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To cite this article: Michael P. Fix, Justin T. Kingsland & Matthew D. Montgomery (2017) The Complexities of State Court Compliance with U.S. Supreme Court Precedent, Justice System Journal, 38:2, 149-163, DOI: [10.1080/0098261X.2016.1274245](https://doi.org/10.1080/0098261X.2016.1274245)

To link to this article: <http://dx.doi.org/10.1080/0098261X.2016.1274245>



Published online: 03 Feb 2017.



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The Complexities of State Court Compliance with U.S. Supreme Court Precedent

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ABSTRACT

The United States Supreme Court has significant influence over the development of legal policy, yet it must rely on external actors to bring to fruition the desired effect of its decisions. Among the most important such actors are state high courts who are often motivated to issue decisions promoting policies at odds with the U.S. Supreme Court and who have mechanisms to legitimize such decisions. This study builds on existing work on state court compliance with U.S. Supreme Court precedent by introducing a new theoretical framework that accounts for the impact of state-specific precedent vitality, or the degree to which the high court of a specific state has positively treated a U.S. Supreme Court precedent, on state high court compliance. Our analysis of state high court treatment of *Miller v. California* provides strong evidence for the importance of state-specific vitality as a determinant of state high court compliance.

KEYWORDS

Precedent; compliance; obscenity; judicial federalism

Under the concept of dual sovereignty, no federal judge . . . can demand that a state should follow their ruling.
—Alabama Supreme Court Chief Justice Roy Moore¹

The United States Supreme Court holds a position of paramount importance in the development of legal policy. Yet a core limitation of its ability to influence policy lies in its inability to directly control the implementation of its own decisions. Once the Court has issued a decision, it becomes dependent on the will of other political and legal actors to bring to fruition the desired effects of that decision. The specific actors on whom the Court depends for this varies across the issue area and context of the decision, but one that continually occupies a central position in this process across a host of areas is state high courts (Songer 1988).

While the Supreme Court has more control over the action of legal actors than non-legal ones through its ability to overturn the decisions of lower courts, its ability to monitor the actions of lower courts is extremely limited and leaves room for those courts to act on their own goals (Songer, Segal, and Cameron 1994). This issue is even more complex when considering state courts who, in many instances, can rely on their own state laws and constitutions to find alternative ways to avoid Supreme Court decisions they find distasteful (Williams 1983). Examples of this abound, from the well-publicized recent defiance of the U.S. Supreme Court's decision in *Obergefell v. Hodges*² by the Chief Justice of the Alabama Supreme Court exemplified by the quote above, to the harsh criticism of the *Miller v. California* decision by the Utah Supreme Court, who described it as “an argument [that] ought only to be advanced by depraved, mentally deficient, mind-warped queers.”³

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¹From an interview with WND.com, available at <http://www.wnd.com/2015/02/judge-roy-moore-the-law-is-very-clear>.

²576 US _ (2015).

³*Salt Lake City v. Piepenburg* 571 P.2d 1299 (Utah 1977).

The importance of state high court compliance with U.S. Supreme Court precedents combined with the ability of these courts to subtly contravene—and in some cases blatantly defy—these precedents, makes it incumbent upon scholars to better understand the determinants of state high court compliance with U.S. Supreme Court decisions, both to enhance our understanding of issues of legal federalism and out of normative concerns for procedural fairness and uniform application of the law. This study builds on existing work on state court compliance with U.S. Supreme Court precedents by taking a fresh look at the impact of precedent vitality on state court decision-making. While prior studies have found that the vitality of a precedent strongly impacts its treatment in future cases (Hansford and Spriggs 2006; Kassow, Songer, and Fix 2012), we argue that this effect may be more nuanced than prior studies have accounted for. Specifically, we postulate that state-specific vitality—the degree to which the high court of a specific state has positively treated a U.S. Supreme Court precedent—has a greater direct impact on the decision making of state high courts than does prior treatment of that precedent by the U.S. Supreme Court itself. Applying our theoretical framework and new measure of state-specific vitality to state high court treatment of *Miller v. California* provides valuable new insights into our understanding of state court compliance with U.S. Supreme Court precedent in a controversial and important area of the law. Additionally, our analysis provides strong evidence for the importance of state-specific vitality as a key determinant of compliance.

State Court Compliance with Supreme Court Policy

From its perch atop the judicial hierarchy, the U.S. Supreme Court possesses the ability to disseminate legal policy throughout the country. A state high court occupies the same position of power within its state's judicial system, but under the principle of federal sovereignty, it is obligated to follow decisions of the U.S. Supreme Court in areas covered by federal law or the U.S. Constitution, absent the showing of adequate and independent state grounds. Prior research has shown that justices of the U.S. Supreme Court are motivated by their policy goals and wish to see them enacted into law (Pritchett 1948; Schubert 1965; Segal and Spaeth 2002). Yet the justices lack the ability to implement their own decisions. Their ability to set policy is constrained through their reliance on other actors to comply with their decisions, thus allowing them to be implemented as policy.

Implementation of the Court's decisions depends on the different legal actors taking part in the process. These actors serve different roles and wield varying levels of influence. Hall (2014) describes two different types of decisions in the discussion of implementation: lateral and vertical. Lateral decisions rely on actors outside of the court system for implementation. These actors include elected officials who are able to constrain the Court with non-implementation, and whose decisions tend to be driven by electoral consequences. Lateral decisions require the U.S. Supreme Court to take other actors preferences into account when shaping a new precedent (Canon and Johnson 1999). In contrast, vertical implementation involves decisions where implementation is controlled by judicial actors. In many areas of the law, state courts have primary responsibility for implementation (Hall 2014). For example, cases regarding criminal and civil liability are implemented within the judicial hierarchy vertically, whereas the majority of other issue areas require lateral actors for implementation (Hall 2014). While decisions requiring vertical implementation tend to be followed more thoroughly, the court writing the opinion still must take care to craft their opinion to be acceptable for the lower court judges interpreting it on the bench (Canon and Johnson 1999).

