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U.S. Court of Appeals:
A Citation Analysis of Judicial Influence

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1. Introduction

Stare decisis is the hallmark of a common law system: Lower courts follow decisions issued by higher courts. The mechanism of precedent fits within the characterization of the U.S. Supreme Court as a principal directing its lower court agents, particularly U.S. Courts of Appeals (Songer, Segal and Cameron, 1994). The principal-agent model reveals that circuit judges have the power to shirk and ignore precedent if they can avoid detection by justices.

Circuit judges, however, may adopt a strategy aimed at attracting Supreme Court attention rather than eluding it. Consider federalism jurisprudence, arguably the most significant doctrinal area for the Rehnquist Court (Greenhouse, 2005). Commentators often overlook the radical decision made by the court of appeals in the watershed case of United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993), *aff'd* 514 U.S. 549 (1995). The Fifth Circuit panelists described the case as one of first impression: a challenge to the constitutionality of the Gun-Free School Zones Act of 1990. The panel of two Carter appointees and one Reagan appointee unanimously reversed the defendant's conviction on the ground that Congress had overstepped its Commerce Clause authority in passing the Act. In the ideologically mixed decision, the panel acknowledged that it knew "of no Supreme Court decision in the last half century that has set aside such a finding as

without rational basis. However, the Court has never renounced responsibility to invalidate legislation as beyond the scope of the Commerce Clause" (2 F.3d at 1364 n.43). The Ninth Circuit in United States. v. Edwards, 13 F.3d 291, 294 (9th Cir. 1993), quickly asserted that the Fifth had gone too far: "With respect, we believe the Fifth Circuit has misinterpreted, or refused to follow, the decisions of the United States Supreme Court that are binding on all courts inferior to our nation's highest court."

The Supreme Court agreed to the government's petition to review the *Lopez* ruling. Given the Court grants certiorari typically to reverse the lower court, this may have appeared to signal that the Ninth Circuit was right. Chief Justice Rehnquist, in his majority opinion, however largely accepted the Fifth Circuit panel's analysis. The *Lopez* circuit judges, and in particular the opinion author Garwood, took a bold step and influenced the development of law. The Fifth Circuit panel correctly anticipated the position of the contemporaneous Court.

In the present paper, we seek to add to the existing literature outlining the principal-agent model of the judiciary by focusing less on how much the agents adhere to the wishes of the principal, although a discussion of this aspect of the model is critical, and concentrating more on the signals, like those in *Lopez* and *Edwards*, sent from the appellate level to the Supreme Court. Appeals court judges can serve as "judicial entrepreneurs," using their legal capital, namely their judicial opinions, to influence the Supreme Court and in turn the development of law and policy (McIntosh and Cates, 1997).

We analyze the success and failure of such judicial entrepreneurship by examining how often and with what intensity the Supreme Court cites appellate courts and appellate court judges. At a superficial level, this paper answers the statistically interesting question of which circuit and which judge garner the most citations during the current Natural Court (1994 through 2002 terms). But, we also reveal the power of inferior courts in a judicial hierarchy.

Part 2 examines the principal-agent model as applied to federal courts, considering how lower court judges may communicate with higher court judges within this framework. We describe our method for measuring circuit judge communication in part 3. And we end in part 4 with a description of our results.

2. Modeling the Judicial Hierarchy

The United States Supreme Court is a constitutionally mandated national court that has ultimate authority over federal constitutional questions and final judicial say on interpretation of federal statutes. The Court's power therefore is immense. But, its capacity for exercising that power is constrained: The nine justices act collectively to decide cases and thus can consider annually a small fraction of the thousands of disputes filed in trial courts. The Court greatly widens the scope of its power by leaving final review of most cases to circuit courts and selecting only a limited number of cases for more deliberate consideration. In recent years, the justices have reviewed fewer than 100 of the 25,000 appeals annually handled by the thirteen intermediate appellate courts.

The Supreme Court's delegation to lower courts fits within the principal-agent model of economics, particularly as developed in the bureaucracy literature (Spitzer &

Talley, 2000). The authority relation is a type of contractual arrangement whereby the principal -- here the Court -- assigns limited powers to an agent -- here the circuits -- in order to increase efficiency (Coase, 1937). The Court controls its agents through the language of their decisions and the structure of doctrine, limiting the options available to lower courts. The certiorari process also allows the Court to monitor lower courts for violations of the relational contract.

