LOWER COURT DISCRETION

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INTRODUCTION

Court decisionmaking has long been a subject of study for both legal theorists and political scientists. Despite the common focus of their efforts, several quite distinct approaches have developed. The dominant approach in traditional legal scholarship has been normative, with scholars asking how judges *should* decide important questions of law. Even when this work has taken a positive turn by asking how judges *in fact* decide cases, the work has emphasized the importance of doctrine, focusing on court opinions as evidence of the rea- sons for their decisions. By contrast, social scientists who study the courts have usually emphasized positive explanations of court behavior and focused their attention on case outcomes rather than written opinions…prominent in recent years are positive political theories that emphasize strategic interactions among judges and between judges and other political actors. This approach shares the attitudinalists' assumption that judges seek to advance their policy preferences; however, it posits that in doing so, they act strategically, taking account of the likely response of other actors and the institutional context in which they operate. Although this approach is more closely associated with political science, a number of legal scholars have also embraced strategic accounts of judicial decisionmaking.

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In considering how law impacts lower courts, I take particular aim at the principal-agent model of the judicial hierarchy on which most of the existing theoretical and empirical work on lower courts is based. Positive political theorists commonly accept that the role of lower courts is best understood in terms of a principal-agent relation- ship. Such a model conceives of the Supreme Court as the principal, enunciating policy but delegating the work of implementation to its agents, the lower federal courts. Law, in the form of court precedents, is a signal—the means by which the Supreme Court communicates its preferences to the lower courts, which are then expected to follow that doctrine. The principal-agent model focuses attention on the pos- sibility that the interests of the principal and the agent will diverge and highlights the resulting need for mechanisms of supervision and control by the principal. Theorists commonly assume that the Supreme Court exercises such control through its power of reversal. This explanation is insufficient, however, given the extremely small percentage of cases ultimately subject to Supreme Court review. More importantly, a purely strategic account of law fails to take seri- ously internal perspectives—those of judges and lawyers who partici- pate in the system—on what law is and how it influences court decisionmaking. Participants report that the law has independent normative force: Legal rules influence how cases

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come out, even though they may not determine the result in all cases.

The failure to develop a more robust account of the law may have resulted from positive scholars' predominant emphasis on the Supreme Court, which operates in a unique institutional setting. The relationship of lower federal courts to law and precedent is quite distinct from that of the Supreme Court because of their different positions in the judicial hierarchy. Although the principle of stare decisis constrains the Court, it is not an "inexorable command," and the Court has on occasion overturned its prior precedents. The courts subordinate to the Supreme Court, however, are subject to an absolute duty to follow its precedents. Federal district courts are further required to follow the precedents of the court of appeals of the circuit in which they sit. Thus, how law impacts a judge's decisionmaking process will depend very much upon the particular court on which she sits and where that court is located in the judicial hierarchy.

Despite the demand of hierarchical precedent, lower federal courts retain a substantial amount of discretion when deciding cases. By "discretion" I mean to indicate situations in which a judge is required to exercise judgment because the outcome of a case is not fully determined by existing legal materials. Even the judge who understands legal rules to be obligatory and faithfully attempts to follow precedent will find that she has the power to exercise choice in deciding a case. To some extent that discretion exists because it is unavoidable—legal language is at some point irredeemably indetermi- nate. But discretion may reflect certain value trade-offs as well: choosing flexibility over certainty by selecting a standard rather than a bright-line rule; or allocating certain powers to trial courts, rather than appellate courts, by establishing a deferential standard of review. Recognizing the presence and nature of that discretion is key to understanding how law shapes the decisionmaking environment of lower court judges and ultimately to developing better theoretical models of the judicial hierarchy.

