Biased Information, Supreme Court Precedent, and Decision-Making on the U.S. Courts of Appeals

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Abstract

Testing our theory in the U.S. Courts of Appeals, we analyze whether opinions that run counter to the known preferences of justices who author them are regarded as more reliable precedents than those Supreme Court opinions that reflect the ideological predispositions of their authors. We find that the opinions of the Court that convey this type of "counter-preference" information are more likely to be followed than opinions that are consistent with the opinion author's (expected) disposition.

Introduction

In 2002, the U.S. Supreme Court decided *Sattazahn v. Pennsylvania*, a case that addressed whether the state could seek the death penalty in a re-trial of defendant, when a jury was unable to agree upon a sentence after an initial conviction. Writing for the majority, Justice Scalia concluded that neither the Fifth Amendment's prohibition against double jeopardy nor the Fourteenth Amendment's guarantee of due process of law stands as a barrier to the imposition of the death penalty. The following year, Justice Scalia authored the majority opinion in another case involving criminal procedure. In *Crawford v. Washington*, Scalia spoke for a majority that ruled that, absent the opportunity for cross-examination before a jury, recorded testimony violates the Sixth Amendment's requirement that defendants have the right to confront witnesses against them.

Both cases established a binding precedent, one that lower courts are constrained, at least theoretically, to follow. In the years subsequent to these decisions, however, the two cases were treated quite differently by the U.S. Courts of Appeals. The decision in *Crawford* was formally followed nearly two hundred and thirty times. By contrast, a full decade after the decision in *Sattazahn*, the courts of appeals had followed that precedent in no more than four cases. What accounts for such disparate treatment?

There are, of course, a host of factors that shape the impact of Supreme Court opinions in the lower courts, and a vibrant scholarly literature has investigated these (see below). In this paper, we highlight an aspect that has not, to our knowledge, been addressed before: The information contained in the relationship between the (expected) preferences of opinion authors, and the tenor of the decision they write. Specifically, we

argue that opinions that run *counter* to the (expected) preferences of their authors are likely to have a larger impact in the lower courts, because such "counter-preferential" opinion authorship conveys important information about the "quality" of a precedent, and therefore, the attractiveness of the precedent to lower court judges seeking to justify their decisions.

Theoretically, this argument takes its inspiration from Calvert's (1985) paper on the importance of biased information. A key insight of Calvert's argument is that "biased information" – especially advice that runs counter to the known preferences of an advisor – is particularly useful and credible precisely *because* it contradicts what the advisor is expected to say: If my car mechanic tells me *not* to replace my belts and hoses just yet, I am much more likely to find this advice credible (and to follow it) than when she tells me that they all must be replaced immediately. Similarly, one key difference between the decision in *Sattazahn* and the decision in *Crawford* is that the former announces a conservative policy that favors the state over the defendant in a criminal case. As such, it comes as no particular surprise to observers of the Court that it is authored by Scalia, one of its most conservative members. By contrast, *Crawford* is clearly a liberal decision, one that makes it more difficult for the state to construct an evidentiary foundation necessary to secure a conviction. Yet this liberal policy was also crafted by Justice Scalia, thereby conveying a quite different signal. The fact that Scalia crossed the ideological divide despite his bias is likely to suggest to lower court judges that the legal rule announced in this decision is likely to enjoy support among conservative as well as liberal justices, and to have, in this sense, greater "staying power."

In what follows, we elaborate this theoretical orientation more fully and offer some competing explanations for why appellate judges follow precedent. We then test our theory systematically through an empirical analysis of decision making on the U.S. Courts of Appeals.

Theoretical Considerations

The nature of the judicial hierarchy confronts lower court judges with a significant challenge. They are expected to dispose of cases in line with established precedent – most importantly, precedent endorsed by the Supreme Court – and to justify

their decisions with reference to such precedents. Lower court judges are likely to pursue such justification for a variety of reasons: They may have a sincere ambition to craft good legal policy, and to follow precedent in order to avoid a jarring dissonance in the law. Another judge – more strategically-minded – might follow precedent for fear that to act otherwise may result in review and reversal by the Supreme Court (Baum 1997, 115-119). No matter what the motivation for adhering to precedent, the challenge confronting these judges is the same: Rarely is there only a single case on any legal question; there are usually *multiple* relevant precedents. And as the number of relevant precedents increases, so too does the difficulty of discerning *which* opinions a lower court judge should rely on to decide a case's outcome (Segal and Spaeth 2002, 77-82). As Justice Cardozo (1921, 19-20) observed, "in a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins."

