

## FRIENDLY PRECEDENT

ANTHONY NIBLETT & ALBERT H. YOON\*

### ABSTRACT

*This Article explores which legal precedents judges choose to support their decisions. When describing the legal landscape in a written opinion, which precedent do judges gravitate toward? We examine the idea that judges are more likely to cite “friendly” precedent. A friendly precedent, here, is one that was delivered by Supreme Court Justices who have similar political preferences to the lower court judges delivering the opinion. In this Article, we test whether a federal Court of Appeals panel is more likely to engage with binding Supreme Court precedent when the political flavor of that precedent is aligned with the political composition of the panel.*

*We construct a unique dataset of 591,936 citations to United States Supreme Court decisions by the federal Courts of Appeals in 127,668 unanimous decisions from 1971 to 2007. We find that judges gravitate toward friendly precedent. The political composition of a panel consistently influences which binding precedent is cited in the written opinion. All Republican-appointed panels gravitate toward the most conservative precedent; all Democratic-appointed panels gravitate toward the most liberal precedent and unfavorably cite the most conservative precedent. This result is notable because it provides*

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\* Niblett is Assistant Professor of Law, and Yoon is Professor of Law, both at the University of Toronto Faculty of Law. We received helpful feedback from Ben Alarie, Christina Boyd, Ian Caines, Ed Cheng, Lee Epstein, John Ferejohn, Tracey George, John Goldberg, Mitu Gulati, Gillian Hadfield, William Hubbard, Ed Iacobucci, Daniel Klerman, Jack Knight, William Landes, Brian Leiter, Anup Malani, Martha Nussbaum, Eric Posner, Richard Posner, Brian Tamanaha, Christian Turner, Jim Zafris, and workshop participants at the University of Chicago, Vanderbilt University, University of Toronto, and Washington University law schools. Jamie Baxter and Chad Cogar provided excellent research assistance. The authors also thank West Publishing for facilitating the provision of their data. Yoon thanks the Russell Sage Foundation for their generous financial support. All remaining errors are our own.

*strong evidence that judges, when reasoning their decisions, have different conceptions of binding precedent.*

TABLE OF CONTENTS

INTRODUCTION . . . . .	1792
I. EXISTING LITERATURE ON PRECEDENT . . . . .	1796
II. DATA . . . . .	1801
<i>A. Our Dataset</i> . . . . .	1801
<i>B. Measures of Ideological Content of Precedent</i> . . . . .	1805
<i>C. Summary Statistics</i> . . . . .	1809
III. RESULTS . . . . .	1811
<i>A. Friendly Precedent</i> . . . . .	1811
<i>B. Unfriendly Precedent</i> . . . . .	1815
IV. DISCUSSION . . . . .	1818
CONCLUSION . . . . .	1822

## INTRODUCTION

Imagine that you are invited to a party. Upon entering a crowded room, you see people that you know and like, those you know but dislike, and still others whom you do not even know. To whom do you gravitate? Do you converse with your existing circle of friends? Do you exchange pleasantries with your adversaries? Do you strike up conversation with strangers?

This familiar hypothetical is the motivation for this Article examining judicial behavior.<sup>1</sup> When a judge writes an opinion, she will see binding precedent from judges whom she likes, and other precedent from judges with whom she may not see eye-to-eye. Which precedent does a judge gravitate toward when writing the opinion? In this Article, we examine the idea that a judge will gravitate toward citing friendly precedent. Friendliness, here, is measured in terms of similar political preferences. Specifically, we test whether a federal Court of Appeals panel is more likely to engage with binding Supreme Court precedent when the political flavor of that precedent is aligned with the political alignment of the panel.

Since at least the early twentieth century, legal scholars have sought to understand how judges decide cases. Within jurisprudence circles, the debate pitted formalism against realism: formalists argued that legal problem-solving was a deductive process contained within the rules themselves;<sup>2</sup> realists rejected the centrality of rules in favor of nonlegal factors, including pragmatism.<sup>3</sup> The interdisciplinary debate has largely focused on whether judges act in

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1. The hypothetical is based on Judge Harold Leventhal's famous description of when and how judges decide to use legislative history as "looking over a crowd and picking out your friends." See, e.g., Michael Abramowicz & Emerson H. Tiller, *Citation to Legislative History: Empirical Evidence on Positive Political and Contextual Theories of Judicial Decision Making*, 38 J. LEGAL STUD. 419, 419 (2009); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

2. See C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS: WITH REFERENCES AND CITATIONS, at vi (Boston, Little, Brown & Co. 1871); Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 495-96 (1996) (reviewing NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995)).

3. See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 23 (1921); see also RICHARD A. POSNER, HOW JUDGES THINK 110-11 (2008) (writing that the opinion-writing process is "mainly a search for supporting arguments and evidence").

accordance with their own ideological preferences<sup>4</sup> or are constrained by higher courts<sup>5</sup> or other political branches.<sup>6</sup> More recently, scholars have taken a middle view that judges are influenced by both legal and political factors.<sup>7</sup>

In exploring this question, interdisciplinary scholars have looked primarily at voting behavior. Their consensus is that judicial ideology influences how Supreme Court Justices<sup>8</sup> and lower federal court judges decide cases<sup>9</sup> alike. For example, the political leanings of federal Courts of Appeals judges—as measured by the party of the president who appointed the judge—are highly correlated with the ideological direction of their decisions.<sup>10</sup> “Ideological dampening” occurs when the three-judge panel is made up of judges appointed by both political parties: a liberal judge moderates a conservative majority; a conservative judge moderates a liberal majority.<sup>11</sup>

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4. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

5. See McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1635 (1995) (describing stare decisis as “a self-enforcing equilibrium of doctrinal preferences among the courts”).

6. See William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 616 (1991).

7. See Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 384-85 (2007).

8. See generally Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007) (examining data based on Supreme Court Justices’ votes to measure ideological preferences).

9. See Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1493-94 (2008) (discussing how ideology and legal doctrine impact judicial outcomes); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825-26 (2006) (examining the impact of judicial convictions on judicial application of the *Chevron* framework); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 835, 837 (2008) [hereinafter Miles & Sunstein, *The New Legal Realism*] (discussing research that suggests the partisanship of judicial panels impacts voting); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 220-21 (1999) (discussing research that suggests a correlation between judges’ political party affiliation and judicial ideology); Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1100-01 (2001) (examining how political changes in the makeup of Congress and the executive branch impact the judicial decision making of the United States Court of Appeals for the D.C. Circuit); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 304-05 (2004) (discussing concepts of “ideological voting,” “dampening,” and “amplification”).

10. See Sunstein et al., *supra* note 9, at 305-06.

11. That is, a panel with one Democratic-appointed judge sitting with two Republican-appointed judges (DRR) is likely to vote less conservatively than a panel with three Republican

This focus on outcomes, while certainly important, fails to capture a crucial aspect of judicial behavior. It completely overlooks the broader importance of the written opinion. These opinions provide guidance to judges and prospective litigants.<sup>12</sup> Case outcomes, by themselves, are limited in informing how judges will decide future cases. As Jack Knight has argued, scholars need to look at “aspects of the opinions accompanying the votes.”<sup>13</sup> Legal precedent serves as the means by which judges validate their decisions and persuade other jurists (and lawyers) to adopt their point of view.<sup>14</sup>

The relationship between judges’ ideology and their use of precedent has been relatively unexplored by scholars in law and political science. When reasoning their decision in a given case, do judges vary from one another in how they perceive and use binding precedent? Two competing hypotheses emerge. The first is that judges, irrespective of their ideology, draw upon the same corpus of precedent, but may differ in their interpretation and the conclusions they reach. The second is that, depending on their ideology, judges draw upon different subsets of precedent to explain their decisions. To return to the party metaphor, the former posits that judges work their way around the room; the latter contends that they talk mostly with their friends.

