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The value of precedent : appellate briefs and judicial opinions in the U.S. courts of appeals.

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The Value of Precedent:
Appellate Briefs and Judicial Opinions in the U.S. Courts of Appeals

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Abstract

This study of appellate advocacy examines factors that affect judicial treatment of precedents identified in litigant briefs. Although we find some attorney and party characteristics influence whether a court addresses precedent cited by a party, legal resources are not as influential in determining whether the court adopts a party's use of a precedent. At times, ideological congruence between the circuit panel and the litigant can increase the likelihood that the court's opinion will use a precedent in the same way as presented by the litigants. There is also some support for the importance of attorney experience. Even when their clients ultimately win the case, attorneys with no experience before the circuit are less likely to see the court use litigant-cited precedents in a similar way to the party brief. Even when their clients lose, there is some support to show that attorneys with more experience are more likely to see the court's opinion address the precedents the attorneys have raised positively. This suggests that attorney experience has some influence in shaping legal policy, regardless of whether the litigant wins or loses.

The Value of Precedent:
Attorney Briefs and Judicial Opinions in the U.S. Courts of Appeals

This study analyzes appellate advocates' role in shaping judicial opinions in the U.S. Courts of Appeals. Drawing from prior research that suggests stronger parties and expert counsel are more likely to prevail in case outcomes before the lower federal appellate courts, we focus on judicial decisions to use precedents raised in the appellate briefs. Our analysis draws on original data to compare legal "inputs" by attorneys with legal "outputs" by judges. By examining precedents used in litigant briefs and the courts' use of or indifference to those precedents, we can further evaluate the role of parties and their attorneys in providing pertinent information and influencing court decisions.

First, we discuss the role that litigants and their counsel have in framing the issues on appeal and the particular importance of appellate briefs in the U.S. Courts of Appeals. Next, we discuss how parties and judges use precedent. Building on these foundations, we then examine variation in judicial treatment of litigant-identified precedents and test our expectations using appellate briefs and majority opinions from the U.S. Court of Appeals for the Seventh Circuit. After evaluating the informational role of appellate advocacy, we assess factors that determine litigant success in persuading courts to use precedents in a manner that is consistent with the position adopted in the appellate brief. Then we explore the potential linkages between winning, losing, and appellate advocacy.

ISSUE FRAMING AND ARGUMENTS IN APPELLATE BRIEFS

On appeal, attorneys have two possible mechanisms for persuading judges: written briefs and oral arguments before the panel. However, the latter is not granted to every appeal, and even

when oral argument is granted, it typically builds on arguments presented in the briefs.[1] Consequently, judges largely rely on attorneys' written arguments as a basis for evaluating the dispute before them (Michel, 1998).[2] Courts themselves stress the importance of the briefs relative to oral arguments. For example, in an instructional handbook provided to attorneys, the Seventh Circuit emphasizes that briefs are "the first step in persuasion, as well as being by far the more important step" and "should contain all that the judges will want to know, including references to anything other than the briefs that may have to be consulted in the record or in the precedents" (*Practitioner's Handbook*, 2003:71-75). In this way, each party presents its own picture of the dispute, which it attempts to shape to its best advantage, largely through the use of influential prior cases.[3]

As specified by the Federal Rules of Appellate Procedure as well as circuit rules, attorneys must follow a highly standardized format for the written briefs that includes detailed instructions on the sequence with which parties must file their briefs, as well as the order of the content within each document. These rules dictate that the appellant must be the first to file a brief that reviews the facts of the case, identifies the central legal issues of the claim, and then elaborates upon those issues. Typically, the respondent brief then uses the issues identified by the appellant as a baseline and modifies or reframes them in a way favorable to the respondent's position. The respondent also has the ability to raise issues that are not discussed by the appellant. Finally, the appellant may file a reply brief to counter any new arguments raised by the respondent or to attempt to distinguish precedents used by the respondent.

