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Judicial Citation to Legislative History:  
Contextual Theory and Empirical Analysis

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## Abstract

Judge Leventhal famously described the invocation of legislative history as “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.” The volume of legislative history is so great and varied, some contend, that judges cite it selectively to advance their policy agendas. In this article, we employ positive political and contextual theories of judicial behavior to examine how judges use legislative history. We consider whether opinion-writing judges, as Judge Leventhal might suggest, cite legislative history from legislators who share the same political-ideological perspective as the opinion-writing judge? Or do judges make such choices in a broader context than Judge Leventhal’s statement suggests. We posit that an opinion writing judge would cite legislative statements supporting an outcome preferred by the opinion-writing judge, when such statements come from legislators who share the same political-ideological perspective as the opinion-writing judge’s colleagues or superiors. This should be so regardless of whether the cited legislator shares the broader perspectives of the opinion-writing judge himself. Put in Leventhal’s terms, instead of looking for their own ideological friends, judges look over the heads of the guests for the legislative friends of the judge’s colleagues on the bench (or superiors on higher benches). We test this approach with court opinion data gathered from LEXIS and find evidence of hierarchy (high court oversight) and panel (co-members on a court) effects in citation to legislative history, effects that appear related to the political-ideological identification of judges who review or are co-members on a panel of the authoring judge. Specifically, we find that the higher the proportion of Republicans in the reviewing court or sitting on the same three-judge panel, the higher the proportion of legislative history cites that will be to Republican legislators, independent of the political orientation of the authoring judge.

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Contextual Theory and Empirical Analysis**

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## Abstract

Judge Leventhal famously described the invocation of legislative history as “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends. The volume of legislative history is so great and varied, some contend, that judges could cite it selectively to advance their policy agendas. In this article, we employ positive political and contextual theories of judicial behavior to examine how judges use legislative history. Do opinion-writing judges, as Judge Leventhal might suggest, cite legislative history from legislators who share the same political-ideological perspective (political party affiliation) as the opinion writing judge? Or do judges make such choices in a broader context than Judge Leventhal’s statement suggests. We posit that an opinion writing judge would cite legislative statements that suggest an outcome preferred by the opinion-writing judge, when such statements come from legislators who share the same political-ideological perspective (as represented by political party affiliation) as the opinion-writing judge’s colleagues or superiors. This should be so regardless of whether the legislator shares the broader perspectives (same party affiliation) of the opinion-writing judge himself. Put in Leventhal’s terms, instead of looking for their own ideological friends, judges look over the heads of the guests for the legislative friends of the judge’s colleagues on the bench (or superiors on higher benches). We test this approach with opinion data gathered from LEXIS-NEXIS and information on the judges’ political perspectives (as measured by the political affiliation of the appointing president). We find evidence of panel and hierarchy effects in citation to legislative history, effects that appear related to the political-ideological identification of judges who review or are co-members on a panel of the authoring judge. Specifically, we find that the higher the proportion of Republicans in the reviewing court or sitting on the same three-judge panel, the higher the proportion of legislative history cites that will be to Republican legislators, independent of the political orientation of the authoring judge.

## **Judicial Citation to Legislative History:**

### **Contextual Theory and Empirical Analysis**

#### **I. Introduction**

Judge Leventhal famously described the invocation of legislative history as “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends” (Wald 1983, quoting Judge Levanthal). The volume of legislative history is so great and varied, some contend, that judges could cite it selectively to advance their policy agendas (Scalia 1997). It may be, however, that judges make such choices in a broader context than Judge Levanthal’s statement suggests. Perhaps instead of looking for their own ideological friends, judges look over the heads of the guests for the ideological friends of their colleagues. In other words, instead of merely citing legislative history statements consistent with their own case preferences, judges may tend to cite legislative history from legislators who share the broad perspectives of the judges whom an opinion-writing judge must persuade. For example, a Democrat-appointed opinion writing judge who sits on a panel with two Republican-appointed judges, or who is a district judge in a circuit in which most judges were Republican-appointed, may search out legislative statements made by Republican legislators supporting the preferred case outcome of the opinion-writing judge.

The judicial politics literature has shown that judicial attitudes are powerful predictors of judges' votes and thus of case outcomes. (Pinnello 1999) The literature has generally assessed whether judicial attitudes and case facts predict case outcomes (e.g., Segal and Spaeth 1993), rather than addressing the traditional interest of law professors, the reasoning underlying judicial decisions. This Article offers a quantitative analysis of the reasoning proffered for decisions by considering whether opinion content varies based on the political characteristics of the opinion audience (other judges), controlling for the opinion author's own political-ideological orientation. In particular, we ask whether judges select arguments that are particularly likely to appeal to those who may have some power to determine whether the judges' preferred resolutions of issues can become law, such as co-members of a judicial panel or judges on a higher court who might hear the case on appeal. Such tailoring would indicate not only that judges genuinely believe in the power of legal argument to persuade, but also that judges recognize that some arguments might be more persuasive to, and more constraining for, some judges than for others.

Determination of whether judges tailor their opinions based on political-ideological context demands identification of some aspect of judicial reasoning that can serve as an easily measurable proxy for whether an opinion is likely to appeal to other jurists. For the purpose of the present analysis, we chose to analyze citations to legislative history in judicial opinions. We assess whether opinion-writing judges are more likely to cite to legislative history created by Democratic than Republican legislators when the judicial audience consists of Democrat rather than Republican appointed judges, and vice-versa. Selective citation may occur because opinion authors expect other judges to take more seriously the legislative statements of those with whom

they are generally inclined to identify with politically, or because same-party legislators are more inclined to make statements that a judge would find persuasive.

