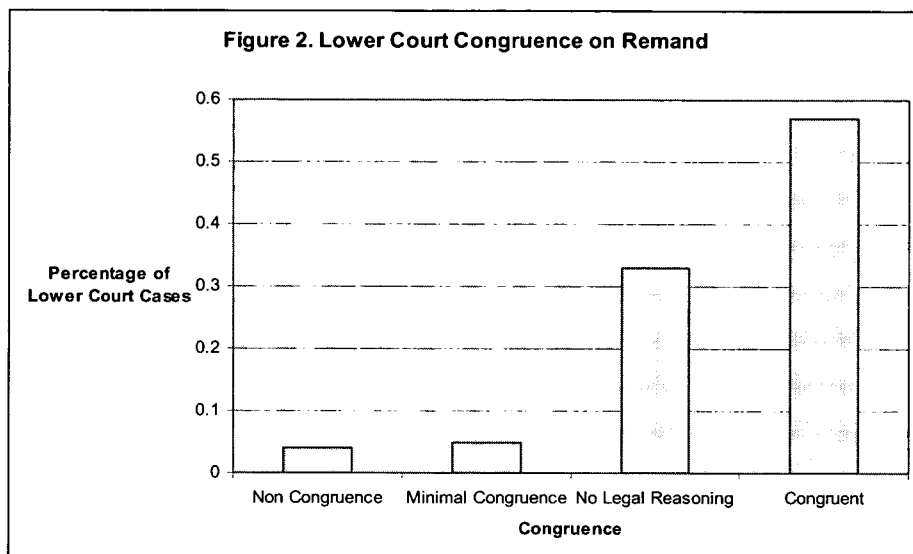


Table 8 displays the frequency and percentages of each different type of compliance. The compliance classification below contains 173 cases. The remaining 102 cases are cases in which the lower court refrained from issuing the final outcome or any legal reasoning in the case. Cases in which the lower court was minimally congruent are included in the noncongruent category.<sup>155</sup> A significant majority included cases classified as compliant.

<sup>155</sup> Cases in which a lower court issues a noncongruent or minimally congruent opinion both show signs of resistance to the Supreme Court reasoning. Because of the small number of cases fitting each description, they are combined in the noncongruent category.

**Table 8. Distribution of Lower Court Compliance on Remand**

		Responsiveness	
		Yes	No
Congruence	Yes	Compliant 117, 68%	Intermediate level of compliance 36, 21%
	No	Intermediate level of compliance 8, 5%	Noncompliant 12, 7%

Even when a lower court does not change its previous outcome, the Supreme Court still exerts a great amount of influence over these cases.<sup>156</sup> Because its reasoning will be used in future cases, the Supreme Court's decision still influences future outcomes, even if its decision does not change the outcome of the particular case at hand.

### VIII. CONCLUSION

Remands allow the same court to hear the exact same case twice, once without and once with, the benefit of a directly applicable Supreme Court decision. In their event history analysis of Supreme Court alterations of precedent, Benesh and Reddick extol the benefits of their case selection by noting that "these cases offer a unique experimental-type design in which we examine what happens in a circuit when the Supreme Court hands down a decision that directly

<sup>156</sup> Lower courts changed their congruent opinions in seventy-five percent of cases in which they reached nonresponsive outcomes. *Supra* Table 8.

conflicts with prior precedent on point.”<sup>157</sup> Remands provide researchers with a similar pseudo- experimental design. The Supreme Court decision acts as a kind of “treatment” on the lower court. The sole motivation for the lower courts’ deviation from their previous decisions is the Supreme Court’s rulings. Hence, remands provide an ideal means of studying the impact of Supreme Court decisions.<sup>158</sup>

Lower courts usually issue responsive decisions after a Supreme Court remand. In a plurality of cases, the lower court changed from its previous cases. Excluding cases where the lower court did not reach a final decision, lower courts were responsive in seventy percent of cases.<sup>159</sup> These statistics show that the Supreme Court exercises a large degree of influence over lower courts on remand. However, that influence is not absolute. A combination of factors, such as the presence of negative instructions, judicial ideology, and the unanimity of the source case, influence the likelihood of a responsive decision on remand.<sup>160</sup> These factors show both the extent and limits of Supreme Court influence. The Supreme Court controls whether or not it issues negative instructions and can thus affect the responsiveness of lower courts. However, the Supreme Court cannot control the unanimity of the previous decision or the ideology of lower court judges. The large substantive impact of these variables shows limits on the Supreme Court’s ability to influence lower courts on remand. The substantial influence of ideology measures also

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<sup>157</sup> Benesh & Reddick, *supra* note 30, at 535.

<sup>158</sup> See Pacelle & Baum, *supra* note 43, at 173-74.

<sup>159</sup> *Supra* Figure 1.

<sup>160</sup> *Supra* Table 1.



shows that judicial ideology comes into play even when the Supreme Court has issued a clear opinion on the case at hand.<sup>161</sup> While lower court judges may be more constrained than Supreme Court justices in exercising their personal preferences, those constraints do not eliminate the influence of judicial ideology.

Recognition of the difference between responsiveness and congruence provides an additional avenue for scholarly research. Compliance is more clearly conceptualized and operationalized along these multiple dimensions.<sup>162</sup> Scholars can take the next step in studying these dependent variables by theorizing in terms of responsiveness and congruence. By testing hypotheses which differentiate between the dependent variables, scholars can isolate the factors which affect different aspects of lower court decision making.<sup>163</sup> Furthermore, this theorizing may help to clarify some of the puzzles in the compliance literature. Studies have found conflicting results concerning the impact of the Supreme Court's vote, salience, judicial ideology, and numerous other factors.<sup>164</sup> All of these studies use unitary measures of compliance which attempt to account for both the outcome and legal reasoning of the case.<sup>165</sup> However, some variables may exert an influence on one dimension of compliance and not the other. By theorizing and operationalizing compliance in terms of

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<sup>161</sup> See *supra* Table 4.