In this Article, we examine how judges in the Courts of Appeals cite Supreme Court precedent. We construct a unique dataset that includes every published unanimous federal appellate decision from the period 1971 to 2007. Specifically, the dataset contains every cited Supreme Court precedent for the years 1953 to 2007. Our dataset comprises nearly 130,000 unanimous Courts of Appeals opinions

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appointees (RRR); and a panel with one Republican-appointed judge sitting with two Democratic-appointed judges (DDR) is likely to vote less liberally than a panel with three Democratic-appointed judges (DDD). *See id.* at 304.

12. *See* Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 269 (2006) (“[L]ooking to outcomes rather than opinions leads to the wrong conclusion of what the court ‘did.’”); Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV. 517, 526 (2006) (“[T]he primary power of doctrine lies in its ability to influence decisions by lower courts.”).

13. Jack Knight, *Are Empiricists Asking the Right Questions About Judicial Decisionmaking?*, 58 DUKE L.J. 1531, 1533 (2009).

14. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 745 (8th ed. 2011) (“[P]recedent projects a judge’s influence more effectively than a decision.”).

and nearly 600,000 citations to Supreme Court precedent.<sup>15</sup> We assign ideological scores to each precedent, using competing measures and methodologies, and distinguish whether judges are citing each precedent favorably (following) or unfavorably (distinguishing or criticizing).

Our central finding is that panel composition consistently and systematically influences which precedents appear in majority opinions. On average, panels comprised of three Democratic-appointed judges (DDD) favorably cite the most liberal ideological precedent. The addition of each Republican-appointed judge to the panel produces favorable citations to more conservative precedent, with a panel of three Republican-appointed judges (RRR) citing the most conservative precedent. The effect also occurs when examining the individual judge authoring the unanimous opinion: Republican-appointed authors cite more conservative precedent than Democratic-appointed authors.

Panel composition similarly influences judges' use of unfavorable Supreme Court precedent. Panels of all Democratic-appointed judges criticize or distinguish the most conservative precedent. As more Republican-appointed judges are selected to sit on the panel, the panel criticizes and distinguishes increasingly more liberal precedent. Panels of all Republican-appointed judges criticize or distinguish the most liberal precedent.

Judges have a great deal of discretion over which binding precedent to cite and significant leeway in determining how to justify their decisions and how to tailor their written opinions.<sup>16</sup> In much the same way that one might gravitate toward friends when

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15. The full constructed dataset has information on en banc as well as three-panel opinions. In this Article, we focus on the latter, and therefore exclude observations from the former. Our dataset of all three-panel opinions has 722,814 citations of Supreme Court precedent in 143,419 opinions. For simplicity and consistency of our analysis, we exclude the 10.61 percent of opinions (and 18.10 percent of citations) from those opinions with a dissent (whether on outcome or reasoning). Including the citations from majority opinions in Courts of Appeals cases *with* a dissent does not change any of our results.

16. Previous scholarly work has suggested that judges may cite friendly precedent when the citation is purely discretionary. *See, e.g.,* Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?*, 37 J. LEGAL STUD. 87, 91 (2008) (examining the propensity of judges to cite along political lines when citing out-of-circuit precedent). This Article goes a step further by illustrating that the propensity to cite friendly precedent is strong and consistent, even when looking at binding precedent.

entering a party, judges gravitate toward friendly precedent when writing judicial opinions. Our findings are notable because they provide strong evidence that different judges have different conceptions of which precedents are binding. Further, when judges restrict analysis in their opinions to certain friendly binding precedent, they may create two distinct echo chambers in case law.

Our Article proceeds as follows: Part I provides a brief literature review on legal precedent. Part II discusses the construction of our new dataset. Part III describes our results. Part IV discusses the implications of our findings—specifically, the practical relevance of precedent for the development of the common law. The final Section summarizes and concludes.

## I. EXISTING LITERATURE ON PRECEDENT

As a formal matter, judges are bound by legal precedent.<sup>17</sup> Adherence to precedent, or *stare decisis*, provides the foundation of the common law. Judges may prefer to follow only their own precedent, but they realize that the import of their own decisions rests on their fellow jurists recognizing the relevance and persuasion of those decisions.<sup>18</sup> In this regard, opinions are a repeated game in which judges collectively benefit from a mutual respect for the common law.<sup>19</sup> This behavior is borne out empirically: when deciding cases, judges consistently acknowledge the importance of precedent.<sup>20</sup>

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17. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 828 (1994) (“[T]he Constitution does compel adherence to Supreme Court precedents.”).

18. For a discussion of the practical importance of precedent, see William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 273 (1976). See also Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987) (“An appeal to precedent is a form of argument, and a form of justification, that is often as persuasive as it is pervasive.”) (footnote omitted).

19. See Eric Rasmusen, *Judicial Legitimacy as a Repeated Game*, 10 J.L. ECON. & ORG. 63, 67 (1994) (“[A] judge will faithfully follow statute and precedent because he wishes to create precedents in new areas of law that will be obeyed by other judges.”); see also Frank Cross, *Appellate Court Adherence to Precedent*, 2 J. EMPIRICAL LEGAL STUD. 369, 371 (2005) (noting that lower court judges follow the law more out of preference than fear of reversal).

20. See, e.g., Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1283 (2008) (noting that, in cases involving constitutional issues in the first two Roberts Court Terms, “the Court claimed precedent as a basis for its decision”).



At the same time, judges have considerable discretion when writing opinions.<sup>21</sup> This discretion extends to the selection of which precedents are cited in a written opinion. Karl Llewellyn described judicial selection of precedent as involving two contradictory pursuits: freeing oneself from unwelcome precedent while “*capitalizing welcome precedents*.”<sup>22</sup> For Llewellyn, judges navigate through existing precedent, selectively choosing the precedent that best supports their decision.<sup>23</sup> Jerome Frank similarly wrote that “[t]he judge, in determining what is the law of the case, must choose and select, and it is virtually impossible to delimit the range of his choice and selection.”<sup>24</sup> Even if the same precedent were cited in a decision, judges may treat the precedent differently—that is, favorably or unfavorably. Herman Oliphant wrote, “Each precedent considered by a judge ... rests at the center of a vast and empty stadium. The angle and distance from which the case is to be viewed involves the choice of a seat.... [The judge] can and must choose.”<sup>25</sup>

Scholars have begun to explore the interplay between judges and legal precedent. Drawing upon the psychology and sociology of small groups, they suggest that panels reach decisions collaboratively and that, during deliberations, the judge in the political minority (the “odd one out”) brings insights that the judges in the political majority may have overlooked.<sup>26</sup>

Another prominent theory suggests that the odd-one-out judge acts as a whistleblower or a watchdog, threatening to author a

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21. See Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1203 (2005) (finding that judges are liberated to act ideologically upon finding the case presents an issue of first impression); Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971, 971-72 (1996) (concluding that Justices are rarely bound by precedent). *But see* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1897 (2009) (“It does not matter whether an appellate judge agrees with established precedent; we are bound to apply established precedent in deciding cases before us.”).

22. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 68 (1977).

23. *See id.*

24. JEROME FRANK, *LAW AND THE MODERN MIND* 138 (Neill H. Alford, Jr. et al. eds., 1985).

25. Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 73 (1928).

26. *See* ALICE H. EAGLY & SHELLY CHAIKEN, *THE PSYCHOLOGY OF ATTITUDES* 658 (1993); POSNER, *supra* note 3, at 31; *see also* Miles & Sunstein, *The New Legal Realism*, *supra* note 9, at 845; Sunstein et al., *supra* note 9, at 303-07.

dissenting opinion that highlights how the political majority's opinion fails to respect precedent.<sup>27</sup> The whistleblower theory suggests that the binding precedent cited by a panel with, for example, two conservative judges and a liberal judge (DRR) will be different than the precedent cited by a panel with three conservative judges (RRR).<sup>28</sup> Whether the sociological or whistleblowing theory applies, we should see different precedent cited in the written opinions of mixed panels, as compared to the opinions of three-of-a-kind panels.