In considering this thesis, we address several questions. First, to what extent does the opinion writing judge's own political ideology affect which legislative history the judge cites? Although this question is somewhat apart from our inquiry, it is independently important because it addresses whether a judge's ideology affects only how the judge votes, or also how the judge argues. Also, it will be important to control for a judge's own ideology in seeking to identify tailoring of opinions to the ideology of others. Second, to what extent is there a "hierarchy effect" on a judge's use of legislative history? In particular, to what extent, if any, does the political orientation of a circuit court affect the citation of legislative history by a district court within that circuit? Third, to what extent is there a "panel effect"? In particular, on a three-judge appellate panel, to what extent is a circuit judge's citation to legislative history influenced by the characteristics of the other two judges assigned to the same panel? For each of these questions, we will develop a model predicting the probability that any particular cite by an authoring judge to identifiable legislative history is a cite to a legislator of a particular political party.

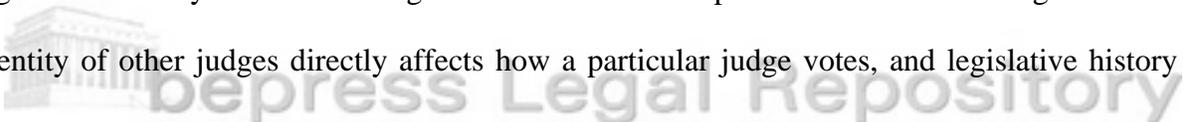
In Part II of this article, we briefly review various models of judicial decisionmaking offered by legal theorists and judicial politics scholars and assess their implications for citations to legislative history. We first briefly note that critics of legislative history have suggested that judges cite legislative history selectively to bolster their preferred issue resolutions. Evidence of selective citation would provide some ammunition to those critics, though it would be insufficient to resolve the underlying normative questions about whether legislative history should be relied upon at all, and if so which legislative history to use. We then focus on the implications of the political science literature for legislative history. The leading theory from

political science – the attitudinal theory -- does not offer strong predictions about legislative history because the theory explains voting rather than the reasons judges may give for their votes.

Recently, though, the judicial politics literature has recognized that a judge's voting behavior may depend on political context, such as the ideology of other judges on the bench or in appellate review capacity. For example, judges may tend to reach more liberal results if the other members of a judicial panel are Democrat appointees than if they are Republican appointees. Such results, however, need not indicate persuasion; they may indicate only that judges defer for collegial reasons or to avoid the embarrassment of a dissent. Indeed, some recent work in this literature has suggested that these contextual effects are not the results of actual persuasion by judges of one another. That literature, however, has focused on judges' votes rather than on the content of their opinions. Our project, by contrast, seeks evidence of attempts at persuasion by examining the opinions themselves.

In Part III, we present our empirical analysis. The evidence suggests that political context does help to predict the invocation of legislative history by federal judges. Specifically, although we find little evidence that a judge's own putative ideology affects whether the judge is more likely than the average judge to cite Republican or Democratic legislators, we find statistically significant evidence of hierarchy and panel contextual effects on an opinion writing judge's decision of what legislative history to cite.

Part IV provides discussion, considering possible interpretations of the data and implications of the data both for debates on judicial behavior and for debates on the use of legislative history. The most significant alternative explanation for our findings is that the identity of other judges directly affects how a particular judge votes, and legislative history in



turn reflects the judge's decision on the merits. Although this may be part of the story, we suggest that it is unlikely to provide a complete explanation of our findings, because such a theory would indicate that a judge's own political orientation should also significantly predict citation patterns. We conclude in Part V with suggestions for further exploration.

## **II. Theoretical Background**

This part situates the empirical project in the context of debates among legal scholars concerning legislative history and among political scientists seeking to explain judicial decisionmaking. Part II.A notes arguments that legislative history is so voluminous that judges may cite it selectively to advance their political agendas. Legal theorists, however, have not assessed or predicted whether selective citation would vary based on the identity of other judges. Parts II.B and II.C, meanwhile, demonstrate that the attitudinal model and the strategic model of judicial decisionmaking do not offer firm predictions about whether selective citation exists. A recent literature on contextual effects has clearly demonstrated that the characteristics of judges on a panel affect the votes of other judges on the panel. That literature, however, has not so far demonstrated that these effects are the result of persuasion, and indeed some studies suggest the contrary.

### **A. Legal Theory and Selective Citation**

The possibility that judges might selectively choose arguments is a familiar one, particularly in the context of legislative history. As mentioned above, Judge Leventhal described the invocation of legislative history as “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends” (Wald 1983, quoting Judge Leventhal). Similarly, Justice Scalia argues that legislative history provides “something for everyone” and it

can be “relied upon or dismissed with equal plausibility” and facilities decisions “based upon the courts’ own policy preferences” (Scalia 1997, pp. 35-37). Because there may be legislative history on both sides of an issue, consideration of legislative history might enable a judge to support either side, perhaps even when the text of the statute points unambiguously in only one direction.