The implementation process begins when lower courts are faced with a new Supreme Court precedent and must decide whether, and to what degree, they will follow it. This decision can be conceptualized as courts choosing to be compliant or non-compliant with regard to the new precedent. It is important to distinguish lower courts as being compliant or non-compliant in regard to how they treat precedent as they could cite but not fully comply with it. A lower court is compliant only when it rules using "proper application of standards enunciated by the Supreme Court in deciding cases raising similar or related questions," and it is non-compliant when it fails "to apply—or properly apply—those standards" (Tarr 1977, 35).

Prior research has identified a variety of factors that influence lower court compliance with Supreme Court precedents. One of the most important factors impacting compliance is the vitality of the

precedent, or the extent to which the precedent has been positively treated (Hansford and Spriggs 2006). When a decision possesses high vitality, it typically carries more weight and is harder for lower courts to ignore or defy (Hansford and Spriggs 2006). Moreover, the vitality of precedents can serve to both facilitate or constrain ideological voting. For a judge pursuing their ideological preferences, an ideologically aligned precedent with high vitality can serve to justify and legitimize the position of an individual judge or a court as a whole. This serves as a valuable instrumental benefit for the judge. Strong precedent can offer a legally sound argument in support of the position taken by the court, as well as legitimize past and future decisions. Additionally, legal forces that impact judicial decision-making can offer unique constraints on ideological motivations of judges (Corley, Steigerwalt, and Ward 2013). Following a precedent with high vitality can guide a court to a decision that is firmly established in the law, offering the intrinsic benefit of following the principle of *stare decisis*. A high vitality precedent can also signal a clear legal answer to a particular case.

Lower court compliance with U.S. Supreme Court precedent is also influenced by the issue type, salience of the case, clarity of the decision, potential political or electoral benefits, the public's acceptance of the new decision, and a precedent's age (Gruhl 1980; Songer and Sheehan 1990; Benesh and Martinek 2002; Black and Spriggs 2013; Hansford, Spriggs, and Stenger 2013). In examining lower courts in particular, research shows that they largely comply with precedent, yet are most likely to shirk their job of faithfully following precedent when it is overly vague, highly controversial, or caused a significant change in policy (Peltason 1961; Canon 1973; Baum 1978; Canon and Johnson 1999). Additionally, compliance can be influenced by individual preferences of the lower court judges, including the strategic consideration of the possibility that the case will be appealed to higher court, which could establish precedent that is farther away from the judge's preference (Baum 1997; Carrubba and Clark 2012) or an individual judge's desire to reach the correct outcome or advance her career (Posner 1993).

State high courts are particularly sensitive when the U.S. Supreme Court introduces a significant policy shift contrary to the state's preferences (Hall and Brace 1992). This is especially true for elected judges who are motivated to get reelected and often reflect the opinion of those in their constituency (Brace and Hall 1997; Huber and Gordon 2004). These elected judges tend to, by design of their selection methods, have preferences that are in line with their state's political environment and tend to have a higher likelihood of protesting an unpopular decision (Brace and Hall 1997; Benesh and Martinek 2002). If the majority of a state supports a policy that runs counter to an elected judge's personal beliefs, there is a high likelihood the judge will vote in line with the public out of a fear that failure to reflect the opinion of the public can lead to negative electoral consequences (Brace and Hall 1997; Hall 2001; Langer 2002; Huber and Gordon 2004).

A Theory of State Court Compliance

Precedent vitality at the federal level is incredibly predictive of treatment by future courts, but it is limited in its ability to explain judicial decision-making at the state level. Where previous studies have found U.S. Supreme Court precedents to be followed consistently over time throughout the judicial hierarchy, there are a host of institutional and contextual differences that can shape the application of those precedents by state high courts. State high courts can be conceptualized as being pulled in opposing directions in some cases due to competing state and federal precedents. While state high courts are bound by U.S. Supreme Court precedent in cases dealing with federal law or the U.S. Constitution, they are also bound by their own precedents. In these situations, we propose that there are four significant reasons to expect that a state high court's own precedents will exert a stronger influence on its decision-making than those of the U.S. Supreme Court. First, since the development of the adequate and independent state grounds doctrine in the late nineteenth century in *Murdock v. Memphis*,⁴ Supreme Court has given discretion to state high courts to decide cases under their state laws or state constitutions except when the case cannot be decided without dealing with a federal question (Williams

⁴87 U.S. 590 (1875).

1983). The more recent U.S. Supreme Court decision in *Michigan v. Long*⁵ slightly weakened this doctrine by assuming that a federal question existed when a state court decision was unclear as to whether it was based in state or federal law. However, *Long* simply requires state courts to be explicit about the legal basis of their decisions, rather than following the previously held view that the U.S. Supreme Court should ask state courts what they intended in situations of uncertainty (Collins 1984). Even this slightly weakened adequate and independent state grounds doctrine still provides state courts with a mechanism to avoid the need to comply with Supreme Court precedents in areas where federal questions can be avoided. Additionally, when an adequate and independent state ground does not exist, state high courts still serve as a powerful member of the implementing population with respect to U.S. Supreme Court opinions (Canon 1973). When a state high court applies a U.S. Supreme Court precedent to an issue within its state, it gets to shape the parameters for how that precedent is interpreted and applied in the courts of its state. Moreover, as that state high court decides more cases in that issue area, it can decide how policy in the state will evolve either by continuing to positively (negatively) support the U.S. Supreme Court precedent, or by deciding to alter its own earlier approach and treat it negatively (positively). For lower courts within a given state, that state's high court decisions interpreting a U.S. Supreme Court precedent are potentially more important than the original precedent itself, as it shapes the meaning of the U.S. Supreme Court's precedent within that state's borders.