Even if the opinion of the judges in the political majority is not "unprincipled,"<sup>29</sup> the threat of a dissenting vote may moderate outcomes in mixed panels. Dissents are costly to all three judges; the odd-one-out judge may be able to sway her colleagues toward her preferred outcome if they do not feel strongly one way or the other.<sup>30</sup> Although rates of dissent are often low, observed rates of dissent tend to underestimate the level of disagreement about the vote.<sup>31</sup> Therefore, a credible threat of dissent may force the author of the opinion to moderate the policy, the breadth, or the reach of the written opinion.<sup>32</sup> That is, the ideological content of a unanimous decision will be moderated in order to satisfy the odd-one-out judge.

The precedents themselves provide a strong proxy for the ideological flavor of the opinion.<sup>33</sup> If a conservative decision is broad and far-reaching, it stands to reason that the authoring judge will likely favorably cite more conservative Supreme Court precedent and criticize liberal Supreme Court precedent. If the conservative decision is narrower, the authoring judge will likely also favorably

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27. See Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2159 (1998).

28. See *id.* at 2161.

29. POSNER, *supra* note 3, at 30-31.

30. See *id.* at 31; Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 108 (2011).

31. See Joshua B. Fischman, *Estimating Preferences of Circuit Judges: A Model of Consensus Voting*, 54 J.L. & ECON. 781, 788 (2011) (describing how the disutility of writing separately may result in a judge signing on to the majority, notwithstanding her dissatisfaction).

32. See Cliff Carrubba et al., *Who Controls the Content of Supreme Court Opinions?*, 56 AM. J. POL. SCI. 400, 402 (2012); Charles M. Cameron & Lewis A. Kornhauser, *Modeling Collegial Courts (3): Judicial Objectives, Opinion Content, Voting and Adjudication Equilibria* 16, 19 (N.Y.U. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 08-56, 2008), <http://ssrn.com/abstract=1296071> [<https://perma.cc/48RC-TQJV>].

33. See Frank B. Cross, *The Ideology of Supreme Court Opinions and Citations*, 97 IOWA L. REV. 693, 707-09 (2012).

cite relatively liberal precedent. Thus, there are good reasons to suggest that moderation or ideological dampening will influence the ideological content of the written opinion as well as the outcome of the case.

Previous interdisciplinary work has examined citations of precedent as a measure of the “influence” of particular decisions, as well as the importance or quality of decisions, judges, circuits, and schools of thought.<sup>34</sup> Scholars have recently studied citations to Supreme Court precedent by lower courts to examine the impact and ideology of the Supreme Court precedent.<sup>35</sup>

Other studies test the idea that citations to precedent may reflect certain biases of the judge writing the opinion. Federal appellate judges are more likely to cite decisions written by politically aligned judges when citing out-of-circuit decisions.<sup>36</sup> Among state courts, pro-plaintiff decisions disproportionately cite pro-plaintiff precedent, and pro-defendant decisions favor pro-defendant precedent.<sup>37</sup>

Studies also suggest that judges implicitly recognize that the higher judicial landscape influences the degree to which they can challenge precedent. The obvious influence is the Supreme Court: lower federal courts are more likely to treat precedent unfavorably when the ideological distance between the enacting Supreme Court

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34. See, e.g., RICHARD A. POSNER, *CARDOZO: A STUDY OF REPUTATION*, at ix (1990); Mita Bhattacharya & Russell Smyth, *The Determinants of Judicial Prestige and Influence: Some Empirical Evidence from the High Court of Australia*, 30 J. LEGAL STUD. 223 (2001); Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83 (1983); Choi & Gulati, *supra* note 16; Frank B. Cross, *Determinants of Citations to Supreme Court Opinions (and the Remarkable Influence of Justice Scalia)*, 18 SUP. CT. ECON. REV. 177 (2010); James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 SOC. NETWORKS 16, 16-17 (2008); James H. Fowler et al., *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court*, 15 POL. ANALYSIS 324 (2007); Daniel M. Katz & Derek K. Stafford, *Hustle and Flow: A Social Network Analysis of the American Federal Judiciary*, 71 OHIO ST. L.J. 457 (2010); William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J.L. & ECON. 385 (1993); William M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998). For an early discussion of the potential of studying citations, see Richard A. Posner, *An Economic Analysis of the Use of Citations in the Law*, 2 AM. L. & ECON. REV. 381, 402 (2000) (“[C]itations analysis is a versatile, rigorous, practical—and, increasingly, an inexpensive—tool of empirical research.”).

35. See generally Cross, *supra* note 33; Thomas G. Hansford et al., *The Information Dynamics of Vertical Stare Decisis*, 75 J. POL. 894 (2013).

36. See Choi & Gulati, *supra* note 16, at 101-02, 102 tbl.4.

37. See Anthony Niblett, *Do Judges Cherry Pick Precedents to Justify Extra-Legal Decisions?: A Statistical Examination*, 70 MD. L. REV. 234, 235 (2010).

and the contemporary Supreme Court is greater.<sup>38</sup> The relevant landscape may also be one's own court, where the threat of en banc review affects judges' decisions to cite Supreme Court precedent favorably or unfavorably.<sup>39</sup>

The citation of precedent has both a spatial and temporal dimension. The spatial dimension can be decomposed to vertical and horizontal dimensions: vertical precedent is hierarchical and binding upon lower courts within the same jurisdiction; horizontal precedent is nonbinding for courts in other jurisdictions, but nonetheless may serve as persuasive reasoning. Sharing a common methodological approach or using citation analysis or social network theory, studies have found instances of both vertical<sup>40</sup> and horizontal<sup>41</sup> influences of precedent.

The clear conceptual distinctions between these directional transmissions of precedent set out in this literature are likely blurred in practice. Courts, whether citing binding precedent or persuasive precedent, have considerable discretion in determining whether the precedent is germane to the case before them. The focus of this Article is on vertical precedent: the corpus of Supreme Court precedent that federal appellate judges are constitutionally bound to follow.

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38. See Chad Westerland et al., *Strategic Defiance and Compliance in the U.S. Courts of Appeals*, 54 AM. J. POL. SCI. 891, 902 (2010).

39. See Rachel K. Hinkle, *Strategic Anticipation of En Banc Review in the U.S. Courts of Appeals* 27 (Feb. 15, 2014) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2365030](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2365030) [https://perma.cc/K2EE-HSRP].

40. See Fowler & Jeon, *supra* note 34, at 16; Charles A. Johnson, *Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions*, 21 LAW & SOC'Y REV. 325, 339 (1987).

41. See Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovation: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975, 985 (1981); Peter Harris, *Ecology and Culture in the Communication of Precedent Among State Supreme Courts, 1870-1970*, 19 LAW & SOC'Y REV. 449, 476 (1985); Robert J. Hume, *The Impact of Judicial Opinion Language on the Transmission of Federal Circuit Court Precedents*, 43 LAW & SOC'Y REV. 127, 145, 147 (2009); Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 LAW & SOC'Y REV. 135, 146-48 (2006) (finding that judges are more likely to adopt reasoning from more prestigious circuits); Russell Smyth & Vinod Mishra, *The Transmission of Legal Precedent Across the Australian State Supreme Courts over the Twentieth Century*, 45 LAW & SOC'Y REV. 139 (2011); David J. Walsh, *On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases*, 31 LAW & SOC'Y REV. 337, 357-58 (1997).