An implication of the Leventhal and Scalia views is that judges should be more likely to cite legislative history approvingly when the legislative history advances the judge’s personal policy preferences. Identification of selective citation would thus provide some support for Scalia’s normative argument that judges should not rely on legislative history. It would not resolve the dispute altogether, however. The ultimate question is the degree of selective citation and constraints inherent in legislative history, relative to other legal sources.

### **B. Political Science and Selective Citation**

The dominant view of judicial decisionmaking in the political science literature—the attitudinal model—holds that that the political beliefs and attitudes of judges measurably affect their voting choices. (Segal and Spaeth 1993) The studies supporting this view are now legion (Pinello 1999), seriously undercutting at least the strong version of the legal model. The empirical research also shows that a judge’s political party affiliation, as represented by the party of the appointing president, is a good proxy for ideological or attitudinal differences that impact the judge’s voting in cases (Pinello 1999).

The attitudinal model makes predictions about the outcomes of cases, not about the content of opinions. The attitudinal model thus does not produce clear testable predictions about citations to legislative history. At least stated in a strong form, the model would appear to deny that legislative history in fact motivates judicial decisionmaking. Attitudinal theory, however,

would be consistent with findings of ideological influences on legislative history citation. Perhaps such citation is merely a form of post hoc rationalization, in which case the attitudinal model might predict that judges would tend to cite legislative history consistent with their policy preferences.

In recent years, judicial politics scholars have begun looking beyond case outcomes to consider some aspects of the reasoning underlying decisions, showing how some choices may reflect strategic attempts to affect policy. Tiller and Spiller (1999), for example, posited that a judge's choice between relying on factual and legal grounds to resolve a case can serve to protect the judge's policy choice preferences. Smith and Tiller (2002) found empirical support for that theory by considering environmental cases. They found that judges would choose fact-based rationales for the decisions they cared about most to insulate those decisions from higher court review and reversal. Specifically, liberal judges were more likely to use fact-based rationales when reversing EPA decisions for being too lax (outcomes those judges wanted to stick) than when reversing the EPA for being too strict. Conservative judges, on the other hand, were more likely to use fact-based rationales when reversing EPA decisions for being too strict (outcomes those judges would want to stick) than when reversing the EPA for being too lax.

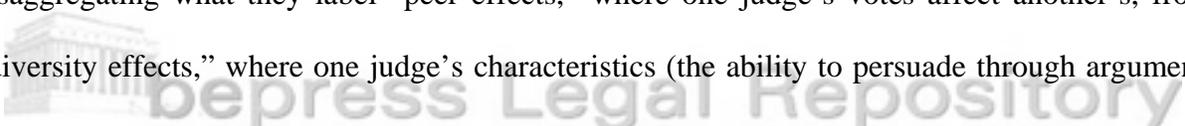
This literature has thus identified a strategic dimension to opinion reasoning, but only when the choice of reasoning has clear legal implications. The literature has not yet explained more micro-level aspects of opinion reasoning, such as why an opinion emphasizes certain facts or cases rather than others. Given a particular final case outcome, there is no immediate legal consequence to whether a judge supported that outcome by citing to legislative history created by a legislator of one party or the other, or by not citing to legislative history at all. Citation of

legislative history thus could have a strategic dimension only if such citation affected the probability that a judge's preferred case outcome in fact becomes the selected final outcome.

This possibility finds some support in the recent development of a contextual effects model which demonstrates that the characteristics of judges affect the decisions of other judges deciding cases with them. Cross and Tiller (1998), for example, show that a judge writing an opinion for a three-judge panel is less likely to vote against legal precedent and in accordance with the judge's presumed ideological preferences, as measured by the political party of the President who appointed the judge, when there is at least one remaining judge on the panel who does not share the judge's presumed preferences. This third judge acts as a potential "whistleblower" who induces the opinion author to follow the law.

Sunstein et al. (2004) have found related interaction effects in a range of doctrinal settings, though not in some others. On cases concerning issues such as affirmative action, piercing the corporate veil, and environmental regulation, they found that while the party of the appointing president is "a fairly good predictor of how individual judges will vote, ... the political party of the president who appointed the other two judges on the panel is at least as good a predictor of how individual judges will vote." (p. 305) As Sunstein et al. note, however, there are multiple possible explanations for the interaction effects: "Our data do not reveal whether ideological dampening is a product of persuasion or a form of collegiality." (p. 305)

Identification of contextual effects by itself is thus insufficient to establish the decisionmaking dynamics underlying those effects or to establish that judges genuinely persuade one another. Cameron and Cummings (2003) attempted to explore the underlying dynamics by disaggregating what they label "peer effects," where one judge's votes affect another's, from "diversity effects," where one judge's characteristics (the ability to persuade through argument,



for example) affect another judge's votes. To disaggregate the diversity and peer effects from each other and from the effect of a judge's own ideology on the judge's decisionmaking, Cameron and Cummings studied the effect of racial, gender and ideological diversity on judicial decisionmaking in a group of 179 affirmative action cases. Their analysis attributed the contextual effects entirely to the peer effect rather than to the diversity effect.

A separate study, Farhang and Wawro (2004), identified similar contextual effects to those found by Cameron and Cummings in the context of discrimination cases. They showed that the presence of a single woman on a judicial panel had a significant effect on the votes of the other panel members. They also attributed the result to a peer effect rather than to a diversity effect. Whether a female judge wrote the opinion did not have a statistically significant effect on the votes of either that judge or of the other judges. Thus, they conclude, the contextual effect does not occur as a result of the other judges' being persuaded by the opinion author in particular. Because judges conference before resolving cases, however, a judge could persuade other judges in the absence of writing an opinion.

