Precedent Direction and Compliance: Horizontal Stare Decisis on the U.S. Court of Appeals for the Sixth Circuit

Emery G. Lee III[1]

The binding nature of circuit precedents established in published panel opinions is a familiar part of the court of appeals environment. Sixth Circuit rule 206(c) states that "[r]eported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel."[2] There can be little doubt, though, that the second quoted sentence is on firmer ground than the first. Three-judge panels simply do not overrule other panels' previous decisions in subsequent cases in the absence of an intervening Supreme Court or en banc decision. But that does not mean that subsequent panels always comply with previous panel decisions. In practice, there are many techniques courts of appeals judges may use to evade precedents they do not wish to follow. They may, for example, distinguish the present case from the precedent on factual grounds and thus reach a decision contrary to the one directed by the precedent. They may find an earlier (or later) precedent pointing in a different direction and rely on that precedent

[1] Assistant Professor of Political Science and Law, Case Western Reserve University. This research was supported by the W.P. Jones Presidential Faculty Development Fund at Case Western University.

[2] 6TH CIR. R. 206(c).

instead of the disfavored one. Or they may even conclude that an intervening Supreme Court or en banc precedent has undermined the disfavored precedent, even when reaching such a conclusion is, well, a reach.

On the one hand, then, there is a strict rule of horizontal stare decisis. On the other hand, there is a more-than-reasonable suspicion that judges can evade that rule, at least some of the time. The pertinent issues for empirical study, then, are: (1) how often do panels of the courts of appeals comply with their own precedents, (2) under what conditions are panels more likely to comply with precedent, and (3) under what conditions are they less likely to comply?

To answer these questions, of course, one must first operationalize the concept of "compliance" and devise an empirical measure for it. A number of potential measures of compliance are readily available. In a previous article on Sixth Circuit compliance with circuit precedent, for example, I used Keycite positive and negative treatment codes as proxy measures for compliance and non-compliance.[3] Other researchers have employed Shepard's Citations for a similar purpose.[4] In addition, studies of lower court compliance with Supreme Court precedent in civil liberties cases have used a measure of compliance based on the outcome of the cases involved.[5] This outcome-based measure works on the assumption that precedents typically have a policy dimension in that they favor one "side" in a particular policy area, e.g., the creation of *Miranda* rights[6] favors criminal defendants in future cases. Using this measure, then, one determines whether the judge(s) citing the precedent reach an outcome in the same policy direction as that of the cited precedent, e.g., pro-criminal defendant or "liberal," to measure compliance.[7]

In this Article I analyze whether three-judge panels of the Sixth Circuit reached outcomes pointing in the opposite policy direction than the precedents cited to support their decisions. The analysis includes almost 500 citing cases (n = 499). I find that three-judge panels complied

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[3] Emery G. Lee III, *Horizontal Stare Decisis on the U.S. Court of Appeals for the Sixth Circuit*, 92 KY. L.J. 767 (2003-04).

[4] *See*, *e.g.*, Charles Johnson, *Lower Court Reactions to Supreme Court Decisions: A Quantitative Examination*, 23 AM. J. POL. SCI. 792 (1979) (employing Shepard's to track compliance with Supreme Court precedent).

[5] *See*, *e.g.*, Donald R. Songer & Reginald S. Sheehan, *Supreme Court Impact on Compliance and Outcomes: Miranda and New York Times in the United States Courts of Appeals*, 43 W. POL. Q. 297, 302 (1990) (employing "the percentage of liberal decisions announced by the courts of appeals in each policy area" as the dependent variable in modeling Supreme Court impact).

[6] Miranda v. Arizona, 384 US 436 (1966).

[7] *See* Bradley C. Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision*, 8 L. & SOC'Y REV. 109, 111-16 (1973).

with cited circuit precedents' policy direction in 60.7% of the sampled citing cases. This estimate of compliance is considerably lower than the comparable 81.2% figure obtained using Keycite codes to analyze the same cases.[8] Moreover, the overall estimate masks different dynamics in sampled published and unpublished decisions. The outcome-based compliance figure is much lower in published citing cases, 54.2%, than in unpublished citing cases, 67.9%. Indeed, regression analysis reveals that, in published cases, the policy preferences of the subsequent panel majority is the key explanatory variable but that in unpublished cases the direction of the cited precedent is the key explanatory variable. This finding strongly suggests that there is an important difference between published and unpublished cases in terms of the discretion judges enjoy in such cases to reach decisions in accord with their policy preferences. This provides empirical support for the conventional wisdom that unpublished cases generally represent "easy" cases, i.e., cases in which the applicable legal materials point to one and only one outcome.[9]

The remainder of this Article is organized in the following way. Part I discusses recent research on measures of compliance, which suggests that an outcome-based measure of compliance offers a rather straightforward means of capturing this complex concept. Part II specifies the hypotheses of interest and explains the data collection and coding procedures used in this study. Part III presents my findings using the outcome-based measure of compliance. Overall, I find support for the hypotheses advanced in Part II. Part III also provides a comparison of the outcome-based measure to the Keycite measure of compliance. Part IV provides a brief conclusion along with suggestions for future research.

I. MEASURING COMPLIANCE

Like most other concepts of interest to social scientists, "compliance" is a complicated matter. It is not always clear what it means to comply with a previous decision, partly because it is not always clear what a previous decision actually "holds."[10] To make matters even worse, quantitative researchers need a measure of compliance that is valid, reliable, and not overly subjective or dependent on the person

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[8] Lee, *supra* note 3, at 781-82.