The Court's various mechanisms for control, however, still leave opportunities for rogue judges because circuit judges derive utility from making decisions that they prefer (Cardozo, 1921: 161-162; George, 1998). If a panel majority's preferences align with the Court's, then delegation imposes no costs on the principal. But, if their views are incongruous, then the lower court has an incentive to impose a ruling contrary to the Court's views. Justices cannot write opinions that are sufficiently detailed to constrain completely the lower courts nor can they review many decisions. The geometric increase in the number of appellate court decisions augments the information divide between appellate courts and the Supreme Court, because it becomes harder for the Supreme Court to monitor each decision and it becomes easier for the appellate courts to evade detection. The rise in unpublished opinions even further increases the information asymmetry because appellate courts make decisions of ambiguous significance. Circuit judges, then, have opportunities to extract rents as a consequence of discretion coupled with information asymmetries.

Circuit judges, however, appear generally to follow Supreme Court preferences despite moral hazard risks. Although the likelihood of reversal is relatively small given

the Court's limited caseload, the *cost* of reversal may be perceived as higher due to threats to prestige, status or reputation (Baum, 1976; Caminker, 1994). And, most available studies have found that circuit courts generally follow the Supreme Court's preferences. In the first study to develop fully a principal-agent model of the judiciary, Songer, Segal and Cameron (1994) examined a series of search and seizure cases decided by the Supreme Court to determine whether the lower courts adhered to contemporary Supreme Court doctrine regarding a subject that appears before appellate courts on a fairly routine basis. Their study demonstrated that the model of appellate court congruence to the Supreme Court's decisions fared quite well, as the "model correctly predict[ed] 88% of the decisions of the courts" (690). They measured several fact pattern variables, such as location of search, existence of a warrant, and level of probable cause, as well as ideology, and ultimately found a high degree of congruence. However, as they stated, "the deck...[was] loaded against a finding of congruence" (692) because search and seizure cases are controversial, politically charged, and the presence of ambiguous precedents makes decision more malleable. The conclusion stemming from their article is that appellate courts do serve as faithful agents.

Most principal-agent models of the judicial hierarchy focus on the possibility of circuit court shirking and fail to consider the impact the agents may have on the principal. Inferior courts may seek to influence a supreme court rather than avoid its detection. One way they may do so is by signaling the appropriateness of certiorari. Cross and Tiller (1998) have argued that, under a sophisticated model of judicial behavior, circuit judges are most likely to dissent when a panel reaches a decision that is contrary both to existing

Court precedent and to their preferences. The whistleblowing circuit judge would signal to the Court that a case is worthy of review (Daughety and Reinganum, 2002). And, George and Solimine (2001) found that the Supreme Court indeed is more likely to grant certiorari to cases in which a circuit judge writes a dissent. But even these studies are primarily interested in the ability of the Supreme Court to ensure compliance by lower courts.

Appellate judges can be faithful agents, as found by Songer, Segal and Cameron, *and* be policy entrepreneurs. They may offer a ruling contrary to precedent but consistent with their view of the current Court's preferences as they did in *Lopez.* Or, they may do so by laying out policy arguments in order to impact future cases, while reaching the conclusion in the present case consistent with the criticized Supreme Court doctrine. For example, in an anti-trust dispute, Khan v. State Oil Company, 93 F.3d 1358 (7th Cir. 1996), Seventh Circuit Judge Richard Posner explicitly and vigorously criticized the controlling Supreme Court position that vertical maximum price restraints are per se illegal. Posner argued that maximum price-fixing had considerable pro-competitive justifications; however, he deferred to the Court precedent, acknowledging that the power to change the rule was solely reserved to the justices. The Supreme Court soon adopted Judge Posner's argument and overruled its own precedent in State Oil Co. v. Khan, 522 U.S. 3 (1997).

Why would justices look to lower court judges for guidance? Although the current Supreme Court hears fewer than 100 cases a year, justices are still faced with the difficult task of sorting out complex issues and reading through hundreds of pages of

briefs and supporting documents. Thus, justices may view one reliable source of information to be a lower court judge whom they trust, just as justices are known to look to the Solicitor General. Of course, justices are not required to sort through all of this information themselves as most have a staff of four energetic law clerks to handle the first cut. But, those clerks, all of whom come from circuit clerkships, also seem likely to seek out the position of circuit judges, especially the judge for whom they previously clerked.