The findings that no diversity effect exists may not be robust. Most judges may be sufficiently familiar with the central arguments concerning affirmative action (the Cameron and Cummings study) and gender discrimination (the Farhang and Wawro study) that others are unlikely to persuade them to change their initial positions. In addition, the contextual effects studies that have failed to find a diversity effect may not have looked at the data most likely to be relevant. The contextual effects studies have focused on data concerning judges' votes in cases presumably because of the availability of such data. Judges are engaged in a deliberative enterprise, however, so contextual effects also may occur at the level beneath judges' votes, in the micro-level legal reasoning that judges use to support the resolutions that they reach. If the

diversity effect exists and leads judges to attempt to persuade one another, then we might expect judges seeking to persuade other judges to adopt reasoning tailored to those judges' political orientations. Our study considers this possibility.

### **III. Empirical Analysis**

We theorize that the judicial-political context confronting a particular judge may be associated with particular patterns of citations to legislative history. In Part III.A, we define three testable implications of our model. Part III.B describes the data that we use to conduct our empirical analysis, and Part III.C reports the results. Part IV will assess the implications of the results.

#### **A. Testable implications**

We offer three hypotheses, detailed below. Although our theoretical model suggests that these effects may be causal—for example, that judges cite to legislators of a particular party because the judges wish to influence higher-ranking judges of the same period—our empirical model tests only whether associations exist. We will discuss alternatives to the causal explanation in Part IV.

First, we hypothesize the existence of a *political-ideology effect for the opinion-writing judge*. That is, we predict that when an authoring judge, whether on a district or appellate court, cites to legislative history, the judge is more likely to cite a Republican legislator if the judge was appointed by a Republican president (and similar for Democrat appointed judges and Democrat legislators). This is our most tentative hypothesis because it is not a prediction of the contextual effects model; it is only a possible implication of the attitudinal model as it looks solely to the authoring judge's own political ideology. We further predict that the ideology effect is most

likely to be pronounced in concurring and dissenting opinions on circuit court panels, where the judge is disagreeing with an opinion the majority has endorsed. In those situations, a judge has failed, and perhaps not even attempted, to persuade other judges on the panel.

Second, we hypothesize the existence of a *hierarchy effect*. That is, a judge's pattern of citation to legislative history is likely to be correlated with the identities of judges who may review the judge's work. In particular, we predict that when a district judge cites to legislative history, the probability that the citation is to a Republican legislator will be greater, the larger the proportion of Republican-appointed judges on the reviewing court. Note that we will test the hierarchy effect only on district court decisions because the rarity of changes in the composition of the Supreme Court makes it difficult to identify associations between Supreme Court composition and lower court decisionmaking.

Third, we hypothesize the existence of a *panel effect*. That is, a judge's pattern of citation to legislative history is likely to be correlated with the identities of the other judges on the panel. In particular, we predict that when an appellate judge cites to legislative history, the probability that the citation is to a Republican legislator will be greater, the larger the proportion of Republican-appointed judges on that panel. This prediction applies to all circuit court panels, including three-judge panels and en banc panels.

## **B. Data**

Our data derive from the Lexis database of decisions by federal courts in the United States. We downloaded all cases decided from 1950 through 2003 that contained the phrase "Cong. Rec.", the appropriate citation form for the *Congressional Record*. Our analysis is thus only to this form of legislative history, not to other forms, such as committee reports.<sup>1</sup> The

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<sup>1</sup> A computer program developed in Visual Basic for Applications parsed the downloaded cases, and a macro in the SAS statistical programming language accomplished further processing.

dataset including data identifying for each opinion the court issuing the opinion, the judge authoring the opinion (or the first listed judge in the case of jointly authored opinions), the number of citations to legislative history, and the proportion of legislative history citations that were to Republican legislators. Cases in which we were unable to determine the identity of all judges on the panel.<sup>2</sup>

Data identifying the President appointing a particular judge was drawn from the *Federal Judges Biographical Database*. That source was also used to calculate, for each district court and Court of Appeals case, the proportion of Republican judges on the Court of Appeals at the end of the year in which the case was decided. We assigned particular legislators to particular citations by examining parentheticals following citations, which often contained text such as “remarks of Rep. Smith.”<sup>3</sup> In the absence of such an identification, we searched in the 1000 characters preceding the citation for an identification of a legislator (either a member of the House or of the Senate). Though this approach may admit occasional errors, we have no reason to believe that these errors would bias our results. Where no legislator could be identified, either because there was no reference to a legislator or a reference did not uniquely identify a legislator in the relevant session of Congress, the citation was ignored. Cases with no citations successfully processed were omitted from the dataset.

The result of the processing was a dataset consisting of data covering 6,524 opinions, comprising in total 13,074 citations to legislative history. To analyze the data, we ran probit regressions on the dataset, treating each citation as a unique observation. Because of the

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<sup>2</sup> For example when the wording identifying the judges was nonstandard or a judge’s name was misspelled, the computer program sometimes was unable to make a certain identification. Such cases were excluded from the dataset.

