Chapter 2: Explaining the Interpretation of Precedent

Recall from chapter 1 that the Court’s treatment of precedent takes two broad forms, positive interpretation and negative interpretation. First, the Court can interpret a precedent positively by relying on it as legal authority and thus broaden its reach or at least reiterate its continuing legal relevance. When doing so, for example, the Court can indicate that a precedent is controlling or determinative for a type of dispute (Aldisert 1990; Freed 1996; Baum 2001, 142). Second, the Court can negatively interpret a precedent by restricting its reach. For instance, the Court can distinguish a precedent by finding it inapplicable to a new factual scenario or limit a precedent by restating the legal rule in a more limited way (see Gerhardt 1991, 98-109; Maltz 1988, 382-388; Murphy and Pritchett 1979, 491-495). Our specific goal in this chapter is to provide an explanation for the circumstances under which the Court will interpret a precedent either positively or negatively.

We base our theoretical argument on two premises. First, justices interpret precedent to influence the current state of legal policy (Brenner and Spaeth 1995; Johnson 1986; Epstein and Kobylka 1992; McGuire and MacKuen 2001; Wahlbeck 1997). By interpreting precedent, the Court can alter the scope and authority of existing legal rules and, in doing so, influence how other decision makers view and implement them. The Court’s interpretation of precedent can influence lower court judges, non-judicial actors, and, perhaps to a lesser extent, future Supreme Court justices. Thus, by interpreting precedent, and changing the existing legal status quo in the process, the Court can influence present and future distributional outcomes.

The second reason justices interpret precedent is to justify the new policies established in their current opinions (Friedman et al. 1981; Johnson 1987; Walsh 1997). The American public, especially its attentive members, expects the Court to base its decisions on legally-relevant
criteria. Most notably, the norm of *stare decisis*, by which courts are to follow the legal principles articulated in previously decided cases, instructs courts to base their decisions on precedent. Thus, while legal authority comes in a variety of forms—such as abstract rights principles or modes of interpretation (e.g., original intent) (see Murphy, Fleming, and Barber 1995; Gates and Phelps 1996)—one of the most pervasive (and arguably persuasive) arguments used in Court opinions is an appeal to precedent (Phelps and Gates 1991; Knight and Epstein 1996). *Stare decisis* therefore provides justices with incentives to link current policy choices to those from the past.

We begin this chapter with a discussion of these two basic foundations of our argument. Based on these principles, we derive two motivations—policy-based and legitimacy-based—driving the Court’s interpretation of precedent. Next, we outline the manner in which these two concepts combine to determine the benefit or utility the justices receive from positively or negatively interpreting a precedent. Based on this theoretical framework, we derive the general propositions which will ultimately yield the specific hypotheses tested in subsequent chapters.

**The Role of Policy Preferences**

Research consistently indicates that the justices’ policy preferences are the primary determinant of their votes on the merits of cases (Pritchett 1948; Rohde and Spaeth 1976; Segal and Spaeth 1993, 2002). Perhaps more importantly, evidence also indicates that the justices’ policy goals affect other important choices they make while on the bench, such as voting on certiorari (Boucher and Segal 1995; Caldeira, Wright, and Zorn 1999), asking questions at oral argument (Johnson 2004), assigning opinions (Brenner 1982; Maltzman and Wahlbeck 1996; Rohde 1972), and joining opinion coalitions (Brenner and Spaeth 1988; Maltzman, Spriggs, and
Wahlbeck 2000; Wahlbeck, Spriggs, and Maltzman 1999; Ulmer 1970). Recent research also shows that the bargaining and negotiation that takes place on the Court is largely oriented towards influencing the content of majority opinions (Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000).

The evidence of the importance of policy preferences in the decision making of the justices is so convincing that many theoretical approaches start with the assumption that the justices are principally motivated by their preferences over legal policy (Caldeira, Wright, and Zorn 1999; Cameron, Segal, and Songer 2000; Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000; Gely and Spiller 1992). For example, Epstein and Knight (1998, 9-10) state that “judicial specialists generally agree that justices, first and foremost, wish to see their policy preferences etched into law. They are, in the opinion of many ‘single-minded seekers of legal policy.’” Maltzman, Spriggs, and Wahlbeck (2000, 17) refer to this tenet as the “Outcome Postulate” of Supreme Court decision making, which holds that “Justices prefer Court opinions and legal rules that reflect their policy preferences.”

We follow this theoretical tradition and maintain that the justices’ decisions to interpret precedent depend on their policy goals. Importantly, this perspective emphasizes that Supreme Court justices do not merely seek to establish legal policy consistent with their policy preferences. Instead, they endeavor to create legal rules that are both consistent with their preferences and actually influence legal and political outcomes in the intended manner. Justice Vinson (1949, 552) suggested as much when he wrote: “What the Court is interested in is the actual, practical effect of the disputed decision—its consequences for other litigants and in other situations.”
In short, the justices recognize that the legal rules established in the Court’s majority opinions represent their most important tool for influencing social, political, and economic outcomes. Their behavior on the bench is therefore principally motivated by the distributional consequences of their opinions, and they want those outcomes to reflect their policy goals. As a result, the justices choose when and how to interpret precedent based on their policy preferences.