Second, and related to the first point, is the recognition that each state is responsible for implementing U.S. Supreme Court precedent in a way that is compatible with the state's own legal traditions. While precedent vitality based on later treatment by the U.S. Supreme Court accurately captures the influence of past treatment on decision-making in lower federal courts, theoretically it is not adequately suited to measure the influence of past treatment on decision-making in state high courts. Given the ability of state courts to creatively interpret opinion language, the low chance of review from the higher court, and the independently functioning government system in each state, state courts of last resort have a wide swath of considerations and tools available to them in deciding to treat precedent. This argument mirrors that of Benesh and Martinek's (2002, 126) multiple principal agency model for state court decision-making that holds that state courts are willing to defer to Supreme Court precedent, yet "do not hesitate to use federalism to their advantage." They find that state court judges are influenced by both their Legal Principal (the Supreme Court) and their Political Principals (state elites or electorates) in deciding cases.

Third, we recognize that state courts do not follow precedent simply out of some form of mechanical jurisprudence. Rather, as Bueno de Mesquita and Stephenson (2002) observe, judges do not care about policy over precedent; instead, they care about precedent *because* they care about policy. Under the Bueno de Mesquita and Stephenson model, the use of precedent can be used as strong legal communication to lower courts to use as guiding principle. They argue that "if judges can sufficiently improve their communication of the proper legal rule by integrating their decision with an existing line of cases, they will do so, even if it means somewhat modifying the legal rule they announce and expending some energy on writing a compelling and coherent opinion that integrates seemingly divergent rulings" (Bueno de Mesquita and Stephenson 2002, 764). However, they also posit that if the use of precedent is not worth the negative impact on substantive policy, a judge will break with the precedent. Therefore, while judges desire to use strong precedents to legitimize their decisions, the use of precedent is merely a means to achieve an end result of desired policy.

Finally, as Langer (2002) observes, state court judges are attentive to their local political environment. They must take into consideration the electoral prospects resulting from a particular decision and accounting for potential institutional backlash from the legislature or the executive. Where elected and appointed judges follow precedent, elected judges may place heavier consideration on the cost of following precedent in light of reelection. Conversely, those in appointed states, while not fearing electoral backlash, can alter the calculus of decision making out of the unwillingness to deviate from the legislature or executive. Additionally, some state judges may alter their behavior due to their susceptibility to court-curbing efforts (Leonard 2016). Simply put, yielding to the political context in which

⁵463 U.S. 1032 (1983).

these courts operate can prove to be a more desirable exercise than the implementation of a precedent. Therefore, while it is likely that federal precedent vitality informs the state-specific vitality in each state, the conceptual framework we develop with respect to state-specific vitality allows us to theoretically and empirically engage in a comparative analysis of compliance across the states in ways impossible with the employment of federal vitality alone.

An Application: *Miller v. California* and State High Courts

In U.S. constitutional law, it has long been recognized that obscene materials are a limited class of material that fall outside of the protections afforded by the First Amendment.⁶ While this core principle would intuitively seem to breed simplicity in the law, it has instead produced a constitutional imbroglio where judges must examine individual materials to determine on which side of the bright line separating protected speech from unprotected obscenity they fall. Obscenity is, by its very nature, a difficult term to define. This definitional difficulty is magnified by the need for a universal definition applicable to a wide array of specific materials, in the context of individual cases, occurring in diverse communities across the nation with vastly different standards of acceptability (Fix 2016). In *Miller v. California*,⁷ the Court sought to provide clarity in this area by formulating a universal standard, or test, for defining what constitutes obscenity.⁸ Part of the Court's goal in *Miller* was to allow individual states flexibility in crafting obscenity laws to meet the needs of their states while simultaneously drawing a line in the constitutional sand across which no such law could cross without offending the First Amendment.

Scholarly criticism of the *Miller* test questions its ability to live up to such a lofty goal in practice due to an inability of juries or trial judges to determine and apply community standards (Scott, Eitle, and Skovron 1990; Fix 2016). However, this prior work fails to evaluate the success of this standard in terms of one of the most important measures of its impact: Has it clarified the law for appellate courts that must comply with it? When the Supreme Court issues a decision, there is an expectation that the opinion will settle the matter for the litigants and give clear direction to lower courts for interpretation. A recognition of this was at the heart of the Court's *Miller* decision. Noting how the lack of a clear standard had led to the abundance of obscenity cases it had been forced to deal with in recent terms, and the "tension between state and federal courts," the Court justified its introduction of a new standard out of a need to remedy these problems.⁹

A casual review of the four decades of obscenity jurisprudence following the Court's decision in *Miller* might lead one to conclude that it has been successful, as the Supreme Court has made no attempt to alter the standard. This conclusion would be reinforced by *Miller*'s rather high vitality score. Hansford and Spriggs (2006) developed vitality scores as a measure of positive and negative treatments of U.S. Supreme Court precedent. A higher vitality score suggests successful implementation as more subsequent positive treatments have occurred than negative ones, whereas lower vitality scores imply the converse. As of 2011, only seven cases decided since 1946 had a higher vitality score than *Miller*,¹⁰ illustrating that—at least with respect to the Supreme Court itself—the decision has been faithfully followed.