Stated differently, faced with multiple precedents that could plausibly point in a number of directions, lower court judges must ask themselves, "How seriously should I take this policy of the Supreme Court?" One feature that lower court judges are likely to look for as they answer this question are precedents that they suspect will command the respect of other judges (and Supreme Court justices) regardless of their ideological predisposition. Why? For judges primarily motivated by legal quality, precedents that are not driven by a particular ideological perspective are more attractive precisely *because* they appear less ideological. And for judges primarily concerned about the possibility of review and reversal by the Supreme Court, reliance on precedents that reflect an enduring commitment to principle, rather than a policy that will remain in force only until a personnel change in the Court's lineup produces an ideological shift, likely reduces vulnerability to reversal. A number of existing studies highlight this logic. Most prominently, scholars have argued that lower court judges are more likely to follow Supreme Court precedents that reflect a broad consensus that transcends ideological divisions among the justices. Thus, Supreme Court Opinions are more likely to be followed by lower courts the greater the number of justices in the majority, and the greater the ideological range of that majority (Benjamin and Desmarais 2012, Corley 2009, Westerland et al. 2010).

We argue that there is another feature that is critical in this context: The potential information contained in the relationship between the ideological tenor of a precedent, and the ideological predisposition of the justice who authored it. Given that ideology is a well-established influence on the justices' decisions, an opinion that runs counter to its author's predispositions is likely to be perceived as a signal that this is a precedent in which a lower court judge should invest. A liberal decision that is authored by a conservative justice (or a conservative decision written by a liberal justice) indicates to lower court that the policy commands a majority *despite* the Court's ideology, not *because* of it. All else being equal, then, such opinions are likely to be viewed as persuasive. Significantly, this fact appears not to have been lost on chief justices when assigning opinions. As Abraham (1996, 35) recounts "Chief Justice Stone assigned one of the Court's leading 'liberals,' Justice Black, to write the majority opinion in the highly controversial *Japanese Relocation Case*. Similarly, Chief Justice Warren assigned on of the Court's leading 'conservatives,' and a deeply religious man, Justice Clark, to write the hotly denounced opinion outlawing state-sponsored Bible reading and recitation of the Lord's Prayer in public schools….[I]t is questionably sound judicial strategy." This argument leads to the following expectation, which we test below:

> **Hypothesis:** Ceteris paribus, Supreme Court opinions that run contrary to the (expected) preference of the opinion author are more likely to be followed by the courts of appeals than opinions that are consistent with the opinion author's ideological predisposition.

Of course, we are scarcely the first to underscore the linkage between biased information and judicial decision-making. In fact, scholars of the courts have documented a variety of ways in which a "counter preference" indicator is useful to judges. In selecting cases for its plenary agenda, for example, the Supreme Court can safely ignore petitions seeking review of the lower courts to which it is ideologically opposed, if those lower courts make ideologically countervailing decisions (Cameron, Segal, and Songer 2000).[1] In like fashion, judges on the courts of appeals take their cues

[1] Perry (1991) makes a related point about the ideological composition of lower court panels as a signal to the Court when setting its agenda. If an ideologically diverse panel on a court of appeals can agree

from district court judges, affirming decisions that the trial judges were not, preferentially speaking, inclined to make (Haire, Lindquist, and Songer 2003). Similarly, dissents on panels of the courts of appeals are likely to result in review by the full court when they are ideologically unanticipated (Beim, Hirsch, Kastellec 2014). Likewise, the amicus briefs of the solicitor general exercise a strong influence over the members of the Supreme Court when those briefs assume positions that depart from their ideological positions (Bailey and Maltzman 2011, 126-139; cf. Black and Owens 2012, 81-87). At the agenda stage, unexpected information --- amicus briefs opposing a grant of certiorari --- can help the justices identify important cases (Caldeira and Wright 1988). The Supreme Court itself can also convey a kind of "counter preferential" information when it explicitly invites Congress to overturn the very statutory decisions in which those invitations are issued (Hausegger and Baum 1999). That Congress acts on these recommendations with relative frequency suggests that such unexpected signals are as useful to legislators as they are to judges.

In light of these findings, we think there is strong reason to believe that the opinions of the Court that are written by "counter preferential" justices will carry with them additional credibility. Credibility being a scarce commodity among a wash of plausible precedents, it should be valuable signal that will inform policy making on the courts of appeals.

