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Sophia Anne Luby April 3rd, 2014

Judicial Ideology, Precedent Vitality and the Decision to Overturn Circuit Court Precedent

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Abstract

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This study examines the judicial behavior of Court of Appeals judges sitting en banc. The role of ideology and precedent vitality is examined in regards to the decision to sustain or overrule circuit court precedent. Judicial ideology is measured by GHP scores and the party of the appointing president to determine the ideological distance between a precedent and Court of Appeals judges sitting en banc. The en banc panel and the individual judge are used as the units of analysis for this research. I find support for the hypothesis that ideology matters in judicial decision making; additionally, the ideological distance between a precedent and an en banc judge influences the decision to overturn precedent. Additionally, statistically significant evidence was discovered to indicate the directionality of ideological distance affected the decision to overturn precedent. However, the analysis of directionality of ideological distance did not produce the expected pattern of results. In regards to precedent vitality, the findings indicate that precedent vitality does have a significant impact on the judicial behavior of Court of Appeals judges.

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Introduction

In the 2009 confirmation hearings of Supreme Court Justice Sonia Sotomayor a great deal of emphasis was placed on her judicial philosophy and the role of personal ideology in judicial decision making. Sotomayor declared that her judicial philosophy could be defined as "fidelity to the law" and she went on to say "the task of a judge is not to make law, it is to apply the law... hewing faithfully to precedents established by the Supreme Court" (Mears and Hamby). Precedent, or the legal holding established in a court case that governs subsequent decisions concerning the same legal issue, is a fundamental aspect of the American legal system (Brenner and Spaeth 1995, 72). Sotomayor's commitment to precedent and promises of impartiality in decision making are not only staples of judicial confirmation hearings, they are virtually requirements to secure a seat on the bench. Judges claim that personal ideology is not a factor in decision making, but rather rule of law and precedent serve as the guiding factors in deciding a case.

While they claim otherwise, a significant amount of research has indicated that ideology is in fact a powerful determinant of how justices decide cases (see Epstein, Landes, and Posner 2013, 137; Segal and Spaeth 2002, 324-351 for a summary of this research). While there is some evidence that law may provide a constraint on justices' decisions, there is limited evidence for the role of precedent described by the justices at their confirmation hearings. Indeed there is strong evidence that the decision to maintain or overturn precedent at the Supreme Court is itself determined by the ideological preferences of the justices (Brenner and Spaeth 1995; Segal and Speath 2002).

The present study examines the decision to sustain or overrule precedent in the U.S. Courts of Appeals, a topic that has not previously been examined systematically. While there is

evidence that the ideology of judges affects their behavior in the Courts of Appeals its impact is significantly less than among justices of the Supreme Court (Epstein, Landes and Posner 2013, 153). Because appeal to the Courts of Appeal is by right, there is also reason to believe that the decisions of the Court of Appeals judges, including the decision to sustain or overrule precedent may turn on non-ideological factors particularly the legal vitality of the precedent.

The effect of ideology on judicial decision making is a topic that is of interest to judicial scholars as well as the general public. In his 2005 confirmation hearing, Chief Justice John Roberts famously claimed the role of the Court was to act like an umpire, "to call balls and strikes and not to pitch or bat," to follow the rule of law instead of ideological beliefs (U.S. Congress 2005). Because the legal model is advocated by the justices themselves and assumed by the public, research into the role of ideology on judicial decision making can provide insightful information to the public as to the rationale behind court decisions. Research into the effect of ideology on circuit court decision making is particularly important because the circuits are the final arbiters on a substantially higher number of cases than the Supreme Court (Giles *et. al* 2007, 450). As a result the circuit courts have the potential to be influential policymakers within the legal system. This research will provide a first look at the behavior of judges sitting en banc and judicial behavior when precedent is challenged in the Court of Appeals. It will also provide a first look at factors such as ideology and precedent vitality and their potential to influence the maintenance of precedent in the Courts of Appeals.

The thesis proceeds as follows. I first provide a description of the federal courts of general jurisdiction with particular attention to features that distinguish the Courts of Appeals and are relevant to the focus of the thesis. I then review the literature on judicial decision making and particularly that on the maintenance of precedent. This is followed by the

development of hypotheses regarding the role of ideology and precedent vitality on the maintenance of precedent in the Courts of Appeals, a description of the research design and data employed to test the hypothesis and the results of that analysis. To preview the results I find ideology and precedent vitality both influence the treatment of precedent in the Court of Appeals, however some of my results lack the statistical significance to confidently assert the role of ideology in the decision to maintain precedence.

The U.S. Courts of Appeals in the Federal System

The U.S. federal courts are composed of three levels. The United States Supreme Court is the court of last resort and primarily functions using discretionary review. The United States Courts of Appeal are composed of 12 geographically based circuits and hear cases that arise from the lower courts. The circuit courts operate under mandatory review, so unlike the Supreme Court they must hear the cases that are brought before them. The third level of courts in the U.S. are the district courts which serve as federal trial courts. There are 94 federal district courts, with at least one district in each state. Cases that arise in the district courts can be appealed to the appropriate circuit court and then subsequently to the Supreme Court.

There are several factors that distinguish the circuit courts from the Supreme Court that add to the importance of circuit court decision making. A primary distinction is that the circuit courts operate under mandatory review and are required to hear the cases that come before them. The Supreme Court on the other hand operates under discretionary review and only hears cases that it chooses to grant certiorari. As a result the circuits act as the courts of last resort for the vast majority of litigants particularly because of the Supreme Court's limited docket especially in recent years as the docket size has diminished. The Courts of Appeals docket is far more heterogeneous than the Supreme Court's as a function of the mandatory review which allows the

circuits to establish precedents in a variety of policy areas (Cross, 2007). Additionally, the Courts of Appeals deal with many cases that are simply to correct the errors of a lower court.

While we often think of the Supreme Court as the institution that establishes legal precedents, the circuit courts also have the ability to establish circuit precedents. When a case is decided by a randomly assigned three-judge panel, the circuit panel has the power to establish a precedent for the circuit. When a circuit precedent is established all district court judges in the circuit and all subsequent panels in the circuit are bound by the precedent.

In order for a circuit precedent to be overturned an en banc hearing is required. En banc hearings typically occur after the case is heard by a circuit panel and it serves as a reconsideration of the case before a full or larger complement of the judges appointed to the circuit (Giles *et. al*. 2007, 450). In rare instances a circuit may take a case en banc without a prior panel hearing. Three actions must occur before a case will be reheard en banc (Giles, Walker and Zorn 2008, 853). First, a party who is unsatisfied with a panel decision must file for the case to be heard en banc. Second, a judge from the circuit must ask that the full complement of judges from the circuit vote on the request to grant en banc. Third, the majority of the judges must vote to grant the petition to hear the case en banc. En banc rehearings are the only procedure, with the exception of Supreme Court intervention, that allow for a circuit panel decision to be reversed (Giles, Walker and Zorn 2008, 853).