**The Role of Precedent**

The American judicial system is premised in large part on the principle of *stare decisis*, which is the norm declaring that judges should follow precedent. As Alexander Hamilton put it in Federalist 78, “[judges] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.” Precedents are the legal rulings from prior court cases that establish which case facts are relevant (Richards and Kritzer 2002) and create legal consequences or tests that attach to particular sets of factual circumstances (Aldisert 1990; Schauer 1987). The essence of *stare decisis* is that judges should treat like cases alike by applying the legal principles from prior cases to the similar factual circumstances in present cases.

Legal reasoning and *stare decisis* operate as inductive processes. Law develops as judges draw general principles from specific prior cases and determine how to apply those rules to new factual circumstances (see Levi 1949; Wahlbeck 1997). The use of precedent is thus typically depicted as reasoning by example, where the law in a precedent is the example and the judge applies it to a present case (Aldisert 1990; Schauer 1987). The core purpose of precedent in this process is to provide judges with information about how to compare and group factual circumstances so that they can be treated similarly. In the process of determining these legal
rules, judges decide specific disputes, and, in doing so, affect the meaning and reach of precedents.

The norm of precedent reportedly serves a variety of goals, including judicial efficiency, stability and predictability in the law, and justice and fairness (see Douglas 1949; Maltz 1988; Schauer 1987). One of the most important attributes of *stare decisis* is its ability to foster the legitimacy of the judiciary and the individual decisions reached (Friedman et al. 1981; Powell 1990; Stevens 1983). By promoting the legitimacy of the Court and its decisions, the justices can enhance the power of their opinions and improve their prospects for influencing distributional outcomes (see Epstein and Knight 1998; Knight and Epstein 1996). Landes and Posner (1976, 273) make this point when stating: “No matter how willful a judge is, he is likely to follow precedent to some extent, for if he did not the practice of decision according to precedent (*stare decisis*, the lawyers call it) would be undermined and the precedential significance of his own decisions thereby reduced.” Justice Stevens (1983, 2) reiterates this point by noting that *stare decisis* “. . . obviously enhances the institutional strength of the judiciary.”

The importance of legitimacy follows from two features of the judiciary. First, unlike elected officials or bureaucrats, judges are expected to provide legally relevant justifications for their decisions (Friedman et al. 1981; Maltz 1988). One important element of this expectation is that justices show respect to the Court’s prior decisions (Powell 1990). Second, the Court lacks significant implementation powers and thus relies on its external reputation to encourage implementation of and compliance with its opinions (Epstein and Knight 1998). If the Court (or a particular opinion) is perceived as somewhat illegitimate then the prospects for compliance may decrease (Epstein and Knight 1998; Gibson, Caldeira, and Baird 1998; Grosskopf and
Mondak 1998; Hoekstra 2003, 2000; Mondak 1994). Thus, the justices’ have a need to promote the legitimacy of their opinions and preserve the Court’s reputation to ensure their precedents influence distributional outcomes.\footnote{Judicial legitimacy can potentially be studied with several different units of analysis, including the legitimacy of a particular opinion, the legitimacy of the Court as an institution, or the legitimacy or reputation of particular judges. Our theoretical argument applies to the legitimacy of particular decisions, although the legitimacy of the Court as an institution does in part derive from the aggregated legitimacy of these decisions.}

Indeed, one of the principal reasons that courts write opinions and cite precedent is to legitimize their policy choices. The justices recognize the social expectation that they justify their policies, and they understand that this belief can affect whether and to what extent decision makers accept and comply with Court decisions (Powell 1990; Stevens 1983). They therefore utilize precedent and link current decisions to past rules of law (Phelps and Gates 1991; Johnson 1986; Walsh 1997). Judge Patricia Wald (1995, 1372) recognizes this point when noting that the main reason judges write opinions is to promote their “credibility.” As she notes (1995, 1372):

“One of the few ways we [judges] have to justify our power to decide matters important to our fellow citizens is to explain why we decide as we do.” In other words, the use of and adherence to precedent can produce external legitimacy and thereby enhance the Court’s ability to write opinions that have influence (see Knight and Epstein 1996).

Given the justices’ need to legitimize their policies, precedent can limit their flexibility or discretion. It does so by constraining the alternatives available to the justices to those which are legally defensible (van Hees and Steunenberg 2000). By this, we mean legal holdings and reasoning that the justices can credibly argue are founded on legally relevant bases. In a given case, precedent may eliminate particular outcomes from consideration or require the justices to at least consider certain others. Lawyers recognize this facet of judicial decision making and develop arguments in their briefs, especially based on precedent, in an effort to narrow the range
of alternatives available to a court (Shapiro 1965, 148). Epstein and Kobylka (1992), for example, argue that the development of abortion and death penalty policy turned on the types of legal arguments put forward by organized interests.