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By contrast, the principal-agent model highlights the importance of the institutional context but neglects the discretionary spaces created by law. Scholars utilizing a principal-agent model have not examined closely the concept of discretion or how it fits with various theories of law. To the extent that they write about discretion at all, they tend to use the term as a pejorative, suggesting that the exercise of discretion by lower courts is a form of shirking or that the existence of any judicial discretion evidences a failure of law. In doing so, they implicitly embrace formalist understandings, assuming that law can and should determine the outcome in every case. This approach ignores much recent jurisprudential thought and the widespread understanding that discretion is inherent in the task of applying the law in particular cases.

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LOWER COURT DECISIONMAKING

A.   *The Judicial Hierarchy*

…certain legal norms govern the work of judges at every level of the hierarchy. By "norms," I refer to rules—both formal and informal—which are understood by actors within the system as creating obligations to act or not act in a certain way. Thus broadly defined, legal norms include the substantive legal rules found in the precedential opinions, statutes, and regulatory provisions that judges are expected to apply to the facts of the cases before them. They also include a wide variety of both formal rules and informal practices that govern how judges should go about the task of deciding cases. These norms tell judges such things as which materials are relevant to consider, how they should treat the opinions of judicial colleagues above and below them in the hierarchy, when reasons are required to explain a decision, and what kinds of reasons are authoritative. Some of these norms—such as the rule of strict hierarchical precedent—are well established; others are highly contested—for example, the norm regarding the use of foreign legal materials. Because at least some of the relevant legal norms depend upon a judge's place in the judicial hierarchy, taking account of institutional context is crucial to understanding how judges decide.

Positive political theorists commonly use principal-agent models to describe the judicial hierarchy, assuming that the Supreme Court is the principal and the lower federal courts are the agents. These models posit that judges have policy preferences and are motivated to decide cases in a manner consistent with those preferences. When the preferences of lower court judges diverge from those of the Supreme Court, value conflicts arise, raising the possibility of noncompliance by lower courts. Songer, Segal, and Cameron describe the model:

> The Supreme Court is the principal, whose subordinates, the courts of appeals, are the agents. If the circuit courts consisted of faithful agents, they would obediently follow the policy dictates set down by the Supreme Court. But utility maximizing appeals court judges also have their own policy preferences, which they may seek to follow to the extent possible.

The existence of divergent policy preferences means that lower court judges will have an incentive not to follow the directives laid down by the Supreme Court—to "shirk" their duty as agents. Principal-agent theory is thus concerned with how hierarchical control is maintained: How and to what extent can the Supreme Court control the behavior of lower federal courts to ensure that its policy dictates are implemented?

The principal-agent model of the judicial hierarchy draws on theories of economic organization. In the context of a firm, the principal hires the agent to act on its behalf in order to reduce the costs of coordination and increase efficiency. However, the agent has her own interests, which may conflict with those of the principal. The central challenge for the principal is to design an incentive structure to ensure that the agent pursues the principal's objectives—a goal made more difficult by the fact that it typically lacks complete information about the agent's

efforts and the context in which she acts. Common mechanisms of control in hierarchical organizations include monitoring agent behavior and the use of sanctions and rewards to induce compliance. The principal-agent model has been extended to the political context as well, leading to theories of how Congress and the Executive maintain control over bureaucratic agencies to which responsibility for policy implementation has been delegated. Regardless of the context, the principal-agent model focuses attention on "issues of hierarchical control in the context of information asymmetry and conflict of interest."

Applying the principal-agent model to the judiciary usefully high- lights the possibility that judges may have conflicting goals. As discussed in the next section, considerable empirical evidence supports the notion that judges in fact are influenced to some degree by their policy preferences and that these preferences often diverge along ideological lines. The principal-agent model focuses attention on the issue of how value conflicts will be resolved in the context of a hierarchical organization and the extent to which superior courts can effectively direct and control the actions of lower courts. It also asks how the institutional structure of the judiciary will affect the possibilities for and limitations on monitoring and sanctioning lower court behavior—for example, by focusing attention on the Supreme Court's lack of power over traditional economic incentives such as the salaries, job security, or promotion prospects of its subordinates.