The circuit courts use en banc review to check panel rulings that may be inconsistent with the circuit's position (Clark 2008, 57) but they comprise a fairly small percentage of all Court of Appeals cases, often less than 1% of all cases heard in a year (Giles *et al*. 2007, 450). Research indicates that dissenting opinions or majority opinions that overturn district court decisions are indicators that the court might consider the case for an en banc review (Clark 2008,

57). Additionally, research indicates that the more diverse the ideological composition of a circuit, the more frequently the circuit uses en banc review (Giles *et. al.* 2007, 461). These findings lend initial support to the idea that the ideology of a circuit affects when an en banc review is granted, and thus influences the possibility of a precedent being overturned.

En banc reviews eliminate the constraint of mandatory jurisdiction because the cases that are selected for en banc hearings are a unique example of discretionary agenda setting in the federal courts. The court's ability to choose the cases it hears en banc creates a selection effect, similar to the selection effect that takes place when the Supreme Court chooses to grant or deny certiorari (Segal and Spaeth 2002, 240). This selection effect could influence results of an ideological study if the judges are more likely to grant en bancs to cases that are ideologically charged, thus allowing for more ideologically based decisions. Because en banc cases involve discretionary review, and often a hearing in front of a full complement of judges (Giles et al. 2007, 450), the circuit courts resemble the Supreme Court when they decide cases en banc. As such, the attitudinal model of judicial decision making may be more applicable to circuit court decisions heard en banc.

The focus of this study is the behavior of judges sitting en banc in cases where the continued adherence to a circuit precedent is called into question. The models of judicial behavior provide a theoretical framework for investigating why judges vote the way they do.

Models of Judicial Behavior

The literature proposes three prominent decision making models that serve as theories for judicial behavior. The first is the attitudinal model which argues that justices vote for a liberal or conservative outcome in a case as a function of their own ideological predispositions (Hansford and Spriggs 2006, 9). According to the attitudinal model, judges are motivated by their desire to

implement their policy preferences into law (Giles *et. al.* 2007, 452). Contrary to the attitudinal model, the legal model argues that justices decide cases based on the relevant legal provisions and the norm of stare decisis (Brenner and Spaeth 1995, 72). The strategic model, the third decision making model, argues that judges will modify their behavior based on the policy preferences of other actors and the institutional context under which the decision is made (Giles et al 2007, 452).

Evidence of Models at Supreme Court

While this paper focuses on the behavior of judges sitting en banc, it can be helpful to examine the behavior of justices on the Supreme Court to provide insight on judicial decision making generally. There is significant amount of evidence that suggests that the attitudinal model can be applied to Supreme Court judicial behavior. Segal and Spaeth argue that because the attitudinal model can be used to accurately predict the Court's decisions, it is the best explanation for those decisions (2002, 324-351). Spaeth for example, was able to accurately predict 88 percent of the Court's decisions for the years 1970-1976 using the attitudes of the justices as the explanatory factor of their votes (Spaeth 1979, 122-164).

The validity of the attitudinal model has been extensively studied by political scientists, and while significant evidence supports it, the legal model cannot be discounted. Justices may be motivated by their personal policy preferences, but they can still be constrained by their respect for stare decisis (Knight and Epstein 1996). While the empirical literature does not deny that justices are constrained by legal factors, there is a general consensus that justices are rational policy makers, who rely on their individual ideological preferences when making decisions in order to further their policy goals.

When applied to the Supreme Court, the strategic model often considers the strategic maneuvering of justices to ensure a majority coalition, as well as congressional preferences that place constraints on the justices (Bergara, Richman, and Spiller 2003, 267). Based on the strategic model, judges will still vote based on attitude if an opportunity arises in which there is a low level of external constraint. Therefore, ideology still plays a role in strategic decision making. It is only when the Court is constrained by political actors such as Congress that it must respond strategically, and in a way that doesn't necessarily match the justices' ideologies (Bergara, Richman and Spiller 2003).

Another way the Supreme Court behaves strategically is through prediction strategies. Justices will use prediction strategies in an effort to grant certiorari only for cases they believe will have a chance of succeeding at the merits stage (Segal and Spaeth 2002, 257). A liberal justice who wants to reverse a conservative precedent will be more likely to grant cert for the case if he/she believes that a majority of justices will also want to reverse. If a justice does not believe that a majority of the justices will favor reversal he/she will vote to deny cert based on the prediction strategy model because they do not believe a reversal will be successful when the Court hears and decides the case at the merits stage. Therefore, if their ideological position is favored by a majority of the Court, justices are more likely to grant certiorari, and thus liberals on a liberal court or conservatives on a conservative court are more likely to grant cert (Segal and Speath 2002, 257).

Evidence exists that the attitudinal, legal and strategic models can be applied to the Supreme Court; however the research ultimately indicates that ideology is the most important influence on how a justice votes (Epstein, Landes, and Posner 2013, 137; Segal and Speath 2002, 324-351, Brennar and Speath 1995, 106).

Evidence of Models at Courts of Appeal

When applying the models of judicial behavior to the circuit courts there is less evidence of the role of ideology and therefore the attitudinal model does not explain judicial behavior at the Courts of Appeals as it does at the Supreme Court (Epstein, Landes, Posner 2013, 174). Ideology does not have the same effect on circuit courts for several reasons. First, circuit courts have mandatory jurisdiction (Epstein, Landes, and Posner 2013, 175; Segal 2008). As a result, many of the cases circuit courts hear are not concerned with readily identifiable ideological issues and therefore the judges' decisions cannot be based on their attitudinal preferences. Likewise this means that the reversal strategy does not exist in the circuit courts (Segal and Spaeth 2002, 240-258). The reversal strategy and the prediction strategy, the idea that judges can predict which cases will be successful at the merit stages, are influential in that they allow the justices to create a docket full of ideologically salient cases, something that the circuit courts do not have power to do. As a result, ideological voting is less frequent in the Courts of Appeals than in the Supreme Court (Epstein, Landes, and Posner 2013).

A second factor that is thought to reduce the role of preferences at the Court of Appeals is Supreme Court oversight (Segal 2008; Songer, Segal, and Cameron 1994, 690). The theoretical framework of the principle-agent hierarchy of the courts contends that the circuit courts are the agents of the Supreme Court (Songer, Segal and Cameron 1994, 674). In a principle-agent relationship, the agent is subject to the discretion and control of the principle; therefore when applied to the Supreme Court and circuit courts, the circuit courts are subject to the control of the Supreme Court (Songer, Segal, and Cameron 1994, 674). Songer, Segal, and Cameron used search and seizure cases to study the responsiveness and the congruence of subsequent circuit court decisions and found that the circuit courts are highly faithful agents of the Supreme Court,

thus adhering to the legal model (1994, 690). However, other studies have argued that because so few appeals court cases reach the high court, Supreme Court preferences have little influence on circuit court decision making, allowing strategic or attitudinal decision making to go unchecked. The low rate of Supreme Court review renders the vast majority of circuit court decisions effective without ever being heard by the Supreme Court (Cross 2007, 99; Giles *et. al.* 2007, 449). As a result, circuit court judges do not fear that their decisions will be overturned (Bowie and Songer 2008, 405; Cross 2007, 99). Judges do not believe they can accurately predict which cases will be reviewed by the Supreme Court and the total number of cases reviewed is so low that there is little support for the idea that appeals court judges modify their decision making behavior to avoid reversal (Bowie and Songer 2008, 405).

