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Deference of Defiance? Principal-Agent Theory and the US Courts of Appeals during the Rehnquist and Burger Courts

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by

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By examining cases from the Courts of Appeals in several issue areas between 1969 and 2002 (e.g., the Burger and Rehnquist Courts), this research examines both the fear of reversal from the high court (judicial impact theory) and whether this results in differences in response from these courts to Supreme Court precedent (principal-agent theory). The study finds that when the Supreme Court grants review to a decreasing number of lower court cases and thus gives a longer leash to these courts that instead of deferring to their principal, the appellate courts often defy the high court and seek to advance their collective policy and doctrine preferences.

TABLE OF CONTENTS

Table of Contents—continued

LIST OF TABLES

CHAPTER I

INTRODUCTION

Background

Since the right of selective *certiorari* (hereafter "*cert*") was granted to the Supreme Court by the Judiciary Act of 1925, the number of cases the Supreme Court has heard each term has diminished. With the elevation of William Rehnquist to chief justice, the number of cases heard each term by the Supreme Court has diminished even further, presumably giving the lower circuit courts more freedom to pursue their own policy agendas. Given the longer leash, do the Courts of Appeals continue to act as faithful agents to their principal by deferring to the policy and doctrine preferences of the high court? Or do they defy their principal when given a longer leash and pursue their own policy initiatives?

This study explores two distinct, but similar bodies of judicial research. First, principal-agent theory has allowed court scholars to consider how different courts act when they are placed in the role of principal or agent; in other words, how the circuit courts (working as agents) react to the mandates of the Supreme Court (working as the principal). In contrast, judicial impact

research has also allowed scholars to explore the interaction of lower courts to high court mandates but in a somewhat different way. Judicial impact research is not concerned with how faithfully the lower courts enacted high court policy but rather what impact the fear of reversal from the high court may have on circuit court decisions. These two research methods essentially ask the same question and seek similar answers. However, they apply slightly different lenses to achieve their goals. In using these two similar lenses this study explores the impact that the lower courts' fear of reversal has on their decision making and whether circuit courts continue to act as faithful agents when the fear of reversal decreases.

This study finds that when the Supreme Court grants review to a decreasing number of lower court cases and thus gives a longer leash to these courts that instead of deferring to their principal, the appellate courts often defy the high court and seek to advance their collective policy and doctrine preferences.

CHAPTER II

LITERATURE REVIEW

Principal Agent and Judicial Impact Theories

Principal Agent Theory

Principal-agent theory began as an economic theory of organization and explored the responses of workers and managers to directives from their bosses. Terry Moe (1984) first utilized principal-agent theory as a way to explain the organization of public bureaucracies and attempted to apply the theory to governmental institutions as a means of explaining the hierarchical relationships that exist.

Political science scholars followed Moe's lead by applying principal-agent theory to the relationships between the Supreme Court and the lower circuit and district courts. What actions, if any, does the high court acting as principal have on the lower courts acting as agent? The strongest recourse the Supreme Court has against an agent that has shirked or defected from its responsibility, of course, is for them to overturn a lower court decision on appeal.

As Moe notes (766), to what degree the principal can monitor an agent becomes important when we consider that "principal-agent theory focuses on information

asymmetry". Information asymmetry becomes tricky when one is looking at the relationship between the courts. While some general monitoring does occur, the only real monitoring apparatus the high court has is when a litigant seeks review for their case and the case is ultimately granted cert. Since very few cases seek review, or are granted *cert*, by the court, any sort of monitoring on this level becomes difficult. Another monitoring problem comes into play when not all cases heard by the circuit courts are published. This is probably one of the largest problems that exists, not only when applying principal-agent theory to the courts, but also when doing any sort of research on the U.S. Court of Appeals.[1] The only data available (US Courts of Appeals Database 1925-1996, Songer 1997; and the Update on the US Courts of Appeals Database 1997-2002, Haire and Kuersten 2007) quantifies published decisions only, for example.

Songer, Segal, and Cameron (1994) took the first look at applying principal-agent theory to judicial hierarchy studies. Noting that a catholic examination of

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[1] I would like to thank Dr. Stephen Wasby for bringing this problem to my attention. While I know that most court scholars are aware of this problem it was through a series of discussions about this paper that Dr. Wasby brought this problem to my attention.