<sup>3</sup> The computer program looked up individual legislators by consulting McKibbin (1997).

possibility of correlation among citations to legislative history in any given case, we clustered the regressions by case to obtain robust standard error estimates.

## C. Results

### 1. Ideology Effect of Authoring Judge

Table 1 illustrates our analysis of the ideology effect by counting all citations to legislators by judges, broken down by the political affiliation of the citing judge ( $J_D$  for Democrat-appointed judge,  $J_R$  for Republican-appointed judge) and the political affiliation of the legislator cited ( $L_D$  for Democrat or independent legislators,  $L_R$  for Republican legislators). The data is listed for majority opinions and nonmajority opinions. We classified an opinion as a majority opinion if it was the first opinion in a case; all other opinions (concurrences and dissents) were classified as nonmajority opinions. This table reflects decisions by all courts, including district courts (all of whose opinions are necessarily majority opinions), the U.S. Courts of Appeals, and the U.S. Supreme Court. Table 2, meanwhile, presents the same data, but counting only opinions produced in three-judge panels of the U.S. Courts of Appeals.

**Table 1. Judicial Citations to Legislators  
(All Court Opinions)**

		Cited Legislators			
		Majority Opinions		Nonmajority Opinions	
		$L_D$	$L_R$	$L_D$	$L_R$
Opinion Writing Judge	$J_D$	3506 (61%)	2281 (39%)	508 (63%)	297 (37%)
	$J_R$	3367 (60%)	2252 (40%)	484 (56%)	379 (44%)



**Table 2: Judicial Citations to Legislators  
(All Circuit Court Panels)**

		Cited Legislators			
		Majority Opinions		Nonmajority Opinions	
		L <sub>D</sub>	L <sub>R</sub>	L <sub>D</sub>	L <sub>R</sub>
Opinion Writing Judge	J <sub>D</sub>	2086 (61%)	1338 (39%)	277 (69%)	122 (31%)
	J <sub>R</sub>	1526 (61%)	965 (39%)	184 (59%)	128 (41%)

There appears to be at most a tiny difference in the citation patterns of Democrat- and Republican-appointed judges, though a difference is manifest in nonmajority opinions. We conducted a probit analysis combining all of the cases for (1) all the data, (2) for majority opinions only, and (3) for nonmajority opinions only, as summarized in Table 3.

**Table 3: Probit Analysis on Opinion Author's Party Affiliation**

	All opinions		Majority opinions		Nonmajority opinions	
	Estimate (R.S.E.)	Pr > ChiSq	Estimate (R.S.E.)	Pr > ChiSq	Estimate (R.S.E.)	Pr > ChiSq
Intercept	-0.2765	<0.0001**	-0.2685 (0.0217)	<0.0001**	-0.3347 (0.0681)	<0.0001**
J <sub>R</sub>	0.0384 (0.0295)	0.1932	0.0172 (0.0310)	0.5796	0.1816 (0.0878)	0.0387*

\*  $p < 0.05$ ; \*\*  $p < 0.01$

Table 3 illustrates that while the ideology effect is at all times in the expected direction, the effect is not statistically significant for all opinions or for majority opinions. Consistent with the prediction that a judge's ideology is most likely to manifest itself when the judge disagrees

with majority sentiment, the effect is statistically significant ( $p < 0.05$ ) for the subset of nonmajority opinions.

## 2. Hierarchy Effect

We next consider potential judicial hierarchy effects. Table 4 presents the results for overall citations by district court judges based upon their own party affiliation and the party affiliation of the legislators cited. In the probit analysis that follows in Table 5, we consider the presumed party affiliation of the judge, as well as the party affiliation of the reviewing circuit court (the hierarchy relationship).

**Table 4: Judicial Citations to Legislators  
(All District Court Cases)**

		Cited Legislators	
		L <sub>D</sub>	L <sub>R</sub>
Opinion Writing Judge	J <sub>D</sub>	1014 (60%)	680 (40%)
	J <sub>R</sub>	1076 (58%)	776 (42%)

**Table 5: Probit Analysis on Judicial Hierarchy**

	Estimate (R.S.E.)	Pr > ChiSq
Intercept	-0.4299 (0.0892)	< 0.0001**
J <sub>R</sub>	0.0211 (0.0554)	0.7030
% J <sub>R</sub> on Circuit	0.3330 (0.1497)	0.0261*

\* $p < 0.05$ ; \*\* $p < 0.01$



We continue to find that a judge's own political ideology is not significant in deciding what type of legislator will be cited. The political ideology of the overseeing circuit is statistically significant ( $p < .05$ ), however, and the effect is in the expected direction.