⁶In *Chaplinsky v. New Hampshire*, the Court summarizes the "classes of speech" falling outside the umbrella of the First Amendment's coverage as "the lewd and obscene, the profane, the libelous, and the insulting or fighting words," 315 U.S. 568 at 571–572 (1942).

⁷413 U.S. 15 (1973).

⁸The Court in *Miller* created a three part test for determining whether material was obscene:

1. whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
2. whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
3. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value (413 U.S. at 24).

⁹The points in the majority opinion were largely directed at Justice Brennan's dissent where he argued essentially that these were reasons to abandon any attempt to define obscenity altogether.

¹⁰The only cases decided since 1946 with a higher vitality score than *Miller* were *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Mathews v. Eldridge*, 424 U.S. 319 (1976), *Strickland v. Washington*, 466 U.S. 668 (1984), *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), *Michigan v. Long*, 463 U.S. 1032 (1983), and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Yet, focusing only on the impact *Miller* has had on subsequent Supreme Court decisions ignores the fact that state high courts bear a great responsibility in the implementation of legal policy. While lower courts rarely defy a higher court's decision outright, this tends to occur more frequently in regard to a highly salient civil rights or civil liberties case (Baum 1978; Canon and Johnson 1999). This stands in contrast to the normal tendency for vertical implementation to exhibit high rates of compliance throughout the judicial system. However, the influence of the law on judicial decision-making is rarely simple. For example, prior research shows that statutory language can both constrain and facilitate ideological voting (Randazzo, Waterman, and Fine 2006; Randazzo, Waterman, and Fix 2011). Therefore, utilizing many of the Supreme Court's civil rights or liberties decisions to test our theory of state court compliance would make it difficult to separate true compliance with a legal principle (or the lack thereof) versus the appearance of compliance (or the lack thereof) simply because the decision happened to facilitate (constrain) reaching the court's preferred ideological outcome. Part of the Court's impetus for the adoption of a new standard in *Miller* was the need to resolve the "tension between state and federal courts."¹¹ The way in which the ambiguous language of the standard interacted with the nature of vertical decisions may have given state courts the ability to follow their own preferences. Each of the prongs outlined above are open to interpretation, which could provide great freedom to a judge motivated by a particular ideology or moral code. In this way, the decision provides a legal standard that can be followed with minimal constraint upon ideological preferences of a liberal or conservative nature. In other words, *Miller* is ideally suited for a study of state court compliance with the *legal principle* ensconced in a U.S. Supreme Court precedent because it offers the flexibility to reach a wide range of ideological outcomes while still following it.

Additionally, we feel that *Miller* is ideally suited as an initial test of our theory for two other reasons. First, using other U.S. Supreme Court precedents that lack variation in the level of vitality across states or over time would make it extremely difficult to disentangle the impact of state-specific vitality from vitality based solely on later U.S. Supreme Court treatments. In contrast, *Miller* offers high variation in the number of treatments across states and over time. Second, because obscenity cases are relatively common, there are cases from all fifty states over the timeframe of our study where the state high court has had the opportunity to positively treat *Miller*.

Given that the implementation of U.S. Supreme Court decisions is dependent on the willingness of lower courts to comply with them in individual cases, understanding whether a decision impacted national legal policy requires an examination of how the precedent was treated by lower courts. While the Supreme Court has not altered its obscenity standard since *Miller*—and has faithfully followed that decision on multiple occasions—its impact is still limited by the degree to which state high courts have shirked their responsibility of applying *Miller* and its three-pronged test. Therefore, the degree to which implementation was a success depends on the rate at which *Miller* was followed in the states. Like the federal courts, state courts can use strong precedent to legitimize both individual decisions and the institution as whole. This can serve to benefit individual judges in pursuit of ideological and electoral goals, but also to increase the legitimacy of decisions that shape policy in the states. Prior work on state high court decision-making shows that the vitality of U.S. Supreme Court precedents is a powerful determinant of their subsequent treatment in state high courts (Kassow, Songer, and Fix 2012). Therefore, we expect that, all else being equal, state courts should be more likely to adopt and follow the decision in *Miller* faithfully when its vitality is high. This leads us to our first hypothesis:

H₁: As the vitality of *Miller* increases over time, state courts will be more likely to treat it positively.

Alternatively, as the theoretical framework we introduce posits, the degree to which the U.S. Supreme Court has continued to support a core precedent may be less important than how the high court of a given state has treated the decision previously. This is especially likely in a controversial area such as obscenity. As judges on each state high court pursue their ideological and legal preferences,

¹¹*Miller*, 413 U.S. at 29, quoting from Brennan's dissenting opinion in *Paris Adult Theatre I v. Slaton*.

several factors may condition their willingness to follow federal precedent. *Miller's* ambiguous language in defining obscenity could provide state courts with further justification to avoid complying with the decision without directly defying the U.S. Supreme Court. Therefore, state high courts may find it more desirable to rely on the past decisions of their own court when deciding new cases in a given issue area, particularly in a controversial one such as obscenity. Simply put, state high court judges may be less influenced by the vitality of a precedent overall, and more concerned with its state-specific vitality. Thus, our second hypothesis:

H₂: As the state-specific vitality of *Miller* increases over time, that state's high court will be more likely to treat it positively.