A third explanation for why circuit courts are less ideological considers the effects of effort aversion. Courts of Appeals have significantly heavier workloads than the Supreme Court as a result of their mandatory jurisdiction. Effort aversion places a premium on unanimity and creates a predisposition to affirm the district court decision. Simply applying a precedent to a case is very efficient for judges who are seeking to get through a large caseload. Unanimous decisions that affirm previous rulings result in reduced effort because there are no dissents and no revisions to the majority to counter dissents (Epstein, Landes, and Posner 2013, 193).This can reduce the influence of ideology on appellate decisions because such panel effects can lead judges to make decisions that do not match their ideological preferences in order to obtain unanimity or to preserve the district court decision (Epstein, Landes, and Posner 2013, 193). Additionally, the circuit courts must consider legal factors such as establishing clear and applicable precedents for the district courts to implement. As such their decisions may focus more on establishing a clear procedure than implementing an ideological preference. The circuit

courts will sometimes hear cases en banc to establish a *per se* rule, which defines an act as illegal in it of itself and would not require further explanation by the district courts as to why they declared the act illegal. When the circuits establish *per se* rules they are seeking uniformity and efficiency among the district courts and not seeking to advance ideological preferences (Epstein, Landes, and Posner 2013, 175).

Support has also been found for the presence of conformity effects. A conformity effect is the idea that a judge, regardless of whether he/she was appointed by a Republican or a Democratic president, will vote conservatively more often in civil and criminal cases when the number of judges appointed by Republican presidents makes up a majority of the circuit and vice versa (Epstein, Landes, and Posner 2013, 186). This indicates that judges conform to the preferences of the majority of the circuit, whether those preferences match their personal ideology or not.

When the strategic model is applied to the circuit courts, strategic behavior typically refers to judges veering away from their ideological preferences for fear of being overturned by the Supreme Court (Cross 2007, 95). Although little empirical research supports the notion that federal judges fear their panel decisions will be overturned, it is possible that for en banc cases this is a bigger consideration for judges because the likelihood of the Supreme Court granting certiorari is greater for en banc cases (George and Solimine 2001, 197). Consequently, the chance of being overturned is also greater for en banc cases (Bowie and Songer 2008, 405; Cross 2007, 99). While little support has been found for the application of the strategic model to regular circuit court decisions it might be applicable specifically to en banc cases if judges have a greater fear of being overturned by the Supreme Court (Cross 2007, 95). Additionally, conformity effects have been demonstrated at the circuit courts indicating that there is a strategic

consideration that goes beyond an individual's personal ideology (Epstein, Landes, and Posner 2013; 186).

Models and the Maintenance of Precedent

In regards to the maintenance of precedent, the attitudinal model can be applied to the Supreme Court's treatment of precedent. The applicability of the attitudinal model to the treatment of circuit court precedent has yet to be investigated. Research indicates that ideology influences Supreme Court decision making across a broad range of cases, as well as specifically, for cases that overturn precedent (Epstein, Landes, and Posner 2013, 137; Segal and Spaeth 2002, 324-351) . When a precedent and the justices' ideologies differ, the likelihood of that precedent being overturned increases. Specifically, justices are motivated to overrule precedent as their ideological distance from the precedent increases, conditioned by the "vitality" of the precedent, or the "extent to which a precedent maintains legal authority" (Hansford and Spriggs 2006, 23). Hansford and Spriggs argue that judges are more likely to adhere to precedents that possess greater legal weight and define precedent vitality as the legal authority of a case, as determined by the Court's prior interpretation of it (2006, 56). Although constrained by the vitality of precedents and the need to legitimatize their legal decisions, justices seek to create policy that is consistent with their own ideological preferences (Hansford and Spriggs 2006, 23). Brenner and Spaeth demonstrate that personal policy preferences explain the voting that occurs in decisions that overturn precedent (1995, 70). In their study of the Vinson, Warren, Burger and Rehnquist Courts, 97% of nonunanimous decisions that overturned precedent were compatible with the ideologies of the individual justices (Brennar and Spaeth 1995, 106). Liberal courts overturn conservative precedents, and conservative Courts overturn liberal precedents (Brennar and Speath 1995, 106; Epstein, Landes, and Posner 2013, 77). The research supports the

hypothesis that ideology, measured in terms of conservatism or liberalism, explains why the Supreme Court overturns precedent.

The attitudinal model, as applied to the Supreme Court provides the main theoretical framework for investigating the extent to which ideology can explain the overturning of circuit precedent. Ideology has been linked to maintenance of precedent at the Supreme Court. While the circuit courts are less ideological than the Supreme Court, the nature of en banc cases may make the judges more ideologically driven when deciding a case en banc. However, Court of Appeals judges' concern with establishing clear and consistent precedent and averting effort may constrain attitudinal voting. As a result, the question becomes to what extent can ideology explain the overturning of precedent at the circuit level? Some measures of ideology previously used to study the Supreme Court can be applied to the circuit courts to determine the extent to which judge's attitudes are responsible for their decisions.

Statements of Hypotheses

The extent to which ideology can explain the overturning of precedent in the circuit courts is a question that focuses on the relationship between the independent variable of judicial ideology and the dependent variable of adherence to precedent. Because ideology can explain decision making that results in the overturning of precedent for the Supreme Court (Hansford and Spriggs 2006, 23), it is possible that circuit judges are also ideologically driven when overturning precedent and thus adhere to the attitudinal model. I will look specifically at the ideological distance between the original decision that established the circuit precedent, which I will call the stare decisis case, and the subsequent en banc case that considers a challenge to precedent.

I will look at ideological distance in terms of the position of the judges on an ideological dimension. Following this approach I will test the following hypothesis.

> H1 (a): The greater the ideological distance between the panel issuing the precedent and the en banc determining the maintenance of the precedence, the greater the likelihood the precedence will be overruled (Hansford and Spriggs 2006, 57).

A second approach to assessing ideology is by the direction of outcomes. The literature suggests that liberal judges would be more likely to overrule conservative precedents regardless of whether they were produced by a panel that was ideologically liberal or conservative, and vice versa for conservative judges. Following this logic I test the following hypothesis.

> H1 (b): The greater the ideological distance in a conservative (liberal) direction between the panel issuing the precedent and the en banc determining the maintenance of the precedence the greater the likelihood an overruled precedence will be liberal (conservative).

These predictions are consistent with the attitudinal model and the trend at the Supreme Court level, that liberal judges overturn conservative precedents and vice versa (Brennar and Speath 1995, 106; Epstein, Landes, and Posner 2013, 77).

A plausible reason for not expecting a positive effect between ideological distance and adherence to precedent lies within the vitality of the precedent. If the precedent vitality of a case is high, regardless of ideological distance the court might be less likely to overturn the precedent, favoring the legal importance of the precedent and thus not deciding based on personal ideology. The theoretical framework illuminating the influence of precedent vitality on judicial decision making stems from the norm of stare decisis. According to Hansford and Spriggs, stare decisis implies that justices are more likely to rely on precedents that carry greater legal weight

(Hansford and Spriggs 2006, 23). By applying this idea of stare decisis it can be argued that judges recognize variation in vitality and respond accordingly. Because precedent vitality is a plausible explanation for why the court might not adhere to the hypothesis concerning ideological distance and the likelihood of overturning precedent I test the following hypothesis (Hansford and Spriggs 2006, 57).