In any given case, there may be a number of legally defensible positions, and thus our conception of precedent does not suggest that it leads ineluctably to particular outcomes. Scholars (see Murphy, Fleming, and Barber 1995, 30-33; Carter 1988; Dworkin 1978; Shapiro 1965) and jurists (Cardozo 1964; Wald 1995) recognize that judges continue to have discretion even in the face of the norm of precedent. For example, Supreme Court justices rarely confront two cases with precisely the same facts, and they must thus determine whether a precedent governs a case (see Carter 1988; Schauer 1987). Few precedents are so similar to a case at hand that a justice is inevitably bound to follow them, and thus decisional leeway results.

Two quotes, one from a jurist of the previous century and one from the current, eloquently make this point. Benjamin Cardozo (1964, 103) wrote: “We [judges] must keep within those interstitial limits which precedent and custom . . . have set to judge-made innovations. But within the limits thus set, within the range over which choice moves, the final principle of selection for judges, as for legislators, is one of fitness to an end.” Judge Wald (1995, 1399) echoes this position: “In most cases there are prior circuit cases or Supreme Court cases whose rulings and rhetoric are relevant, but it is still a judgment call for the court whether they require a particular outcome in the immediate case.”

In sum, we contend that *stare decisis* plays a causal role in Court decision making due to the justices’ need to legitimize their policy choices. In deciding current disputes, the justices therefore pay attention to precedent and incorporate it into their opinions. In doing so, they can provide legally relevant justifications for their opinions. This norm, however, operates in such a
way that justices continue to have significant discretion. Thus, we do not suggest that precedent is necessarily binding or argue, for example, that precedent will inevitably change a justice’s vote on the merits (see Spaeth and Segal 1999). Nonetheless, we argue that this norm creates incentives for the justices to respond to precedent in predictable ways. We now turn to a discussion of the aspect of *stare decisis* on which we focus attention—the legal vitality of a precedent.

**The Vitality of Precedent**

Precedents vary in their legal vitality, or the extent to which they maintain legal relevance, authority, and applicability (see Aldisert 1990; Peczenik 1997). Some precedents are more legally relevant and authoritative than others and thus have an enhanced ability to justify and legitimate the justices’ policy choices. We refer to this element of *stare decisis* as precedent vitality. The norm of *stare decisis* implies that, for legitimacy reasons, the justices are more likely to rely on those precedents possessing greater legal weight. We therefore argue that that the justices recognize variation in the vitality of precedent and respond accordingly.

The concept of precedent vitality is commonly discussed. It is referred to by justices in their opinions, pointed to by lawyers in their legal briefs, debated in law review articles (e.g., Bhala 1999; Stern 1989), and discussed by judges in their off-the-bench writings (e.g., Aldisert 1990; Wald 1995). These sources generally agree that, in the words of Judge Aldisert (1990, 631), not all precedents “have the same bite.” They also typically suggest that precedent vitality

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has implications for the interpretation of precedent and legal change (Johnson 1987; Peczenik 1997). But, this idea has yet to be formally conceptualized and incorporated into systematic analyses of court usage of precedent.

The literature discusses a variety of possible factors that could be linked with precedent vitality, most notably characteristics of the precedent, such as the size of the decision coalition supporting the precedent, the presence of separate opinions (e.g., Aldisert 1990, 632; Danelski 1986; Johnson 1987; Pacelle and Baum 1992; Pecznik 1997), and the age of precedent (Kosma 1998; Landes and Posner 1976). With the exception of precedent age, these factors are static in nature and do not fluctuate over the life of a precedent. As a result, they are not linked to the ebb and flow of the vitality of a precedent over time. Our argument centers on the notion that the vitality of a precedent changes over time, and thus our theoretical framework does not place emphasis on these factors. Nonetheless, the empirical models presented in subsequent chapters do control for them as possible influences on the interpretation of precedent.

We conceptualize the vitality of a precedent as deriving from the Supreme Court’s interpretation of it in other cases. This focus follows from our contention that the meaning of a precedent is not fixed but can fluctuate over time as the Court decides whether and how to apply it to new factual settings. As the Court interprets a precedent and decides, for example, to extend it in new circumstances or limit it to its facts, the reach and scope of the case changes. This process is precisely what Levi (1949) and Wahlbeck (1997) have in mind when they argue that legal development occurs as judges confront novel factual circumstances and determine whether to include or exclude them from the relevant legal rule. Thus, theoretically speaking, the meaning and clout of a precedent hangs centrally on how the Court treats it in subsequent cases.
This variation in the authority of precedent has important implications for the Court’s ability to legitimate its policies. If the Court has positively interpreted a precedent then it takes on greater authority, is more institutionalized, and hence has greater legal weight (see Aldisert 1990, 632; Ulmer 1959). As a result, precedents having been previously positively interpreted by the Court provide good vehicles for justifying current Court outcomes. Landes and Posner (1976, 250) note that: “Where, however, the rule has been, as it were, solidified in a long line of decisions, the authority of the rule is enhanced.” The Court can therefore maximize the legitimacy of an opinion by relying on precedent that has received prior positive Court treatment.