### 3. Panel Effects

Finally, we consider panel effects in decisions of the U.S. Courts of Appeals, while continuing to control for both ideology effects and, given the possibility of en banc review, hierarchy effects. Table 6 below shows all citations to legislators by circuit court judges sitting in three-judge panels, broken down by the political ideology of judge and political ideology of the legislator cited (all by political party), and Table 7 conducts a probit analysis, with independent variables representing the political affiliation of the opinion author, the political affiliation of the remaining judges on the panel, and the political affiliation of the remainder of the circuit.<sup>4</sup>

**Table 6: Judicial Citations to Legislators  
(Circuit Court Panel Decisions)**

		Others both Republican		Others mixed		Others both Democrat	
		L <sub>D</sub>	L <sub>R</sub>	L <sub>D</sub>	L <sub>R</sub>	L <sub>D</sub>	L <sub>R</sub>
Opinion Writing Judge	J <sub>D</sub>	566 (61%)	368 (39%)	1105 (62%)	688 (38%)	692 (63%)	404 (37%)
	J <sub>R</sub>	453 (56%)	363 (44%)	836 (64%)	473 (36%)	421 (62%)	257 (38%)
	All	1019 (58%)	731 (42%)	1941 (63%)	1161 (37%)	1113 (63%)	661 (37%)

<sup>4</sup> We calculated this by subtracting the number of Democrats and Republicans on the panel from the number of Democrats and Republicans in the circuit as a whole. In some cases, the variable representing the proportion of judges in the rest of the circuit may be slightly inaccurate, for example when there are visiting judges on a three-judge panel, but there is no reason to believe that this should bias our results.

**Table 7: Probit Analysis on Panel Effects  
(All Circuit Court Three-Judge Panel Opinions)**

	Estimate (R.S.E.)	Pr > ChiSq
Intercept	-0.3809 (0.0594)	<0.0001**
J <sub>R</sub>	0.0133 (0.0408)	0.7441
% J <sub>R</sub> on rest of panel	0.1165 (0.0561)	0.0378*
% J <sub>R</sub> on circuit	0.0500 (0.0830)	0.5470

\*  $p < 0.05$ ; \*\*  $p < 0.01$

As the table shows, when the rest of the panel shifts from Democrat appointees to Republican, the opinion writing judge employs relatively more cites to Republican legislators. This is so whether the opinion author is a Democrat- or Republican-appointed judge. The probit analysis reveals that the variable representing the proportion of Republicans on the rest of the panel is statistically significant ( $p < 0.05$ ), once again in the expected direction. The variable representing the proportion of Republicans on the circuit as a whole is not statistically significant, however. This should not be surprising. Although in theory the circuit as a whole may review a panel decision en banc, such review is not mandatory and, for a variety of jurisprudential and decision cost reasons, rarely occurs. (George 1999). Thus, in the vast majority of cases, the only judges that an authoring circuit panel judge likely will need to persuade are the other judges on the panel.

To assess robustness, we also ran a probit regression involving all circuit court cases, including en banc cases.<sup>5</sup> The variable representing the percentage of Republicans on the remainder of the panel continued to have the expected sign and to be statistically significant ( $p < 0.05$ ). The variable representing the presumed ideology of the opinion author remained statistically insignificant.

We also ran both of these probit regressions over subsets of the cases, isolating majority and nonmajority opinions. See Table 8 below. As before, in none of the subgroups is the hierarchy effect statistically significant. For majority opinions, however, the panel effect is statistically significant ( $p < 0.01$ ), while the opinion writer's individual ideology is not. For nonmajority opinions, the ideology effect is statistically significant ( $p < 0.05$ ), but the panel effect is not. These conclusions appear consistent with the hypotheses advanced above. The ideology effect is most likely to be manifest when a judge has adopted a position that a majority of a panel has rejected. The panel effect, meanwhile, appears most likely to manifest itself in majority opinions. An author of a nonmajority opinion may be much less concerned about persuading other judges because attempts at persuasion have already failed, at least by the time such an opinion is published. By contrast, the author of a majority opinion must guard against the possibility of losing votes.

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<sup>5</sup> The variable representing the percentage of Republicans in the remainder of the circuit was omitted for this regression because this variable was undefined for en banc cases.

**Table 8: Probit Analysis on Panel Effects  
(All Circuit Court Three-Judge Panel Opinions)**

	Majority Opinions		Nonmajority Opinions	
	Estimate (R.S.E.)	Pr > ChiSq	Estimate (R.S.E.)	Pr > ChiSq
Intercept	-0.3674 (0.0478)	<0.0001**	-0.4879 (0.2067)	0.0182*
J <sub>R</sub>	-0.0227 (0.0429)	0.5967	0.2687 (0.0.116)	0.0406*
% J <sub>R</sub> on rest of panel	0.1570 (0.0587)	0.0075**	-0.0910 (0.1838)	0.6206
% J <sub>R</sub> on circuit	0.0367 (0.0861)	0.6699	0.0596 (0.2677)	0.8237

\*  $p < 0.05$ ; \*\*  $p < 0.01$

We also ran separate regressions to assess whether there were interaction effects between the opinion author variable and the other variables, but no statistically significant associations were identified. In addition, we ran regressions to analyze specific subject matter areas, as determined by the presence of particular words and phrases in judicial opinions, but we did not find statistically significant results in any subgroups of cases, perhaps because of the relatively small size of the samples. Finally, we ran regressions analyzing only Supreme Court cases, but again there were no statistically significant associations.

#### IV. Discussion

The above data support the existence of the hierarchy effect and the panel effect, particularly in majority opinions. Put differently, opinion writing judges – whether at the district or circuit level – are more likely to ignore their own political-ideological biases in citing

legislative history and, instead, consider the makeup of the other judges who will review or be part of the decision making process. For district court judges, that means looking to the makeup of the circuit court; for circuit court judges, that means looking to the makeup of the other members on the panel.