The extent to which judges accept the arguments put forth by one party (rather than by the other) can be influenced by the way in which attorneys couch the issues at stake. Attorneys engage in this type of behavior, first, by constructing the wording of their statement of issues in

the light most favorable to their client, and second, by selectively using favorable precedent and legal authorities to explicate their position in the "Argument" section of the brief (Haire and Moyer, 2008:596).

One recent study on the Supreme Court tested this linkage, using plagiarism software to identify when language from litigant briefs was used in Supreme Court opinions. Attorney experience, ideological compatibility, and elite cues (specifically, Washington attorneys and the solicitor general) all increased the likelihood that a Supreme Court opinion would directly borrow from a party's brief (Corley, 2008). The notion that judges respond to the reputation of the source has additional support in research on political persuasion, suggesting that the likelihood of a cue being well received by the "listener" depends in large part on a listener's perceptions of the "speaker." In order to be convincing, the speaker must build a relationship of trust so that the listener will view the speaker as a credible source of information (Lupia, 2002). Applied to this context, a judge's assessment of an issue frame, including the argument and precedents used to support that argument, may vary with his or her perceptions of those who have presented these arguments in the appellate brief.

ARGUMENTS, REASONING, AND PRECEDENT

Counsel's ability to persuade a panel of judges often hinges on their use of relevant legal authorities, including precedent. The use of precedent in legal decision making reflects what is often referred to as analogical reasoning: to resolve a given dispute, a decision maker should look to similar disputes that have been resolved in the past, determine the rule established by the past decisions, and apply that rule to the current circumstances. Analogical reasoning through precedent both organizes and legitimizes legal decision making (Braman and Nelson, 2007).

However, not all precedents are created equal. In the context of the U.S. Courts of Appeals, judges must contend with several sources of precedent, some of which are binding, and some of which may be considered persuasive or advisory (Johns and Perschbacher, 2007:110-11). While all circuits are bound by Supreme Court precedent, each circuit develops its own body of law that is binding within that circuit but not within others.[4] Aside from territorial factors and judicial hierarchy considerations that limit the applicability of precedents, scholars have used a variety of measures to show that the relative strength and importance of individual precedents often wax or wane over time (Hansford and Spriggs, 2006; Biskupic and Witt, 1997; Cook, 1993). More recently, judicial scholars have begun to examine the psychological processes that underlie legal decision making (Braman, 2006; Furgeson, Babcock, and Shane, 2008) and, specifically, the use of precedent. Braman and Nelson (2007) find evidence that legal decision makers vary somewhat in their judgments about the relative similarity of two cases.

To understand how specific precedents ultimately make their way into the court's opinion, it is important to move beyond a focus on case outcomes and, alternatively, compare the use and treatment of precedent from attorneys' briefs with that in the court's opinion. We develop our analysis in three distinct parts, each representing a different perspective on understanding court use of precedent identified in the litigants' briefs. The first analysis examines whether the court's opinion addresses the precedent cited by the attorney in any way. This perspective emphasizes the informational role played by litigants and their counsel, focusing on whether the court used the precedent cited by the party, regardless of how the court chooses to employ the prior case. In the second analysis, we test for factors that affect litigant success by modeling whether the court uses the precedent in a manner that is congruent with a litigant's use of that precedent. Finally, we focus on the mechanism underlying litigant success

with respect to case outcomes. In this respect, we examine how the ability of litigants to persuade a court to adopt their use of precedent is tied to winning and losing.

The Informational Role of Appellate Advocacy. Appellate briefs are expected to provide courts with all relevant information needed to render a judgment. As noted by one prominent appeals court jurist, "judges labor under the immense disadvantage of having very little time to spend on each case . . . the judges are badly in need of the advocate's help" (Posner, 2008:220). In transforming the case from the trial posture to one focused on appellate review, counsel frame the issues and construct arguments designed to persuade the judges to rule in their favor. As part of that process, advocates identify those legal authorities, including precedents that are central to their arguments. By identifying and discussing precedents in their briefs, advocates play an important informational role. The parameters of those efforts are defined by the actions of the court below, with advocates representing appellants searching for reversible legal errors made by the trial judge and advocates representing respondents arguing in support of the status quo.