Circuit judges have various reasons to seek the attention of Supreme Court justices. Entrepreneurship may further a judge's policy goals, reinforce her legal perspective, satisfy professional objectives, or offer public recognition. As we discuss in the next section, judges are most likely to seek these goals through their most obvious tool: opinions. Published opinions are judges' primary vehicle for influencing law and policy: they decide the instant case, they set precedent for the circuit, they may influence decisions in other circuits, and they may influence the views of the justices (consider Greenhouse, 2004).

3. Measuring Judicial Entrepreneurship

Measurement is the perennial challenge of judicial studies. Judges rarely offer insights to their motivations and goals, certainly much less frequently than other political actors. While some judges release their private papers after the end of their tenure, these resources are sufficiently infrequent, incomplete, and delayed that they cannot serve as the primary means of studying judicial institutions. We instead rely on the visible actions taken by judges: opinions and votes. We have chosen to focus on opinions -- Supreme

Court opinions and the circuit court opinions that they cite -- to measure circuit judge entrepreneurship. We believe that trends in justices' citation to lower courts and lower court judges may reveal something about their behavior as agents.

Citation analyses such as the one we propose here are far from novel or lacking in analytical heft. Citations themselves provide support for a judge's decisions. As John Henry Merryman, one of the pioneers of citation analysis described it, all opinions "state the final result of a long process of trial and appeal, instruct the lower court, the parties, their lawyers, and through eventual publication, a more general audience, about the law, and establish a precedent" (1997: 392). Citations aid in this goal and help to legitimize decisions by showing that they are grounded within the framework of stare decisis and previous rulings. Attempting to determine precisely why a judge cites to specific cases is rarely possible, but the path of citation creates branched relationships between cases — a tree of law so to speak — and the reference of one case by the other helps to draw the connection between the sources upon which the opinion writer relied (Merryman, 1954). A citation to another case denotes that the cited case has had at least some marginal influence upon the opinion writer. Except in the most novel of legal situations, judges must justify their opinions by appealing to the conclusions that others have reached previously, but more importantly for our purposes, judges attempting to deviate from the present course often cite to other courts that have provided a rationale for doing so (Friedman, 1981: 792). Accordingly, such appeals to the thoughts of others help to portray citations as a proxy for influence and support the conclusion that the most influential judges get cited the most.

Landes and Posner's well-known 1976 article creating an economic model of precedent further elucidates this point. They hypothesized that a precedent's value is represented by the number of times it is cited in subsequent opinions and that there is a correlation between a precedent's age and its diminishing marginal returns. Other studies have picked up where Landes and Posner left off, and they have concluded, like Kosma (1998:339), that "[a]uthored opinions represent the primary work product of members of the Court, and the frequency with which a particular opinion has been cited generally indicates how often it has influence the resolution of subsequent cases." We follow suit here and employ citation analysis to measure the influence of appellate court actors on the Supreme Court within the principal agent framework.

Several studies have analyzed citation patterns for the purpose of determining influence, calculating rate of citation among the state courts, between appellate court equivalents, and within the Supreme Court. Numerous citation studies have looked at horizontal judicial influence: Segal and Spaeth (1996) have measured patterns of influence among Justices through citation analysis while Landes, Lessig and Solimine (1998) have done the same for federal circuit judges. Caldeira (1985) and Merryman (1977) have offered separate measures of citation patterns among the state supreme courts. Some studies have also examined the impact of Supreme Court decisionmaking on the lower courts based on citations. However, no study has mined the rich data of the Supreme Court's citation of appellate courts for the purpose of measuring influence, although Choi and Gulati (2004) did consider citation over a short period to evaluate the promotion potential of circuit judges.

We utilize citation analysis while acknowledging its drawbacks. Citation counts, for example, may reflect a judge's time on the bench or number of opinions written, rather than her actual influence over the principal (Landes, Lessig & Solimine 2001). Certain opinions may set such a clear legal standard that subsequent legal actions are never appealed, resulting in few citations to such a "superprecedent." Other opinions may be so vague and unclear that they produce additional litigation and thus are cited more frequently than their merit justifies (Kosma, 1998). The presence of clerks writing opinions both for appellate court judges and for Supreme Court justices may mean that citation is a product of clerks' views rather than justices'. However, we presume that few opinions leave either circuit or Supreme Court chambers without a large measure of judicial oversight. Moreover, the selection of clerks is also a part of a judge's strategy for influence.