## II. DATA

### A. *Our Dataset*

We construct a unique dataset to analyze how federal appellate courts cite Supreme Court precedent. Specifically, we examine *published* federal appellate decisions in the Federal Reporter (F.2d and F.3d) during the period 1971 to 2007 that cite to Supreme Court precedent decided from 1953 to 2007.

Our study takes advantage of the institutional design of random assignment within federal appellate courts to address potential problems of selection. At the oral argument stage, federal appellate courts randomly assign judges and cases to panels.<sup>42</sup> This feature provides a clear and straightforward identification strategy. The intuition of random assignment of cases is best compared to observing baseball hitters over the course of a season.<sup>43</sup> Briefly stated, because batters generally face the same distribution of pitchers over the course of a season (or several seasons), one can attribute differences in performance (for example, batting average) to the hitters themselves rather than other factors (for example, differences in opposing pitchers).<sup>44</sup> Similarly, because federal appellate judges are randomly assigned to panels, one can credibly attribute differences in outcome over a large number of cases to the judges rather than to case characteristics.<sup>45</sup>

While several characteristics—for example, age, gender, ethnicity, and prior legal experience<sup>46</sup>—may distinguish judges from one

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42. See Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1005 (2005); see also Revesz, *supra* note 9, at 1134. It is worth noting that the selection of cases that proceed to oral argument is not random. Federal Rule of Appellate Procedure 34 allows circuits to adjudicate some appeals prior to oral argument—a nonrandom process that culls cases that are frivolous, cases that involve dispositive issues already authoritatively decided, or cases where the facts and legal arguments are adequately presented in the appeal.

43. For a full explanation, see David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1157 (2007).

44. *Id.*

45. See *id.*

46. Some scholars argue that judges' background characteristics do not significantly predict how they decide cases. See Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Backgrounds on Case Outcomes*, 24 J. LEGAL STUD. 257, 281 (1995). But see Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause*

another and may influence how they decide cases, this Article focuses on judicial ideology. Using the political party of the appointing President as a proxy for judicial ideology, all federal appellate judges during this time period are identified as being either Democrats or Republicans. If panel composition has no effect on outcomes or citations, one would expect that panels, deciding a similar distribution of cases, would (1) reach similar outcomes and (2) use precedent similarly. If, however, panel composition does affect judicial behavior, then we should observe differences in how different panels decide cases and how they use precedent. Judicial behavior scholars have exhaustively examined case outcomes; we focus on judges' use of precedent.

Each observation in our dataset is a citation in a federal Court of Appeals case to a Supreme Court precedent. Drawn from multiple sources,<sup>47</sup> the resulting dataset contains detailed information about the federal appellate court decision and the Supreme Court precedent cited. Our universe of citations to Supreme Court precedent comes from Westlaw. As part of its online subscription, Westlaw provides a service called *Keycite*, which reports subsequent cases that cite Supreme Court precedent. For this study, Westlaw provided access to its data to identify all citations to Supreme Court precedent (federal and state), which produced over five million citations.<sup>48</sup>

We look only at unanimous opinions of the federal Courts of Appeals. The reason for restricting our analysis to this subset of decisions is methodological. We exclude dissenting opinions because Westlaw does not indicate which individual judge cited the prece-

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*Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37, 52 (2015) (arguing that gender-related factors influence how judges decide cases); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1787 (2005) (same).

47. For a discussion of these sources, see *infra* notes 49-56 and accompanying text. These datasets contained common identifiers—for example, federal docket number and judges' full names—which we use to combine the datasets.

48. It is worth noting that the resulting dataset represents only a limited subset of the citations in federal appellate cases. The data set excludes opinions not included in the Federal Reporter. More significantly, it excludes appellate cases that do not cite Supreme Court precedent (which comprises approximately 58 percent of the total federal appellate cases). In addition, given the Article's focus on three-judge panels, the dataset excludes en banc decisions.

dent. All citations, rather, are lumped together. This makes comparison of citations across different cases extremely difficult without knowing which opinion cited the precedent (that is, the majority opinion or the dissenting opinion). Accordingly, we compare only those cases in which all three judges agree with the outcome and sign on to a single written opinion.<sup>49</sup> This restriction allows us to easily compare precedent used by different panels, but it does introduce an element of nonrandomization in panel composition. The proportion of mixed panels (DDR and DRR) is likely greater in a set of cases with a dissenting opinion. Due to the small fraction of dissents, however, this nonrandomization is unlikely to be driving our results.<sup>50</sup> Our final dataset comprises 591,936 citations to Supreme Court precedent in 127,668 Courts of Appeals written opinions.

Each citation contains information about the federal appellate case: *Keycite* provides the federal reporter number and docket number; jurisdiction and corresponding circuit; date of the decision; and the depth of treatment (ranging from one to four stars). Each citation also contains substantive information about the underlying federal appellate case. The Federal Judicial Center maintains the United States Courts of Appeals database, which provides, in part, the nature of the suit (such as bankruptcy, habeas, et cetera) and the outcome of the appeal (such as affirmed, reversed, dismissed, and so on). Each citation also identifies the judges who participated on the panel. Because the United States Courts of Appeals database removes the names of the judges, obtaining them required a textual analysis of every federal reporter opinion that extracted this information. The text of all federal appellate decisions, dating back to 1950, is publicly available on Public.Resource.org, a website that

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49. Of course, there still may be some level of disagreement between judges in these unanimous cases. See, e.g., Epstein et al., *supra* note 30, at 102; Joshua B. Fischman, *Estimating Preferences of Circuit Judges: A Model of Consensus Voting*, 54 J.L. & ECON. 781, 784 (2011); Joshua B. Fischman, *Decision-Making Under a Norm of Consensus: A Structural Analysis of Three-Judge Panels* 2, 16 (1st Annual Conference on Empirical Legal Studies Paper), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=912299](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912299) [<https://perma.cc/9ZJD-UZ23>].

50. Cases with a dissenting opinion (at least, in part) represent about 9 percent of cases over the entire period covered by our dataset. Further, we have run all the tests with the entire dataset, including citations from dissenting opinions. The results are entirely consistent with our reported results. For ease of analysis, however, we elect to report the results from unanimous decisions only.

makes government documents available online.<sup>51</sup> Accompanying the identity of each judge is the President who appointed the judge to the appellate court,<sup>52</sup> also available from the Federal Judicial Center.<sup>53</sup>

Each observation also contains information about the Supreme Court precedent cited in the opinion. The substantive area of law (criminal, First Amendment, judicial power, et cetera) involved in the precedent's underlying case comes from the United States Supreme Court Database, which contains detailed information on all Supreme Court decisions from 1953 to the present.<sup>54</sup> Excluding precedent prior to 1953 inevitably omits prominent cases that remain salient today—for example, Commerce Clause cases from the New Deal Era, such as *Wickard v. Filburn*<sup>55</sup> or *NLRB v. Jones & Laughlin Steel Corp.*<sup>56</sup>—but is necessary to provide internally consistent measures of precedent.

Not all citations to precedent are used the same way. Crucial for our analysis, Westlaw also classifies the treatment of precedent as either a “positive” citation or a “negative” citation. To avoid confusion with our discussion of correlation, we will refer to these as “favorable” or “unfavorable” citations. A favorable precedent is a *friendly* precedent, one which the majority cites in support of its own reasoning. An unfavorable citation is an *unfriendly* precedent, which the majority criticizes or distinguishes. This latter category also includes citations of superseded precedent or situations in which the lower court declined to follow the precedent. Perhaps un-

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51. A textual analysis program designed for this study extracted the citation, the docket number(s), the circuit, the identification of each of the judges on the panel, and the authoring judge of the majority opinion as well as any concurring or dissenting opinions. Opinions that did not include a written opinion (simply listed in a Table of Cases) or that did not report the judges on the panel were excluded from analysis.