Principal-agent models thus offer important insights into the decisionmaking context of lower court judges; however, the way in which positive political theorists have utilized these models to describe the judicial hierarchy currently suffers from certain limitations. The following sections explore these limitations, arguing that principal-agent models currently lack a satisfactory account of why lower courts comply with precedent and fail to take seriously the role of law as a normative force.

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C. Law as a Signal

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Crucial to any principal-agent account is an explanation of *how* the Supreme Court exercises control. It is commonly observed that few of the usual economic incentives are available to the Supreme Court to influence the behavior of lower courts. Federal judges are appointed for life, and Congress, not the Supreme Court, determines their level of compensation. In the absence of traditional economic carrots and sticks, principal-agent models have relied heavily on the reversal power of the Supreme Court to explain lower court compliance.

In its simplest form, the model posits that the risk of reversal works as an effective sanction, inducing lower courts to comply with higher court precedent even when their own political preferences would lead them to a different result. While the

model has a certain facial plausibility, a closer examination suggests some practical and theoretical difficulties. On a practical level, the effectiveness of the sanction depends in part on the *actual* risk of reversal. For court of appeals judges, the chance of reversal by the Supreme Court is quite small. Even though the Supreme Court reverses a majority of the cases it accepts for review, it only reviews a tiny fraction of the output of the federal courts of appeals—far less than one percent of the appellate cases decided in a given year. As a result, the threat of reversal is quite low and its effectiveness as a sanction questionable. For district court judges, the analysis is further complicated by their position at the bottom of the judicial hierarchy. While they face a significant chance that their decisions will be reversed by a court of appeals, the likelihood of reversal, or even review, by the Supreme Court is extremely low. Thus, their incentives for acting as faithful agents of the Supreme Court seem quite attenuated. More likely, if fear of reversal in fact motivates judges, the district court judge should be primarily concerned with avoiding reversal by the appellate court directly above it. Determining the preferences of the circuit court, however, is complicated by the fact that appeals are heard by panels of three judges whose identity is unknown at the time that the trial court makes its decision. It is further complicated by the possibility that the circuit court's decisions may be influenced by the panel judges' own desire to avoid reversal—either by the entire court of appeals sitting en banc or by the Supreme Court. Given these uncertainties, it is unclear to what extent fear of reversal motivates district courts to comply with Supreme Court precedent.

Aware of the extremely low rate of Supreme Court review, scholars have elaborated on the basic principal-agent model to explain how the Court can nevertheless maintain control over lower federal courts. For example, Songer, Segal, and Cameron have suggested that litigant policing plays a crucial role in insuring effective monitoring. They assert that litigants who have lost in the lower courts are more likely to seek Supreme Court review of noncomplying decisions, thereby sounding a "fire alarm" that alerts the Court to cases of "fla- grant doctrinal shirking." In their view, this risk is sufficient to induce substantial compliance with precedent by circuit judges. However, even assuming that a litigant's petition for certiorari provides an accurate signal, the Supreme Court must still sort through approximately eight thousand petitions each year and only accepts about ninety of those cases for review. Thus, even when a fire alarm is sounded, the risk of reversal remains quite low. Knowing this, cir- cuit judges who are constrained only by the risk of reversal might respond by *increasing* their level of noncompliance, thereby diluting the effectiveness of the fire alarm and further reducing the reversal risk in any particular case.

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D. Law as a Normative Force

If the fear of reversal is insufficient to explain judicial behavior, then the principal-agent model presents a puzzle. In the absence of any effective sanction, why would lower court judges—assumed to be motivated by their policy preferences—choose to follow legal authority rather than pursuing their own preferred outcomes? The simplest explanation for lower court compliance is that judges have *legal* preferences independent of their political preferences. More precisely, even if judges care about whether the outcome in a given case advances their preferred policy, they likely care about whether it conforms to legal norms as well. Judges may have a variety of legal preferences regarding matters such as the appropriate mode of interpreting statutes, or the relevance of foreign legal materials, and these preferences may vary from judge to judge. But their decisions are also guided by a set of widely shared norms—some of which are formulated as legal rules—regarding their role in the judicial hierarchy. One fundamental and widely accepted norm requires that lower federal court judges follow precedent established by a court directly in line above them in the judicial hierarchy. Adherence to this norm offers a straightforward explanation of why lower courts comply with superior court precedent, even that with which they disagree.