4. The Most Cited Circuits and Circuit Judges

Our study focuses on the recent Natural Court, which began in 1994 with the appointment of Justice Stephen Breyer and ended this year with Justice O'Connor's retirement, and is the longest period of unchanged membership in the Court's history. By focusing on the Natural Court, we avoid changes due to changing composition of the court (either because of an individual's justice's citation practice or the dynamic between the court) and also limit the range of average caseload. Our study period ends with the 2002 term.

Our database includes *all* Supreme Court opinions reviewing circuit court rulings for the 1994 through 2002 terms. We recorded every citation to *any* circuit court opinion

(published or unpublished; signed or per curiam; majority, concurrence or dissent) *excluding* the decision below (that is, we did not count the case being reviewed because such cases are cited as a matter of course). We next pulled the cited circuit opinion in order to identify the authoring judge (justices typically do not name the judge who is cited). We also noted the circuit and year of the cited circuit opinion. Finally, we coded characteristics of the lower court judge, including appointing president.

We collected data on 654 Supreme Court cases, nearly 2,000 separate Supreme Court opinions (majority, concurring, and dissenting), and more than 3,000 circuit court decisions. In our examination of the data, we use the 1993 term caseload as a benchmark because it was the term immediately prior to the first Supreme Court term in our sample.

The most striking finding in our database is that the majority of Court opinions (more than 60%) cite at least one circuit case *other than* the case under consideration. Justices cited courts of appeals decisions 3,211 times and in nearly every instance cited a majority opinion (3,127 or 97%).[1] Of course, separate opinions are unusual on the courts of appeals: for example, studies estimate that fewer than 9 percent of courts of appeals decisions are divided. En banc decisions are also infrequent actions by courts of appeals (accounting for less than 1/10 of one percent of all decisions); and only thirty-one en banc opinions are cited. Of course, we expected ex ante that atypical circuit actions, like dissents and en banc rehearings, would be *more* likely to draw Supreme Court attention; but, the relative frequencies do not provide support for this hypothesis.

Some circuits garnered more attention than others. Table 1 sets forth the citation pattern by circuit and compares it to the caseload and active judgeships in each circuit.[2]

The citations-versus-caseload figure reflects the ratio of citation-share to caseload-share. If circuit citations were distributed based on caseload, we would expect the ratio to be 1-to-1, which would be recorded as a 1. A number higher than 1 would mean more citations per relative caseload. The number of judgeships, which includes all approved seats rather than active judges or total (active plus senior) judges, has been constant during the entire period of the current Natural Court.

Table 1. Supreme Court Citations to Circuit Courts

Circuit	Citations	% of all citations	1993 Merits Decisions	% of all Merits Decisions	*Ratio of Citations to Caseload*	Number of judgeships	Citations per judgeship
1	184	5.7%	753	2.8%	*2.06*	6	30.7
2	355	11.1%	1947	7.2%	*1.55*	13	27.3
3	238	7.4%	2152	7.9%	*0.94*	14	17.0
4	212	6.6%	2537	9.3%	*0.71*	15	14.1
5	344	10.7%	3658	13.4%	*0.80*	17	20.2
6	224	7.0%	2331	8.6%	*0.82*	16	14.0
7	374	11.7%	1811	6.7%	*1.75*	11	34.0
8	220	6.9%	2165	8.0%	*0.86*	11	20.0
9	383	11.9%	4654	17.1%	*0.70*	28	13.7
10	192	6.0%	1657	6.1%	*0.98*	12	16.0
11	227	7.1%	2779	10.2%	*0.69*	12	18.9
D.C.	201	6.3%	775	2.8%	*2.20*	12	16.8
Federal	41	1.3%				12	3.4
Earlier circuits	14	0.4%	NA	NA		NA	
TOTAL	3209	100%	27219			179	17.93

The most cited circuit is the Ninth Circuit at 383 times, but the Seventh is a close second with 374. The First is the least frequently cited general jurisdiction court with only 184 citations (the specialized Federal Circuit only garnered 41 cites). Of note, the much larger Tenth (twice as many judges – 12 versus 6), only beats it by 8 citations (192 total). The Seventh has the highest per judgeship citation with 34 per judgeship (11 active judgeships). The First Circuit has the second highest per-judge citation, but it is also the only circuit whose judges number in the single-digits (6 judgeships) and it also

has had many years to accumulate cases. The general jurisdiction circuit with the lowest per judge citation is the Sixth (14 per judgeship).