52. Over 90 percent of federal appellate judges in the period of interest were first appointed to the appellate court. For those who served first as district court judges (112), only 7 were appointed by a President of a different political party when nominated to the appellate court. The data reflect these changes in political affiliation.

53. *History of the Federal Judiciary*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/home.nsf/page/export.html> [<https://perma.cc/3TWC-8W9R>] (last visited Mar. 30, 2016).

54. The United States Supreme Court Database is available online. See *Current Dataset: 2015 Release 01*, SUP. CT. DATABASE (Aug. 17, 2015), <http://scdb.wustl.edu/data.php> [<https://perma.cc/3SX9-N4WT>].

55. 317 U.S. 111 (1942).

56. 301 U.S. 1 (1937).



surprisingly, given constitutional hierarchy, the vast majority of the precedent cited in our dataset, however, falls under friendly, or favorable, precedent (97.22 percent). That is, the majority follows an overwhelming fraction of the Supreme Court precedent that it cites.

### *B. Measures of Ideological Content of Precedent*

In distinguishing among different Supreme Court precedents, we assign each precedent an ideological score. This allows us to ascertain whether the majority opinion in each case is citing to liberal or conservative Supreme Court precedent.

The United States Supreme Court Database identifies for each case the majority author and the Justices who joined the majority opinion of each Supreme Court decision.<sup>57</sup> We use scores developed by Andrew Martin and Kevin Quinn to measure the ideology of each Supreme Court Justice for each year.<sup>58</sup> The scores range from -1 to +1. The more liberal a judge, the more negative the score; the more conservative a judge, the more positive the score. With this measure, the Supreme Court Justices in our dataset range from -0.8082 for Justice Douglas in the 1974 Term to 0.7190 for Justice Thomas in 2007.

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57. The original United States Supreme Court Database, *see supra* note 54, codes each judgment as liberal or conservative, a subjective determination that may produce unreliable estimates of ideology. For a discussion of the limitations of this database, see Anna Harvey, *The Will of the Congress*, 2010 MICH. ST. L. REV. 729, 733.

58. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134, 148 (2002). For the updated Martin-Quinn scores, see *Project Description*, MARTIN-QUINN SCORES, <http://mqscores.berkeley.edu/> [<https://perma.cc/G4Z8-ACQF>] (last visited Mar. 30, 2016).

Table 1. Supreme Court Ideology Scores, 1994-1995 Term

Justice	Ideology Score
Stevens	-0.6324
Ginsburg	-0.2656
Souter	-0.2524
Breyer	-0.2449
O'Connor	0.0937
Kennedy	0.1010
Rehnquist	0.3626
Scalia	0.5349
Thomas	0.6253

To create our ideology scores for each Supreme Court precedent, we look to the majority opinions in these precedents. We create three different ideology scores of precedents:

(1) *Ideology of the median judge of the majority coalition* (“Median”): For example, if a Supreme Court decision is unanimous (9-0), then our measures of ideology will be that of the median judge of the entire Court. If a Supreme Court decision is split 5-4 with liberal judges in the majority coalition, then the median of the five judges in the majority will be less than zero. If the Supreme Court decision is split 5-4 with conservative judges in the majority, the median of the five judges in the majority will be greater than zero. This measure comports with recent literature finding that the majority opinion will fall at the ideal point of the median member of the coalition.<sup>59</sup>

(2) *Mean ideology of the judges of the majority coalition* (“Mean”): One might be concerned that the median judge does not reflect the influence that other judges, including those with outlier ideologies, may have on the written opinion. The mean average

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59. See Tonja Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, 1 J. LEGAL ANALYSIS 411 (2009); Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 GEO. L.J. 1 (2009); see also Tom S. Clark & Benjamin Lauderdale, *Locating Supreme Court Opinions in Doctrine Space*, 54 AM. J. POL. SCI. 871, 872 (2010).

ideology of majority coalition judges will, however, capture this collective effect.

(3) *Ideology of the author of the majority opinion* (“Author”): The authoring judge of the written opinion may best reflect the ideological content of Supreme Court precedent. For example, take two 9-0 Supreme Court decisions. The ideological content of the written opinion may differ depending on whether a liberal judge or a conservative judge authored the opinion. Further, judges on the lower court may be attracted to precedent written by Supreme Court Justices with whom they share ideological views. The author measure of ideology has greater variance than the median and mean scores of ideology.

Two examples of Supreme Court precedent from the 1994-1995 Term may prove illustrative. In *United States v. Lopez*, the Supreme Court was split 5-4.<sup>60</sup> The majority, comprising Chief Justice Rehnquist with Justices O’Connor, Scalia, Kennedy, and Thomas, limited Congress’s powers under the Commerce Clause.<sup>61</sup> The four liberal judges—Justices Breyer, Stevens, Souter, and Ginsburg—dissented.<sup>62</sup> In terms of Martin-Quinn ideal scores, the *median* judge of the majority was Chief Justice Rehnquist. His ideological score for the 1994-1995 Term was 0.3626. Chief Justice Rehnquist also authored the majority opinion. By our measure, the *author* score is the same as the *median* score for this case. The *mean* score for the five judges in the majority was 0.3435. These ideological scores reflect the conservative nature of the majority coalition and, by our measure, the conservative nature of this precedent.

Now consider *U.S. Term Limits, Inc. v. Thornton*.<sup>63</sup> Here, the Supreme Court was split 5-4, but this time Justice Kennedy voted with Justices Breyer, Stevens, Souter, and Ginsburg.<sup>64</sup> The *median* judge on the majority, in terms of ideal points, was Justice Souter. His ideological score for the 1994-1995 Term was -0.2524. The *mean* score for the five judges of the majority coalition was very similar, -0.2589. This score reflects the liberal nature of the

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60. See 514 U.S. 549 (1995).

61. See *id.* at 567.

62. See *id.* at 602-31.

63. 514 U.S. 779 (1995).

64. See *id.* at 781.

majority coalition and the liberal nature of this precedent. Justice Stevens authored the majority opinion.<sup>65</sup> Consequently, with the *author* ideological score of -0.6324, *Thornton* appears more liberal than when we use the *median* or *mean* score.

These scores, of course, may not be perfect representations of the ideology of each Supreme Court precedent. For example, readers may be concerned that the median of a majority coalition on any given issue is not always certain,<sup>66</sup> or that the median Justice may not control the content of the opinions.<sup>67</sup> Although this may be true of the median, this problem is less pervasive in our second measure of ideology, using the mean score of the majority coalition.

Accordingly, each of our three measures of ideology by themselves may be imperfect, but taken together, we argue that they capture the essence of the ideological direction of the Supreme Court's decision. All three of our ideological measures indicate that *Lopez* was a conservative precedent and *Thornton* was a liberal precedent. Our continuous variable provides a more nuanced description of the ideological flavor than simple binary measures that classify Supreme Court precedent as either liberal or conservative.

Readers may be concerned that the Martin-Quinn scores are not directly comparable from year to year<sup>68</sup> and may generate a noisy measure of judicial ideology. As a robustness check, we have performed all of our tests using an alternative measure of Supreme Court ideology generated by Michael Bailey.<sup>69</sup> His alternative measure of ideology produces comparable preference estimates for Presidents, members of Congress, and Supreme Court Justices, basing the ideological measurement on positions taken by individual Justices, members of Congress, and Presidents on Supreme Court cases that are directly comparable across institutions. In these "bridge" observations, the aforementioned actors take positions on issues that may have been decided earlier or were before another

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65. See *id.* at 782.

66. See Benjamin E. Lauderdale & Tom S. Clark, *The Supreme Court's Many Median Justices*, 106 AM. POL. SCI. REV. 847, 860 (2012).