The search for legal authorities may begin with trial court decisions that use precedents to develop the rationale for the disposition; however, the actions of the trial court (or administrative judge) are often not framed for appellate review.[5] Several examples may help illuminate the distinction between the trial and appellate levels. For instance, a plaintiff may appeal a summary judgment decision that is largely an account of the facts yielded from discovery. Or a litigant who lost in a jury trial might focus his appeal on jury instructions or the trial court judge's rulings on admissibility of evidence. In some situations, there may not even be a trial court decision, such as when a case is a direct appeal from an administrative agency decision. As these illustrations suggest, the nature of the trial court disposition being appealed will vary,

but the expectations of the appellate advocate are constant. Advocates are expected to place the alleged errors by the lower court in the appellate context. As part of that effort, they provide information to the court on relevant precedents. Here, we evaluate this aspect of their informational role through a model in which the dependent variable is coded simply as whether or not the court cited a precedent used by the brief writer.

One would expect the degree to which a brief effectively provides courts with information on the relevant precedents to vary with the abilities of the appellate advocate. In recent extensions of party capability theory (Galanter, 1974), scholars have found attorneys with substantial experience and expertise exercise more influence on the content of the court's opinion (Haire, Lindquist, and Hartley, 1999; Szmer, Johnson, and Saver, 2007). Here, we expect that as the expertise and the experience level of the brief writer increase, the likelihood of the court addressing that precedent will also increase. We also expect that other resources, including those associated with the size of the legal team, will affect the likelihood of court citation to the precedent. Past studies have suggested that as the number of attorneys on a party's litigation team increases, that party's chances of success also increase (Szmer, Johnson, and Sarver, 2007). Further, the presence of multiple firms may be influential (Wheeler et al., 1987). Legal firms generally possess legal resources that go beyond the number of attorneys, such as higher numbers of legal assistants, interns, extensive law libraries, and access to on-line resources. Firms that specialize in appellate practice also may possess more procedural expertise at the appellate level and, thus, may be more persuasive in identifying relevant precedents for the circuit court.

In addition to being represented by more experienced, expert counsel, repeat-player institutional litigants would be expected to identify precedents that have greater informational

value to the court than those used by individuals, particularly prisoners. One-shot litigants (individuals), motivated by their immediate interest in the case outcome at hand, will be less selective when identifying relevant precedents than institutional litigants who "play for the rules."

Judges may also be more likely to cite those precedents that are consistent with norms surrounding horizontal and vertical stare decisis. By grounding an opinion in the law of the circuit or the decisions of the U.S. Supreme Court, a judge will enhance the legitimacy of that decision. Older cases may also lack the salience and influence of more recent precedents (Hansford and Spriggs, 2006). Further, we would not expect a court to comment on each precedent used by counsel. One would expect that judicial attention to a precedent is more likely when the brief writer does not attempt to cite every possible case, whether highly relevant or not, and chooses instead to focus the argument on a limited number of precedents.[6] For this reason, we expect that as more cases are cited within a brief, the likelihood of the court addressing any single case from that brief should decrease. However, if both sides cite a particular case, this may be an important signal to the court of a case's importance, or at least an indication of the need to recognize a precedent. Finally, one would expect that judicial attention to precedents will vary with the salience of the legal policy area.