What is the half-life of a circuit opinion? We can consider that by looking at the average age of a circuit opinion cited in the Supreme Court (Supreme Court term minus the year of the circuit opinion), and by looking at the decade in which a decision was issued. As reflected in Table 2 below, more than half of the cited circuit opinions (51.5%) were decided within 5 years of the Supreme Court citation, and 71.3% within 10 years of the Supreme Court's decision.

Table 2. Age of Cited Circuit Opinions

Decade	**Number of Citations**	**% of citations**		
2000-2003	186	5.8%		
1990-1999	1772	55.2%	Most recent	0 (same year)
1980-1989	765	23.8%	Oldest opinion cited	196 years
1970-1979	231	7.2%	Average age of cited opinions	10.5 years
1960-1969	80	2.5%	*Standard Deviation*	*17.6 years*
1950-1959	55	1.7%	Median age of cited opinions	5 years
1940-1949	45	1.4%		
1930-1939	26	0.8%		
1920-1929	23	0.7%		
1910-1919	4	0.1%		
1900-1909	7	0.2%		
1800s	17	0.5%		
TOTAL	3211	100.0%		

The justices have cited a large percentage of the judges who have served on the circuits.[3] The justices have cited 110 circuit judges at least 10 times each; and an additional 314 circuit judges were cited at least once. Thus, 60 percent of the 695 circuit judges have been cited by the current natural court. Table 3 lists, in order, the top 50 (and ties) most frequently cited circuit judges.

Table 3. Circuit judges most cited by Supreme Court, 1994-2002 terms (Top 50 & ties)

Rank	**Judge**	**Circuit**	**Tenure**	**Number of citations**
1	Frank Easterbrook	7	1985-	67
2	Richard Posner	7	1981-	61
3	Edward Becker	3	1981-	34
4	Dolores Sloviter	3	1979-	28
5	Frank Coffin	1	1965-	26
5	Bruce Selya	1	1986-	26
7	John Gibson	8	1982-	25
7	J. Harvie Wilkinson	4	1984-	25
9	Michael Kanne	7	1987-	24
9	Stephen Reinhardt	9	1979-	24
11	Walter Cummings	7	1966-1999	23
11	Henry Friendly	2	1959-1986	23
13	Levin Campbell	1	1972-	21
13	William Garwood	5	1981-	21
15	Hugh Bownes	1	1977-	20
16	Richard Cardamone	2	1981-	19
16	Richard Cudahy	7	1979-	19
16	David Ebel	10	1988-	19
19	Joel Flaum	7	1983-	18
19	Learned Hand	2	1924-1961	18

Table 3. Circuit judges most cited by Supreme Court, 1994-2002 terms (Top 50 & ties)

Rank	**Judge**	**Circuit**	**Tenure**	**Number of citations**
19	Amalya Kearse	2	1979	18
19	Jon O. Newman	2	1979-	18
19	James Oakes	2	1971-	18
19	Jerry Smith	5	1987-	18
25	Stephen Breyer	1	1980-1994	17
25	Pierce Lively	6	1972-	17
25	Patricia Wald	DC	1979-2002	17
28	Stephen H. Anderson	10	1985-	16
28	Richard Sheppard Arnold	8	1979-2001	16
28	William Bauer	7	1974-	16
28	Stanley Birch	11	1990-	16
28	Pasco Bowman	8	1983-	16
28	Joseph Hatchett	11	1979-1999	16
28	Phyllis Kravitch	11	1979-	16
28	Diarmuid O'Scannlain	9	1986-	16
36	Ruggero Aldisert	3	1968-	15
36	John Godbold	5/11	1966-	15
36	Daniel Manion	7	1986-	15
36	Illana Diamond Rovner	7	1992-	15
36	Alvin Rubin	5	1977-1991	15
36	Stephen Williams	DC	1986-	15
36	John Minor Wisdom	5	1957-1999	15
43	Danny Boggs	6	1983-	14
43	Michael Boudin	1	1992-	14
43	Frank Minis Johnson	5/11	1979-1999	14
43	E. Grady Jolly	5	1982-	14
43	J. Dickson Phillips	4	1978-	14