If, by contrast, the Court has negatively interpreted a precedent then that case’s legal authority is diminished (Douglas 1949; Stern 1989; Wald 1995). By interpreting a precedent negatively, the Court, at a minimum, can distinguish a case and indicate that it does not apply to a new factual circumstance. At the extreme, the Court can overrule a case, and declare that it is no longer controlling law (see Murphy and Pritchett 1979, 491-495). As a result, negative interpretation serves to narrow the reach of a precedent and weaken its vitality. Prior negative interpretation also makes it easier or less costly, in terms of legitimacy, for the Court to treat it negatively in the future (Spriggs and Hansford 2001).

In short, the vitality of a precedent can change over time as the Court positively or negatively interprets it. The Court’s ability to justify current policies depends in part on the vitality of a precedent. Cases with greater legal authority better serve to legitimize the Court’s current decisions. As a result, the justices have incentives, deriving from the norm of *stare decisis*, to consider the legal vitality of a precedent when choosing how to interpret it.4

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4 It is possible that lower court treatment of a Supreme Court precedent may have some effect on its vitality. We explore this possibility in Chapter 7.
Why the Court Interprets Precedent

We contend that the interpretation of precedent serves two vital functions, both of which bear on the justices’ ultimate desire to influence distributional outcomes consistent with their policy preferences. The first is the justices’ goal to fashion legal policy consistent with their policy preferences. This factor is relevant because a necessary, but not sufficient, condition for favorable policy effects is that Court opinions be consistent with the justices’ preferences. The second is the justices’ need to justify their policy choices and promote the legitimacy of their decisions. Since the Court cannot truly implement its decisions, the justices must rely on the Court’s perceived legitimacy to enhance the likelihood that other decision makers will implement or comply with them. As a result, the justices are concerned about both the policy content and legitimacy of their majority opinions.

Thus, the utility associated with the interpretation of a precedent is a combination of the utility associated with altering the current status of a precedent and the utility associated with legitimizing the new legal policy established by the Court:

\[ u(\text{interpretation}) = v(\text{influence over extant policy}) + w(\text{legitimization of new policy}) \]

We first turn to a discussion of the utility of interpreting a precedent positively and afterwards address the utility of negative interpretation.

The Positive Interpretation of Precedent

When will the Supreme Court choose to interpret a precedent in a positive manner? If the utility of interpreting a precedent depends upon the utilities associated with potential effects on the scope and content of extant legal policy and the legitimacy of new legal policy, then the utility of the positive interpretation of a precedent can be represented as:

\[ u(\text{positive interpretation}) = v(\text{influence over extant policy}) + w(\text{legitimization of new policy}) \]
We address the two components of this utility function in turn.

**Influence Over Extant Policy**

The Court can strengthen a precedent by interpreting it in a positive manner. Through this type of interpretation, the justices can broaden the precedent’s legal basis, make it applicable to a wider set of factual scenarios, or simply reaffirm its continuing relevance. The utility the justices receive from positive interpretation derives in part from the degree to which they agree with the precedent in question. The more in-line the precedent is with the sitting justices’ policy preferences, the greater the utility (in terms of influence over extant policy) they receive from interpreting it positively. By contrast, the more ideologically distant the justices are from a precedent, the smaller the utility of interpreting the precedent positively.

This utility will also depend on the current vitality of the precedent in question. If the justices are ideologically close to a precedent and the precedent has been weakened in the past, then there is an even greater policy incentive to bolster the vitality of this precedent by treating it positively. This positive interpretation of the precedent may increase its applicability in lower courts and otherwise revive the importance of this ideologically favored precedent. There is less of a policy incentive, relatively speaking, for the justices to positively treat an ideologically proximate precedent if the precedent is already quite vital. The ultimate effect of positive interpretation on the legal reach of a precedent is greater when the favored precedent is currently weaker than stronger.

If a precedent is ideologically incongruent with the Court, then the vitality of the precedent should exert the opposite effect. The less vital an ideologically distant precedent, the less utility the Court will derive from interpreting it in a positive manner. In other words, the Court will most prefer to bolster weak precedents that are ideologically congruent with the Court
and will least prefer to strengthen weak precedents that are incongruent with the Court. We are not suggesting that the Court will ever be more likely to positively interpret precedents as ideologically distance increases. We are simply claiming that the small utility associated with positively interpreting an ideologically distant precedent will diminish even further if the precedent is not vital, for the same reason that the Court more prefers to positively interpret an ideologically close precedent if it is less vital.