Supreme Court cases, while giving greater understanding, would not be possible, Songer, et al. limit their examination to search and seizure cases. While this universe of cases is easily quantifiable, it is an area of law where one would be hard pressed to not find a Supreme Court justice who had well known opinions on this contentious area of law (see Segal and Spaeth 1993 for a larger discussion on Supreme Court justices search and seizure policy preferences). Nonetheless, Songer, et al. found that the courts of appeals were generally deferential to the Supreme Court when hearing search and seizure cases and thus deferred to their principal.

But what about cases beyond search and seizure issues? Several anecdotal stories indicate that the Supreme Court eras they investigated (the Warren and Burger Courts) placed enormous importance on search and seizure cases (see, for example, Woodward and Armstrong 1979). Brent (1999) later explores religious freedom cases to understand whether the circuit courts are faithful agents. He explores how the circuit courts reacted to the ruling in *Employment Division Department of Human Resources v. Smith,* and the congressional response to this decision in the Religious Freedom Restoration Act. He finds that when faced with having to

adhere to both the policies of the Supreme Court and the Congress, the circuit courts will act faithfully to both principals. Brent's use of principal-agent theory when the lower courts are under the watch of two masters added a new dimension to this area of hierarchical studies.

Certainly as Songer, Segal, and Cameron show, the circuit courts act as faithful agents to their principal. But Brent adds to the theory by asking the question of which principal the circuit courts will follow if their directions conflict with each other. While the Supreme Court is the final voice on decisions of constitutionality, congressional response to court decisions is the law of the land until decided otherwise by the high court. While it is true that, to a degree, lower courts do have two principals commanding them, when the Congress steps in and overturns a judicial decision through statute, any role the Supreme Court had as a principal to the lower courts falls to the wayside (for further discussion on statutory impact see Hausegger and Baum 1999).

Brent finds that while the passage of the Religious Freedom Restoration Act does conflict with the ruling in *Smith,* acting as faithful followers of the constitution the lower courts should have no choice in which principal

they follow at that point. Essentially, if lower court judges are following congressional mandates and enforcing legislation, any question of defection should become moot.

Judicial Compliance

Other scholars have explored whether agents' (e.g., lower courts) fear of reversal from a higher court impact their decision making. Furthermore, scholars have considered how much defection occurs in the lower courts or to what degree adherence to precedent and *stare decisis* actually takes place.

For instance, Klein and Hume (2003) argue that there are three ways that fear of reversal influences lower court compliance to Supreme Court policy (581). First, lower court judges will make strategic choices in order not to be reversed by the higher court. Building on conventional wisdom, being reversed is professionally costly for lower court judges because they may suffer a lack of standing in the legal community (see also Cannon and Johnson 1999; Baum 2006). In fact, the fear of reversal may contribute to so few cases being published.

The third area of judicial behavior explored is a judge's desire to construct decisions in a legally accurate manner (i.e., adherence to *stare decisis*). As

such, Klein and Hume disagree with Songer (1987) (see below for further discussion) that judicial compliance is attributed to circuit court judges following the policy trends of the court in order not to be reversed. They argue that it is not fear of reversal that drives circuit court policy decisions. Rather, the "effect is strong enough and pervasive enough to explain substantial compliance" (580). The model of impact used by Klein and Hume considers whether the policy decision made by the lower court advances or undermine the high court's policy decisions (*ibid*).

Klein and Hume find that in cases where it would seem that the high court would be most likely to hear and reverse lower court decisions (e.g., when the lower court decision differs from the policy inclinations of the Supreme Court) the high court did not grant cert and thus did not overrule the defection from the lower curt judge. Rather, the cases they examined appear to show that the high court is not acting consistently with their apparent policy preferences (594). This suggests that something deeper may be occurring inside the high court when it comes to enforcing policy decisions.

Perhaps the agenda setting that is typically attributed to the Chief Justice does not have as great an

effect as scholars might like to suggest. Or it might be the case that while justices do have specific policy preferences, the role of *stare decisis* plays a larger role than Segal and Spaeth (1993) suggest.

So what variables influence judicial compliance? Using an event history analysis, Benesh and Reddick (2002) examine the broad spectrum of variables that come into play when circuit courts comply, if at all, to Supreme Court precedent. They find that existing Supreme Court precedent as well as the ideological make up of a particular circuit have high explanatory value in regards to compliance levels. Noting previous judicial impact research, they argue that there are certain institutional mechanisms that attempt to ensure circuit courts compliance to Supreme Court precedent (536).