Table 3. Circuit judges most cited by Supreme Court, 1994-2002 terms (Top 50 & ties)

Rank	Judge	Circuit	Tenure	Number of citations
43	Stephanie Seymour	10	1979-	14
43	Laurence Silberman	DC	1985-	14
43	Walter Stapleton	3	1985-	14

We can see a pattern in the data of pairs of circuit colleagues gaining high numbers of citations. For example, the most cited circuit judge during the current natural court is Seventh Circuit Judge Frank Easterbrook, who is cited 67 times, and his colleague Richard Posner is a close second at 61 times. (Posner is the jurist most frequently cited by dissenting justices (17), and Easterbrook falls back to 10, tied with First Circuit Judge Frank Coffin who also scores 10 cites (out of 26).) Likewise, the most cited *female* circuit judge, Third Circuit Judge Dolores Sloviter, follows immediately behind her colleague Edward Becker in the ranking. The appearance of such couplings may reveal competition within a circuit for status and influence.

Women and minorities are better represented in the top 50 than they have been on the circuit bench. Women make up 12% of the top 50 but fewer than eight percent of circuit judges. The most cited African-American, with18, is Second Circuit Judge Amalya Kearse (she is one of 28 African-Americans who have served); the most cited Latino-American, with 12 cites, is First Circuit Judge Juan Torruella (one of only 14 Hispanic-Americans); and the most cited of the four Asian-American circuit judges is Ninth Circuit jurist A. Wallace Tashima with 6 citations, plus one citation when, as a

district judge, he presided on the court of appeals by designation. Once we control for the more recent tenure of women and minority judges as well as their political affiliation, however, the probability of citation is the same.

We would expect a Republican-dominated Court to cite Republican appointees more frequently than Democratic appointees. And, indeed, Democratic appointees accounted for 38.9% of citations where as Republicans claimed 60.8%. (The other parties were the remainder). By way of comparison, Republican presidents appointed 343 of the 695 circuit judges in our study (or 49.4%) and Democrats 289 (41.6%).

We also would predict justices would prefer to cite their own circuit opinions, as well as their colleagues, when possible. Seven of the nine sitting justices were promoted from the courts of appeals. They have many reasons to cite their own circuit opinions: They are more familiar with their own prior rulings, those rulings are likely to be consistent with their current perspective, the congruence between past and present confirms their consistency (a valued judicial characteristic), and the citation reinforces their judicial reputation. They might cite other sitting justices to gain their support for an opinion or to highlight a seeming inconsistency if they disagree. The rate of self-citation by justices is generally low, as reflected in Table 4 below, although Stevens' relative self-citation rate is impressive.

Table 4. Supreme Court Justices Citations to a Sitting Justices' Opinions as a Circuit Judge

Justice	Circuit	Tenure	Citations to Justice's Circuit Opinions	Self-citations	Self-citation percentage
Breyer	1	14	17	2	12%
Ginsburg	DC	13	8	3	38%
Kennedy	9	12	11	1	9%
Scalia	DC	4	10	0	0%
Souter	1	1	0	0	0%
Stevens	7	5	10	9	90%
Thomas	DC	1	4	0	0%
AVERAGE			8.6	2.1	24%

Conclusion

The rational choice model of judicial behavior posits that judges seek to maximize their policy preferences (i.e., their judicial utility function) (Segal and Spaeth, 2002; Epstein and Knight, 1997). Judges obviously seek to maximize other preferences as well, but policy is assumed to be dominant in the context of decision making. The existing principal-agent model of the federal courts reveals that lower court judges can vote their preferences when they are congruent with the Court's median or when the Court is unlikely to detect shirking. The model has also been used to demonstrate that judges can seek to further their policy goals by signaling to the Court when a case is appropriate for review.

The present paper adds to the existing model by demonstrating that circuit judges can maximize their policy goals as well as personal goals such as status and reputation by

authoring opinions that gain the attention of justices. Supreme Court justices regularly cite circuit court opinions, particularly those decided within the last ten years and authored by judges from the same party. The Court's practice of acknowledging lower court rulings emphasizes the power of intermediate appellate courts in a hierarchical, common-law judicial system.

References

Altfeld, Michael and Harold J. Spaeth. "Measuring influence on the U.S. Supreme Court," 24 Jurimetrics Journal 236.