[9] *C.f.* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 64 (1997) (illustrating that hard cases are those cases in which the "relevant legal rules do not lead clearly to a particular decision.").

[10] *See*, *e.g.*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949) (discussing how legal concepts develop in the case law through reasoning by example and tracing the rise and fall of the "inherently dangerous" rule). The basic point here is that the holding of a case depends on how subsequent cases interpret and apply it.

coding the cases. Three potential quantitative measures of compliance are readily available: Shepard's Citations, Westlaw Keycite, and the outcome-based measure. Researchers have used each of these measures in the past, but which should researchers use in the future? In a recent study of state high-court compliance with Supreme Court precedent, political scientists McClurg and Comparato[11] provide much-needed guidance on this question. McClurg and Comparato carefully divided the concept of compliance into four "dimensions" of scholarly interest: (1) the treatment of the legal principle found in the precedent; (2) the application of the precedent to a specific set of facts; (3) the policy effect of the precedent in terms of the party favored by the rule found in the precedent; and (4) the use of the cited precedent to justify the decision in a specific case.[12] They then compared the ability of the competing measures to gauge compliance with Supreme Court precedent along these dimensions by creating their own, content-based measure of compliance with the Supreme Court's decision in *Illinois v. Gates*,[13] and by applying each of these four measures to a sample of thirty-nine state high-court decisions citing *Gates*.[14]

McClurg and Comparato found that each ready-to-hand quantitative measure of compliance had its advantages and disadvantages.[15] Shepard's is the only measure that allows for a neutral code, i.e., the "Cited By" code. But because of this, Shepard's often incorrectly categorizes compliant or non-compliant behavior as "neutral."[16] The other measures, however, tend to err in categorizing citations as compliant or non-compliant when they are really "neutral."[17] McClurg and Comparato found that Keycite tends to code decisions as compliant (i.e., "positive" treatment) even when the content-based measure would have categorized them as non-compliant.[18] Keycite, in short, is biased toward overestimating compliance, compared to the content-based measure. Similarly, the outcome-based measure is biased toward overestimating non-compliance, compared to the content-based

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[11] Scott D. McClurg & Scott A. Comparato, Rebellious or Just Misunderstood? Assessing Measures of Lower Court Compliance with U.S. Supreme Court Precedent (2003) (unpublished manuscript, on file with the Seton Hall Circuit Review).

[12] *Id.* at 6, 39 (fig. 1).

[13] 478 U.S. 186 (1986).

[14] McClurg & Comparato, *supra* note 11, at 13.

[15] *See generally id.* at 27-29 (summarizing their conclusions on the strengths and weaknesses of the alternative measures).

[16] *Id.* at 20, 23-24, 28.

[17] *Id.* at 23, 28.

[18] *Id.* at 28 ("[T]he Achilles heal of *Keycite* is a tendency toward false positives . . . .").

measure.[19] The reason for this tendency seems clear. A subsequent decision may reach a different result and still comply, substantively, with cited precedent. For example, the facts of the subsequent case may actually differ in legally relevant ways from those in the cited precedent. But when this occurs, the outcome-based measure will always code the subsequent decision as non-compliant.

After examining the performance of each measure of compliance for each of the four dimensions, McClurg and Comparato combined the different dimensions of compliance to compare the quantitative measures of compliance to their content-based measure overall.[20] They found that Shepard's correctly classified ten of the seventeen non-compliant decisions in the sample,[21] Keycite correctly classified nine out of the seventeen, and the outcome-based measure correctly classified fifteen out of the seventeen.[22] This last figure (fifteen out of seventeen) makes sense, because a non-compliant decision will generally point in the opposite policy direction from the cited precedent. Thus, the outcome-based measure should do a better job than the quantitative alternatives in identifying non-compliant decisions. In terms of correctly classifying compliant decisions, however, Keycite performed somewhat better than the other quantitative measures.[23] Most notably, the outcome-based measure incorrectly classified the seven cases McClurg and Comparato classified as "weak compliance" as non-compliant.[24] Again, this makes sense, as not every decision pointing in the opposite policy direction is actually non-compliant. The outcome-based measure will incorrectly classify every such decision, however.[25]

In terms of measuring all four dimensions of compliance, McClurg and Comparato offered the following advice to researchers:

> First, for scholars interested in measuring *only* the treatment of legal principle [this study] shows that *Shepard's* is the best

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[19] *Id.* at 28-29.

[20] *Id*. at 25-26.

[21] Seventeen out of 39 decisions were coded non-compliant using the content-based measure. *Id.* at 26, Table 6.

[22] *Id.*

[23] *Id.* at 26-27.

[24] *Id.*

[25] McClurg and Comparato comment:

> [T]he outcome measure is predisposed toward overstating levels of noncompliance. However, we would be remiss if we did not point out that in terms of measuring overall compliance, the outcome measure's false negatives are almost entirely of a specific type—treating weak forms of compliance as noncompliance—that is not as clearly egregious of a mistake as some of those made by the other two measures.

Id. at 28-29.