Data and Measures

To assess whether counter-preference information contained in opinion authorship affects the subsequent treatment of Supreme Court majority opinions by the courts of appeals, we rely on *Shepard's Citations*.[2] *Shepard's* codes Supreme and lower court opinions by classifying citations that have a substantive treatment of a Supreme Court decision (that is, mere string citations are *not* included). Broadly speaking, *Shepard's* notes when other opinions "follow" the Supreme Court precedent. This coding is widely

about the disposition of a case, "there is little reason to think that the Supreme Court would come out differently" (p.125).

[2] *Shepard's* also tracks when precedents are treated negatively. Negative treatments are divided into "strong" negatives (Overruled, Questioned, Limited, and Criticized), and "mild" negatives (Distinguished). We code this information, as well. Reliance upon *Shepard's* has become a standard measure for the impact of Supreme Court opinions in the lower courts (e.g., see Benjamin and Desmarais 2012, Corley 2009, Hansford and Spriggs 2006, Westerland et al. 2010).

regarded as reliable, and independent work has confirmed the accuracy of *Shepard's* classification (Sprigss and Hansford 2000).

Table 1: Number of "Follows" of Supreme Court Majority Opinions in the Courts of Appeals, 1953-2012

# of Follows	# of opinions
None	641 (11%)
1-3	1,311 (24%)
4-7	1,044 (18%)
8 or more	2,682 (47%)
N	5,678

To construct our data, we begin with all orally argued cases in which the Supreme Court issued a signed majority opinion in the 1953-2012 terms, as reported by the *U.S. Supreme Court Database* (Spaeth et al. 2013).[3] We then use *Shepard's* to generate a count of the total number of positive treatments for each of these Supreme Court opinions in courts of appeals opinions issued between 1953 and the end of 2012. Thus, the unit of observation is a Supreme Court opinions, and the full dataset comprises 5,678 majority opinions. Table 1 provides an overview of the raw data. As is clear, courts of appeals engage with Supreme Court opinions quite frequently, and most opinions elicit multiple "follows."

Key Explanatory Variable

The central claim we seek to test is that *counter-preference information* provided by opinion authorship may shape how Supreme Court opinions are received and treated in the lower courts. Specifically, our expectation is that opinions that are "surprising"

[3] These are those opinions coded as "decisionType=1" in the Supreme Court Database.

given the expected ideological and jurisprudential inclinations of its author are likely to be more influential in the lower courts than opinions for which the tenor of the decision and the inclinations of its author are aligned. Testing this claim requires a measure that indicates opinions in which such counter-preference information is present, i.e., opinions that run contrary to what we might expect to be the natural disposition of the opinion author. This is obviously no straightforward task, especially when dealing with thousands of Supreme Court opinions. We confront this challenge by relying on two separate pieces of information. First, we use the Supreme Court database's coding of the opinion "direction" to identify the ideological tenor of each opinion.[4] Next, we use the Martin-Quinn (2002) estimates of the (one-dimensional) ideal points of Supreme Court justices to identify the three most liberal and the three most conservative justices in each Supreme Court term. Combining these two sets of data, we identify decisions that contain *counter-preference information* as i) liberal opinions written by one of the three most conservative justices, and ii) conservative opinions written by one of the three most liberal justices. Of the 5,678 opinions in the dataset, 1,292 are ones in which the opinion author deviated from her expected ideological preference. Of these, 581 are conservative opinions written by a liberal justice, while 711 are liberal opinions written by a conservative justice.

Control Variables

Naturally, the manner in which lower courts treat Supreme Court opinions is likely to be a function of a number of factors beyond the information conveyed by opinion authorship, and a rich literature has explored these. Broadly speaking, these factors fall along two lines: Characteristics of an opinion that affect its reception by lower courts, and dynamic factors in the relationship between the Supreme Court and lower courts that evolve over time. We control for both sets of factors in our analysis.