H2: As the vitality of a precedent decreases the probability of it being overruled increases

Research Design

This paper employs the use of quantitative analysis for a large n-sample of en banc cases. Because of practical time constraints, an important consideration of my research design is the selection of a purposeful sample. I am making use of Dr. Micheal Giles' En Banc Database which provides information on en banc cases that have arisen over the past 70 years. The En Banc Database identifies 637 cases from the 12 circuit courts as cases that involved a challenge to precedent. Of the 637 en banc cases, 130 cases were selected to be in the sample; 20 percent of all cases that resulted in an overruling of precedent were selected and 40 percent of all cases that did not result in an alteration of precedent were selected. Cases that resulted in a modification of precedent, and cases where it is unclear if precedent was altered are not included in the sample. I chose to oversample cases that did not alter precedent because there were significantly more cases in the population that did alter precedent and I wanted to ensure my sample had an adequate number of both types of cases. Oversampling created a more even distribution of sample en banc cases which allowed for the role of ideology on decision making to be tested not only on precedents that the en banc panel ultimately overturns, but also the effect of ideology on precedents that are upheld. After selecting a sample from the En Banc dataset I

create a stare decisis dataset that provides information about the case that establishes the precedent.

A case study of one circuit was considered, however in order to ensure a large enough sample and to avoid selecting a circuit that is not ideologically representative of the others, I believe that a sample from all circuits is the best approach for studying the effect of judicial ideology on the overturning of precedent. A disadvantage of a cross circuit sample is the limited frequency with which judges appear in the sample data as compared to a study of only one circuit. While looking at one circuit would allow for the study of specific judges over several cases, I have chosen not to do a case study of one circuit as this would raise issues of generalizability and the applicability to other circuits.

I will be conducting analysis at both the case level and the judge level. Therefore I have two units of analysis. For the case level data I use the majority voting coalition for each case as my unit of analysis, using the aggregate majority panel scores to perform my analysis. My unit of analysis for the judge level data is the individual judge on the en banc panel.

Measurement of Variables and Data Collection

By looking at adherence to precedent by circuit court en banc decisions and two proxy measures for judicial ideology, I will be able to test empirically whether the theoretical framework of the attitudinal model serves as the primary explanation for judicial decision making. The independent variable for my first hypothesis is the ideological distance between the precedent case and the en banc case. The independent variable for my second hypothesis is the precedent vitality.

The measurement of the latent independent variable of judicial ideology is an important decision in creating an effective research design. Because judges rarely state their ideological

preferences, judicial ideology is not directly observable and as a result proxy measures must be created to measure judicial ideology. Previous studies have used ex ante and ex post measures as ideology proxies. Ex ante measures are derived from preappointment information about the justices and ex post measures are based on postappointment data.

The ex post measure most often used in judicial research is the assessment of the actual votes of the justice and whether they tend to be liberal or conservative (Epstein, Landes, and Posner 2013, 70). Martin-Quinn scores are measures based on votes in all non-unanimous cases in the Supreme Court database and are used as the ideological scores to predict judges votes (Epstein, Landes, and Posner 2013, 107). A serious objection to ex post measure of this kind is circularity (Epstein, Landes and Posner 2013, 75). In other words, classifying a judge as conservative based on his or her judicial votes makes it impossible for a liberal judge to have a conservative voting record (Epstein, Landes, and Posner 2013, 75). As such, I have chosen not to use judicial votes as a measure of ideology for my research.

Segal-Cover scores is an ex ante measure used in many recent studies on the effects of ideology on Supreme Court decision making (Fischman and Law 2009, 173; Segal and Spaeth 2002, 321). This measure, developed by Jeffery Segal and Albert Cover, uses editorials from four major newspapers to determine the ideology of a nominee to the Supreme Court (Epstein, Landes, and Posner 2013, 73). Segal-Cover scores are a valid measure of ideology; however they are limited to the Supreme Court because the nominations of appellate court judges do not receive sufficient newspaper attention for an accurate and consistent measure to be established. Thus this measure will not be applicable to this research on the appellate courts.

The most common ex ante measure of a justice's ideology is the party of the appointing president (Epstein, Landes, and Posner 2013, 74; Fischman and Law 2009, 167). Party of the

appointing president is a measure that can easily be applied to the circuit courts because all federal court judges have been appointed by a U.S. president. An additional measure of ideology used specifically for the circuit courts are Poole-Rosenthal scores which were later amended by Giles, Hettinger and Peppers to GHP scores. GHP scores is another ex ante measure that uses home-state senatorial ideology and presidential ideology to create a common space score that provides information about the political environment under which the judge was appointed (Fischman and Law 2009, 174; Giles, Walker and Zorn 2008, 858). Because party identification, defined by the party of the appointing president, and GHP scores are easily applied to the circuit courts and are valid measures, they will serve as my two main measures of judicial ideology (Epstein, Landes, and Posner 2013, 74; Fischman and Law 2009, 167). To ensure the robustness of the results I will test hypothesis 1 using both measures of ideology.

GHP scores are available for judges on the stare decisis and en banc cases, however they are limited to judges with Rosenthal-Poole scores, therefore there are a few judges in my dataset that will not have assigned GHP scores. Likewise, if a district court judge sat on a circuit court panel, he/she will not have a GHP score because GHP scores are only available for circuit court judges. GHP scores are measured on a -1 to 1 scale, with negative values indicating a liberal score and positive values indicating a conservative score (Giles *et. al*. 2007). In order calculate the ideological difference between the stare decisis majority coalition and the en banc majority coalition, a *GHP differenc*e score is calculated by subtracting the mean GHP for the stare decisis panel from the mean GHP for the en banc panel.

Ideological distance in terms of the party of the appointing president will be measured by the percentage of judges appointed by Democratic presidents in the stare decisis panel and the percentage of judges appointed by Democratic presidents in the en banc panel for the by case

analysis. I subtract the percentage of Democrats in the majority for the stare decisis from the percentage of Democrats in the majority for the en banc case to determine the ideological difference.

For the by judge analysis, the stare decisis panel is measure using percent Democrats in the majority panel, and the en banc party of the appointing president of the en banc judge. Ideological distance is measured from the percentage of Democrats in the stare decisis to the ideology of the en banc judge. The GHP difference at the judge level is measure by the en banc judge's distance from the mean GHP for the stare decisis majority panel.

I measure precedent vitality using *LexisNexis*'s shepardizing tool and I construct two measures. *Shepard's citations* contains all state and federal level court cases and identifies whether a precedent case is treated positively or negatively by subsequent cases. The cases that refer to the precedent case are known as the treatment cases (Hansford and Spriggs 44). Shepard's asks "What effect, if any does the citing (treatment) case have on the cited case (precedent?)" and then classifies each treatment case (Hansford and Spriggs 44). I am adopting Hansford and Spriggs coding scheme for what I consider a positive treatment versus a negative treatment. All "followed" treatments are considered positive, while treatments designated as "distinguished," "criticized," "limited," "questioned," "overruled" or "cautioned" are all considered negative treatments. The first of two measures used to measure precedent vitality uses the total number of negative treatments a precedent case receives. A high number of negative treatments indicates a low level of precedent vitality. The second measure of precedent vitality uses the number of positive treatments a precedent receives minus the number of negative treatments; therefore a high number indicates a high level of precedent vitality. The expectation in regards to the first measure is that precedent cases with higher occurrences of

negative treatments will be overturned more often than cases with low occurrences of negative treatments. This expectation is based on the hypothesis that as precedent vitality decreases, the likelihood of the precedent being overturned increases.