> measure as it has the highest percent correct and is capable of identifying irrelevance. Both *Keycite* and the outcome measure hover around the 50-percent mark and are incapable of dealing with cases where this dimension is not at all relevant. Second, [if] interest[ed] in measuring the remaining three dimensions of compliance [,] scholars would be best accomplished by using the *Keycite* measure. On a dimension-by-dimension basis, *Keycite* is the superior measure for distinguishing between compliant and noncompliant lower court cases. Along these same lines, *Shepard's* is by far the weakest of the three measures. Finally, if we consider all four dimensions together, the outcome measure outperforms both *Shepard's* and *Keycite*. Although using the outcome of a case is not useful for measuring one particular element of compliance, the evidence in the final column of Table 7 suggests that its strength is capturing the concept more generally. This also has some substantive importance, as it suggests that compliance is closely linked to . . . case outcomes.[26]

In sum, the results of the McClurg and Comparato study indicate that researchers interested in measuring compliance with precedent "should consider using an outcome based measure" for compliance, in part because "it has the highest level of content validity with respect to measurement of the general phenomenon of compliance."[27] At the same time, researchers should be aware of this measure's potential bias toward coding compliant behavior, especially weakly compliant behavior, as non-compliant.[28]

In this Article, I follow the advice of McClurg and Comparato and use the outcome-based measure of compliance to study the efficacy of the norm of horizontal stare decisis on the U.S. Court of Appeals for the Sixth Circuit. This is an important theoretical question in its own right. Having already conducted an analysis of compliance using the Keycite measure, in this Article I am also able to compare the two measures and contribute to the discussion of measurement error in this research area. The next part explains the hypotheses of interest and the details of the research design employed in this study.

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[26] *Id*. at 28 (citation omitted).

[27] *Id.* at 32.

[28] *Id.* at 28-29. To test this in another legal context, McClurg and Comparato sampled search and seizure cases in the state supreme courts and measured non-compliance with relevant Supreme Court precedents using the three quantitative measures. *Id.* at 30-31, Table 8. They found that Shepard's coded about 0.5% of the sampled cases as non-compliant, Keycite 2.3%, and the outcome-based measure 38.6%. They concluded that although this 38.6% estimate was "inflated," it might serve as a kind of "upper boundary estimate for all forms of noncompliance." *Id.* at 31.

II. RESEARCH DESIGN

A. Hypotheses

This Article focuses on a limited number of variables, primarily the composition of panel majorities in the citing cases, the policy direction of the cited and citing cases, and whether the opinion in the citing case is published or unpublished. The first hypothesis of interest involves the policy preferences of the citing panel. Court researchers simply lack anything resembling a direct, fully satisfactory measure of lower-court judicial policy preferences. A vast body of literature, however, documents that judges appointed by Republican presidents have different policy preferences than those appointed by Democratic presidents.[29] With respect to that literature, the leading political science work on the U.S. courts of appeals concludes that "[t]he general picture presented by these studies is clear: across a wide variety of courts and issue areas, Democratic judges are more likely to support the liberal position in case outcomes than their Republican colleagues."[30] Moreover, the ongoing controversy regarding the appropriate role of judicial ideology in judicial confirmations demonstrates that policy-makers recognize that judges' policy preferences vary according to partisanship.[31] Given these differences in policy preferences, one would expect that a panel dominated by Democratic judges[32] would be more likely to disagree with a conservative-direction precedent than a panel dominated by Republican judges, and that a Republican-dominated panel would be more likely to disagree with a liberal-direction precedent than a Democratic-dominated panel.[33] Thus, the first hypothesis of interest:

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[29] *See* DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURT OF APPEALS 110-119 (2000) (providing a synthetic overview of the literature with a full-range of citations). Measuring appellate judge policy preferences by reference to the party of the appointing president certainly has its limitations, but previous studies have shown that partisanship measured by "presidential cohorts" explains "a substantial portion of the variation in judicial voting." *Id.* at 118. *See also* 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 (1988).

[30] *Id*. at 112. Throughout the remainder of the Article, I will follow this usage and refer to judges nominated by Democratic presidents as Democratic judges and judges nominated by Republican presidents as Republican judges.

[31] *See* Emery G. Lee III, The Federalist *in an Age of Faction: Rethinking* Federalist *No. 76 on the Senate's Role in the Judicial Confirmation Process*, 30 OHIO N.U. L. REV. 235, 237-43 (2004), for a useful discussion of the contemporary debate.

[32] I.e., a panel on which a majority of the judges are Democratic judges.

[33] This should be true regardless of the composition of the panel that decided the cited precedent. My previous work suggests that it is the policy direction of the cited precedent and not the composition of the panel that decided the precedent that explains variation in compliance. *See* Lee, *Horizontal Stare Decisis*, *supra* note 3, at 785-89. For

> H1: Democratic-Dominated Citing Panels Are More Likely than Republican-Dominated Panels Not to Comply with Conservative Direction Precedents, and Republican-Dominated Panels Are More likely Not to Comply with Liberal-Direction Precedents, All Else Equal.

This relationship will probably not be symmetrical, however. The policy direction of the cited precedent should also affect the overall level of compliance, regardless of the composition of the citing majority, although the reasons for this are not as readily apparent. Overall, I expect that compliance, using the outcome-based measure, will be greater for conservative-direction precedents than for liberal-direction precedents. To understand why, one must consider the nature of "liberal-direction precedents." As will be discussed *infra*, the sample includes only civil liberties and civil rights cases. Given the court of appeals docket, the sampled precedents are largely criminal appeals rather than First Amendment cases or even Title VII discrimination suits. In a criminal appeal, a liberal-direction decision is almost always a reversal of the district court in some respect.[34] But the courts of appeals affirm the district courts in an overwhelming majority of cases. Thus, liberal-direction, pro-defendant decisions should be less common than conservative-direction, pro-prosecution decisions even when the cited precedent is a liberal-direction precedent. Thus, the second hypothesis of interest is:

> H2: Compliance is more Likely for Conservative-Direction Precedents than for Liberal-Direction Precedents.