Data and Measures for Informational Models. Our analysis focuses on advocacy and decisions from a single circuit: the U.S. Court of Appeals for the Seventh Circuit. At the inception of this project, this appeals court was the only circuit that maintained free electronic access to parties' briefs and opinions for civil (but not criminal) cases on its public Web site (www.ca7.uscourts.gov). Although the single-circuit focus is a limitation on generalizability, this approach offers the advantage of controlling for court-level dynamics.[7]

The data-collection process occurred in several stages. First, we used a systematic sampling design to identify a random sample of published civil cases from 2005 to 2007 from the Seventh Circuit. Second, we downloaded the court opinions, the appellant briefs, and the respondent briefs. This process yielded 86 cases and 172 briefs for the analysis, which represented 10 percent of the universe of cases.[8] Third, we identified each precedent used in the appellants' and respondents' briefs considered to be a "strong citation" as used by the parties. A citation was deemed to be "strong" if the author specifically named a precedent in its discussion or quotes from the text of the opinion. Strong citations by brief writers included those that were positive as well as those that were negative. String citations used by the parties in their briefs were not included in the analyses.[9] This resulted in 814 precedents used in our sample of cases. Fourth, we analyzed the majority opinion, recording whether the court acknowledged the precedent in any way or ignored the cited case altogether.[10] Fifth, if the citation was acknowledged in the opinion, we looked to see how the precedent was used by the court. We coded these precedents in the court's opinion as one of the following categories: ignored, positive, negative, or cited in a string.

In the informational model, the dependent variable was coded as a 1 if the court mentioned the litigant-identified precedent at all and as a 0 if the precedent was ignored by the court in the opinion. While "mentions" include a wide range of court use (negative, positive, cites in a string of cases), the implications of not mentioning a litigant-identified precedent were clear: the court did not consider it to be relevant. As previously noted, adversaries at the briefing stage follow a sequential process whereby the appellant's brief establishes the initial issue agenda, including the identification of a set of relevant precedents. For that reason, as well as the need to control for the tendency of the appellate court to affirm the court below, we

separate the observations by litigant status, modeling those used by appellants (n=402) separately from respondents (n=412). Respondents, who must react to appellants' arguments, will decide which precedents to use from their opponent's brief and may include other precedents that support their position. Recognizing that a respondent's use of precedent may be different when the goal is to counter the appellant's discussion of precedents (that are favorable to the appellant's position), we estimated another model of respondents' unique precedents that excludes those that were initially discussed by appellants (n=285).

As we discuss more fully below, the deference given by the appellate panel to the court below, the sequential process of appellate advocacy, and the different goals of opposing litigants should contribute to differential effects that vary by litigant status. For example, inexperienced advocates representing appellants may be doubly disadvantaged because they are less skillful at selecting a potential "winner" when deciding to appeal, while also lacking expertise in crafting persuasive appellate briefs for the circuit court. In contrast, inexperienced advocates representing respondents should not fare as poorly (compared to inexperienced appellants) as they are in the easier position of supporting the status quo.

Our primary independent variables required the collection of multiple measures of attorney, firm, and litigant characteristics. To evaluate experience levels, we follow previous studies that use attorneys' prior court appearances that have been used in past research (Flemming and Krutz, 2002; Haire, Lindquist, and Hartley, 1999; Kritzer, 1998; McGuire, 1998, 1995; Wahlbeck, 1997). Although existing studies vary in the operationalization of this concept, a reasonable expectation would be that the number of times an attorney has appeared before a court should be related to their institutional knowledge and ability to identify precedents that would be persuasive to that court. Therefore, we used prior appearances before the Seventh

Circuit as determined through Westlaw attorney-name searches. We found wide variation in attorneys' experience levels.[11] Among appellants, approximately one-fifth of attorneys were making their "debut" before the Seventh Circuit, whereas close to 10 percent had over twenty previous appearances in cases decided by the circuit. Attorneys representing respondents also demonstrated considerable variance: 22 percent were first timers, whereas 8 percent had been involved in twenty or more previous cases decided by the Seventh Circuit.