These scholars note in a roundabout manner that ideology has an effect on how lower courts apply new precedent, but that does not have a uniform influence across all cases. Rather, it appears that case factors play a role into how the ideology of the circuit court panels defer or defect from precedent (546-47). "All precedents are not created equally when it comes to lower court compliance" (584).

In summary, many scholars argue that compliance is the order of the day when explaining the degree to which deference is paid to the high court. But who are the various "masters" the lower court hierarchy is subject to (see, for example, Klein and Hume 1997, Haire, Lindquist and Songer 2003)? Haire, et al., using a variation on the traditional principal-agent model, look at the interactions of the district and circuit courts, and then the interaction between the circuit and Supreme Court. Their findings demonstrate that the district courts will ultimately serve the Supreme Court as their main principal.

Judicial Impact Theory

Songer (1987), echoing Johnson and Cannon (1984), makes the argument that the research on judicial impact has dealt with a small number of "dramatic Supreme Court decisions" (Songer 830). He notes that prior research has shown that Supreme Court impact on lower courts to be mostly insignificant (*ibid*). Songer and others argue that by ignoring the more ordinary cases of the Court the true impact of the Supreme Court might be missed in the overall analyses.

In addressing this gap, Songer looks at economic policy decisions, particularly labor and anti trust decisions, made by the high court during the Warren Court and part of the Burger court eras. He argues that past research has focused on compliance models of decision making; that the lower courts either comply with high court policy preferences or ignore the preference and strike out on their own (831). To Songer, this compliance model misses the bigger picture on how lower courts react to Supreme Court policy preferences.

Following suggestions in the literature by Baum (1977), Songer looks at lower court reactions to these policy preferences through a decisional model. In other words, he explores whether or not the lower courts model their decisions based on preexisting policy trends that may not be established "explicit rules of law." Songer finds that there was a distinct policy change by the appellate courts as the Supreme Court moved from the more liberal Warren era to the more conservative Burger era. Though he is unable to show causation (or the source of the impact), he notes a variety of possibilities as to why the shift may have occurred (839)[2].

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[2] What Songer does not suggest and may very well help in showing causation is that rather than collecting more descriptive data, scholars should look into possible qualitative options. It would

Building on Songer's work, Cross and Tiller (1998) investigate the power that a judge's defection from *stare decisis* can have on the other members of the panel pushing forth agendas instead of adhering to precedent. Applying an empirical legalistic model to judicial impact research allows for an interesting angle to this important question. Adherence to legal doctrine has long been dismissed across the cannon of judicial scholarship (2156).

These scholars do not discount the attitudinal model but neither do they exactly discount the strategic model either. Rather they assume that there are five possible choices judges have when deciding a case. These choices range from judges using their own attitudes and policy predilections to "dutifully performing their roles as sincere jurists" (2158). Rather than saying that judges always act in one direction or another, they see judicial decision making as being a possible mixture of a variety of theoretical prospects. They find that a minority court member acting as a "whistle blower" can check their ideologically opposed brethren to adhere to settled

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seem that if the descriptive data show that there is a shift in the policy decisions that is in line with the preferences of the high court, but it does not show causation, looking at alternative methods to find causal inference would be the next intuitive step. However, this is not the case as will be seen through out the literature discussed here; most court scholars are inclined to simply state that no causation can be found.

doctrine rather than pushing their own politically driven agendas. However, when no minority member exists on a panel the judges are more willing to adhere to doctrine when the doctrine met their unified ideologies.

If Cross and Tiller attempt to answer the horizontal impact, Hurwitz and Reddick (2006) take a different approach and address the judicial impact question by exploring the effect that vertical *stare decisis*[3] plays in influencing judicial decisions. How strong is the desire to defer to the rulings of the Supreme Court by the court of appeals? The argument that precedent plays a stronger role than the attitudinal model would suggest is not a new charge (see Perry 1991, for example), but it is one that deserves a great deal of attention. These scholars find that in a statistically significant number of cases, the circuit courts adhere to Supreme Court doctrine. This suggests, as the authors note,that at least in the lower courts, vertical rather than horizontal *stare decisis* is the order of the day. It appears that "legal and extra legal factors play a

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[3] Hurwitz and Reddick define vertical *stare decisis* as involving "judges on lower courts who are bound absolutely by relevant precedent emanating from their superiors" p 2

critical role in explaining" (16) the strength of vertical *stare decisis*.