Finally, I expect that the citing panel's decision to publish the subsequent opinion will be positively correlated with non-compliance; in general, non-compliance should be more common in published citing cases than in unpublished citing cases. This expectation reflects the conventional wisdom that unpublished cases tend to be routine cases, i.e.,

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example, when a policy direction variable is included in the model, the coefficient for the variable comparing the policy preferences of the citing and cited panels does not reach statistical significance. *See id.* at 787 (Table 3). I concluded in that previous Article: "In sum, the ideological composition of the panels involved is important because of its consequences for the direction of the [cited] precedent; however, the ideological composition of the panels, alone, does not explain variation in the negative treatment of precedents." *Id.* at 790.

[34] I.e., a liberal direction will almost always be a pro-criminal defendant decision in that defendant's appeal of his or her conviction and/or sentence. Thus, almost all such decisions will vacate the conviction and/or sentence and remand the case for further proceedings.

cases governed by clearly established precedent.[35] Given the lack of judicial discretion in such cases, non-compliance should be less likely. Thus, the third hypothesis of interest:

> H3: Compliance with the Cited Precedent is More Likely in Unpublished Citing Cases than in Published Citing Cases.

B. Data Collection

The sample used to test these hypotheses was collected as follows. First, precedents decided by the Sixth Circuit in 1995 and 1996 were identified from the *Federal Reporter 3d Series*. These years were selected because previous research has found that the average "half-life" of a non-Supreme Court precedent cited in a court of appeals case was 4.3 years; i.e., half of the citations to lower federal court precedents occurred within 4.3 years of its decision date.[36] Sampling precedents from the mid-1990's, then, should mean that the study will include most of the citations to the sampled precedents that will occur. For each sampled precedent, records were made of the case number, the authoring judge, panel membership, outcome in terms of ideological direction, and decision date.[37] The sample was limited to precedents involving criminal procedure, including sentencing issues, civil rights claims of race or sex discrimination, and the violation of federally guaranteed rights.[38] Such cases comprise a significant part of the Sixth Circuit's docket and, more importantly, permit one to code the ideological direction of case outcomes. [39] In this context, the outcome variable was coded "liberal" if any relief (including partial relief) was granted to the defendant on the relevant issue in criminal procedure cases, and "conservative" if all relief

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[35] There is, however, more that one could say on this matter. *See* Lee, *supra* note 3, at 790 n.90, and sources cited therein.

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

[37] Additional data on variables not discussed in this Article were also collected. *See* Lee, *supra* note 3, at 779-81.

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

[39] The sampled precedents can be found in volumes 50-102 of the *Federal Reporter*, 3d Series. I began with volume 50 and collected data on all published Sixth Circuit cases meeting the sampling rules until a sufficient number of subsequent citations had been collected for logistic regression analysis. The author, in other words, examined and did citation checks on all published criminal procedure, sentencing, and civil rights cases decided by three-judge panels of the Sixth Circuit that were published in these volumes of the reporter. Volume 50 was not selected as my starting point for any particular reason, other than the fact that 50 "seemed like a nice round number." COOL HAND LUKE (Jalem Productions of Warner Bros. (u.s.) 1967).

was denied. In civil rights cases, the outcome variable was coded "liberal" if the panel held in the plaintiffs' favor on the relevant issue and "conservative" when the panel held in the defendants' favor. The panel membership variables were coded to reflect the party of the appointing president of the three judges on the panel.

Subsequent citations to the sampled precedents by three-judge panels of the Sixth Circuit were then located using the Westlaw Keycite service.[40] Citing cases were included in the sample if the treatment of the precedent was coded as negative (including "Distinguished") or if the treatment was coded as positive and the citing case either "explained" or "discussed" the precedent. This means that subsequent cases that merely cited the sampled precedent, positively, without discussion, as in a string citation, were omitted from the sample of citing cases. The reason for this coding decision is that such brief "positive" citations generally do not signal that the citing panel relied, in any substantive sense, on the cited case for an important question of law. If the citing panel does not rely on the precedent in reaching its decision, then the citation cannot really be characterized as "compliance." By contrast, even a brief "negative" treatment represents some level of "non-compliance" with the policy represented in the cited precedent. Unpublished opinions, including per curiam opinions, were included in the sample of citing cases.

As with the sampled precedents, records were compiled including the following information: case citation, the treatment of the precedent, publication, party of the president appointing the judges on the panel, case outcome in terms of ideological direction, and the decision date. The panel membership and outcome variables were coded as in the sampled precedents. In multiple issue cases, great care was taken to ensure that the outcome variable was coded according to the direction of the outcome on the issue or issues for which the precedent was cited.

III. FINDINGS

A. Descriptive Statistics

The data summarized in Table 1 reveal that subsequent panels complied with cited circuit precedents 60.7% of the time, in all cases,

[40] The original study employed Keycite both to find cases and to code the compliance variable; in the present study, Keycite was used only for the latter purpose. A citing case is included more than one case in the sample if it cites more than one of the sampled precedents; the unit of analysis is the citation of precedent rather than the citing case, strictly speaking. However, there are 422 distinct citing cases in the sample, accounting for 499 observations (citations to precedent), so few cases are included more than twice.

measured by the policy direction of the precedent and citing case. In other words, citing panels did not comply with the policy direction of cited precedents almost 40% of the time. This percentage is slightly misleading, however, because the figures for published and unpublished cases are substantially different. Panels complied with the policy direction of the cited precedent in 54.2% of published decisions, compared to 67.9% in unpublished cases. That difference is statistically significant beyond the .001 level, which strongly indicates that there is a very different dynamic in published and unpublished cases. Non-compliance with the policy direction of cited precedent occurred almost half of the time in published opinions.