Thus, the vitality of a precedent will condition the effect that ideological distance exerts on this utility function. Precedent vitality increases the utility of positively interpreting an ideologically distant precedent, relatively speaking, and decreases the utility of positively treating an ideologically close precedent. In this sense, precedent vitality attenuates the effect of ideological distance in that ideological distance exerts a greater effect on the utility of treating a low-vitality precedent positively than a high-vitality precedent. We can represent the utility associated with positively affecting the status of a precedent with the following weighted combination:

\[ v(\text{influence over extant policy}) = -b_1*ID + b_2*(ID*V) - b_3*V, \]

where \( ID \) is the ideological distance between the Court and a precedent and \( V \) represents precedent vitality. The positive sign for \( b_2 \), in conjunction with the negative sign for \( b_3 \), represents our argument that when the Court prefers a precedent it will derive less utility from positively interpreting a precedent that already has a good deal of vitality. Conversely, when comparing ideologically distant precedents, the Court will prefer to positively treat a precedent that is more vital. Put differently, as ideological distance increases the effect of vitality will shift from positive to negative, and hence we expect a positive coefficient for the interaction term and a negative coefficient for \( V \).
Our argument here also requires two constraints to be placed on this function:

c1) \(-b_1 + (b_2 \cdot V_{max}) \leq 0\);\(^5\)

and

c2) \(b_2 \cdot ID - b_3 < 0\) for the lower range of \(ID\) and \(b_2 \cdot ID - b_3 > 0\) for the upper range of \(ID\).

The first constraint ensures that \(ID\) always exerts a negative effect on the utility of treating a precedent positively. This constraint captures the argument that the Court, for policy-based reasons, will never be more likely to interpret a precedent positively as it becomes ideologically further removed from a precedent, regardless of the degree to which the precedent is legally vital. The second constraint captures our argument that the effect of \(V\) will change direction as ideological distance increases.

**Legitimization of New Policy**

The utility associated with the extent to which a positive interpretation of a precedent will increase the legitimacy of the Court’s new decisions and policies will be determined solely by the vitality of a precedent. If, for example, a precedent has been treated positively in the past and has not been treated negatively (i.e., the precedent has a high degree of vitality), then it takes on greater authority, is more institutionalized, and hence has greater legal weight (see Aldisert 1990; Landes and Posner 1976; Ulmer 1959). As a result, vital precedents provide good vehicles for justifying current Court outcomes, and the justices can maximize the legitimacy of an opinion by relying on such precedents.

If, by contrast, the Court has negatively interpreted a precedent then that case’s legal authority is diminished. As Judge Patricia Wald (1995, 1399) notes, “Over time, precedent ignored or widely criticized loses its vitality.” The Court’s reliance on such a precedent is therefore less likely to contribute to the legitimacy of a new policy. The ideological distance

\(^5\) \(V_{max}\) represents the maximum possible value of \(V\).
between the Court and the precedent will not play a role in this utility function, since the extent
to which a precedent will legitimize a decision will be independent of policy considerations. We
can represent the utility associated with policy legitimization as:

\[ w(\text{legitimization of new policy}) = b_4 \cdot V. \]

The Combined Utility of Positive Interpretation

To establish the overall utility a justice receives from interpreting precedent positively,
we combine \( v(\text{influence over extant policy}) \) and \( w(\text{legitimization of new policy}) \) to yield the
following:

\[ u(\text{positive interpretation}) = -b_1 \cdot ID + b_2 \cdot (ID \cdot V) + (b_4 - b_3) \cdot V. \]

The constraints from \( v(\text{influence over extant policy}) \) remain in place:

1. \(-b_1 + (b_2 \cdot V_{\text{max}}) \leq 0; \)

and

2. \( b_2 \cdot ID - b_3 < 0 \) for the lower range of \( ID \) and \( b_2 \cdot ID - b_3 > 0 \) for the upper range of \( ID \).

Assuming that the probability of the Court treating a precedent positively will be determined by
the utility associated with this choice, this function yields the following propositions. First, the
ideological distance between the Court and the precedent should have a negative effect on the
probability of the Court treating the precedent positively since increases in ideological distance
decrease the utility associated with this type of interpretation.

**Proposition 1:** The smaller the ideological distance between a precedent and the Court, the
more likely the Court is to positively interpret it (reflected by \(-b_1 \) and \( c1 \)).

The second general proposition is that the vitality of a precedent will condition the effect
of ideological distance on the probability of the Court treating the precedent positively.
Ideological distance exerts a greater negative effect on the likelihood of treating a low-vitality precedent positively than on the likelihood of treating a high-vitality precedent in such a manner.

*Proposition 2:* As precedent vitality increases, the negative effect of ideological distance on the probability of positive treatment will be attenuated (reflected by $b_2$ and $c1$).