Summary

In contrast, principal-agent theory argues that lower court judges are more likely to follow their own preferences and go against their principle when the fear of reversal is the lowest. For example, Songer, Humphries-Ginn and Sarver (2003) explore whether appellate court judges follow state law or their own policy preferences in an area of law the Supreme Court seldom hears. Using tort diversity cases in the U.S. Court of Appeals between 1960 and 1988, these scholars find that the Supreme Court in *Erie Railroad v. Tompkis (304 US 64, 1938)* overturned a federal law and obligated federal courts to apply state laws in tort diversity cases (139-140). This case is important because it creates a situation where appeals courts are almost certain to be the final word on the issue.

By devising an indirect indicator of appeals court preferences based upon the ideology of the nominating president of each sitting judge, they find that the degree of economic liberalism of the lower court judges does effect the attitudes of these judges. However, they also find that even though these judges are virtually

free from any threat of reversal by the high court, they continue to follow the legal constraints of the relevant state laws (147-148).

Essentially appeals court judges do appear to adhere more to the doctrine of *stare decisis* even when fear of reversal is not eminent. This may suggest that the overall culture of the appeals' courts is one that fosters a greater adherence to precedent than Segal and Spaeth (1993) argue is virtually non-existent in the high court. However, the scholarship in judicial impact studies and principal-agent theory focuses on single issue case types; a comparative studies across different types of cases would be a better indicator of whether principal-agent theory applies across all areas of law that come before the courts. Additionally, research that only looks at these important, largely single issue groups of cases, ignores the freedom lower court judges may have in less high profile issue types. That is, lower court judges determine that defection from *stare decisis* might go unnoticed by the high court but, in contrast, be closely monitored by the executive and/or legislative branches; and further, this attention may increase their stature before the executive or legislature and thus

their chances for elevation to a higher position in the judiciary or government.

Moreover, what about unpublished cases? Since we have seen an increase both in cases being heard and in decisions being hidden by the circuits it is reasonable to assume that the circuits might not be adhering to *stare decisis* as this research shows but hiding unpopular decisions as a way to avoid triggering review by the Supreme Court. Since current and previous research cannot attest why and how the circuits chose to not publish a decision we cannot be certain that judges simply hide decisions that defect from the *stare decisis* doctrine. We also need to consider that while some interviewing of judges has occurred, (see Perry 1990 and Epstein 1990) and that scholars found that there is, at least verbally, a strong adherence to *stare decisis* through this process, judges and their staff may lie when being interviewed (Heumann 1990). So the conventional wisdom that circuit court judges strictly follow *stare decisis* might not be exactly true. This line of thought bolsters the idea that judges might be hiding unpopular policy decisions in their unpublished opinions. While the research presented here also cannot account for all of the unpublished decisions in the circuits it does include

at least some unpublished decisions in its findings (see below for this discussion). While this inclusion certainly does not fully address this problem the results do allow us a better look at what affect these unpublished decisions may have.

CHAPTER III

RESEARCH DESIGN

Data, Methods, and Results

Hypothesis

With the completion of the update to the U.S Court of Appeals data set[4] we are now able to gain a better understanding of how circuit court judges behave in response to decisions of the Supreme Court. The update to the Court of Appeals data set gives scholars a sample of over 18,000 cases[5] over several years and in various issue areas, allowing them to gain knowledge in how circuit courts work and the variables that influence their behavior.

Using the enormous number of cases and case types in the database allows us to overcome one of the greatest difficulties in previous explorations of principal-agent theory: the limited number of case types. An exploration to understand more fully principal-agent theory is

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[4] *Update on the US Courts of Appeals Database* 1997-2002 (Susan Haire, University of Georgia; Ashlyn Kuersten, Western Michigan University). In the interest of full disclosure, the author notes that he was the project coordinator for the Western Michigan University half of the update to the Court of Appeals dataset.