67. See Carrubba et al., *supra* note 32, at 400.

68. For a discussion of the limitations of using the Martin-Quinn scores for comparisons over time, see Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CALIF. L. REV. 813, 827 (2010).

69. See Michael A. Bailey, *Comparable Preference Estimates Across Time and Institutions for the Court, Congress, and Presidency*, 51 AM. J. POL. SCI. 433, 435-40, 444-46 (2007).

institution.<sup>70</sup> We re-run our analysis (median, mean, author) using the Bailey scores as a robustness check for all of our empirical tests, generating consistent results with respect to point estimates and statistical significance.<sup>71</sup>

### *C. Summary Statistics*

Our dataset includes 591,936 citations to Supreme Court precedent that are drawn from 127,668 unanimous federal appellate cases. There are an average of 4.63 Supreme Court precedents cited per case. Table 2 provides the summary statistics. The majority of citations are from published majority opinions. A probable explanation for the small number of unpublished opinions is that, by their nature of judges electing not to publish them, they involve more routine issues and are perhaps less likely to cite Supreme Court precedent.<sup>72</sup>

Table 2 also reports the permutations of the panel composition, based on the political party of the President appointing each judge to the federal bench. The least common composition was all Democratic-appointed judges (DDD, 8.8 percent) followed by all Republican-appointed judges (RRR, 21.5 percent). Two Democratic-appointed and one Republican-appointed panels occurred nearly one-third of the time (DDR, 29.6 percent). The most common composition was two Republican-appointed and one Democratic-appointed panels (DRR, 40.1 percent). Over the entire time period, over 60 percent of panels were Republican-appointed majorities.

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70. See *id.* at 438. Bailey uses the example of Justice Thomas in *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992), in which he wrote that *Roe v. Wade*, 410 U.S. 113 (1973), was “wrongly decided.” See Bailey, *supra* note 69, at 439. Justice Thomas’s decision in *Casey* informs how he would have voted on *Roe*.

71. We do not report our results with the Bailey scores here, but they are available upon request.

72. It is difficult to define the universe of unpublished opinions. Westlaw makes available online some unpublished opinions that are not included in the Federal Reporter. Although it includes a broader set of unpublished opinions, Westlaw does not necessarily include all unpublished opinions.

Table 2. Summary Statistics for Our Dataset

Number of citations (observations)	591,936
Number of unique Courts of Appeals cases	127,668
Ideology of Supreme Court precedent (mean, s.d.)	
Median	0.0122 (0.211)
Mean	-0.1357 (0.190)
Author	0.0022 (0.398)
Composition of Three-Judge Panels	
DDD	8.8%
DDR	29.6%
DRR	40.1%
RRR	21.5%
Publication status of opinion containing citation	
Published	87.6%
Unpublished	12.4%
Treatment	
Favorable (cited, followed, discussed, etc.)	97.22%
Unfavorable (criticized, distinguished, etc.)	2.78%
Citations by U.S. Circuit Court	
First	5.9%
Second	7.4%
Third	5.6%
Fourth	6.1%
Fifth	11.0%
Sixth	9.7%
Seventh	11.8%
Eighth	7.9%
Ninth	16.0%
Tenth	7.7%
Eleventh	5.6%
District of Columbia	5.5%

### III. RESULTS

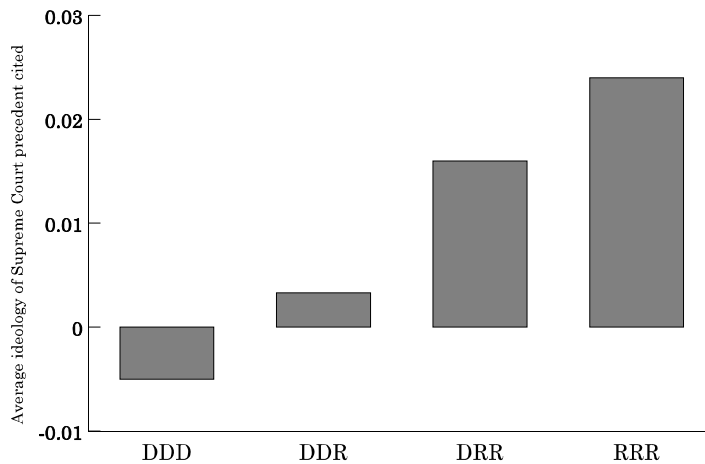
#### *A. Friendly Precedent*

We begin by examining “friendly precedent.” We look at which precedent judges gravitate toward. We find that judges consistently gravitate toward precedent that is friendly in terms of political alignment.

There are clear differences in the way different panel compositions cite precedent. Figure 1 shows the average ideology score of Supreme Court precedent cited, based on the median Justice of the majority coalition. Recall that the higher the score, the more conservative, on average, the cited precedent. Therefore, the higher the bar in our graph, the more conservative the precedent.

The graph illustrates that favorably cited precedents are increasingly conservative as more Republican-appointed judges are added to the panel. A panel of all Democratic-appointed judges (DDD), on average, favorably cites the most liberal precedent. As more Republican-appointed judges are assigned to the panel, more conservative precedent is favorably cited. A panel of all Republican-appointed judges (RRR), on average, favorably cites the most conservative precedent. Figure 1 provides graphical support for our hypothesis that judges gravitate toward friendly precedent when describing the state of the law.

Figure 1. Ideology of Favorably Cited Precedent by Panel Composition



While not shown in Figure 1, the graphs for our *mean* and *author* scores are very similar.<sup>73</sup> Table 3 provides average precedent scores for favorable precedent—using *median*, *mean*, and *author*—broken down by panel composition and by the treatment of the precedent. The table reveals that the higher the ideological score, the more conservative our measure of the precedent. This pattern is monotonic and similar. Under all three of our measures of ideology, the precedents cited favorably by the Courts of Appeals are increasingly conservative with more Republican-appointed judges on the panel.

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73. These graphs are not shown here but are available upon request.



Table 3. Ideology of Favorably Cited Precedent by Panel Composition

Panel	Median	Mean	Author
DDD	-0.0066	-0.0279	-0.0112
DDR	0.0027	-0.0207	-0.0048
DRR	0.0161	-0.0102	0.0058
RRR	0.0266	-0.0021	0.0142

While Table 3 provides the raw, unadjusted precedent scores, our findings are robust, controlling for the circuit and the year that the Court of Appeals decision was handed down. Table 4 presents the regression-adjusted effect of panel composition. Our regression takes the following form:

$$precedent_{ij} = \alpha + \beta.republicans_i + \gamma.X_i + \varepsilon_j.$$

*Precedent<sub>ij</sub>* is a continuous variable measuring the ideological score of the Supreme Court precedent (*j*) cited in the Court of Appeals opinion (*i*). We use three different dependent variables to measure the ideological score of the precedent: *median*, *mean*, and *author*. Our main right-hand-side variable of interest is *republicans<sub>i</sub>*—the number of Republican-appointed judges on the three-judge panel of the lower court that decided case *i*. We also include control variables, *X<sub>i</sub>*, circuit dummies, and dummies for the year of the lower court decision. We cluster our standard errors at the Court of Appeals decision level.

We hypothesize that the conservative lean of the favorably cited precedent will be positively correlated with the number of Republican judges ( $\beta > 0$ ). Our results, set out in Table 4, confirm this hypothesis. The results are as expected and are highly significant. For example, looking at the median score of ideology, adding a Republican to the panel results in significantly more conservative precedent being favorably cited.