Data and Methods

In order to evaluate our hypotheses regarding state court treatments of *Miller*, we created a unique dataset containing all state high court obscenity cases. To locate the universe of cases, we used the search terms “obscene,” “obscenity,” and “pornography” in LexisNexis. After eliminating irrelevant cases, cases with missing data on key variables, and those decided prior to *Miller*, we retained 321 cases from the years 1973 to 2013, with at least one case from each state.

Our dependent variable is a measure of whether the state court treated *Miller* in a positive way. To code positive treatments, we assess each citing case to determine whether the state supreme court used the U.S. Supreme Court's decision in *Miller* as the guiding principle or test in its decision in each case. Our coding mirrors that of *Shepard's Citations* where we code *Positive Treatment* as 1 for any case where the state court “followed” *Miller* under the guidelines established by *Shepard's*.¹² According to their coding rules,¹³ a decision follows a precedent when it “relies on the case you are Shepardizing as controlling or persuasive authority.” While there is always a degree of subjectivity in coding court decisions, the specific application of this coding rule to *Miller* is quite straightforward.¹⁴ The core legal principle in *Miller* was its definition of obscenity laid out in the three-part test. Thus we code a decision as following *Miller* when the state court applied the three-part test from *Miller* in determining whether material was obscene, regardless of the ideological implications of that determination. We code all other cases as 0. Our dependent variable is well balanced, as positive treatment of *Miller* in state high court obscenity cases decided between 1973 and 2013 occurred in nearly half of our observations, with 145 involving positive treatment of *Miller* (45.17 percent), and the rest either negative treatment (4.36 percent) or no treatment (50.47 percent).¹⁵

To test the impact of precedent *Vitality* on state high court treatment, we utilize the Hansford and Spriggs (2006) measure, updated through the Court's 2013 term. Their vitality scores are measured as a running tally of treatments of the *Miller* precedent by the Court in future cases. The measure is computed such that a positive treatment increases the vitality score by a unit of one, and a negative treatment decreases the score by one. During the 1973–2013 period, *Miller's* vitality scores ranged from 5 (1974 and 1983–1985) to 9 (2003–2012). If our first hypothesis is correct, we should see more positive treatments by state high courts as *Miller's* vitality score increases. However, as we argue that prior treatment by the high court of a given state has a greater impact than treatment by the U.S. Supreme Court, we must also account for the vitality of *Miller* within each individual state over time. To test for this, we create a measure of *State-specific Vitality* that mirrors the Hansford and Spriggs (2006) measure but focuses on how the high court of each state has treated *Miller*.¹⁶ Specifically, for each state/year we calculate the difference

¹²We coded treatments ourselves due to the timeframe of our study. As Kassow, Songer, and Fix (2012) note, *Shepard's Citations* do not report treatments of U.S. Supreme Court precedents by state courts systematically prior to 1993.

¹³For details on *Shepard's* classification rules, see: https://www.lexisnexis.com/shepards-citations/printsupport/shepardize_print.pdf.

¹⁴This is reflected in the high level of intercoder reliability (Krippendorff's alpha = 0.903).

¹⁵We also utilize an alternative coding scheme with a trichotomous dependent variable to differentiate negative treatments from cases in which *Miller* was cited without treatment (1 = positive treatment, 2 = just cited, 3 = negative treatment). Reestimating our primary model as a multinomial logit with this alternative dependent variable largely yields substantively equivalent results with respect to the impact of the independent variables of interest on the likelihood that state high courts will positively treat *Miller* as opposed to just citing it.

¹⁶Descriptive statistics of State-specific Vitality can be found in Table A1 of the Appendix.

between the number of positive treatments of *Miller* in the prior decisions of a state's high court and the number of negative treatments.¹⁷ Theoretically, *State-specific Vitality* can range from negative infinity to positive infinity, but in our data it ranges from a minimum of -2 (Virginia from 1974 to 1981) to a maximum of 12 (Louisiana from 1990 to 2013 and Nebraska from 2002 to 2013).¹⁸

Along with our measures of vitality, we include a variable to account for the impact of the age of *Miller*. Prior research has consistently shown that the likelihood of positive treatment of precedents, or even citation of them, declines as precedents age (Boyd and Spriggs 2009; Westerland et al. 2010; Black and Spriggs 2013; Hansford, Spriggs, and Stenger 2013). Additionally, this effect appears to be nonlinear, with the most dramatic drop coming in the earliest years of the precedent's life (Boyd and Spriggs 2009). As such, we follow Hansford, Spriggs, and Stenger (2013) and include $\ln(\text{Age})$ to account for the nonlinear impact of age on positive treatment of *Miller* in state high courts.

In addition to our vitality measures, we include two case-specific covariates. The first, *Constitutional Question*, is a dichotomous indicator of whether the case involved a challenge to the constitutionality of a state law or the action of a state official under either the federal or state constitution. As it may be more difficult to defy precedent in a case involving a constitutional challenge, state courts should be more likely to treat *Miller* positively in these cases. The other, *Viewed Material*, is a measure of whether the state court specifically stated in the opinion that they had viewed or read the specific material at issue in the case. The famous observation from Justice Potter Stewart in *Jacobellis v. Ohio* recognizing his own difficulty in defining obscenity, but that "I know it when I see it,"¹⁹ leads to an expectation that actually viewing specific material might impact a judge's determination of whether the material is obscene. Moreover, as *Miller* specifically requires a determination of whether the material at issue "lacks serious literary, artistic, political, or scientific value,"²⁰ it seems likely that this would increase the likelihood of positive treatment as judges would have to view the material to make an independent determination as to whether this condition was satisfied.