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An account of legal preferences does not require that the out- come in every case is determined in advance by existing legal mater- ials. Rather, a judge's preferences regarding *legal* outcomes might be understood as an "attitude" in much the same way that Segal and Spaeth model political preferences. They state that "an attitude is nothing more than a set of interrelated beliefs about at least one object and the situation in which it is encountered." They assume that the relevant "attitudes" are policy goals, which explain judges' behavior in response to a set of cases that present similar "objects" or "situations," such as criminal procedure or First Amendment issues. Judges might also be assumed to have "attitudes" toward sets of legal materials—such as statutes or judicial opinions by superior courts— that influence their behavior in cases that present those sorts of materials. Even the most conservative judge will not necessarily decide *every* case involving issues of criminal procedure in favor of the government's position; so too, legal preferences should not be assumed to predetermine an outcome in every case. Like political preferences, legal preferences will produce a behavioral tendency, a correlation, rather than an exact correspondence between attitude and behavior.

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Although no definitive explanation exists for the formation of legal preferences, several plausible theories have been advanced in the literature. Some scholars argue that the socialization process involved in professional training or the role perceptions of judges shape their legal preferences. Others contend that judges have self- interested reasons for following

precedent, such as ensuring respect for their own decisions or for the judiciary more generally. Judge Posner has suggested that judges gain inherent utility from following precedent, analogizing doctrine to the rules of a game to which they must adhere to make the game meaningful. In any case, the assumption that judges have legal preferences is at least as plausible as the theory that they have policy preferences. Judges who decide cases in ways that advance their policy preferences do not benefit directly from those decisions, except to the extent that they derive utility from generating outcomes consistent with their attitudes, just as they might gain utility from decisions that comport with legal norms.

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Conclusion

Principal-agent theories have become a common method of mod- eling relationships between courts in the judicial hierarchy. They improve on the traditional jurisprudential approach—focused on the abstract judge wrestling only with legal materials—by highlighting the importance of institutional context and the influence of policy goals. They also represent an advance from simple attitudinal models that relied solely on a psychological model of judging, without recognizing the possibility that interactions with other actors in the system might influence behavior. Thus, principal-agent models usefully focus attention on interactions between courts within a judicial hierarchy, emphasizing the potential value conflicts that can occur and the challenge of aligning judges' incentives with the needs of a legitimate and well-functioning judicial system.

Those models fall short, however, in their failure to account for law and legal norms. Principal-agent models typically rely on fear of reversal to explain compliance with superior court precedent, yet both practical and theoretical considerations suggest that such an explanation is inadequate. As I have argued here, a more straightforward explanation recognizes that judges likely have preferences for complying with legal norms, as well as preferences regarding policy. Positive political theorists have been skeptical that legal norms in themselves motivate judges, in part because they find formalistic accounts of the law implausible. The law, however, need not be fully determinative in order to have a binding quality. Jurisprudential accounts recognize that law can be both binding on judges *and* permit them to exercise discretion in certain contexts. That discretion exists not only because legal rules will inevitably be indeterminate at some point, but also because social needs demand some measure of flexibility in the application of legal rules, and because institutional values argue for allocating different types of power between different levels of the judiciary.

Of course, all models necessarily simplify a complex reality. That simplification, however, creates the risk that some essential aspect of the process or phenomenon under study will be lost. In the case of principal-agent models, the failure to account for the nature of law and legal institutions obscures important aspects of the interaction between upper and lower courts. Principal-agent accounts emphasize control by the superior court and evasion by "shirking" lower courts.

What they overlook is that lower courts sometimes have power over law development as well as case outcomes, and, depending upon the type of power afforded in a particular case, their goals in deciding may include publicity and persuasion rather than evasion.