Scholars have demonstrated that the size and ideological range of the majority coalition in support of an opinion matters for its reception (Benjamin and Desmarais 2012, Westerland et al. 2010). Legal rules that are broadly acceptable to judges and

[4] Scholars have begun to document potential bias in this directional measure (see CITATIONS). Nevertheless, as a first-cut, these data represent the best available measure of ideological content across a large number of opinions.

lawyers across the ideological and jurisprudential spectrum are more likely to be received well, and the size and breadth of the opinion's majority coalition are related to both: The greater the number of Justices who sign on to an opinion, and the broader the ideological range of that coalition (which we measure by the range of the majority in terms of Martin-Quinn), the more broadly acceptable the decision is likely to be. We thus expect these variables to increase the number of positive treatments. In contrast, a greater number of concurring opinions signals that there are alternative legal justifications for the outcome reached in a case, and that the particular legal rule articulated in the opinion is not fully acceptable to all justices who support the disposition. Consistent with prior work (see Benjamin and Desmarais 2012), we expect the number of concurrences to *decrease* the number of positive treatments.[5]

A second set of control variables focuses on changes in the legal environment that may affect how a given Supreme Court opinion is treated over time. Several of these emerge out of the hierarchical nature of the judicial system. As a number of scholars have argued, given that lower courts are subject to review by the *contemporary* Supreme Court, lower court judges may worry about how the current Court views a given precedent in deciding how to treat it. They are more likely to treat a precedent favorably if they have reason to believe that the current Court supports it. In keeping with other work (see Benjamin and Desmarais 2012; Hansford and Spriggs 2006; Westerland et al. 2010), we control for the relative shift in the location of the median Justice on the Supreme Court that issued the cited opinion and the current Supreme Court, measured as the absolute distance between the Martin-Quinn scores of these Justices, averaged over the time period of our study. We anticipate that, as this distance increases, the number of positive treatments decreases. Similarly, the ideological congruence between the Supreme Court that issued a decision and the courts of appeals that might make use of that precedent is likely to matter. We measure this congruence as the absolute difference between the percentage of Supreme Court justices and courts of appeals judges appointed

[5] In related work, Spriggs and Hansford (2001) demonstrate that the probability that an opinion will be overruled rises in the number of concurrences. We should note, however, that Westerland et al. (2010) find that the number of concurrences has a positive impact on the probability of compliance.

by a Democratic president (again, averaging this yearly score over the years in our dataset).

Hansford and Spriggs (2006) have demonstrated that lower courts are more likely to follow Supreme Court precedents the greater the vitality of these precedents, defined as the number of positive treatments of a precedent *by the Supreme Court* minus the number of negative treatments by the Supreme Court. The logic of this argument also derives from the nature of the judicial hierarchy: The more support the Supreme Court has demonstrated for a precedent, the more constrained lower courts are likely to feel in applying it. Similarly, if an opinion is explicitly overruled by the Supreme Court, we would of course expect appeals courts to treat this opinion and less positively (Benesh and Reddick 2002). We control for this possibility by including a variable that indicates the percentage of time over our study period during which an opinion has been overruled.

Finally, we must take account of the fact that opinions do not have equal opportunities to be treated positively. There are several aspects to this. Opinions vary in the extent to which they are pertinent to the issues before the courts of appeals. Some decisions are relevant in many cases. Others are more obscure and only relevant infrequently. Naturally, an opinion that is relevant to many cases before the courts is more likely to be treated positively than an opinion that is hardly ever relevant. As a proxy measure of this relevance, we include the (logged) number of number of times an opinion is treated positively (or negatively) in *any* federal court (i.e., the sum of all treatments in the Supreme Court, Court of Appeals, and District Courts).[6] Because more salient opinions are more likely to be cited, we also control for the average salience of a precedent as measured by the *New York Times* and *Congressional Quarterly* salience measures (Epstein and Segal 2000; Hansford and Spriggs 2006). Lastly, we include the age of the opinion because older precedents obviously have had more opportunity to be followed.

Estimation and Results

The dependent variable for our analysis is a count of the number of times a Supreme Court opinion has been followed in the courts of appeals over the period of our

[6] To be precise, we use ln(# of total treatments+1) in order to deal with the fact that some opinions are not treated at all.

study. Because our dependent variable is a count, we employ a negative binomial count model. The negative binomial is particularly appropriate in the current case because there is likely to be overdispersion in the dependent variable. We report the results of this analysis in Table 2. In model 1, we simply estimate the unconditional effect of a counter-preference opinion, controlling for the additional factors outlined above. Importantly, an opinion author who writes an "unexpected" opinion has precisely the impact we expect: Controlling for other factors known to affect subsequent treatment of an opinion, counter-preference opinions are followed *more* often than opinions that are aligned with the opinion author's ideological and jurisprudential inclinations, and this effect is statistically significant. Moreover, most of the control variables have the expected sign: Opinions supported by greater majorities result in more positive treatments, as do opinions that are more relevant before courts generally. Precedents with greater vitality are followed more often. Opinions are followed *less* often as the (average) distance between the contemporary Supreme Court and the deciding Court increases, as a decision features more concurrences, and the longer an opinion has been overruled. Surprisingly, opinions supported by a coalition of greater ideological range result in a lower number of positive treatments.