Finally, we account for key institutional features of the courts and the political context of the state in which they operate. First, as the method of retention has been repeatedly shown to influence the decision making of state judges in a number of ways, we include a series of indicator variables to detect the differential impact of *Partisan Elections*, *Nonpartisan Elections*, or *Retention Elections* compared to a baseline of judicial appointment. Similarly, the presence of discretionary docket control can have an impact on the types of cases a court decides, indirectly impacting treatment of precedents by limiting the number of relevant cases on its docket. Therefore, we include an indicator of whether the state has an intermediate appellate court, or *IAC*, to capture this institutional feature. Finally, since the political environment in which a court operates impacts many aspects of state court behavior, we account for the possibility that it will influence positive treatment of *Miller* as well. For this, we utilize the commonly used measure of state *Citizen Ideology* from Berry et al. (1998, 2010) as a proxy for the state's overall political views.²¹

¹⁷While we feel that our measure is a valid operationalization of the concept of state-specific vitality, it could be argued that a ratio measure might be more appropriate in a highly litigated issue area. The count measure is more consistent with our theory since the total number of positive and negative treatments matters as much as the ratio of positive to negative treatments; however, we used the ratio of positive treatments as an alternative measure of *State-specific Vitality* as a robustness check in an alternative model specification. Reestimating our primary model with this alternative measure yielded substantively equivalent results.

¹⁸Raw data for the state-specific vitality scores for *Miller* for all 50 states over the time period of the study is available from the authors upon request.

¹⁹378 U.S. 184, 197 (1964).

²⁰413 U.S. 15, 25 (1973).

²¹While the state's overall ideological climate is likely to mirror the ideology of its high court judges to a high degree, ideally we would include an additional variable to account for the median ideology of the court. However, no existing measure of state high court ideology covers the full timeframe of our study. To ensure this did not impact our model estimates, we reestimated our model for the abbreviated 1973–2005 timeframe and included a variable accounting for the median state high court ideology using Brace, Hall, and Langer's (2000) party-adjusted judge ideology score (PAJID). The estimates from this model were substantively identical to those presented herein. An alternative measure of judge ideology recently introduced by Windett, Harden, and Hall (2015) would be a more ideal measure for this study. However, it is available only for the 1995–2010 timeframe. As the bulk of our observations came in the decade following the *Miller* decision, dropping all observations prior to 1995 (and those after 2010) would significantly reduce our sample size ($n = 72$) and, more importantly, include only state court decisions issued after obscenity standards had become settled law in most states post-*Miller*.

Table 1. Determinants of positive treatment of *Miller*.

	Coefficient (Standard Error)	<i>p</i> value
State-specific Vitality	0.189 (0.053)	0.000
Vitality	0.031 (0.133)	0.814
Constitutional Question	1.155 (0.298)	0.000
Material Viewed	0.663 (0.347)	0.056
Partisan Election	-0.487 (0.412)	0.237
Nonpartisan Election	0.077 (0.362)	0.830
Retention Elections	-0.088 (0.337)	0.792
IAC	-0.664 (0.447)	0.138
Citizen Ideology	-0.001 (0.008)	0.930
ln(Age)	-1.186 (0.186)	0.000
Constant	1.195 (1.099)	0.277
<i>N</i>	321	
PRE	0.441	
χ^2	62.16	0.000
AIC	341.03	
BIC	382.52	

Note: Dependent variable is whether the state court positively treated *Miller v. California*. Cell entries are logit coefficient estimates. Standard errors clustered by state are in parentheses.

Results

Table 1 provides estimates from a logit model of the impact of the factors discussed above on state court treatment of *Miller v. California*. Overall, the model performs quite well, correctly predicting over 74 percent of all observations for a reduction in error of over 44 percent. The results show strong support for our second hypothesis. Consistent with our theoretical expectations, state high court treatment for *Miller* appears to be driven heavily by how that court has treated it in its own past precedents. Moreover, the relationship between the two is quite strong substantively. As Figure 1 shows, a shift from the minimum to maximum observed value for *State-specific Vitality* equates to an increase in the probability of a positive treatment by 0.541. Interestingly, our estimates show that prior U.S. Supreme Court treatment of *Miller* has no significant effect on the likelihood of positive treatment of the precedent by state high courts. We speculate that this finding may be due to vitality having only an indirect impact on the treatment of *Miller* in individual state high court cases but a direct influence on the long-term interpretation of *Miller* by state courts.²² Further, the age of the *Miller* precedent also exerts a strong influence on the likelihood of a positive treatment. Consistent with the extant literature, the probability of a positive treatment strongly decreases as the age of the precedent increases.

Case-specific factors also significantly influence the probability of positive treatment, as both case-specific variables exert a strong positive impact on the likelihood a state high court will positively treat *Miller*, although *Material Viewed* does not quite achieve statistical significance at the conventional 95

²²Auxiliary analyses provided in Appendix 2 provide support for this, showing that *Vitality* has a positive and statistically significant impact on our measure of *State Vitality*, while accounting for a set of potentially relevant covariates (Table A2). Additionally, in Appendix 2, we conduct an auxiliary analysis to ensure that potential cointegration between *Vitality* and *State-specific Vitality* is not impacting our estimates (Table A3).