Our theory is agnostic regarding the relative magnitudes of $b_3$ and $b_4$, and, as a result, we cannot make a prediction for the main effect of precedent vitality on the probability of the Court interpreting a precedent positively. We therefore do not predict the influence of vitality for precedents that are ideologically proximate to the Court. We can predict the manner in which vitality conditions the effect of ideological distance, but we cannot predict shifts in the intercept that result from different values of precedent vitality. In our various empirical analyses, however, we will be able to generate estimates of $(b_4 - b_3)$.

However, there is a third proposition that involves the effect of precedent vitality on the likelihood of the Court treating a precedent positively. Based on the constraint that $b_2*ID - b_3 > 0$ for the upper range of $ID$, it follows that when ideological distance is great, precedent vitality will have a positive effect on the probability of positive treatment.$^6$

*Proposition 3:* For precedents that are ideologically distant from the Court, increases in precedent vitality will increase the probability of positive interpretation (based on $b_4$ and $c2$).

To further illustrate these points and provide a better feel for our propositions more generally, Figure 2.1 presents three possible scenarios that are consistent with our model. The difference across the three scenarios involves the relative magnitudes of $b_3$ and $b_4$, about which, as discussed above, we have no theoretical prediction. In the first (top) scenario, $b_3$ is greater in

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$^6$ If $b_2*ID - b_3$ is positive for the upper range of ideological distance and $b_3$ is always positive, then $b_2*ID - b_3 + b_4$ (the combined effect of vitality) must also be positive for the upper range of ideological distance.
magnitude than $b_4$ while in the second (middle) and third (bottom) scenarios $b_3$ is equal to $b_4$ and $b_3$ is smaller than $b_4$, respectively. For all scenarios, the utility, and thus probability, of treating a precedent positively decreases as ideological distance increases (Prop. 1), and this decrease is steepest for low vitality precedents (Prop. 2). Ideologically distant precedents are also more likely to be treated positively if they have a high degree of vitality (Prop. 3).

[Insert Figure 2.1 About Here]

The differences in the relative magnitude of weights $b_3$ and $b_4$ across these three scenarios do affect the intercept of the lines, however. Depending on the relative magnitude of these weights, precedent vitality can either increase or decrease the utility associated with positively interpreting a precedent that is ideologically compatible with the Court. If the justices’ desire to influence the state of existing policy dominates ($b_3 > b_4$), then scenario one results and precedent vitality will increase the utility of positively interpreting ideologically distant precedents and decrease the utility for ideologically close precedents. If the justices’ desire to maximize the legitimacy of the new precedent being created dominates ($b_3 < b_4$), then the Court will always prefer to positively treat highly vital precedents as opposed to less-vital precedents (scenario three). The second scenario, in which precedent vitality always exerts a positive effect except for when ideological distance is at its minimum, will occur when these two concerns are equally important. In subsequent chapters, we will be able to ascertain empirically which of these scenarios most closely reflects reality. In doing so, we can speak directly to whether the policy or legitimacy aspect of vitality has a stronger pull on the justices’ decisions.

The Negative Interpretation of Precedent
When will the Court interpret a precedent in a negative manner (e.g., limit or distinguish the precedent)? If, as above, the utility of interpreting a precedent depends upon the utilities associated with the potential influence on extant policy and the legitimacy of new policy, then the utility of a negative interpretation of a precedent can also be represented as:

\[ u(\text{negative interpretation}) = v(\text{influence over extant policy}) + w(\text{legitimization of new policy}) \]

We now turn to each of these incentives.

**Influence Over Extant Policy**

In pursuing their policy goals, the justices wish to produce Court policy that influences distributional outcomes in ways consistent with their policy preferences. One way they can do so is by negatively interpreting a precedent and thus weakening its legal relevance. The justices will derive greater policy utility from negatively interpreting precedents that are ideologically distant from them. By contrast, the closer a precedent is ideologically to the sitting justices, the less utility they receive from interpreting it negatively.

The effect of ideological distance on this type of utility also depends on the current legal vitality of the precedent in question. When considering ideologically distant precedents, the justices garner greater utility from reducing the applicability of a vital precedent, as opposed to negatively treating a precedent that has already been significantly criticized. Precedents that already have a low degree of vitality are less likely to be exerting much influence over lower courts or other relevant decision makers. As a result, there is less incentive to negatively interpret weakened precedents with which the justices disagree, as opposed to vital precedents that continue to influence policy outcomes. When considering a precedent preferred by the
justices, greater precedent vitality will further diminish the already small utility associated with treating this precedent negatively.

Thus, the vitality of a precedent will condition the influence that ideological distance has on this type of utility. We can represent the utility associated with negatively affecting the status of an existing precedent in the following manner:

\[ v(\text{influence over extant policy}) = b_5 \times ID + b_6 \times (ID \times V) - b_7 \times V, \]

where

\[ c3) \quad b_6 \times ID - b_7 < 0 \quad \text{for the lower range of } ID, \quad \text{and } b_6 \times ID - b_7 > 0 \quad \text{for the upper range of } ID. \]

This utility function indicates that when ideological distance is low, the utility of treating a precedent negatively will decrease as the vitality of the precedent increases. As the ideological distance between the justices and a precedent increases, however, the effect of vitality will change in direction (which is guaranteed by the constraints) and vitality will exert a positive effect on the probability of the Court treating the precedent in a negative fashion. In other words, the justices gain more policy utility from negatively interpreting a vital (rather than a non-vital) precedent with which they disagree. Conversely, vitality will exert a negative effect for precedents that are compatible with the Court’s preferences. Put yet another way, increases in precedent vitality enhance the effect of ideological distance on the utility associated with treating a precedent negatively.