Table 1: Compliance as Measured by Policy Direction

	% Compliant	N
Overall	60.7	499
Published Cases	54.2	262
Unpublished Cases	67.9	237

This finding makes sense if, on the whole, cases decided by published opinions present more legal ambiguity, and thus greater judicial discretion, than cases decided in unpublished opinions. Given greater judicial discretion to reach a decision in accordance with a panel majority's policy preferences, one would expect a higher level of non-compliance with previous decisions in such cases. Even so, three out of every ten unpublished decisions are non-compliant with cited precedent, according to the outcome-based measure. As will be discussed *infra*, however, almost all of that non-compliance occurs when a panel majority arrives at a conservative-direction result despite citing a liberal-direction precedent.[41]

Table 2 displays the results of various cross-tabulations to make the relationships among the variables of interest more clear. The cited precedent's policy direction is clearly related to whether the citing panel complies with it. Overall, citing panels complied with 35.3% of liberal-direction precedents but more than three-fourths of conservative-direction precedents (76.0%). Non-compliance, in other words, is much more common for liberal-direction cited precedents than for conservative-direction cited precedents, as expected. The same general relationship holds for Democratic-dominated citing panels, which

[41] *See infra* Part III.A, Table 2.

complied with 36.9% of liberal-direction precedents but 69.7% of conservative-direction precedents, and for Republican-dominated citing panels, which complied with 33.3% of liberal-direction precedents but more than four-fifths of conservative-direction precedents, 83.9%. The most striking finding here is that the differences between panel majorities are much greater for conservative-direction precedents. Republican-dominated citing panels are much more likely to comply, overall, with conservative-direction precedents than Democratic-dominated citing panels (83.9% compared to 69.7%), but Democratic-dominated citing panels are slightly more likely to comply with liberal-direction precedents than are Republican-dominated citing panels (36.9% compared to 33.3%). Non-compliance is much more common for both Democratic- and Republican-dominated panels when the cited precedent was decided in the liberal (usually pro-criminal defendant) direction, although the non-compliance rate of Democratic-dominated panels citing conservative-direction precedents (31.3%) was almost twice that of Republican-dominated panels (16.1%). These findings are generally consistent with the hypotheses advanced in Part II.A.[42]

The composition of the citing panel is not the whole story, though. Publication of the citing opinion is also related to whether the citing case complies with the precedent's policy direction. Overall, non-compliance is much more likely in published than unpublished cases, and that relationship holds when controlling for the policy preferences of the citing panel. In published opinions, Democratic-dominated citing panels complied with 43.3% of liberal-direction precedents and 54.2% of conservative-direction precedents. In other words, in published opinions, Democratic-dominated citing panels were almost as likely to comply with a liberal-direction precedent as with a conservative-direction precedent.

Overall, Democratic-dominated citing panels were non-compliant with cited precedent in 50% of published opinions. It should be noted that these differences between liberal- and conservative-direction precedents in published opinions decided by Democratic-dominated panels are not statistically significant. But that is, in its own way, interesting. This is the only cross-tabulation in Table 2 in which the differences in compliance with liberal- and conservative-direction precedents are not statistically significant. Democratic-dominated citing panels are as likely to reach a liberal-direction result when citing a conservative-direction precedent (45.8%) as to reach a compliant liberal-direction result (43.3%).

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[42] *See supra* notes 28-34 and accompanying text.

Table 2: Policy Compliance by Panel Majority and Publication

	% Compliant	N
Overall	60.7	499
Liberal-Direction Precedent	35.3	187
Conservative-Direction Precedent	76.0***	312
Panel Majority		
Democratic-Dominated Panel	57.6	278
Liberal-Direction Precedent	36.9	103
Conservative-Direction Precedent	69.7***	175
Republican-Dominated Panel	64.7	221
Liberal-Direction Precedent	33.3	84
Conservative-Direction Precedent	83.9***	137
Publication		
Published Cases Only	54.2	262
Liberal-Direction Precedent	41.0	100
Conservative-Direction Precedent	62.3**	162
Unpublished Only	67.9	237
Liberal-Direction Precedent	28.7	87
Conservative-Direction Precedent	90.7***	150
Publication and Panel Majority		
Published Cases Only		
Democratic-Dominated Panel	50.0	156
Liberal-Direction Precedent	43.3	60
Conservative-Direction Precedent	54.2	96
Republican-Dominated Panel	60.4	106
Liberal-Direction Precedent	37.5	40
Conservative-Direction Precedent	74.2***	66
Unpublished Only		
Democratic-Dominated Panel	67.2	122
Liberal-Direction Precedent	27.9	43
Conservative-Direction Precedent	88.6***	7
Republican-Dominated Panel	86.1	115
Liberal-Direction Precedent	29.5	44
Conservative-Direction Precedent	93.0***	71

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

In published cases, then, the policy direction of the precedent is not important in determining whether a Democratic-dominated panel will reach a liberal-direction result; they will do so about four times in ten. Republican-dominated citing panels, by contrast, complied with 37.5% of liberal-direction precedents and 74.2% of conservative-direction precedents in cases decided by published opinion. In other words, Republican-dominated panels did not comply with 62.5% of liberal-direction precedents cited in published opinions, as compared to 25.8% non-compliance with cited conservative-direction precedents. These findings indicate, yet again, that cases decided by published opinions offer much greater opportunities for judges to decide cases in accord with (even rough measures of) their policy preferences. In cases decided by unpublished opinions, there is no real difference between Democratic- and Republican-dominated panels in terms of the policy direction of the results reached; Republican-dominated panels reached conservative-direction results in 84.3% of such cases, Democratic-dominated panels in 82.8%. But in cases decided by published opinion, there is a difference: Democratic-dominated panels reached a liberal-direction result in 44.9% of such cases compared to only 30.2% for Republican-dominated panels (n=262). This difference is statistically significant (at the .05 level).