<sup>162</sup> See *supra* Part VII.

<sup>163</sup> See *id.* A multi-dimensional measure of compliance provides scholars with a clearer picture of lower court behavior. By focusing on this measure, future researchers should be able to isolate different types of compliance or noncompliance.

<sup>164</sup> See, e.g., Johnson, *supra* note 26, at 325; Benesh & Reddick, *supra* note 30, at 536; Cross & Tiller, *supra* note 11, at 2155; CANON & JOHNSON, *supra* note 25, at 25.

<sup>165</sup> See Table 1 & Table 6.

both responsiveness and congruence, scholars may be able to clarify some of their previously contradictory findings.

The combination of responsiveness and congruence provides a fruitful means of future research on Supreme Court compliance. The model presented in this Comment, using responsiveness as the dependent variable, is a good starting point in this study. It shows that responsiveness is the norm and nonresponsiveness is relatively rare.<sup>166</sup> It also shows that the outcomes of lower court decisions are influenced by the Supreme Court in a systematic and predictable manner.<sup>167</sup> However, the Supreme Court has limited influence over lower court outcomes, because it cannot shape or direct many of the influential factors on lower court decision making. However, the limits of Supreme Court power should not be overstated. Lower courts alter their previous decisions in a majority of cases, showing the Supreme Court's ability to alter behavior even when the lower court has previously expressed disagreement with the decision.

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<sup>166</sup> See Figure 1.

<sup>167</sup> See Table 1 & Table 6. Both regressions demonstrate that some independent variables affect lower court behavior in a statistically significant manner. The fact that the Supreme Court can alter some of these variables, like its disposition of a case, shows that the Supreme Court can increase the likelihood of lower court compliance with its decisions.

## APPENDIX A

**Table 1. Probit Regression for Responsiveness**

N=118;  $\chi^2=63.42$ ; pseudo  $R^2=.48$

<b>Supreme Court Characteristics</b>	<b>Coefficient</b>	<b>Standard Error</b>
Multiple legal issues	0.18	0.65
Length	-1.20E-04	0.000078
Negative Instructions	-2.8**	0.86
Positive Instructions	2.2	1.4
Vote	-1.3	1.9
Affirm in part	1.6	1.1
Reverse	1.2	0.7
Inter-circuit Conflict	0.78	0.77
Constitutional Issue	-0.1	0.66
<b>Source Case Characteristics</b>		
En Banc	0.64	0.87
Unanimous	-1.8*	0.91
Same Panel	0.12	1
Interaction-Vote and Panel	0.3	1.1
<b>Political Factors</b>		
New York Times Score	0.49	0.43
Congressional Quarterly Score	-0.79	0.88
Ideology	-4.1**	1.64
Interaction-Instruct & Ideology	-3.5	2
Interaction-Salience & Ideology	1.1	2.3
<b>Issue Area</b>		
Criminal Procedure	0.31	1.4
Civil Rights	-0.97	1.2
Due Process	-1.7	1.6
Economic Activity	-1.2	1.30
Judicial Power	-2.4*	1.30
Privacy	-0.14	3.60
<b>Circuit</b>		
Second	-2.8*	1.5
Third	-2.6*	1.2
Fourth	-1.4	0.98
Fifth	0.56	0.86
Sixth	-1.9	1.2
Seventh	1	0.8
Eighth	0.29	1.5
Ninth	-0.33	0.77
District of Columbia	0.51	1.3

\* significant at the two tailed .05 level

\*\* significant at the two tailed .01 level

## APPENDIX B

**Table 6. Probit Regression with Remand as the Dependent Variable**N= 189;  $\chi^2= 69.99$ ; pseudo  $R^2= .28$ 

<b>Supreme Court Characteristics</b>	Coefficient	Standard Error
Multiple legal issues	0.42	0.34
Length	-2.26E-05	0.000029
Negative Instructions	-0.74	0.43
Positive Instructions	0.22	0.46
Vote	-0.56	0.85
Affirm In Part	-1*	0.52
Reverse	-0.62*	0.3
Intercircuit Conflict	0.96**	0.28
Constitutional Issue	0.21	0.26
<b>Source Case Characteristics</b>		
En Banc	0.39	0.41
Unanimous	-0.02	0.61
Same Panel	0.13	0.59
Interaction-Vote and Panel	0.16	0.68
<b>Political Factors</b>		
New York Times Score	0.49	0.43
Congressional Quarterly Score	0.53	0.63
Ideology	0.2	0.67
Interaction-Instruct & Ideology	-1.4	1.1
Interaction-Salience & Ideology	-0.83	1.1
<b>Issue Area</b>		
Criminal Procedure	1.5*	0.71
Civil Rights	1.1	0.69
First Amendment	1.4	0.94
Due Process	0.86	1.1
Unions	1.9*	0.82
Economic Activity	1.7**	0.65
Judicial Power	1.7*	0.69
<b>Circuit</b>		
Second	1.2	0.86
Third	1.2	0.7
Fourth	0.95	0.69
Fifth	2**	0.58
Sixth	0.81	0.77
Seventh	1	0.68
Eighth	0.99	0.78
Ninth	1.8**	0.57
Tenth	1.4	0.86
Eleventh	2**	0.65

\* significant at the two tailed .05 level

\*\* significant at the two tailed .01 level