Baum, Lawrence. 1976. "Implementation of Judicial Decisions: An Organizational Analysis," 4 American Politics Quarterly 86.

Bhattacharya, Mita and Russell Smyth. 2001. "The Determinants of Judicial Prestige and Influence: Some Empirical Evidence From the High Court of Australia," 30 Journal of Legal Studies 223-.

Caldeira, Gregory A. 1985. "The Transmission of Legal Precedent: A Study of State Supreme Courts," 79 American Political Science Review 178-194.

Caminker, Evan. 1994. "Why Must Inferior Courts Obey Superior Court Precedents?" 46 Stanford Law Review 817.

Canon, Bradley C. 1973. "Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision," 8 Law & Society Review 109.

Cardozo, Benjamin N. 1921. *The Nature of the Judicial Process.*

Choi, Stephen and Mitu Gulati. 2004. "A Tournament of Judges." 92 California Law Review 299-332.

Coase, R.H. 1937. "The Nature of the Firm, 4 Economica 386.

Cross, Frank and Emerson Tiller. 1998. "Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals," 107 Yale Law Journal 2155.

Daughety, Andrew F. and Jennifer F. Reinganum. 2002. "Speaking Up: A Model of Judicial Dissent and Discretionary Review." Vanderbilt Law and Economics Research Paper No. 02-14.

Epstein, Lee and Jack Knight. 1997. *The Choices Justices Make.*

Friedman, Lawrence. 1981. "State Supreme Courts: A Century of Style and Citation," 33 Stanford Law Review 773.

George, Tracey E. 1998. "Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals," 58 Ohio State Law Journal 1635.

George, Tracey E. and Michael E. Solimine. 2001. "Supreme Court Monitoring of the Courts of Appeals En Banc," 9 Supreme Court Economic Review 171.

Greenhouse, Linda. 2005. "The Rehnquist Court and Its Imperiled States' Rights Legacy." *New York Times*, June 12.

Johnson, Charles A. 1987. "Law, Politics and Judicial Decision Making: Lower Federal Courts Uses of Supreme Court Decisions," 21 Law & Society Review 325.

Kosma, Montgomery N. 1998. "Measuring the Influence of Supreme Court Justices," 27 Journal of Legal Studies 333.

Landes, William M., Lawrence Lessig, and Michael E. Solimine. 1998. "Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges," 27 Journal of Legal Studies 271-332.

McIntosh, Wayne V. and Cynthia L. Cates. 1997. *Judicial Entrepreneurship: The Role of the Judges in the Marketplace of Ideas*.

Merryman, John Henry. 1977. "Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Practice of the California Supreme Court in 1950, 1960 and 1970," 50 Southern California Law Review 381.

Merryman, John Henry. 1954. "The Authority of Authority: What the California Supreme Court Cited in 1950," 6 Stanford Law Review 613.

Murphy, Walter F. 1959. "Lower Court Checks on Supreme Court Power," 53 American Political Science Review 1017.

Pacelle, Jr., Richard L. and Lawrence Baum. 1992. "Supreme Authority in the Judiciary: A Study of Remands," 20 American Politics Quarterly 169.

Segal, Jeffrey A. and Harold J. Spaeth. 1996. "The Influence of *Stare Decisis* on the Votes of United States Supreme Court Justices," 40 American Journal of Political Science 971.

Segal, Jeffrey A. and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited.*

Songer, Donald R., Jeffrey A. Segal and Charles M. Cameron. 1994. "The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions." 38 American Journal of Political Science 673**.**

Spitzer, Matthew and Eric Talley. 2000. "Judicial Auditing," 29 Journal of Legal Studies 649.

Wald, Patricia. 1987. "The D.C. Circuit: Here and Now," 55 George Washington Law Review 718.

Endnotes

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1. Justices cited dissenting opinions 49 times, concurrences 27 times, concurring and dissenting opinions 5 times, and dissents from denial of rehearing en banc 3 times.

2. In Table 1, the Federal Circuit data includes predecessor courts such as the Court of Patent Appeals, and the earlier circuits are single-state circuit courts that existed prior to the creation of the circuit courts of appeals in 1891.

3. The Supreme Court rarely cites designated judges: District judges were cited 134 times and International Trade judges 7 times. But, over the last ten years, more than one in three circuit panels have included a designated district judge, and those judges write nearly as frequently as circuit judges (George 2005).