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7 We do not need an equivalent of the first constraint in the positive interpretation model (c1) here because the positive direction of \( b_5 \) and \( b_6 \) guarantee that ideological distance will always have a positive effect on the utility of interpreting a precedent negatively.

8 This effect will occur when \( b_2 \times ID \) is greater than the absolute value of \(-b_3\).
Legitimization of New Policy

The Court can incur legitimacy costs from negatively interpreting a vital or institutionalized precedent (Wald 1995; Ulmer 1959). The vitality of a precedent thus determines the extent to which the justices receive disutility from the negative interpretation of a precedent. Therefore, the more vital a precedent is, the smaller the utility, in terms of determining the legitimacy of the new policy being established, that results from treating the precedent negatively. The ideological distance between the justices and the precedent will not play a role in this type of utility. This utility function can be represented as:

\[ w(\text{legitimization of new policy}) = -b_8 \cdot V. \]

The Combined Utility of Negative Interpretation

By combining the above two utility functions, we obtain the following:

\[ u(\text{negative interpretation}) = b_5 \cdot ID + b_6 \cdot (ID \cdot V) - (b_7 + b_8) \cdot V, \]

where

\begin{align*}
\text{c3) } & b_6 \cdot ID - b_7 < 0 \text{ for the lower range of } ID, \text{ and } b_6 \cdot ID - b_7 > 0 \text{ for the upper range of } ID.
\end{align*}

If the probability of the Court treating a precedent negatively is determined by the utility associated with this type of interpretation, then this function contains the following general propositions.

Proposition 4: The greater the ideological distance between the Court and a precedent, the greater the likelihood that the Court will negatively interpret the precedent (based on \( b_5 \) and \( b_6 \)).
Proposition 5: The positive effect of ideological distance on the probability of negative interpretation will increase in magnitude as a precedent becomes more vital (based on $b_6$).

Proposition 6: For precedents favored by the Court, increases in precedent vitality will lower the probability of negative interpretation (based on $-(b_7 + b_8)$ and constraint 3).\(^9\)

Our theory does not lead to a prediction for the effect of vitality when ideological distance is high because while $b_6*ID - b_7 > 0$ for the upper range of $ID$, $b_6*ID - b_7 - b_8$ could be greater or less than zero for the higher values of $ID$. We therefore cannot predict the effect of vitality on the probability of the Court negatively interpreting a precedent when the Court and the precedent are ideologically distant from one another.

To further illustrate these propositions, we again plot three possible scenarios consistent with our theoretical model (see Figure 2.2). The only difference across these scenarios is the relative magnitudes of $b_7$ (the policy aspect of vitality) and $b_8$ (the legitimacy component of vitality). In the first (top) scenario, $b_7$ is larger in magnitude than $b_8$ and this leads the effect of precedent vitality to switch directions at some value of ideological distance. Precedent vitality exerts a negative effect on the utility (and thus probability) of interpreting a precedent negatively when ideological distance is low and exerts a positive effect for high values of ideological distance. In the third (bottom) scenario, $b_7$ is larger in magnitude than $b_8$, causing high vitality precedents to always be less likely to be interpreted negatively than their low vitality counterparts. The second scenario depicts the utilities when $b_7$ and $b_8$ are of equal magnitude.

For all three scenarios, increases in ideological distance lead to increases in the utility associated with treating a precedent negatively and this effect is stronger for highly vital precedents. In the

\(^9\) If $b_2*ID - b_3 < 0$ for the lower range of $ID$, then $b_2*ID - b_3 - b_4$ must also be less than zero for the lower range of $ID$. 

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empirical chapters that follow, we can estimate \(- (b_7 + b_8)\) and thus empirically establish the relative strength of the legitimacy incentive element of vitality relative to the policy incentive aspect.

[Insert Figure 2.2 About Here]

**Summary of Argument and Expectations**

In summary, we posit that the utility the justices receive from the interpretation of precedent is a function of the combination of the desire to influence the scope and meaning of existing precedent and to establish new legal policy that is perceived as legitimate, and thus efficacious. The greater the utility resulting from a positive interpretation of precedent, the more likely the Court is to interpret the precedent in a positive fashion. Likewise, the greater the utility associated with the negative interpretation of a precedent, the more likely the Court is to interpret the precedent negatively. We specifically expect the decision to interpret precedent to be affected by a combination of the ideological distance between the sitting justices and the precedent and the vitality of the precedent. Precedent vitality should attenuate the negative effect of ideological distance on the probability of positive interpretation and accentuate the positive effect of ideological distance on the likelihood of negative treatment. Table 2.1 summarizes the hypothesized effects for *Ideological Distance* and *Vitality of Precedent*.