In order to code each case for precedent vitality I used Shepard's Citations and found the number of positive and negative treatments of precedent. This entailed searching the stare decisis case on *Lexis Nexis* and determining how many intra-circuit treatments existed, and distinguishing positive from negative treatments. I employed the use of Hansford and Spriggs coding for treatment of precedent to ensure a systematic coding method (Hansford and Spriggs 2006, 44). I also coded each stare decisis case for the names of the three judges that sat on the panel and then matched each judge with their court of appeals identification number and federal judicial center identification number. Having identification numbers for each of the judges in the stare decisis dataset allowed the data to be merged with the Giles en banc dataset. The merged dataset produces a match between all stare decisis judges and their GHP scores. The dataset also includes the GHP scores for judges sitting on en banc decisions, as well as whether the en banc case ruled in a liberal or conservative direction. The directionality of the en banc case is essential for assessing whether expectations based on ideology are actually met, for example whether liberal en banc judges or panels actually establish liberal precedents.

The dependent variable for the by case analysis is whether precedent was overruled and for the by judge analysis it is whether a judge voted to overrule a precedent. The alteration of precedent is the dependent variable for both of the hypotheses proposed. This is a binary variable and can be measured on a 0,1 scale, 0 for cases that are sustained and 1 for cases that are overturned.

Using *Westlaw* I read all stare decisis cases and code them as a 1 if liberal, and a 3 if conservative based on the treatment of the substantive issue in the case. Giles' Guideline for Coding En Banc Cases is used to ensure a systematic means of determining the ideological direction of decisions. The En Banc dataset includes the substantive direction of each case.

Analysis

The analysis section of this paper will be comprised of three subsections including descriptive statistics, by case analysis and by judge analysis. I begin by providing descriptive data about the sample of cases.

Descriptive Analysis

The en banc cases are drawn from a period of 66 years, from 1943-2008. The extensive time period ensures that cases are not simply coming from a highly ideologically polarized time period on the courts. The en banc panels were comprised of 362 unique judges. Some of these judges sat on a single en banc panel (28%) while seven judges sat on twenty or more cases. As a result the by judge dataset includes 1575 cases. The judges sitting on the en banc panels were selected by 13 different presidents (7 Republicans and 6 Democrats); 47.8 % of judges were appointed by Democrats and 52.2% were appointed by Republicans.

After filtering through the selected cases I was left with 128 cases. Two cases were removed because on review they did not involve the application of precedent. The final sample includes 51 cases that did not alter the precedent established in the stare decisis case and 77 cases that overturned precedent. Table 1 illustrates the breakdown of sample cases among the 12 circuits.

Table 1: Number of Cases by Circuit

Circuit	Frequency	Percentage of Cases Heard in the Circuit
1	1	0.78
2	4	3.13
3	6	4.69
4	10	7.81
5	30	23.44
6	3	2.34
7	2	1.56
8	16	12.5
9	28	21.88
10	9	7.03
11	9	7.03
12	10	7.81
Total	128	100

As discussed in the measurement and data collection section, the stare decisis cases were divided into 8 different substantive issue areas which correspond to the issue areas used in the En Banc Dataset. Table 2 shows the number and percentage of cases in each issue area.

Table 2: Stare Decisis Cases by Substantive Issues

Case Type	Number of Cases in Sample	Percentage of Total Cases
Criminal	46	36%
Civil Rights	22	17.2%
First Amendment Issues	2	1.6%
Due Process	2	1.6%
Privacy	2	1.6%
Labor	7	5.5%
Economic Activity and Regulation	41	32%
Miscellaneous	6	4.7%

The distribution of case type is important to note to demonstrate that there is a wide range of issues represented in the sample. A sample that lacks diversity of case type might not be indicative of judicial behavior for all issues with which federal circuit courts are faced. While criminal cases and economic activity and regulation cases clearly represent the largest portions of the sample, all case types are represented and no case type possesses a majority of total cases.

Case type can also be compared between the stare decisis case and the en banc case as a potential indicator as to whether the precedent in question concerns a specific substantive issue area or whether it spreads across issue areas, often indicating that procedural issues are involved. The majority of en banc cases (85.2%) were coded in the same general issue category as the corresponding stare decisis case. This suggests that there is a strong correlation between the stare decisis case and the en banc case in terms of issue area. The breakdown of case type for the en banc cases is presented in Table 3.

Table 3: En Banc Cases by Substantive Issues

Case Type	Number of Cases	Percentage of Total Cases
Criminal	54	42.2%
Civil Rights	18	14.1%
First Amendment Issues	2	1.6%
Due Process	3	2.3%
Privacy	1	.78%
Labor	5	3.9%
Economic Activity and Regulation	40	31.2%
Miscellaneous	5	3.9%

My sample includes 58 cases that establish a liberal precedent in the stare decisis case, and 64 that establish conservative precedents. Of the 51 precedent cases that are unaltered by the en banc decision, 31 are conservative precedents, 19 are liberal precedents and 1 is a mixed conservative/liberal precedent. Of the 77 precedent cases that are overturned by the en banc, 39 are liberal precedents and 33 are conservative precedents, 4 were undeterminable and 1 was a

mixed precedent. This indicates that both conservative and liberal precedents are being overturned at fairly similar rates, 50.6% of the time for liberals and 42.9% of the time for conservatives.

The variable precedent vitality when measured by the number of negative treatments has a mean of 2.85, a minimum of 0 and a maximum of 22. The following table illustrates the number of cases by the number of negative treatments.

Table 4: Number of Cases by Negative Treatments

Negative Treatments	Number of Cases
0	28
1	29
2	14
3	23
4	6
5	7
6	7
7	5
8+	9
	Total: 128

When precedent vitality is measured by the number of positive treatments minus the number of negative treatments the mean is 4.07, the minimum is -9 and the maximum is 282.

By Case Analysis

I begin the case analysis with an examination of hypothesis 1a; the expectation is that greater ideological distance between the stare decisis panel and the en banc panel will be associated with the decision to overturn precedent. I use the mean GHP scores of the stare decisis and en banc panels in order to evaluate whether differences in judicial ideology is behind the tendency to overturn precedent.

In order to understand the effects of ideological distance specifically, the absolute value of the *GHP difference* score is calculated. The absolute value of *GHP difference* is a measure of

how far apart the majority coalition of the stare decisis panel and the en banc panel are without accounting for directionality. I compare the mean of absolute value of *GHP difference* by whether precedent is overturned or not. I conclude that cases that are overturned have a larger absolute value of *GHP difference*, on average, than cases that are upheld.

Table 5: Absolute Value of GHP by Treatment of Precedent

Precedent Altered: Yes or No	Observations	Mean of Absolute Value of GHP
No	47	.186
Yes	77	.223
Difference		.037

This is consistent with the hypothesis that the greater the ideological distance between the precedent and the en banc case the greater the probability the precedent is overturned. However, this difference does not attain standard levels of statistical significance using a two-sample t test with equal variances (p=.1346) and I cannot reject the null hypothesis of no difference.