While these results are encouraging, they raise a question. As discussed above, and as reflected in our results, opinions supported by a larger majority generate more positive treatments than opinions carried by a small coalition. Naturally, opinions supported by a larger majority are also *more* likely to be authored by a justice whose natural inclinations might suggest otherwise. That is, an opinion supported by a larger majority is more likely to contain counter-preference information, and this likelihood probably increases with majority size. Indeed, among the 5,678 opinions in our sample, roughly 30% of unanimous and 8-1opinions are counter-preference, while only 24% of 7-2 decisions, 17% of 6-3, and 11% of 5-4 decisions are counter-preference. Thus the question: Does unexpected information provided by opinion authorship convey information *over and above* the information conveyed by a larger majority coalition? Put differently, can we disentangle the impact of counter-preference opinion authorship from the impact of a growing majority coalition, which increasingly signals that justices with divergent views support an opinion?

Table 2: Negative Binomial Model of Positive Treatments of Supreme Court Majority Opinions in the Courts of Appeals, 1953-2012

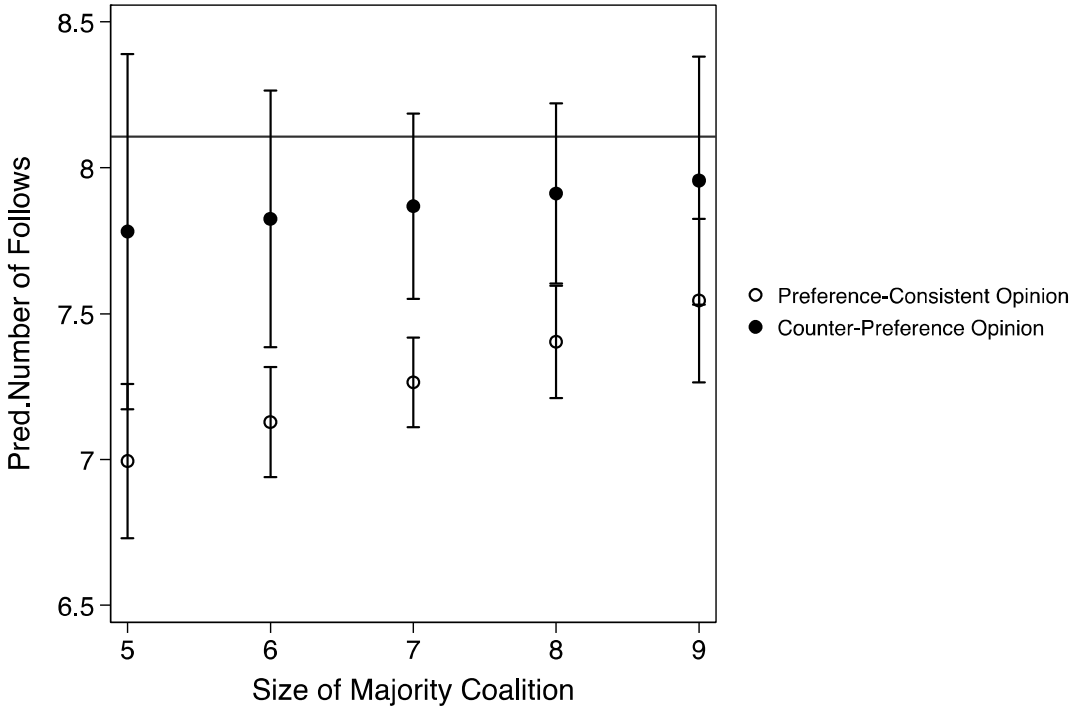
	Model 1		Model 2	
Counter-Preference Opinion	0.073	***	0.107	**
	(0.021)		(0.043)	
Counter-Preference Opinion x # of Extra Votes			-0.013	
			(0.015)	
Shift in SC Medians	-0.166	***	-0.168	***
	(0.031)		(0.032)	
Shift in SC-Courts of Appeals	0.003	**	0.003	*
	(0.001)		(0.002)	
# of Majority Votes	0.016	**	0.019	**
	(0.007)		(0.008)	
Range of Majority	-0.011	*	-0.011	**
	(0.006)		(0.006)	
# of Concurrences	-0.024	**	-0.024	**
	(0.011)		(0.011)	
Vitality	0.028	***	0.028	***
	(0.004)		(0.004)	
Case Overruled	-0.293	***	-0.294	***
	(0.115)		(0.115)	
# of treatments all courts (log)	0.969	***	0.969	***
	(0.007)		(0.007)	
Salience	-0.123	***	-0.122	***
	(0.033)		(0.033)	
Opinion Age	-0.000		-0.000	
	(0.006)		(0.006)	
Constant	-1.584		-1.599	
	(0.069)		(0.071)	
N of opinions	5,678		5,678	
BIC	33,298		33,305	
AIC	33,211		33,213	