[5] This is the total number of cases across both the original Songer data set and the Kuersten and Haire update.

important because the number of cases heard by the circuit courts has increased exponentially, especially in the last twenty years (See Cohen 2002 for further discussion). Furthermore, this increase in workload is coupled with the decrease of cases granted cert by the Supreme Court and is bound to have ramifications to hierarchical relationships that have yet to be addressed.

I hypothesize that during the Rehnquist era the level of defiance to Supreme Court policy by the circuit courts will increase as the high court loosens the leash on the lower courts. That is, as it becomes apparent to the Court of Appeals judges that their decisions in cases will most likely not be overturned by the Supreme Court (because the high court is granting cert to fewer cases), the circuit court judges will become less faithful agents to their principal. Whether real of perceived, the longer leash[6] granted to the circuit courts during the Rehnquist era (e.g., a cue from the Supreme Court acting as principal) will allow the circuit courts (e.g., as agents) to flex more power and in using this new found power the level of deference paid to the principal will diminish.

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[6] The metaphor of a longer leash refers to the idea that with a decrease of cases both heard and decided the Rehnquist court was allowing the circuit courts more latitude in being the final voice on a particular case type.

Using the framework of the principal-agent model, I utilize both the Supreme Court data set and the Court of Appeals dataset. I explore the level of deference the lower appellate court pays to the high court during the Rehnquist Court (when the number of cases from the lower court that were granted cert was low) and the Burger Court (when the number of cases from the lower court that were granted cert was high)[7].

With the elevation of William Rehnquist to the Chief Justice there was a subsequent policy shift by the high court to allow the circuits to be the final arbiters of law in many more cases than previously allowed. This may be one reason the number of cases heard by the high court decreased dramatically over Rehnquist's term. As the circuit courts were given more freedom from the 'leash' of the high court, the circuit courts became more likely to defy the policy agenda of the high court compared to the previous Court era. Thus, the appellate courts became, essentially, the courts of last resort for the federal judiciary because the delegation of authority was

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[7] One criticism of the Court of Appeals dataset is that the sample was drawn from only published opinions and, thus, no unpublished opinions were included. As a result, some circuits actually decide more cases proportionately than would be represented in the sample. To mitigate this problem, weights have been developed (based on the number of unpublished decisions in each circuit) to distribute out more equally the number of cases per circuit per year. The Supreme Court dataset, in contrast, deals with all cases heard by the high court in a particular year. Due to the entire universe of cases being used in the Supreme Court set no weighting is needed.

transferred to them by the high court; the 'agent' became the 'principal' by the delegation of authority by the 'principal.'

To clarify this point, as the Supreme Court gave more leash to the circuits they have essentially become the principals to district courts in their regions. Since the high court now hears, and decides, fewer and fewer cases each term the circuits have been made regional principals through and informal power delegation process. This is not to suggest that if the circuits in their new capacity as principals begin to displease the Supreme Court that they will not lose this delegated power. The principal-agent and organizational hierarchy literature seem to suggest that the shifting of power from a principal to their agent can and does occur. However, the principal still monitors the progress of their agent as this power shift is taking place. [8]

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[8] Economic group organization literature suggests that at times in hierarchies, that oversight responsibility will be shifted down from the principal to an agent; thus making the agent a newly charged principal In the case of economic organization from stock holders to a board, from the board to CEO's etc...(see Moe's (1984) discussion of Berie and Means (1932) also see Coase's (1937) discussion of moving equilibrium). For our purposes I think tha by only hearing 'the most important cases' the court is delegating more oversight authority to the circuits allowing them to act as principals over the district courts. By the very nature that the circuit courts are more and more being seen ,and to a degree treated, as courts of last resort for their geographical region they are being forced through

As such, I hypothesize the following:

> ***h1:*** *With the decrease in cases granted cert by the Rehnquist Court, the circuit courts will defy high court policy and push forth their own policy preferences.*

By analyzing Supreme Court decisions and Court of Appeals decisions over a sixteen year period, a comparison of the level of deference or defiance of the lower courts during both the Burger and the Rehnquist Courts is possible. I hypothesize that as the level of review decreases during the Rehnquist Court (e.g., as the leash becomes longer), the level of defiance from the agent (the lower courts) to the principal (the high court) increases.