Hypothesis 1b predicts that the ideological direction of the absolute difference of GHP scores will predict the ideological direction of an overruling. A negative GHP difference score indicates that the en banc panel is more liberal than the stare decisis panel. Hence, I expect that if the en banc overturns the precedent it will yield a new liberal precedent. Likewise a positive GHP difference score indicates the en banc panel is more conservative than the stare decisis panel. Hence, I would expect that if the en banc overturns the precedent it will yield a new conservative precedent.

To assess whether these expectations are met, I select all cases with a negative GHP difference score that were overturned. I then look at the direction of the en banc decision, whether it was decided conservatively or liberally based on the substantive issue. The expectation is that cases with a negative *GHP difference* score will have a liberal en banc

decision. Of the 29 cases with a negative *GHP difference* score, 19 resulted in liberal en banc decisions, indicating that 65.5% of the time that an en banc panel is more liberal than the stare decisis panel, the en banc panel will produce a more liberal decision than the precedent they overturn. When the same procedure is applied to cases where the en banc panel has a more conservative mean GHP score than the stare decisis panel, 34 of 44 cases resulted in conservative en banc decision, indicating 77.3% of the time that an en banc panel has a more conservative GHP score than the stare decisis panel, the en banc panel will produce a more conservative decision than the precedent they overturned. This analysis lends support to the notion that liberal judges overturn conservative precedents and conservative judges overturn liberal precedents.

Performing a tabulation of the variable that indicates the direction of the en banc panel, by the direction of the stare decisis panel, if precedent is altered, permits me to identify the percentage of time a liberal precedent is overturned to establish a conservative precedent and vice versa. Of the liberal stare decisis cases that are overturned, 79.5% do so by establishing a conservative precedent. Of the conservative stare decisis cases that are overturned, 75.8% do so to establish a liberal precedent. These high percentages indicate that between 75-80% of the time the circuit courts overturn precedent, they establish a new holding that is ideologically inconsistent with the previous precedent. This lends evidence to the notion that judicial panels are altering decisions ideologically; however it does not indicate that judicial ideology is the mechanism that causes decisions to be overturned.

I investigate the tendency to overturn precedent in regards to whether the ideological outcome of the stare decisis panel and the en banc panel differed. The following table demonstrates the results.

Table 6: Percent Overturned by Ideological Congruence and Direction

Congruence	Ideological Outcomes	Mean	N
Yes	Liberal Stare Decisis- Liberal En Banc	.325	40
Yes	Conservative Stare Decisis- Conservative En Banc	.436	16
No	Conservative Stare Decisis – Liberal En Banc	.762	42
No	Liberal Stare Decisis- Conservative En Banc	.806	31

This table is consistent with the notion that cases with ideological non-congruence between the stare decisis decision and the en banc decision have higher rates of overturning precedent than cases with ideological congruence. I collapse this table to compare the relationship between congruence and non-congruence regardless of directionality. The following table demonstrates the results.

Table 7: Overturned Precedent by Ideological Congruence

Congruence	Mean	N
Yes	.357	56
No	.781	73
Difference	.414*	129

This table indicates that a greater percentage of cases are overturned when ideological non-congruence exists between the stare decisis decision and the en banc decision than when congruence exists. This is consistent with the hypothesis that ideological distance between the panel and the en banc increases the likelihood that the precedence is overruled. A two sample t test with equal variances indicates that the difference between ideological congruence and ideological non-congruence is statistically significant.

In order to perform a more nuanced analysis of the relationship between GHP difference and the decision to overturn precedent I separated cases into four categories based on the mean (.057) and standard deviation (.278) of the GHP difference variable. Category 1 represents all cases with a GHP difference value that is more than one standard deviation below the mean. Category 4 contains all cases with a GHP difference value that is more than one standard deviation above the mean. The follow table illustrates how cases are categorized.

Table 8: GHP Difference Range by Category

Category	GHP Difference Range
1	Less than -.221
2	Greater than-.221, less than or equal to .057
3	Greater than .057, less than .335
4	Greater than .335

Based on the categories for GHP difference, I calculate the percentage of liberal en banc outcomes. The expectation is that category 1 has the highest percentage of liberal outcomes and category 4 has the lowest percentage of liberal outcomes because category 1 represents cases

with the most liberal directionality, and category 4 represents cases with most conservative directionality.

Table 9: Percentage of Liberal Outcomes by Category

Category	Mean	Percentage of liberal Outcomes	N
1	.636	63.6%	11
2	.571	57.1%	21
3	.310	31.0%	29
4	.235	23.5%	17
F value	.046*		78

This analysis is consistent with the hypothesis that the greater the ideological distance in a liberal direction between the panel issuing the precedent and the en banc determining the maintenance of the precedence the greater the likelihood the outcome will be liberal. An analysis of variance is used to test the significance of the general pattern exhibited in Table 9. The analysis of variance tests the null hypothesis that the means of each category are equal. GHP difference is related as predicted to the probability of a liberal outcome as Table 9 indicates, and the mean between groups is statistically significant.

In addition to GHP values, by case analysis of ideology can be done using the party of the appointing president as an indicator of a judicial ideology. The two measures for judicial ideology provide a robustness check. The stare decisis cases and the en banc cases are coded for the percentage of Democratic judges in the majority. The ideological composition of the stare decisis panel is then compared to the ideological composition of the en banc majority coalition.

I subtract the percentage of liberals in the majority for the stare decisis from the percentage of liberals in the majority for the en banc case to determine the percentage liberal difference. I code the difference scores into four categories based on the mean (-.09) and standard deviation (.410). Category 1 is composed of cases that have percentage liberal

difference scores greater than one standard deviation above the mean, and thus have the greatest distance in a liberal direction. Category 4 is composed of cases that have percentage liberal difference scores that are greater than one standard deviation below the mean and thus have the greatest distance in a conservative direction. The following table illustrates the results.

Table 10: The Percentage of Liberal En Banc Outcomes by the Difference in Percentage Democrat

Category	Mean	Percentage Liberal En Banc Outcomes	N
1 (Liberal)	.4	40%	15
2 (Moderately Liberal)	.652	65.2%	23
3 (Moderately Conservative)	.391	39.1%	23
4 (Conservative)	.118	11.8%	17
F value	.007*		78

These results indicate that cases with percentage difference in the liberal direction establish liberal precedents more often than cases with percentage differences in the conservative direction. However these results are statistically significant based on an analysis of variance.

In order to test my third hypothesis that the more vital a precedent is, the greater the probability of adherence to precedent, I use two measures of precedent vitality. The first is the total number of negative treatments and the second is the number of positive treatments minus the total number of negative treatments. For the measure that only uses the number of negative treatments of precedent, the mean number of negative treatments for cases that do not alter precedent is 1.39. The mean number of negative treatments for cases that overturn precedent is 3.82. Difference of means is statistically significant (p=.000). This indicates that cases that are

overturned have more negative treatments on average, and thus lower precedent vitality, than cases that are upheld.