Note: Dependent variable is the number of "Follow" treatments in court of appeals decisions between 1953-2012. *** significant at 0<0.01, ** significant at p<0.05, * significant at p<0.10.

To investigate this issue in more detail, model 2 includes an interaction between our indicator for a counter-preference opinion and the number of majority votes beyond 5 that an opinion secures. Thus, the estimated coefficient on the "counter-preference opinion" variable now reflects the impact of a biased opinion author for a 5-4 decision, while the impact of biased opinion authorship for larger majorities can be calculated from the (appropriately multiplied) sum of the coefficient on the interaction term and "counter-preference opinion." Before turning to a substantive illustration of the key result, note briefly that the other coefficients are remarkably stable across the two specifications, and that the estimated coefficient for a counter-preference opinion continues to be positive and in the expected direction.

Because interactive effects are difficult to interpret directly from the coefficients, in Figure 1, we illustrate the substantive impact of a counter-preference opinion on the expected number of positive treatments across the range of majority coalition sizes. The figure conveys several important findings. First, for opinions that are preferentially consistent (i.e., authored by a justice whose ideological predispositions are aligned with the tenor of the decision), an increasing coalition size is associated with more positive treatments, as existing scholarship has argued. Second, and most importantly for our argument, counter-preference opinions are followed significantly more often than preference-consistent opinions. For example, the expected number of follows for a 5-4 opinion that runs counter to the preferences of its author is roughly 7.75, compared to 7 follows for the same opinion if it is preference-consistent. For an 8-1 opinion, the increase that results from "counter-preferential authorship" is about 0.5 follows. Finally, note that for counter-preference opinions, there is no statistically discernable impact of growing majority size on positive treatments. Put differently, the information signaled by unexpected opinion authorship appears to overwhelm the information conveyed by a greater majority; counter-preference opinions already result in a greater number of positive treatments, and there is no additional effect from increasing majority size. Taken together, these results provide strong support for the conclusion that the information provided by opinion authors who pen a "surprising" decision has a significant impact on how a Supreme Court precedent is treated in the courts of appeals.

Figure 1: Average marginal effect of a counter-preference opinion on the predicted number of positive treatments, conditional on size of original majority



Conclusion

The doctrine of stare decisis poses a considerable challenge for appellate judges. Institutionally constrained by a judicial hierarchy, and awash in plausible precedents, members of the courts of appeals cannot know for certain which precedents to apply and when. One of the characteristics of precedential credibility derives from the value of unanticipated information from a biased source. In crafting their opinions, members of the Supreme Court provide guidance --- advice to lower courts about how to resolve issues. The seriousness of that guidance is increased when a justice at one end of the ideological spectrum (i.e., a biased advisor) writes a policy that is counter to that bias. All else being equal, it is these precedents which judges are careful to heed. As Calvert puts it in his formal treatment of the value of biased information, "this effect occurs because a biased advisor recommending the alternative that he was supposed to have

been biased against is likely thereby to prevent the decision maker from making a relatively large error" (Calvert 1985, 552). Seen in this way, the signal from a counter-preference opinion helps members of the courts of appeals overcome at least some of their information deficit by helping them to identify precedents that are likely to be of "high quality," and this, in turn, makes these precedents more likely to be treated favorably in the lower courts.

Our results indicate that the value of this signal comes from its unexpected source; it is not contingent upon the degree of support that it is able to generate among other justices. Opinions that secure large majorities on the Court certainly garner the notice of appellate judges, but liberal opinions written by conservative justices (or conservative opinions written by liberal justices) are important in and of themselves, without regard to the other justices who endorse them.

This analysis suggests that appellate judges understand the Court as a political as well as a legal institution. It is because they know that the justices are ideologically motivated that, no less than other policy makers, they employ a quite rational mechanism by which to pinpoint and incorporate the most useful knowledge in their own decisions.

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