To test these hypotheses, I used the directionality variable coded in both the Supreme Court and Court of Appeals data sets. The directionality variable in the code book for the Appeals Court Data Set (2007) codes whether the court decided each case as either liberal or conservative. Liberal and conservative designations are determined by the generally accepted definitions of both terms. For example, when the court decided against a law enforcement agency in a search and seizure case, the case

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informal process changes into the role of principal by the high court.

directionality was coded "3" (for liberal); when coded "1" the courts decided for the respondent (conservative), or for our purposes here the court sided with the law enforcement agency on a search and seizure case. All cases decided for each Supreme Court era were included in the analysis. By comparing the decisions in both the high court and the lower courts in this manner I will be able to determine when and if the lower court acting as the agent defects from the high court acting as the principal.

Data

I examined all Supreme Court decisions from 1969 through 2002 using the Supreme Court Database. Then, the Appeals Court database was utilized to examine 5760 lower court cases from the Burger era Court (1969 through 1985) and the Rehnquist era Court (1986 through 2002). Because the Appeals Court database utilizes a sample (and not all cases decided during the time frame under study), 30 cases per circuit per year from all decisions made on the US Courts of Appeals were examined, encompassing both the Rehnquist and Burger Court eras.

The start date of the Rehnquist court was coded as beginning on January 1 1987. This was done to address two

factors. First Chief Justice Burger was still sitting as the first part of the 1986 term was finishing. Second, Rehnquist was an associate justice during the Burger Court and did not begin his role as Chief Justice until that October; this makes it safe to assume that decisions where Rehnquist decided and acted as chief justice were not handed down until after the New Year. This consideration allows for testing the actual effect the elevation of William Rehnquist to Chief Justice and subsequent policy shift actually had on the circuits.

The decision to use the entire sample universe from the Court of Appeals dataset (instead of only including cases from particular case types) was made for two reasons. First, due to the fact that each circuit is a sample of all of the published and some unpublished decisions, it is necessary to include the entire sample of cases to ensure reliability instead of just including a 'sample' of the original sample. Second, the basic nature of the research question is not dependent on what type of cases make circuit court judges more likely to defect from their principal. Instead, the question explored here is that given a distinct and sustained policy shift by the Supreme Court acting as principal, the circuit courts will take this policy shift and

respond by defecting and pushing forth different policy agendas than their principal across all cases.

The Burger Court data (both cases from the appellate court and cases from the Supreme Court in that era) were included as a comparison court to the Rehnquist Court. It is necessary to contrast both courts to compare whether the circuits, once their leash is extended, do in fact stop acting as faithful agents of the Supreme Court and decide cases on their own policy initiative. The Burger Court era was chosen for several reasons. First the composition of membership is similar to the Rehnquist court.[9] Second, the Burger and Rehnquist courts share a conservative ideological type. While the views of Chief Justice Burger and Rehnquist differ in areas of constitutional law (see Woodward and Armstrong (1979) and Yarbrough (2000)) their basic political makeup is similar. Third, because the Burger court directly preceded the Rehnquist Court, it will allow us to explore how the circuit courts reacted to the change of the high court and the cert granting policy.

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[9] It should be noted that while the composition of the Rehnquist and Burgers courts was similar, certain changes did occur in the court composition. Most notably are the retirements of Justices Blackmun and Marshall and the elevation of Justices Scalia, who was elevated when William Rehnquist became chief justice, and Justice Thomas who was elevated when Justice Marshall retired. Both men caused a noticeable shift in the ideological bent of the court.

Methods

The dependent variables will be the decision type of the Court of Appeals and the independent variable will be decision type of the Supreme Court. In this analysis I am simply concerned with the degree to which circuits' decision types defect from the decisions types of the Supreme Court. In order to determine whether or not the circuits (acting as agent)defect from their principal (the Supreme Court) across decision type as the total number of cases decided decreases, correlations and cross tabulations using both *tau b* and *gamma* were analyzed.

First, the decrease in the number of cases granted cert from the US Supreme Court during both Court eras was examined. As **Table 1 and Table 2** demonstrates, the number of cases granted cert during the Burger Court held steady each successive year of that court era. Beginning with the Rehnquist Court in 1986, the number of cases granted cert decreases significantly each year; as previously hypothesized, this should allow the Courts of Appeals more leash to pursue their own policy objectives. To further illustrate this point, the Burger Court decided 4,466 cases (see Table 4) while the Rehnquist court between 1987 and 2002 decided 2,564 (see Table 3) cases.

This is a 58 percent decrease in cases decided between the two court eras.