Table 11: Number of Negative Treatments by Altered Precedent

Precedent Altered: Yes or No	Mean	Standard Deviation	N
No	1.39	2.08	51
Yes	3.82	3.56	77
Difference	2.44*		128

The second measure of precedent vitality is based on the number of positive treatments of precedent, minus the number of negative treatments. The mean for the difference of treatments for cases that uphold precedent is 1.84, while the mean for difference of treatments for cases that are overturned is 5.55. The expectation is that precedents that are upheld will have a higher difference of treatments mean of precedent vitality than cases that have their precedent overturned. This expectation is not met by the data. Cases that are overturned have a significantly higher mean of difference of treatments which indicates that these cases have greater positive treatments and fewer negative treatments than cases that are upheld. The two measures of precedent vitality do not produce consistent results.

The following table illustrates the percentage of cases from the sample that were overturned based on their number of negative treatments.

Table 12: Percentage Overturned by Negative Treatments

Number of Negative Treatments	Percentage Overturned	N
0	10.7%	28
1	62.1%	29
2	71.4%	14
3	78.3%	23
4	83.3%	6
5	85.7%	7
6	71.4%	7
7	80.0%	5
8+	80.0%	10

While these percentages are inflated by the fact that in the sample there are more cases that overturned precedent than cases that upheld precedent (77-51), the baseline is .398 (51/128). Therefore the table indicates that as negative treatments increase, so does the probability that precedent is overturned.

In order to capture a more detailed picture of the effect of vitality, I coded precedent vitality scores into a trichotomy. The measure of positive treatments minus negative treatments was used. The first group is composed of cases with negative vitality scores, the second group is cases with a vitality score of 0 and the third group is cases with a positive vitality score. This recoding allows for the percentage of stare decisis cases overturned in each category of vitality to be calculated. The expectation was that cases with a negative vitality score would have the greatest percentage of cases overturned. Cases with vitality scores over one standard deviation away from the mean were omitted to remove outliers from the data. Table 13 illustrates the results.

Table 13: Percentage of Cases Overturned by Vitality

Vitality Score Group	Mean	Percentage Overturned	Standard Deviation	N
1 (Negative)	.795	79.5%	.408	44
2 (0)	.381	38.1%	.498	21
3 (Positive)	.525	52.5%	.503	61
F value	.002*			129

These results indicate that precedents that have negative vitality scores, or lower vitality, are overturned at a greater rate than cases that have a neutral vitality score or a positive vitality score. We would expect cases with positive vitality scores to have a lower percentage of cases overturned than cases with a neutral vitality score, which is not the case here. However, the data still supports the idea that negative vitality results in precedent being overturned more often than positive vitality. An analysis of variance indicates that the difference in means for cases with negative vitality scores and positive vitality scores is statistically significant. This supports the claim that as precedent vitality decreases the probability of overruling precedent increases.

By Judge Analysis

The by judge analysis provides another look at the role of ideology on circuit court decision making. In total, 362 judges participated in one or more of the 128 en banc decisions. Judges in the dataset were appointed between the years of 1929-2007. One way to analyze the effect of ideology on the decision to overturn precedent is to compare the GHP scores of the en banc judge with the ideology of the panel that established the precedent. The expectation is that judges with conservative GHP scores will vote to overturn liberal precedents and judges with liberal GHP scores will vote to overturn conservative precedents.

In order to assess the effect of judicial ideology on the decision to overturn precedent I calculate a GHP difference by subtracting the mean GHP of the stare decisis panel from the GHP of the en banc judge. I then find the absolute value of the GHP difference, and compare the mean

absolute values of GHP difference by whether the en banc judge voted to sustain or overturn precedent. Table 14 illustrates the results.

Table 14: Mean Absolute Value for GHP by whether Judge Voted to Overturn

Voted to Overturn: Yes or No	Observations	Mean absolute value of GHP difference
No	635	.276
Yes	919	.333
Difference	1213	*.057

A two-sample t-test indicates that the difference in means is statistically significant. This table indicates that judges who voted to overturn precedent have higher absolute value scores of GHP difference than judges who voted to sustain precedent, indicating a greater ideological distance between the en banc judge and the stare decisis panel. This is consistent with hypothesis 1a, that the greater the ideological distance, the more likely a case is overturned.

To test the effect of directionality in relation to ideological distance and its effect on the treatment of precedent I find the percentage of judges with liberal GHP scores that vote to overturn precedent, by the mean GHP score of the stare decisis panel. I create four categories for the GHP scores of the stare decisis panels. Category 1 is composed of the cases with the most liberal mean majority coalition GHP values, and Category 4 is composed of the cases with the most conservative mean majority coalition GHP values. The ranges for the GHP scores in each category are determined by the mean (.033) and standard deviation (.233) of the GHP mean variable. The expectation is that the more conservative the panel is, the more likely the individual en banc judge will vote to overturn precedent because the en banc judge has a liberal GHP score. The following table illustrates the findings.

Table 15: Percentage of Cases Voted to be Overturned by Liberal En Banc Judges, by the GHP of the Stare Decisis Majority Panel

Category	Mean GHP of Stare Decisis Panel	Mean	N
1 (Most Liberal)	-1 to -.200	.578	116
2	-.200 to .033	.510	285
3	.033 to .266	.582	194
4(Most Conservative)	.266 to 1	.762	122
F Value	.000*		717

This table is consistent with the expectation that conservative panels have a higher percentage of liberal en banc judges that vote to overturn precedent than liberal panels do. This is consistent with hypothesis 1b in that liberal en banc judges voted to overturn cases established by panels with conservative GHP scores at a greater rate than they voted to overturn cases established by panels with liberal GHP scores. We would expect the percentage of cases overturned for category 1 to be lower than category 2, which is not the case but the other categories match our expectations. An analysis of variance indicates that the difference of means between the groups is statistically significant at an alpha of .05.

When the same analysis is done for conservative en banc judges, measured by conservative (positive) GHP scores, the following results are produced.

Table 16: Percentage of Cases Voted to be Overturned by Conservative En Banc Judges, by GHP of the Stare Decisis Majority Panel

Category	Mean GHP of Stare Decisis Panel	Mean	N
1	-1 to -.200	.691	97
2	-.200 to .033	.513	341
3	.033 to .266	.650	257
4	.266 to 1	.613	163
F value	.0008*		858

The expectation for this analysis is that the percentage of conservative en banc judges voting to overturn precedent is greatest for stare decisis panels with the lowest GHP scores. Although the means are statistically different and category 1 has the greatest percentage of cases

voted to be overturned, Categories 2 and 4 do not adhere to the predicted outcome. Category 4 should have the lowest percentage of cases voted to be overturned, and Category 2 should have a greater percentage of cases voted to be overturned than Categories 3 and 4 which is not the case.

I also test the effect of ideology on the decision to vote to overturn precedent by using the party of the appointing president. I use the percent majority Democrat on the stare decisis panel and the ideology of the en banc judges, measured by whether they were appointed by a conservative or liberal president. The following table illustrates the percentage of cases overturned by a liberal en banc judge by the percentage of Democrats on the stare decisis panel. The expectation is that liberal en banc judges overturn precedents established by stare decisis panels with a low percentage of Democrats. While the differences of means are statistically significant, the results do not clearly indicate that ideological distance between a panel and a judge influences whether a precedent is upheld. The expectation that panels with 0 percent Democrats will have the greatest percentage of cases voted to be overturned is not fulfilled. Panels that are split between Republicans and Democrats have the highest percentage of cases voted to be overturned by en banc judges. Additionally, we would expect liberal judges to vote to overturn when the stare decisis panel has 33% Democrats at a greater rate than when it has 67% Democrats, which is not the case.