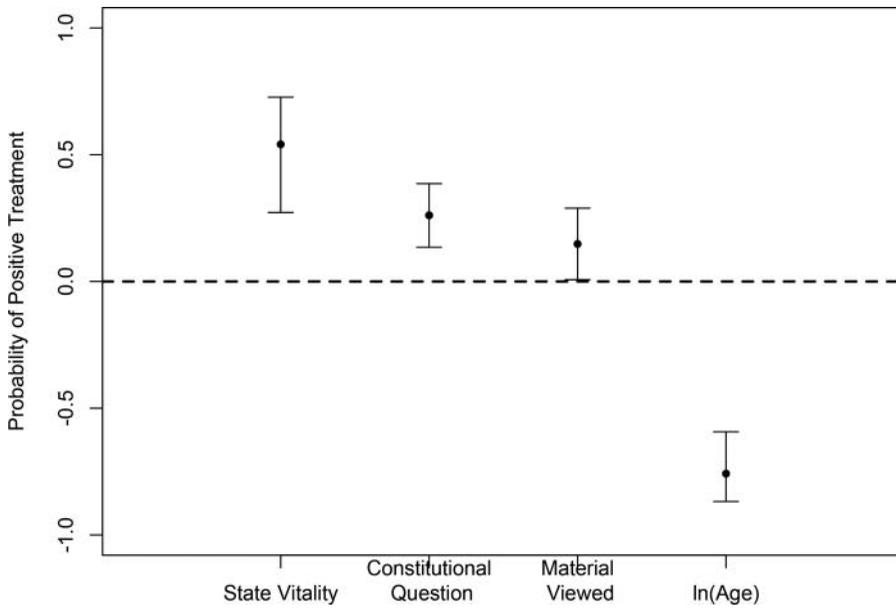


Figure 1. Predicted Probability of Positive Treatment. Predicted probabilities are first differences moving the variable from its minimum to maximum value, while holding all continuous variables at their mean and dichotomous variables at their mode. Dots represent mean probability estimates, error bars are a 95% confidence interval. Only statistically significant estimates are presented.

percent level ($p = 0.056$). The presence of a constitutional challenge increases the likelihood of positive treatment by 0.261, a strong but intuitive finding. When a constitutional challenge is brought, it should be more difficult for a state court to evade a core U.S. Supreme Court precedent in the area. Whether the court directly views or reads the material also has a substantively significant impact on the likelihood of a positive treatment, with the probability of positive treatment increasing by 0.148 when the material is viewed. This is consistent with our theoretical expectation that *Miller's* third prong would force state court judges to directly evaluate the material to see if it has literary, artistic, political, or scientific value. Thus those who view the material would be likely to do so with the intention of applying the *Miller* test.

Our estimates show that both our contextual measure of the state's political environment, *Citizen Ideology*, and the institutional factors we include in our model appear to have little impact as predictors of positive treatment of *Miller* by state high courts. Neither the retention variables nor the indicator of whether the state has an intermediate appellate court achieve significance at conventional levels. Overall, based on our model estimates in Table 1, we are hesitant to draw any firm conclusions about the degree to which the U.S. Supreme Court's *Miller* decision has been faithfully implemented by state high courts. However, the results do demonstrate that the strongest determinant of positive treatment by state high courts appears to be the degree to which a given court has positively treated it in the past.

Conclusions

This study develops a new theoretical framework for understanding state high court compliance with U.S. Supreme Court precedents and the impact of that compliance on successful implementation of the precedent. Scholars have historically viewed implementation of the Supreme Court's legal policy as a function of its treatment in future Supreme Court cases (Hansford and Spriggs 2006; Kassow, Songer, and Fix 2012). Under this conceptualization, high levels of positive treatment of U.S. Supreme Court precedents in lower courts is viewed as successful implementation. We provide an alternative approach to understanding the impact of federal precedent and its subsequent influence over states. Past treatment of precedent by the U.S. Supreme Court has long been considered a determinant of treatment of that precedent in state high courts. However, we introduce a measure of state-specific precedent

vitality, which accounts for the variation in adherence to U.S. Supreme Court precedents across the individual states. This measure accounts for the fact that state supreme courts frequently rely on their own interpretation of U.S. Supreme Court precedent in future cases (rather than reinterpreting the original precedent each time). Moreover, moving past an examination of federal treatment of precedent and looking to state-specific treatment offers a more developed understanding of the implementation of legal doctrine. Operating in a system of shared and separated powers, the U.S. Supreme Court depends on the lower federal courts, state courts, and other institutions to comply with its decisions and, ultimately, for the faithful implementation of those decisions. Further understanding how state court treatment of U.S. Supreme Court precedents develops and evolves over time can provide us with a more thorough picture of how legal policy diffuses across the legal systems of the states.

Applying this theoretical innovation to an analysis of state high court implementation of *Miller v. California* illustrates the fruitfulness of this approach for improving our understanding of this dynamic process. Our findings provide evidence that one of the strongest predictors of positive treatment of *Miller* by a given state's high court is the state-specific vitality score for that state. This simple, but theoretically powerful, measure can easily be expanded and examined across additional issue areas to further our understanding of the life of precedents, the relationship between federal and state courts, and the diffusion of legal policy. While we view *Miller* as an ideal precedent for an investigation of how state high courts treat the core legal principle of a U.S. Supreme Court precedent unencumbered by ideological considerations, future work should examine this in the context of a more ideologically charged precedent to see if positive treatment is more (less) likely under conditions of ideological congruence (divergence). Additionally, future research should examine the impact of state-specific vitality on the likelihood of positive treatment by neighboring states. While beyond the scope of this project, the innovation and diffusion literature suggests that one of the primary determinants of policy adoption is whether that policy has been adopted by neighboring or ideologically similar states (Walker 1969; Canon and Baum 1981; Berry and Berry 1990). It seems intuitive that similar mechanisms may be at work here.

Acknowledgments

The authors thank Susanne Schorpp, Doug Rice, Craig Curtis for providing comments on earlier versions of this article. We also thank the anonymous reviewers whose suggestions significantly improved the final version of this article. A previous version was presented at the 2016 Annual Meeting of the Midwest Political Science Association.