Next, I examined the relationship between the decision types by applying *tau-b* to a cross tabulation analysis and correlation covariance statistics to explore if the decrease in the number of cert cases accepted for review by the Supreme Court (e.g., the principal) in both Court eras had an impact on the decisions on the Courts of Appeals (e.g., the agent) by allowing the lower courts greater leash to initiate policy inclinations and defy their principal.

Table 1

Number of Cases Appealed and Accepted for Cert in Rehnquist Court[10]

Year	Number of Appeal's Filed Before the US Supreme Court	Number of Cases Accepted for Cert and Decided by the US Supreme Court
1986	4,251	383
1987	4,494	332
1988	4,776	312
1989	4,919	286
1990	5,502	214
1991	5,866	246
1992	6,303	178
1993	6,897	159
1994	6,996	126
1995	6,597	146
1996	6,633	134
1997	6,781	136
1998	7,109	142
1999	7,377	141
2000	7,852	132
2001	7,924	122
2002	8,255	130

[10] The data used to create tables 1 and 2 was taken from the All Court Data Set and from the Supreme Court Compendium 3rd and 4th editions.

Table 2

Number of Cases Appealed and Accepted for Cert in Burger Court

Year	Number of Appeal's Filed Before the US Supreme Court	Number of Cases Accepted for Cert and Decided by the US Supreme Court
1969	3,405	226
1970	3,419	282
1971	3,643	318
1972	3,749	330
1973	3,943	341
1974	3,661	286
1975	3,939	320
1976	3,873	315
1977	3,839	308
1978	3,893	292
1979	4,067	284
1980	4,252	329
1981	4,363	328
1982	4,201	345
1983	4,222	361
1984	4,046	339
1985	4,413	378

Results

When the Supreme Court decreases the number of cases granted for cert, does it impact appellate court ideology? In other words as the leash gets longer will the lower court be more defiant in its decision making veering from stare decisis?

The results of the *tau-b* showed a result of -.0047 (for the Rehnquist Court). This result is consistent with the correlation covariant result. As table 3 shows, this indicates that the circuit courts did not act as faithful agents during the Rehnquist era. The results of the cross tabulation analysis show that on conservative decision types, the circuit courts decided with the supreme court 66 percent of the time. However, when looking at liberal decision types, the circuits acted as faithful agents only 34 percent of the time. These results still suggest that circuits are not acting as faithful agents to their principal.

The results of the Burger Court analysis shows a result *tau-b* result of .0209; again, this result is consistent with the results of the correlation covariance analysis. These results as hypothesized show that when their leash was tighter the circuit courts acted as faithful agents to their principal; while this level of

concordance shows a certain amount of strength there is still a suggestion of defection by the agent to the policy preferences of their agent. As will be discussed in the next section there should not be an expectation of perfect concordance between the circuit and Supreme Court decision making, possibly due to the fact that number of cases heard saw a steady decline since the Judiciary Act of 1925.

The results of this analysis (see **Table 3 and Table 4)** suggest that there is a difference between the decision types of the Court of Appeals and Supreme Court during the first 15 years of the Rehnquist Court, indicating that as the leash got longer (e.g., a the number of cases accepted for review decreased) the appellate courts' policy initiatives diverged from *stare decisis. W*hile these results do not allow us to see exactly when the circuit courts began acting as non faithful agents and defying their principal, it does allow us to see that the circuits were more than likely aware of the decreased likelihood of their cases being reviewed by their principal and so were more open to defection. Hence, the circuits appear more likely to move away from the doctrine of *stare decisis* as they were given more leash by the Supreme Court.

Table 3

Results of Cross Tab and Tau-b Analysis for the Rehnquist Era

Circuit Court Decision Type	Supreme Court Decision Type 1	3	Total
1	1,050 66%	635 66%	1,685 66%
3	552 34%	327 34%	879 34%
Total	1,602 100%	962 100%	2,564 100%
Kendall's tau-b = -.005 ASE=.015			
Key			
Frequency Column Percentage			

Table 4

Results of cross tab and tau-b analysis for the Burger era.