Table 4. Results of Regression of Panel Composition on Favorable Precedent Cited

	Median	Mean	Author
Number of Republican-appointed judges	0.0022**	0.0026**	0.0014*
Robust standard errors, clustered by Court of Appeals case	(0.000)	(0.000)	(0.001)
Circuit dummies	Yes	Yes	Yes
Year dummies	Yes	Yes	Yes
Observations	575,411	575,411	575,411
R-Squared	0.0416	0.0314	0.0098
**p < 0.01, *p < 0.05			

The most noticeable difference between the regression-adjusted and the raw estimates is that the regression-adjusted results are less dramatic. Controlling for yearly changes in cited precedent helps explain this reduction.<sup>74</sup> The raw estimates produce larger coefficients, because cases are treated as if they all occurred in the same period. This assumption ignores the fact that in later years of the data (2000-2007), a greater percentage of Republican-appointed judges composed the federal appellate bench. Accordingly, Republican-majority panels were disproportionately represented during a period when cited precedent was generally more conservative. Ignoring this time trend overstates the differences in panel composition.

The relationship between panel composition and precedent, however, remains the same. Although the magnitude of the change appears smaller in the regression-adjusted specification, the results remain significant and again show that precedent monotonically

74. The point estimates for the regression, absent controls for year of decision but controlling for circuit, closely match the raw estimates from Table 3.

increases in conservative ideology as the number of Republicans on the panel increases. As with the raw estimates, favorably cited precedent is consistently more conservative—and unfavorably cited precedent is consistently more liberal—as the number of Republicans on the panel increases.

From Table 3, the ideological difference between the favorable citations by all Democratic- and all Republican-appointed panels is approximately 0.03 in all three measures of ideology. To place some perspective on what this difference in ideology means, the ideological difference in the 1994-1995 Term between Justices Kennedy and O'Connor was only 0.0073. The difference between favorable citations by DDD and RRR panels is over four times greater in magnitude. While our regression results are inherently difficult to directly compare to the difference between two individual Justices, our results suggest that the change in citation behavior with panel composition has practical as well as statistical significance.

### *B. Unfriendly Precedent*

When does a judge criticize or distinguish Supreme Court precedent? When does a judge gravitate away from seemingly binding precedent? We find that judges gravitate away from precedent that is “unfriendly” in terms of political alignment.

Our examination of “unfriendly precedent” also reveals a strong relationship between judicial ideology and selected precedent, this time with the correlation being negative. Figure 2 shows that a panel of all Democratic-appointed judges (DDD), on average, unfavorably cites the precedent with the most conservative ideology scores. As more Republican-appointed judges are assigned to the panel, the unfavorable precedent appears increasingly more negative, with a panel of all Republican-appointed judges (RRR), on average, unfavorably citing the most liberal precedent.

Figure 2. Ideology of Unfavorably Cited Precedent by Panel Composition

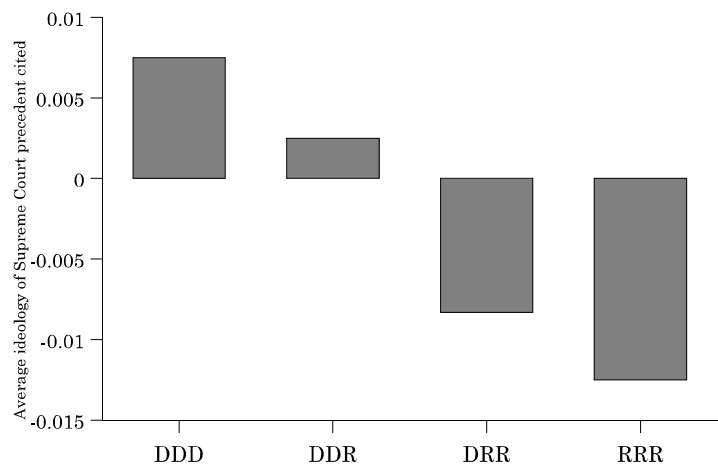


Table 5, replicating Table 3 for *unfriendly* precedent, shows similar patterns when looking at the mean and author. The more Republican-appointed judges on the panel, the more liberal the precedent the panel cites unfavorably. This trend is monotonic along all three measures.

Table 5. Ideology of Unfavorably Cited Precedent by Panel Composition

Panel	Median	Mean	Author
DDD	0.0120	-0.0131	0.0040
DDR	0.0043	-0.0191	-0.0087
DRR	-0.0083	-0.0340	-0.0192
RRR	-0.0105	-0.0376	-0.0197

Table 6 reports that the regression-adjusted estimates of *unfriendly* precedent tell a similar story. It shows the statistically significant effect of panel composition on the content of written opinions. Adding a Republican-appointed judge to the panel results

in significantly less conservative precedent being criticized or distinguished.

Table 6. Regression Results of Panel Composition on Unfavorable Precedent Cited

	Median	Mean	Author
Number of Republican-appointed judges	-0.0096**	-0.0097**	-0.0083*
Robust standard errors, clustered by Court of Appeals case	(0.002)	(0.002)	(0.004)
Circuit dummies	Yes	Yes	Yes
Year dummies	Yes	Yes	Yes
Observations	16,473	16,472	16,473
R-Squared	0.0219	0.0217	0.0055
**p < 0.01, *p < 0.05			

The ideological differences in precedent—both favorable and unfavorable—based on panel composition are perhaps even more meaningful than at first blush for two reasons. First, we focus on only unanimous decisions. Unlike the Supreme Court, federal Courts of Appeals have a nondiscretionary docket.<sup>75</sup> While one must exercise caution when interpreting unanimity, it is reasonable to infer that a significant percentage of these cases reflect true consensus among the judges. These cases may be so straightforward and uncontroversial that the difference in panel composition has no bearing on either the outcome or the precedent cited. For completeness, we include all cases and do not undertake the subjective exercise of parsing out these straightforward cases. The inclusion of such cases, however, biases downward our point estimates. Nevertheless, the effect of panel composition remains highly statistically significant.

75. See Caminker, *supra* note 17, at 823-24.

A second factor to consider is that the political affiliation of the appointing President is a blunt and noisy measure of judicial ideology. If there is reason to believe that some Republican-appointed judges are liberal or some Democratic-appointed judges are conservative, our measure of ideology of the lower court judges will dilute the coefficients on panel composition more than if the ideology of all judges were accurately coded. More generally, even if it were the case that all conservatives are appointed by Republican Presidents and all liberals are appointed by Democratic Presidents, our measure assumes that judicial ideology is dichotomous rather than continuous. Despite this imprecision, we still find high levels of significance, suggesting that the true effect of judicial ideology, along a continuous measure, may be even larger.

The general pattern of favorably citing more conservative precedent when more Republican-appointed judges are on the panel is observed in most circuits when analyzing each circuit individually. Further, we also run our results controlling for other factors such as whether the case was published. These specifications are consistent with our findings presented above. Finally, all of our results are consistent when we use alternative measures of judicial ideology created by Michael Bailey in his 2007 study.<sup>76</sup>

#### IV. DISCUSSION

This Article is meant as a step in formally accounting for the role of judicial precedent in how judges decide cases. The existing literature has consistently found, across a wide array of specifications, that judicial ideology affects case outcomes.<sup>77</sup> This analysis, though convincing, provides only a partial understanding of judicial behavior. In our view, a complete model must include precedent. Irrespective of where one falls in the formalist-realist debate, or has a view at all, judges use precedent when writing decisions. This Article examines the interplay between judges' ideology and the precedent they cite.

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76. See Bailey, *supra* note 69, at 433. These results are not reported here but are available upon request.

77. See Cross, *supra* note 33, at 696-97.

We find that the ideological composition of federal appellate panels—whether a Democratic or Republican President appointed members of the panel—powerfully predicts the type of precedent they include in their opinions. Republican-appointed panels consistently favor conservative precedent and disfavor liberal precedent, and the reverse is true for Democratic-appointed panels. The type of precedent cited is sensitive to the smallest changes in panel composition. The addition of a single Republican-appointed judge to the panel correlates with the majority citing more conservative precedent on average, and the opposite is true with the addition of a single Democratic-appointed judge.