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Appendix 1: Descriptive Statistics

Table A1. Descriptive statistics.

	Mean	Standard Deviation	Minimum	Maximum
Positive Treatment	0.443	0.497	0.000	1.000
State-specific Vitality	3.319	2.967	−2.000	12.000
Vitality	6.257	2.111	0.000	9.000
Constitutional Question	0.646	0.479	0.000	1.000
Material Viewed	0.246	0.432	0.000	1.000
Partisan Election	0.220	0.415	0.000	1.000
Nonpartisan Election	0.220	0.415	0.000	1.000
Retention Elections	0.388	0.488	0.000	1.000
IAC	0.927	0.259	0.000	1.000
Citizen Ideology	45.059	16.842	7.490	91.852
ln(Age)	2.133	1.143	0.000	3.689

Appendix 2: Relationship between Vitality and State-specific Vitality

As discussed in our Results section, our speculation is that the counterintuitive finding with respect to the statistically insignificant coefficient estimate on *Vitality* is likely masking a potential indirect effect that the U.S. Supreme Court's treatment of *Miller* in its own subsequent obscenity cases may be having on its treatment by state high courts over time. If this is the case, then our theoretical interest should not be on the direct influence of *Vitality* on the likelihood of positive treatment of *Miller* in individual state high court cases, but rather on its direct impact on *State-specific Vitality*. As a preliminary test of this hypothesis, we estimate a linear regression model with panel corrected standard errors (Beck and Katz 1995) to examine the effect of *Vitality* on *State-specific Vitality*. In the model, we also account for state ideology and the method of judicial selection in the state by including a measure of *Democrat Vote Share* in the state from the most recent presidential election and the indicator variables for *Partisan Election*, *Nonpartisan Election*, and *Retention Election* from our primary models.²³

The results of this analysis are presented in [Table A2](#). These findings support our intuition regarding the direct effect of *Vitality* on *State-specific Vitality* and our speculation that the null effect for *Vitality* found in our primary models was potentially reflecting its indirect, rather than direct, influence on state high court treatment of *Miller*. While not of primary interest, it is noteworthy that all of the other variables in the model achieve statistical significance at conventional levels, implying that states that utilize partisan, nonpartisan, or retention elections as their mechanism for retaining high court judges will have higher state-specific vitality scores than those that use appointment, all else being equal. Thus institutional factors may also matter for the treatment of *Miller*, but also in an indirect way. Additionally, while the substantive effect is weak, these results suggest that as states vote more Democratic in presidential elections, their state-specific vitality score should increase by a minimal amount.

²³We utilize *Democrat Vote Share* instead of the more robust Berry et al. (1998) measure in this auxiliary analysis to enable examination of the full 1973–2015 time period. However, looking only at the 1973–2013 time period used in the primary analysis with the *Citizen Ideology* variable included instead yields substantively equivalent results.

Table A2. Determinants of state-specific vitality 1973–2015.

	Coefficient (Standard Error)	<i>p</i> value
Vitality	0.187 (0.055)	0.001
Democrat Vote Share	0.035 (0.006)	0.000
Partisan Election	1.887 (0.045)	0.000
Nonpartisan Election	0.965 (0.054)	0.000
Retention Elections	2.176 (0.063)	0.000
Constant	−1.423 (0.439)	0.001
<i>N</i>	2099	
χ^2	3433.36	0.000
r^2	0.098	

Dependent variable is the difference between the number of positive and negative treatments of *Miller v. California* in all decisions of a state's high court(s) prior to that year. Cell entries are regression coefficient estimates with panel correct standard errors.

Additionally, despite the low correlation between the *Vitality* and *State-specific Vitality* variables ($r = 0.12$), the error correction-based cointegration tests for panel data proposed by Westerlund (2007) show the presence of significant cointegration between the two. To see if this cointegration poses issues for the results of our primary analysis, we utilized a two-step robustness check. First, the

Table A3. Determinants of positive treatment of *Miller*—Alternative specification.

	Coefficient (Standard Error)	<i>p</i> value
State-specific Vitality (Residuals)	0.198 (0.052)	0.000
Vitality	0.093 (0.140)	0.506
Constitutional Question	1.172 (0.307)	0.000
Material Viewed	0.650 (0.192)	0.001
Partisan Election	−0.187 (0.408)	0.647
Nonpartisan Election	0.235 (0.361)	0.515
Retention Elections	0.333 (0.323)	0.302
IAC	−0.655 (0.461)	0.155
Citizen Ideology	0.005 (0.009)	0.588
ln(Age)	−1.143 (0.197)	0.000
Constant	0.495 (1.183)	0.676
<i>N</i>	320	
PRE	0.486	
χ^2	63.93	0.000
AIC	330.13	
BIC	371.58	

Note: Dependent variable is whether the state court positively treated *Miller v. California*. Cell entries are logit coefficient estimates. Standard errors clustered by state are in parentheses.

residuals from the linear regression model with panel corrected standard errors discussed above were stored as a new variable representing the variance in *State-specific Vitality* unexplained by *Vitality* and the other covariates in the above model. Second, our primary model in [Table 1](#) was reestimated utilizing this residual variable in place of our *State-specific Vitality* measure. The results of this analysis are presented in [Table A3](#). As the table shows, all estimates are largely unchanged from the initial analysis. The coefficient estimate on *Material Viewed* now achieves statistical significance at the conventional level of $\alpha = 5\%$, but no other coefficient estimates change in any meaningful way.