Circuit Court Decision Type	Supreme Court Decision Type 1	3	Total
1	1,548 57%	975 55%	2,523 56%
3	1,512 43%	791 45%	1,943 44%
Total	2,700 100%	1,766 100%	4,466 100%
Kendall's tau-b =.021 ASE = .015			
Key			
Frequency Column Percentage			

The level of discordance during the Rehnquist era allows for the assumption that the circuit courts began acting as less faithful agents to their principal and were more likely to push their own policy agendas with the decrease in cases heard during the Rehnquist era. The results of the comparison Burger Court era also show that there was not perfect harmony when the principal was paying great, but still diminished, attention. While certainly the results of the Burger Court analysis shown above note that there is agreement between the courts, the fact that results show a less than perfect agreement might suggest that ever since the high court was granted selective cert the number of cases have decreased which should allow for this result. This general decrease in cases over the years suggests a signal to the circuit courts that their principal was not paying as close attention to their actions and, thus, the leash was lengthening.

So even during the tenure of the Chief Justice Burger, there was a policy shift occurring which as these results suggest was beginning to be noticed by the circuits. While there might be other causes for this lack of harmony between the principal and agent, the data do

suggest that there was some defection by the lower courts during this time.

However, the level of significance found during the Burger Court does not discount the hypothesis of this paper and the significance does speak to a change in the over all relationship between the courts. It can be reasonably asserted that the acknowledged and sustained policy shift of the Rehnquist Court had an impact on the circuit courts acting as their agents. In the eyes of Chief Justice Rehnquist, the circuits were to do most of the work leaving only the most important questions of constitutional law and arguments between the circuits to the high court. The vision Chief Justice Rehnquist had for the federal court system as its chief is suggested in these results. Whether this vision of the federal court relationships continues under the helm of Chief Justice Roberts is obviously unknown at this point.

However, given the decrease in cases granted cert in the first two years of the Roberts Court, one could infer that the vision began by William Rehnquist will be continued by his former law clerk.

CHAPTER IV

CONCLUSION

Analysis and Future Research

Analysis

While the results of this research suggest that the appeals courts do not always act as faithful agents to their principal, it does not discount previous research done in this field. The previous research done into the principal-agent relationship of the circuit and high court(s) have only discussed certain policy areas (see Songer, et al. 1995). Most of the policy areas looked at were areas of law that both individual justices and the high court as a whole have shown strong policy preferences for (see Segal and Spaeth 1993). Due to these known policy preferences it would only make sense that when addressing these issues that the circuit courts would act as faithful agents since no justice wants to have their decisions overturned.

What the results of this research seem to indicate is that it appears the circuit courts have become more likely to defect from their principal when their

principal announces a direct policy shift and the leash is long enough to do something about it. The results of the comparison data suggest that selective *stare decisis* and the policy shift of the Rehnquist Court created a culture amongst the federal circuit courts where the circuit courts could begin acting and deciding cases as a courts of last resort. While this is not terribly troublesome today, this scholar can see a day when the circuits both liberal and conservative run amok. This could create a crisis in our court system but one that would be easily remedied by the Supreme Court stepping in to review more cases.

Future Research

This research also suggests a deeper look into the relationships between the circuits and high court. Perhaps analyzing the points at which the circuits feel more comfortable defecting from their principal would be helpful in gathering greater understanding of principal-agent theory. And clearly, a time series analysis of several court eras might suggest how sustained this defection is.

Additionally, it would be extremely helpful to have access to unpublished opinions of the Courts of Appeals. Scholars could find more insight into the behaviors of

circuit court judges by performing greater investigation into unpublished decisions. The reasons why a judge might leave a decision unpublished can only be speculated upon, but perhaps one of the reasons is an attempt to avoid having any opinions that are adverse to or contrary to the high court from seeing the light of day.[11] This possibility definitely goes beyond the scope of this research, but is one that should be better addressed by the cannon.

Conclusion

For now, this study suggests that circuit court judges are not as deferential to stare decisis and their principals as previously thought. While there is no doubt that the judges claim total adherence to the doctrine, it appears that something different is occurring in the twelve circuits. The results given here demonstrates that the old adage is true: when the cat is away, the mice will play.

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[11] While not publishing a cases allows the circuit courts judges some room to hide policy decisions that might be contrary to their principal. It does not stop the loser from seeking appeal at the Supreme Court level. However, given what is know (asstated above) about the high courts attitude toward granting *cert* the circuits can still feel reasonably safe in hiding unpopular policy decisions from the high court in unpublished decisions.

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