Publication means that a liberal-direction outcome is more likely, regardless of the preferences of the panel (but a liberal-direction outcome is even more likely if the panel has a Democratic majority). For this reason, both Democratic- and Republican-dominated panels are much more likely to comply with liberal-direction precedents in published opinions than in unpublished opinions. Given the findings discussed *supra*, it is no surprise that liberal-direction precedents are rarely complied with in unpublished cases—only 27.9% of the time for Democratic-dominated citing panels, 29.5% for Republican-dominated citing panels. On the other hand, this also means that both Democratic- and Republican-dominated panels are much less likely to comply with conservative-direction precedents in published cases, 54.4% and 74.2%, respectively, than in unpublished cases, 88.6% and 93.0%, respectively. Indeed, most of the non-compliance observed in cases decided by unpublished opinions occurred *when panels reached a conservative-direction result despite citing a liberal-direction precedent*. These figures further highlight the differences between cases decided in published opinions and those decided in unpublished opinions. Republican-dominated panels did not comply with conservative-direction precedents cited in unpublished opinions only 7.0% of the time.

B. Logistic Regression Analysis

To further explore the relationships among these variables, logistic regression analysis was employed.[43] Table 3 displays the results of three separate logistic-regression models: (1) a model for all subsequent citations of precedent, (2) a model for citations in published opinions, and (3) a model for citations in unpublished opinions. The separate models were necessary given the different dynamic present in cases decided in published opinions compared to those decided in unpublished opinions.[44] The dependent variable in the logistic-regression models is the policy direction of the citing case, Case Outcome. This variable was coded as *one* when the citing case was decided in a liberal direction and as *zero* when the citing case was decided in a conservative direction. The Precedent Direction variable was coded in the same way. Thus, I expect the coefficient for the Precedent Direction variable to take a positive sign, meaning that, all else being equal, a citing panel is more likely to decide the subsequent case in the same direction as the cited precedent. The Panel Majority variable is coded *one* for Democratic-dominated panels and *zero* for Republican-dominated panels. Thus, I expect this coefficient to also take a positive sign, because, all else equal, Democratic-dominated panels should be more likely to prefer a liberal-direction case outcomes and Republican-dominated panels should be more likely to prefer conservative-direction case outcomes. Publication is also included in the first model as a control variable.

In the first model, including all citations in published and unpublished opinions (n=499), both the Precedent Direction and Panel Majority variables take the expected sign (positive) and reach traditional levels of statistical significance, although the Panel Majority coefficient is significant only at the .05 level. The positive sign of the Precedent Direction coefficient demonstrates that compliance is more likely than non-compliance, even when controlling for the policy preferences of the citing panels and the decision to publish. The positive sign for the Panel Majority variable means that, even controlling for the policy direction of the cited precedent, the policy preferences of the citing panel still affect the policy direction of the Case Outcome. Thus, Democratic-dominated

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[43] Logistic regression is appropriate where the dependent variable is dichotomous, i.e., where the dependent variable can only take two values. *See generally* TIM FUTING LIAO, INTERPRETING LINEAR PROBABILITY MODELS: LOGIT, PROBIT, AND OTHER GENERAL LINEAR MODELS (1994). As discussed in the text, the dependent variable here is the policy direction of the outcome of the citing case, which can only take the values "liberal" (*one*) or "conservative" (*zero*).

[44] *Cf.* Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SCI. 235, 249 & n.10 (1992) (employing separate models for published and unpublished opinions).

panels are more likely to prefer liberal-direction outcomes, and Republican-dominated panels are more likely to prefer conservative-direction outcomes, all else equal. The coefficient for the Publication variable is large and statistically significant. This means that a liberal-direction Case Outcome is much more likely in a published opinion than in an unpublished opinion, a finding fully consistent with the discussion in Part III.A.

Table 3: Logistic Regression Results, Effects of Precedent Direction and Panel Majority on Outcome, Published and Unpublished Cases

Variable	All Cases (n=499)	Published (n=262)	Unpublished (n=237)
Precedent Direction	.572**	.139	1.372***
(SE)	(.211)	(.263)	(.368)
Panel Majority	.457*	.632*	.167
(SE)	(.213)	(.266)	(.363)
Publication	1.157***	--	--
(SE)	(.219)		
Constant	-2.111***	-.892***	-2.364***
(SE)	(.238)	(.235)	(.347)
Model x^2	43.840***	6.082*	14.747**
Degrees of freedom	3	2	2
-2 x LLR	550.329	344.180	197.202