[Insert Table 2.1 About Here]

This theoretical model is distinct from existing discussions of precedent. Prior research typically characterizes precedent as a constraint on the Court that either exists (e.g., Knight and Epstein 1996) or does not exist (e.g., Segal and Spaeth 1993, 1996). Our theory of *stare decisis* focuses on precedent vitality, which pertains to the reach and legal authority of a case. We argue that the vitality of precedent can both provide an opportunity for the Court (in terms of
influencing extant legal policy) and represent a constraint on the Court’s choices (in terms of needing to legitimize new legal policy). Thus, our theory points towards a new way of understanding the role of precedent at the Court. The treatment of precedent is not simply a function of policy preferences or the result of highly constrained judicial choices. Instead, precedent vitality combines with judicial policy preferences to determine how precedent will be interpreted over time.

**Theoretical Issues and Limitations**

Critical readers may raise several questions or issues regarding the theoretical framework we have proposed. Along the way, we have tried to address several potential criticisms. In this section, we anticipate and initially address two remaining issues. We will return to these points in the concluding chapter, when we are further armed with the results from our empirical models.

**Parsimony vs. Comprehensive Explanation**

When attempting to explain something as complex as the determinants of the Supreme Court’s interpretation of precedent, there is a trade-off to be made between parsimony and comprehensive explanation. The model we presented above clearly falls towards the parsimony end of this continuum. As a result, we simplify reality and in the process ignore (or at least deemphasize) factors that other scholars may see as relevant. Rather than viewing this as a limitation, we (along with many other social scientists) see it as one of our principal strengths (see King, Keohane, and Verba 1994, 19-20). By presenting a model built on the most fundamental aspects of this phenomenon, we generate precise empirical predictions that promote a tightly-focused explanation.

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10 Baum (1997) provides a useful discussion of this trade-off in the judicial literature.
Nevertheless, we recognize the need to control for factors that do not derive from our theoretical framework when estimating our empirical models. Their presence in our statistical models controls for alternative explanations and thus allows us to draw confident inferences from the empirical results for our theoretical variables of interest. These control variables can be divided into two groups.

The first set comprises characteristics of precedents that prior research suggests influence its subsequent interpretation and impact. The literature specifically suggests that separate opinions and smaller decision coalitions will cause a precedent to be weaker and thus less likely to be interpreted positively and more likely to be interpreted negatively (e.g., Aldisert 1990, 632; Danelski 1986; Johnson 1979, 1987; Pecznik 1997). We therefore include in our empirical models control variables for the number of concurring opinions accompanying a precedent and the size of the decision coalition in a precedent.

The second set of control variables contains factors that influence whether a precedent is likely to be interpreted by the Court. These variables relate to the extent to which the precedent is either salient or remains relevant for contemporary legal problems. For example, a precedent whose issue area remains active on the Court’s agenda is more likely to be interpreted. Precedents dealing with a larger number and range of legal issues, as well as those that the Court has previously interpreted on a greater number of occasions, are also more likely to receive Court treatment. We control for these and several other considerations that affect the likelihood of a precedent being interpreted in our empirical models. In a sense, we opt for parsimony when developing our theoretical model but err on the side of comprehensive explanation when estimating our statistical models. Greater detail regarding these control variables is provided in the next chapter.
A Theory for the U.S. Supreme Court

One final caveat is in order. Our theory of the interpretation of precedent applies to the U.S. Supreme Court. While the broader ideas driving our theory most likely apply across a wide variety of courts, differences in their institutional features (e.g., degree of discretionary docket control, judicial selection method) would necessitate alterations to the model. For example, a trial court judge cannot hope to have as much influence as the Supreme Court over how a wide range of decision makers use a precedent. Appeals court panels can affect the applicability and vitality of a precedent to some extent, but may be constrained in how they treat a precedent by the possibility of Supreme Court review. It is important to understand how and why lower court judges use or interpret precedent (see, e.g., Comparato and McClurg 2003), but to do so would require theoretical modifications that are outside the scope of this study.
Table 2.1. Summary of Hypotheses Regarding the Interpretation of Precedent

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Expected Effect on:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Positive Interpretation</td>
</tr>
<tr>
<td>Ideological Distance (ID)</td>
<td>Negative</td>
</tr>
<tr>
<td>Precedent Vitality (V)</td>
<td>No Prediction</td>
</tr>
<tr>
<td>ID * V</td>
<td>Positive</td>
</tr>
</tbody>
</table>
Figure 2.1: Three Scenarios Consistent with Our Theoretical Model of the Positive Interpretation of Precedent
Figure 2.2: Three Scenarios Consistent with Our Theoretical Model of the Negative Interpretation of Precedent