Returning to our hypothetical of guests attending a crowded party, judges—at least federal appellate judges—appear to gravitate toward their friends. When writing opinions, judges consistently select precedent from Justices sharing a similar ideology. Judges do engage with ideologically dissimilar precedent, but these instances compose an infinitesimal fraction of the precedent they cite. Further, such precedent is primarily criticized, or distinguished, rather than followed.

The strong correlation between judicial ideology and precedent has potentially significant implications for the development of the common law. The existing literature finds that when appellate judges have discretion over the choice of precedent—for example, choosing precedent from other circuits—they choose precedent from ideologically similar jurists.<sup>78</sup> Our results suggest that judges exercise even more discretion. Judges exhibit this discretion when choosing Supreme Court precedent—precedent that, by definition, they are constitutionally required to follow. For a plethora of reasons—such as limited appellate oversight and fact-intensive questions of law—judges engage in more discretion than judicial hierarchy suggests.<sup>79</sup> At the same time, judges care about the institutional role of precedent, going to great lengths to find doctrinal support for their decisions.<sup>80</sup>

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78. See Choi & Gulati, *supra* note 16, at 91, 119.

79. See Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 420 (2007).

80. See Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, 764 (2002) (explaining Justices' devotion to doctrine in their decisions).

Our findings tell a story in which judges follow Supreme Court precedent but differ dramatically in their conception of which precedent controls. Republican-appointed judges turn to conservative precedent, while Democratic-appointed judges turn to liberal precedent. This selection is consistent with the notion that judges adopt a weak form of *stare decisis*.<sup>81</sup> And perhaps more importantly, it suggests that precedent is segmented, when a given precedent speaks more, or perhaps only, to certain groups of judges and not to others.

Given this finding, should we care? Perhaps we should not. Although judicial ideology influences case outcomes, this effect occurs at the margins. For the vast majority of cases, judges reach the same results, irrespective of their judicial ideology.<sup>82</sup> Accordingly, if judicial ideology has at most a small effect on outcomes, then concerns over any corresponding relationship between ideology and precedent are similarly overstated.

We offer two responses to this consequentialist proposition. Our first response emphasizes the importance of cases at the margin. The common law is built not on routine cases, but on these cases at the margin: when judges disagree with one another over which party should prevail and the legal reasoning for that result.<sup>83</sup> In these cases, the divergence in how judges interpret and use precedent has profound and lasting effects, not merely for the parties in dispute, but for the common law itself, as these decisions are repeatedly cited.<sup>84</sup>

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81. See Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 112 (1989) ("Weak *stare decisis* serves the interests of both groups. It increases the effects of the opinions reached by the intellectually active judges, while simultaneously easing the burden of deciding cases that falls on the shoulders of lazy judges. In addition, judges will prefer a regime of weak *stare decisis* to a regime of strict *stare decisis* because weak *stare decisis* broadens the latitude of judges and increases the demand for their services vis-a-vis the legislature.").

82. See Ashenfelter et al., *supra* note 46, at 260 (finding that neither party of the appointing President nor individual characteristics influence how judges decide cases in the aggregate).

83. The U.S. Supreme Court is replete with closely-decided cases in which Justices disagree over both outcome and controlling precedent. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010) (demonstrating a case in which the Court decided 5-4 to prohibit the government from limiting independent political expenditures by nonprofit entities).

84. For example, since the end of the 2012 Term, *Miranda v. Arizona*, 384 U.S. 436 (1966), has been cited 277 times by the U.S. Supreme Court and over 100,000 times by other lower courts. See John Pressley Todd, *Have United States Supreme Court Decisions Curtailed the*



Our second response speaks to all cases, at the margin or otherwise. The common law is, by design, path-dependent.<sup>85</sup> Each published decision wields the potential to influence prospective litigants, whether they litigate or not.<sup>86</sup> Judges in the future may choose this decision as precedent to support how they decide cases before them. The import of a decision in the short term may be the outcome (that is, which party prevails), but its long-term significance lies in its reasoning. Viewed in this light, precedent is vital. Our results suggest the formation of judicial spheres of influence: Republican-appointed Justices holding greater sway over Republican-appointed appellate judges, and similarly on the Democratic side. As these judicial cliques develop, so too does the common law.

If precedent matters, then judges' selection of it also matters. If precedent becomes segmented based on judicial ideology, it leaves open the possibility that the common law itself becomes segmented. If one were to look only at decisions from panels consisting of Republican-appointed judges, the common law might differ from panels consisting of Democratic-appointed judges. Under random assignment, the distribution of cases is comparable across different panel compositions, but the tenor of their decisions may vary dramatically. This partitioning becomes self-reinforcing as Republican- and Democratic-appointed judges gravitate to like-minded precedent, both individually and collectively. To return to our party metaphor, Republican- and Democratic-appointed judges may be in the same room, but they are socializing only within their respective group.

Coming full circle—if earlier scholarship establishes that judicial ideology influences case outcomes, and this Article provides support that judicial ideology influences choice of precedent—what is the relationship between precedent and outcomes? Our intuition would be that the two move in tandem: conservative precedents support conservative outcomes, and liberal precedents support liberal outcomes. Testing this hypothesis directly, however, is difficult

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Miranda Rule Too Much or Is the Balance Just Right?, 7 PHX. L. REV. 371, 381 n.71 (2013).

85. See Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 603-04 (2001).

86. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 966 (1979) (arguing how parties can resolve disputes when using legal rules and case law to anticipate outcomes from litigation).

because, in any given case, we observe only a single panel's use of precedent and decision. We do not observe the counterfactual—a different panel composition unanimously deciding the same case—and therefore cannot directly test for it.

Recent work on dissents, however, provides an alternative counterfactual identification. Panel decisions that generate a dissent involve judges looking at the same set of facts but disagreeing on outcome based on different interpretations of the law.<sup>87</sup> In this subset of published cases, judges who disagree on the case outcome disagree as to which binding precedent applies.<sup>88</sup> Authoring judges gravitate toward precedent ideologically similar to their own views.<sup>89</sup> The partitioning we observe on unanimous opinions follows a similar path. Precedent cited by the majority is strongly correlated with the majority author but not with the dissent; precedent cited by the dissent is strongly correlated with the dissenting author but not with the majority. Precedent cited by both the majority and dissenting judges are correlated with neither the dissenting nor the majority author. These findings suggest that precedent and outcomes closely correlate.

## CONCLUSION

This Article is an empirical examination to better understand the factors that influence how judges choose precedent when deciding cases. It is important to identify the degree to which judges' ideologies influence their choice of precedent. We show that judges cite precedent friendly to their own views. This segmentation may simply reflect the partisanship of the political process extended to the judiciary, but as we argue, it also has significant implications for the common law.<sup>90</sup> The segmentation may lead to distinct echo chambers in the common law.

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87. See Anthony Niblett & Albert H. Yoon, *Judicial Disharmony: A Study of Dissent*, 42 INT'L REV. L. & ECON. 60, 60 (2015).

88. See *id.*

89. See *id.*

90. For a recent discussion of the politicization of the judicial confirmation process, see generally Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381. For an earlier account, see STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* at ix-xiii (1994).

Our findings leave several questions unanswered. For example, does the general trend we observe vary across and within circuits, or even individual judges? It may be worth exploring which Justices (and judges) are more likely to cite, and be cited by, both Republican- and Democratic-appointed judges. These jurists may share common characteristics that inform our understanding of the opinion-writing process. This Article cannot answer the normative question of how the common law should develop, but we hope that it will stimulate further inquiry.