*** $p < .001$
** $p < .01$
* $p < .05$

By contrast, in the second model, which includes only subsequent citations in published opinions (n=262), the Precedent Direction coefficient does not reach statistical significance, despite taking the expected sign. This means that compliance is not more likely than non-compliance in cases decided by published opinion; instead, the Precedent Direction variable is not affecting the Case Outcome variable one way or the other, once Panel Majority is accounted for. The Panel Majority variable does reach statistical significance in the second model, although again only at the .05 level. Some readers may object that the relationship

between the Panel Majority variable and Case Outcome is only marginally significant and thus that the relationship between these two variables is hardly overwhelming. Even conceding that point, though, the interesting finding here is that *in published cases, the policy direction of the precedent does not affect the policy direction of the case outcome, after controlling for the policy preferences of the citing panel majority*. In other words, using the outcome-based measure of compliance, compliance with the policy-direction of cited precedents is not more likely than non-compliance in cases decided by published opinion. In terms of the theoretical questions asked at the outset of this paper, judges on the Sixth Circuit are not likely to comply with the policy-direction of cited precedents in cases decided by published opinion, according to the outcome-based measure of compliance.

This becomes even more clear when the third model, which includes only subsequent citations in unpublished opinions (n=237), is included in the analysis. The third model indicates that the policy preferences of the citing panel majority are irrelevant, after controlling for the policy direction of the cited precedent, in cases decided by unpublished opinion. In this model, the Precedent Direction coefficient takes the expected sign and is statistically significant. The Panel Majority coefficient, though, does not even approach statistical significance, strongly suggesting that the decisions of panels announced in unpublished opinions are largely determined by the policy direction of the cited precedents. The observed differences between published and unpublished cases could not be clearer.

C. Comparing the Outcome-Based Measure to the Keycite Measure

This Article has presented evidence that compliance with circuit precedent is not more likely than non-compliance in cases decided by published opinions, all else being equal, and that the policy preferences of the citing panel majority explain at least some of the non-compliance that occurs in cases decided by published opinion. But these findings are only as valid as the measure of non-compliance employed. Given the large number of legal issues raised in the sampled precedents, a content-based measure of non-compliance is simply not practicable in the present study. But there are alternative measures of compliance at hand, especially Keycite. How does the outcome-based measure compare to Keycite's positive and negative treatment codes? These figures are shown in Table 4.

Overall, the outcome-based measure coded 60.7% of subsequent citations of precedent as compliant; thus, it yields an estimate of 39.3% non-compliant behavior in the sampled subsequent citations. The Keycite

codes yield corresponding estimates of 81.2% compliant behavior and 18.8% non-compliant behavior.[45] The outcome-based measure, in other words, yielded an estimate of non-compliant behavior more than twice the size of the Keycite estimate (109% greater). The same general pattern holds for the estimates for different values of the explanatory variables—the outcome-based measure of non-compliance typically produces an estimate of non-compliance approximately twice the estimate yielded by Keycite. Thus, in cases decided by published opinion, Keycite yielded a non-compliance measure of 24.8%, compared to 45.8% for the outcome-based measure. For published cases, then, the outcome-based estimate is 85% greater than the Keycite estimate. In unpublished cases, the estimates of non-compliance are 12.2% for Keycite and 32.1% for the outcome-based measure; the latter is fully 163% greater than the former. Despite the different measures, though, the pattern is the same: non-compliance is much greater in cases decided by published opinion, according to both measures, than in cases decided by unpublished opinion.

Table 4: Comparison of Outcome-Based and Keycite Measures of Non-Compliance, by Percentage of Subsequent Citations Coded Non-Compliant.

	Percent Non-Compliant, Outcome-based Measure	Percent Non-Compliant KeyciteMeasure	Increase (%)
All Cases (n=499)	39.3%	18.8%	109%
Publication			
Published Cases (n=262)	45.8%	24.8%	85%
Unpublished Cases (n=237)	32.1%	12.2%	163%
Precedent Direction			
Liberal Direction (n=187)	64.7%	24.1%	168%
Conservative Direction (n=312)	24.0%	15.7%	53%
Panel Majority			
Democratic-dominated (n= 278)	42.4%	19.4%	119%
Republican-dominated (n=221)	35.3%	18.1%	95%

For liberal-direction precedents, Keycite yielded a 24.1% estimate of non-compliance, compared to 64.7% for the outcome-based measure, a 168% greater estimate. For conservative-direction precedents, Keycite produced a 15.7% estimate of non-compliance, compared to 24.0% for the outcome-based measure, a 53% greater estimate. Again, the estimates are similar in that both yield greater rates of non-compliance for liberal-direction precedents. But the difference between the outcome-based measure and the Keycite measure is particularly striking with respect to liberal-direction precedents. Liberal-direction precedents are not that much more likely than conservative-direction precedents to receive negative treatment in subsequent citations (24.1% compared to 15.7%, statistically significant at the .05 level). But panels citing liberal-direction precedents reach a conservative-direction result almost two-thirds of the time. How, exactly, panel opinions justify conservative-direction results in such circumstances without triggering a negative Keycite code is not clear; but clearly, Keycite codes treat such cases as compliant. This finding appears to parallel that of McClurg and Comparato, namely, that the outcome-based measure of non-compliance tends to code weak forms of compliance ("positive" treatment code) as non-compliant (opposite policy direction).[46] This difference in measurement may go a long way toward explaining why this Article finds little evidence of compliance in cases decided by published opinion. In other words, there is probably more compliance, especially "weak compliance," in published cases than is detected using the outcome-based measure.