With respect to causality, that is whether the hierarchy and panel effects exist because opinion authors seek to persuade others of their views and tailor their opinions accordingly, we believe that the data appear more consistent with the persuasion explanation (the diversity effect, in the jargon discussed in Part II) than with the alternative explanation that judges influence one another only through their expected votes (the peer effect). To explain our interpretations, we first discuss the reasons that selective citation might occur, and we then assess the extent to which our data is consistent with these reasons.<sup>6</sup>

#### **A. Theories of Selective Citation**

The above analysis reveals that judges are more likely to cite legislative history created by legislators of a particular party, the greater the number of other judges on the panel appointed by Presidents of that party. To assess these results, we must consider possible reasons that judges might selectively cite legislative history. We do not here consider reasons that judges might cite legislative history in general. Presumably, judges may cite legislative history because they believe that legislative history helps clarify congressional intent. At times, judges also cite legislative history simply to make the point that the legislative history does *not* clarify congressional intent. We have not formally categorized each citation with respect to the role that

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<sup>6</sup> As indicated above, we do not believe that our results are particularly useful for resolving normative debates about the use of legislative history in legal opinions. That we have found some evidence of selective citation supports claims that legislative history is at least somewhat manipulable, but debates on legislative history turn on how manipulable legislative history is. Our political variables are very rough proxies for the content of legislative history, and so we cannot conclude that we have found either a high level or a low level of selective citation. Moreover, because our analysis does not consider other forms of legal argument, we can offer no conclusion about the relative manipulability of legislative history.

the citation plays in the opinion's argument, but casual analysis of randomly selected cases suggests that courts, particularly below the level of the Supreme Court, cite legislative history far more often because they claim it is indeed relevant than because they wish to refute arguments or relevance. Our interest here is only in reasons that citation might be selective, with more cites to Democrats or to Republicans depending on the judge's ideology or context.

*Results-oriented selective citation.* Selective citation might occur because judges would like to reach particular results in particular cases. For example, some judges, more likely Democrats than Republicans, might prefer a liberal interpretation to a conservative interpretation of a statute. The floor comments of Democrats may be more likely on average than the comments of Republicans to support such an interpretation. If this is so, and if Democrat-appointed judges are more likely than Republican-appointed judges to reach liberal results, then selective citation is simply a byproduct of results-oriented voting. On this theory, the selective citation evidence in the hierarchy effect and panel effect occurs solely because the characteristics of other judges affect the vote of the opinion author. Selective citation thus occurs not because legislative history has genuine persuasive force, but because it follows naturally from a case outcome that is chosen.

*Content-based selective citation.* Selective citation also might occur because some judges may be more persuaded by some kinds of arguments than others. For example, judges may tend to find more significance in floor comments by members of Congress when those floor comments consist of the types of arguments that the judges themselves would make if discussing the relevant policy issue. Judges might find more meaning in comments by legislators whose ideology and thinking patterns more closely approximate their own. On this theory, legislative

history genuinely has the ability to persuade, albeit for reasons that may vary from one judge to another.

*Political heuristic selective citation.* Legislative history may serve as a heuristic device. Heuristics are simple, efficient rules of thumb that people use to make decisions, typically when facing complex problems or incomplete information. A judge may give relatively great credence to legislative history from a legislator who shares the same party identification because of the values and policy expectations associated with that party identification. On this theory, to a judge, a statute means what the judge's fellow partisan says it means. Recent theories of coherence-based reasoning presume a connectionist architecture of mental representations where complex decision tasks contain a myriad of variables that point in more than one direction and lack coherence. This experimentally based theory posits that "the mind shuns cognitively complex and difficult decision tasks by reconstructing them into easy ones, yielding strong, confident conclusions" (Simon 2004). Coherence effects interact with the decision-maker's preexisting attitudes, particularly those embedded in the person's enduring value system. (Simon 2004, pp. 541-542) On this theory also, legislative history may genuinely persuade, albeit for reasons that vary from judge to judge and that might not survive more careful analysis.

## **B. Analysis**

The challenge in distinguishing among these three reasons for selective citation is that each potentially applies to the ideology effect of the authoring judge, and the panel and hierarchy contextual effects. An opinion author may invoke legislative history because the judge is results oriented, because the content of the legislative history may appeal to the judge, or because the legislative history has heuristic appeal to the judge. At the same time, however, an opinion author may invoke legislative history because the judge recognizes, consciously or

subconsciously, that the citation will support some other judge's preferred result, that the content of the legislative history may appeal to the other judge or judges, or because the legislative history is likely to have heuristic appeal to the other judge or judges.

Just because each of the theories potentially applies to all of the effects, however, does not mean that each of these theories unambiguously predicts the observed empirical results. In particular, the data may be inconsistent with results-oriented selective citation. Results-oriented selective citation should be expected to lead to the ideology effect to the extent that opinion authors are results oriented, and to the panel and hierarchy effects to the extent that the orientations of other judges affect the opinion author's own vote. As noted above, Sunstein et al. (2004, pp. 305) conclude that the political orientation of a judge has about the same effect on a judge's vote as the political orientation of other judges. Assuming that to be correct, we should expect that the ideology effect to be of roughly comparable magnitude to the panel and hierarchy effects.