Table 17: Percentage of Cases Voted to be Overturned by Liberal En Banc Judges, by the Percentage of Democrats in the Stare Decisis Panel

Percentage of Democrats on the Stare Decisis Panel	Mean	N
0%	.674	132
33%	.593	199
50%	.730	37
67%	.635	178
100%	.459	183
F Value	.0002*	729

When the same analysis is performed for conservative en banc judges the following results are found.

Table 18: Percentage of Cases Overturned by Conservative En Banc Judges, by the Percentage of Democrats in the Stare Decisis Panel

Percentage of Democrats on the Stare Decisis Panel	Mean	N
0%	.537	177
33%	.539	219
50%	.717	46
67%	.637	215
100%	.601	178
F Value	.049*	835

Here the expectation is that conservative en banc judges will vote to overturn precedents established by stare decisis panels composed of all Democrats, as this would be the greatest ideological distance between the judge and the panel. The differences of means for Table 18 are statistically significant. However, the highest percentage of cases overturned come from stare decisis panels that are split between Democrats and Republicans, which does not match the expectation. Panels with Democrat majorities are overturned at greater rate than panels with Republican majorities which is consistent with the expectation.

Hypothesis 2 concerns the role of precedent vitality, as done with the case analysis I code precedent vitality scores into a trichotomy and use the measure of positive treatments minus negative treatments as my vitality score. The first group is composed of cases with negative vitality scores, the second group is cases with a vitality score of 0 and the third group is cases with a positive vitality score. This recoding allows for the percentage of en banc judges that voted to overturn precedent for each category of precedent vitality to be determined.

Table 19: Percentage of En Banc Judges Voting to Overturn by Vitality

Category	Mean	Percentage Overturned	N
1 (negative)	.689	68.9%	505
2 (0)	.440	44.0%	248
3 (positive)	.572	57.2%	822
F Value	.000*		

These results are statistically significant based on an analysis of variance. Precedents with negative vitality scores are overturned a greater percentage of the time than precedents with positive vitality scores which supports hypothesis 2, the weaker the precedent vitality, the more likely the case is to be overturned.

In addition to using the precedent vitality measure that considers positive and negative treatments, I also use the measure of precedent vitality that relies only on the number of negative treatments. The following table illustrates the percentage of cases from the sample that were overturned based on their number of negative treatments.

Table 20: Percentage of En Banc Judges Voting to Overturn by Negative Treatments

Number of Negative Treatments	Percentage Overturned	N
0	38.0%	313
1	55.2%	384
2	70.6%	177
3	62.0%	271
4	62.7%	75
5	69.7%	99
6	76.5%	81
7	65.1%	63
8+	75.0%	112

The table supports the hypothesis that as precedent vitality decreases, measured by an increase in the number of negative treatments the probability of precedent being overturned increases.

Conclusion

The results of these analyses, when considered collectively, provide several conclusions. First, the results clearly indicate that ideological non-congruence between a stare decisis case and an en banc case increases the probability that the precedent is overturned. Liberal panels overturn conservative precedents and conservative panels overturn liberal precedents, which is consistent with the attitudinal model.

In regard to hypothesis 1a, the results were consistent with the expectation that the greater ideological distance between the panel and the en banc, the greater the likelihood of precedence being overruled. The results derived from GHP scores were consistent in that precedents that were overturned had larger absolute values of GHP difference scores, indicating that the probability of a precedent being overturned increases with the absolute distance between the ideological positions of the en banc panel or judge and the stare decisis panel. For the by case analysis the absolute value of ideological distance was not statistically significant, although cases that altered precedent had greater ideological distance than cases that upheld precedent, thus following the predicted trend. The by judge analysis of ideological distance was statistically significant and thus provided evidence for hypothesis 1a.

In regard to hypothesis 1b, the by case GHP analysis produced statistically significant results indicating that the greater the ideological distance in a liberal direction between the stare decisis panel and the en banc, the greater the likelihood a new liberal precedent will be established. The party of the appointing president measure also produced statistically significant results. The by judge analysis provides limited support for hypothesis 1b. While the percentage of votes to overturn by conservative en banc judges based on the GHP scores of the stare decisis panel produced statistically significant results they do not exhibit the expected pattern that

category 1 would have the highest percentage overturned and category 4 the lowest. The same is true for the percentage of cases liberal en banc judges voted to overturn. The results are statistically significant and provided limited support for hypothesis 1b; however, the specific expected pattern of voting to overturn by category is not met.

The by judge analysis produces statistically significant results when party of the appointing president is used as the measure of ideology. When the percentage of liberal en banc judges who voted to overturn is produced based on the percentage of Democrats in the stare decisis panel, there is evidence that the direction of ideological distance is significant. However the expectation that cases with the greatest the ideological distance, a liberal judge and a panel of all Republicans, will have the greatest percentage of votes for precedent to be overturned was not met. The by case analysis does not produce statistically significant results when part of the appointing president is used as the measure of ideology, although the results are consistent with hypothesis 1b.

In regards to precedent vitality, the results support the hypothesis that as precedent vitality decreases, the percentage of cases overturned increases. As the number of negative treatments increases, as a measure of precedent vitality, the percentage of cases overturned increases for the by judge and by case data. When precedent vitality, measured by positive minus negative treatments, is presented as a tricotomy, cases with low vitality are overturned more often than cases with high vitality for both the by judge data and by case data. My research finds the significant support for the third hypothesis that precedent vitality affects whether an en banc panel overturns precedent.

There are some limitations that must be noted when considering these results, namely the assumptions about ideology that were necessary in order to test these hypotheses. The primary

assumption made was that cases the Courts of Appeals selected to hear were ideologically salient, which as I noted, is not necessarily the case. If the case were not ideologically salient this could help explain the lack of statistical significance for the hypothesis concerning the direction of ideological distance and likelihood that precedent is overruled. An additional limitation is the sample size; while the sample was randomly selected, a larger sample could have produced more viable results.

While my research focuses on the applicability of the attitudinal model to the circuit courts, another interesting research question would investigate whether judges consider the ideological preferences of the Supreme Court and whether they will only vote based on ideology if they believe their ideological position will not be reversed (Cross 2007, 95). This line of research would employ the strategic decision making model and test the notion that fear of reversal mitigates the influence of judicial ideology on adherence to precedent. While I do not investigate the role of fear of reversal in this paper, it would certainly be a valid topic for another paper.

The results of this thesis indicate that precedent vitality is an important indicator as to whether a circuit court will overturn precedent. Additionally, judicial ideology has an effect on judicial behavior; the greater the ideological distance between the panel issuing the precedent and the en banc determining the maintenance of the precedence, the greater the likelihood the precedence will be overruled. The analysis of directionality of ideological distance produced some statistically significant results but did not demonstrate a strong relationship between directionality of increased ideological distance and decision to overturn precedent.

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