For Democratic- and Republican-dominated citing panels, the outcome-based measures of non-compliance are 119% and 95% greater than the corresponding Keycite measures, respectively. However, the picture is somewhat different in that the Keycite figures are not substantially different depending on the composition of the panels (19.4% compared to 18.1%). The outcome-based measure yields somewhat different results (42.4% compared to 35.3%), although this difference is not statistically significant, either. Despite the absence of statistically significant differences between Democratic- and Republican-dominated majorities, the outcome-based measure still produces higher estimates of non-compliance than Keycite.

In general, the analysis using the outcome-based measure of compliance reaches results similar to those obtained by Keycite, although the estimates of non-compliance are typically twice the estimates produced by the Keycite measure. These findings are consistent with

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[46] *See supra* notes 13-23 and accompanying text.

those of McClurg and Comparato.[47] They concluded that the outcome-based measure of compliance is biased toward non-compliance and that Keycite is biased toward compliance. Given the similarity in the results of the two studies, it is probably safe to conclude that the 39.3% figure derived using the outcome-based measure is a somewhat inflated estimate of non-compliance. A content-based measure of non-compliance would probably yield an overall non-compliance estimate somewhere between 39.3% and 18.8%.[48] The same probably holds for estimates of non-compliance based on the explanatory variables. The patterns observed in the data analysis also appear if one uses the Keycite measure of non-compliance, suggesting that, despite measurement error, the outcome-based measure is tracking the concept of compliance.[49]

IV. CONCLUSION

This Article addresses an important empirical question for scholars of the federal courts of appeals, namely, whether courts of appeals judges actually comply with circuit norms regarding precedents established in published panel decisions. It finds, *inter alia*, that judges are no more likely to comply than not to comply with cited circuit precedent in cases decided by published opinion, measuring compliance by the policy direction of the precedent and subsequent case. This is an interesting finding, suggesting that judges' policy preferences do matter in published cases, regardless of circuit precedent. A different picture emerges in unpublished cases, in which precedent policy direction is the important explanatory variable. These findings may not be surprising to certain persons, including practitioners, based on their personal experiences and a wealth of anecdotal evidence. This Article, however, presents systematic evidence that these experiences and anecdotes reflect more general phenomena. Judges clearly have greater discretion in certain cases to reach decisions more in keeping with their policy preferences, and they appear to take advantage of these opportunities. Circuit precedent matters, but it is hardly the whole story.

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[47] *See supra* notes 17-28 and accompanying text.

[48] Again, it is not clear that one could formulate a content-based measure to cover the broad range of cases included in the present study. In addition, it must be remembered that the sample excludes citations to precedent without discussion, such as those in string citations, when not coded by Keycite as "negative" treatment. *See supra* Part II.B. In short, all these figures of non-compliance are inflated compared to a hypothetical sample including all subsequent citations, no matter how minimal.

[49] The Keycite measure (negative or positive treatment) is positively correlated with a variable measuring whether the citing case is decided in the same direction as the cited precedent ($r = .305$, significant at the .001 level).

On a more theoretical level, this Article is part of a much larger effort to model courts of appeals decision-making.[50] The leading models of judicial decision-making are based, either explicitly or implicitly, on Supreme Court justices.[51] But these justices occupy a rather special place in the judicial hierarchy—namely, the top. Judges on the U.S. Courts of Appeals occupy a much more difficult position to conceptualize—the middle. Intermediate judges must cope with both vertical and horizontal precedents. Vertical precedents can swiftly unsettle well-settled circuit precedent.[52] Moreover, unlike Supreme Court justices, courts of appeals judges are not generally free to consider overruling horizontal precedents. This Article, however, suggests that circuit precedent is not a significant restraint on the pursuit of judicial policy preferences, at least not in cases decided by published opinion. Additional research is necessary to determine whether courts of appeals judges in the other circuits treat circuit precedents in the same way as judges on the Sixth Circuit; indeed, additional research on the Sixth Circuit is needed to confirm the results reported in this Article. Future research along these lines must work to refine measures of a number of concepts, including compliance, and to determine just when judges on the federal courts of appeals have policy discretion. This latter point is particularly important, given the observed differences between published and unpublished cases.

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[50] *See*, *e.g.*, Donald R. Songer et al., *Do Judges Follow the Law When There Is No Threat of Reversal?* 24 JUST. SYS. J. 137, 138 (2003) ("[T]here seems to be a consensus that in the lower federal courts, at least some judicial decisions are influenced by the policy preferences of the judges, but that the exercise of discretion to advance one's policy preferences is constrained by statute, precedent, and other manifestations of the law.")

[51] Over 20 years ago, Professor Howard warned scholars against "falling into the trap of projecting the Supreme Court onto the whole judicial process and assuming that what occurs in our least typical tribunal characterizes all of them." J. WOODFORD HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM, xxi (1981). Despite this warning, political science models still do not adequately address the lower courts. The premises of the attitudinal model are clearly based on the position of Supreme Court justices at the top of the federal judicial hierarchy. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 92-97 (2002) (explaining how the rules of the game free Supreme Court justices to decide cases based on their policy preferences). Rational choice theories also typically treat Supreme Court Justice strategic behavior only. *See generally*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998) (applying rational choice theory to behavior of Supreme Court justices); FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000).

[52] For a discussion of "disruptive" Supreme Court precedents, see Emery G. Lee III, *Policy Windows on the U.S. Court of Appeals*, 24 JUSTICE SYS. J. 301, 301, 307-09 (2003).


SETON HALL UNIVERSITY
HAZARD ZET FORWARD
1856