That prediction, however, is not consistent with the data. Consider in particular Table 8, reporting the probit analysis for the subset of three-judge panels that represent majority opinions. We have already noted that the variable representing the percentage of Republicans on the circuit panel is significant while the variable representing the ideology of the opinion author is not. The magnitudes of the coefficients, moreover, are also different by an order of magnitude. We used a Chi-square test to assess the null hypothesis that the coefficients were equal, and we were able to reject that hypothesis ( $p = 0.016$ ). Thus, at least for majority circuit opinions, we can conclude that the identity of other judges on the panel has a greater impact on citation of legislative history than the identity of the opinion author. The probit analysis of district judges (Table 5) and the probit analysis of all circuit court panel decisions (Table 7) also reveal coefficients of vastly

different magnitudes, though in these cases the differences were statistically insignificant ( $p = 0.0557$  and  $0.1388$ , respectively).

Though our conclusion on this point must be tentative, the analysis thus does not appear consistent with the hypothesis that result-oriented selective citation is the sole reason for selective citation. Of course, we cannot with this study exclude the possibility that in fact the ideology of other judges is far more important than the ideology of the authoring judge in predicting the authoring judge's vote; we can say only that previous data do not suggest a large disparity. But it at least appears that citations to legislative history have much more to do with the presumed ideologies of other judges than with the presumed ideology of the authoring judges, and it is difficult to square this observation with results-oriented selective citation.

The other two theories of selective citation, however, are potentially compatible with this observation. It may be that opinion authors themselves do not tend to find legislative history consistent with their own political affiliation to be particularly persuasive, but anticipate that legislative history consistent with the political affiliation of other judges on a panel or potential reviewing judges will be persuasive to those judges. There are two possible explanations for this. First, judges may simply overestimate the extent to which other judges' ideological leadings will lead those judges to find certain arguments particularly persuasive. Second, a judge writing an opinion might spend more time thinking through an issue than the judge expects either colleagues on a panel or reviewing judges to spend before those judges reach the decisions that they will reach. As a result, opinion authors expect legislative history to make at least a significant first impression on other judges, even when the legislative history might appear less probative on closer analysis. This theory is particularly consistent with political heuristic selective citation.

## V. Conclusion

This study differs from past judicial politics studies in quantifying the reasoning within judicial opinions in situations in which the reasoning will have no direct legal effect on the parties in a case. We have found evidence of panel and hierarchy effects in citation to legislative history, effects that appear related to the political-ideological identification of judges who review or are co-members on a panel of the authoring judge. Specifically, we find that a higher proportion of legislative history cites will be to Republican legislators, the higher the proportion of Republicans in the reviewing court or sitting on the same three-judge panel. Although we cannot conclusively identify causality, the pattern of the data appears most consistent with the theory that judges do in fact attempt to persuade one another.

There are at least three possible directions for further research. First, other forms of judicial reasoning are potentially subject to quantification. In particular, precedents might be quantified based on the presumed ideology of the courts that initially enacted those precedents. Second, consideration of the briefs filed in particular cases might further illuminate judges' reasoning. For example, it would be possible to test whether citations to sources not cited in briefs are particularly likely to be associated with judges' presumed ideologies. Third, quantitative analysis of reasoning might be combined with quantitative analysis of whether the results in cases were liberal or conservative. Data on whether particular decisions reached a liberal or conservative result might allow for clearer conclusions about the reasons for selective citation.

## Bibliography

Cameron, Charles M. and Craig P. Cummings. 2003. "Diversity and Judicial Decisionmaking: Evidence From Affirmative Action Cases in the Federal Courts of Appeal, 1971-1999." Manuscript, Columbia University Department of Political Science.

Cross, Frank B. and Emerson Tiller. 1998. "Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals." *Yale Law Journal* 107(7):2155.

*Congressional Record*, United States Congress.

Farhang, Sean and Gregory Wawro. 2004. "Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decisionmaking." *Journal of Law, Economics and Organization*. 20(2): 299-329.

*Federal Judges Biographical Database*. 2004. [air.fjc.gov/history/judges\\_frm.html](http://air.fjc.gov/history/judges_frm.html).

George, Tracey E. 1999. "The Dynamics and Determinants of the Decision to Grant En Banc Review." *Washington Law Review*. 74:213.

McKibbin, Caroll. 1997. "Roster of United States Congressional Officeholders and Biographical Characteristics of Members of the United States Congress, 1789-1996."

Pinello, Daniel R. 1999. "Linking Party to Judicial Ideology in American Courts: A Meta-Analysis." *Justice Systems Journal* 20:219.

Scalia, Antonin. 1997. "A Matter of Interpretation: Federal Courts and the Law."

Segal, Jeffrey A., and Harold J. Spaeth. 1993. "The Supreme Court and the Attitudinal Model."

Simon, Dan. 2004. "A Third View of the Black Box: Cognitive Coherence in Legal Decisionmaking." *University of Chicago Law Review* 71:511.

- Smith, Joseph L. and Emerson H. Tiller. 2002. "The Strategy of Judging: Evidence From Administrative Law." *Journal of Legal Studies* 31:61.
- Sunstein, Cass R., David Schkade, and Lisa M. Ellman. 2004. "Ideological Voting on Federal Courts of Appeal: A Preliminary Investigation." *Virginia Law Review* 90:301.
- Tiller, Emerson H. and Pablo T. Spiller. 1999. "Strategic Instruments: Legal Structure and Political Games in Administrative Law." *Journal of Law, Economics, & Organization* 15:349.
- Wald, Patricia M. 1983. "Some Observations on the Use of Legislative History in the 1981 Supreme Court Term." *Iowa Law Review* 68:195.