Recognizing that the learning curve for appellate advocates may be steep (Haire, Lindquist, and Hartley, 1999) and that previous appearances before the court may vary widely within the legal team, we employed two indicators of experience. In one, we created a dichotomous measure to distinguish litigants represented by counsel (including all on the legal team who were listed on the brief) who were appearing for the first time before the Seventh Circuit. In the other, we used the number of prior appearances for the first listed attorney on the brief (if there were multiple attorneys) as followed from prior studies (Wahlbeck, 1997).[12] Because of the skewed distribution of this measure (and the expectation that experience at high levels may lead to diminished returns), we used the natural log of lead attorney experience.[13] The two attorney experience variables are moderately correlated at r = -.41.

To determine whether the litigant was represented by a firm that specializes in appellate practice, we looked up each firm on Martindale Hubbell to identify the areas of practice for that firm. The dummy variable for appellate-specialist firms is coded as a "1" if the firm listed appellate practice as an area of specialization and "0" if it did not. In examining a litigant's legal-team size, we also include measures for the total number of attorneys and law firms, if any, that are listed as representing the litigant. To take into account the broader effect of party

resources and repeat-player status, we created two dichotomous variables to flag briefs submitted by individual persons and prisoners.[14]

We also constructed two dummy variables that indicated whether the precedent referenced in the appellate brief was from the Seventh Circuit (1= 7th Circuit, 0 = all other sources) or the U.S. Supreme Court (1= Supreme Court, 0 = all other sources). Thus, a zero for both of these variables could indicate a precedent from a state court, a federal district court, or a different federal circuit.[15] In addition, work on the Supreme Court suggests that the persuasive power of precedents will vary with its age, with its informational value decreasing over time (Landes and Posner, 1976; Kosma, 1998). To account for this possibility, we follow Hansford and Spriggs (2006) by including two variables, both the age of the precedent (in years) and the age squared. As a citation to the same precedent by both parties may provide a stronger indication of a precedent's importance to the court, we also included a control indicating whether both parties cited a precedent.[16] Finally, because the court's treatment of precedent might vary across different case types, we included dummy variables for constitutional cases, prisoner cases, and civil-rights cases (with economic/other issues as the excluded category).

Informational Model Results. Brief writers for appellants and respondents used, on average, strong citations to four precedents in the development of their arguments.[17] Table 1 displays the results that predict the likelihood of the court's opinion citing these litigant, strong-cited precedents, excluding precedents associated with issues not addressed by the court.[18] For both appellants and respondents, precedents raised in prisoner appeals were less likely to be identified by the court, while for appellants, precedents raised in constitutional cases were more likely to mentioned by the court.[19] Appellants represented by "newcomer" litigation teams (those with no experience) were less likely to see the court identify a precedent raised in their

brief. Interestingly, the measure of lead-attorney experience was associated with a reduced likelihood of court attention to a precedent for appellants, contrary to expectations. This finding is robust regardless of how this measure is specified (e.g., lead attorney or attorney team, logged experience or total experience) and is not affected by removing the "newcomer" variable from the model (which, as noted earlier, is only moderately correlated with the continuous measure of attorney experience). One possibility is that more difficult appeals tend to attract highly experienced attorneys who are especially aggressive in identifying precedents—and this high-risk strategy is more likely to yield information on previous precedents that the court does not use in its decision-making process.

[Table 1 about here]

Our framework also suggested that counsel who had substantive legal expertise in appellate advocacy, as indicated by a firm's self-reported specialization in appellate practice, would be more likely to use precedents that hold informational value for their judicial audience. The results for Model 1 in Table 1 offer support for this hypothesized effect. For appellants, using a firm with a specialization in appellate practice increases the likelihood of court citation to their precedents from .16 to .26 (with all other variables held at their median values). In contrast, access to other legal resources associated with the number of attorneys and firms did not affect judicial citations to precedents identified by appellants' counsel.[20]

The results for respondents (Models 2 and 3) portray a somewhat different story about the role of legal resources. None of the variables that measure attorney experience and firm specialization show a statistically significant relationship to citation by the court. While there is a strong, positive effect for number of attorneys in Model 3, the results for the number of firms is somewhat counterintuitive. When looking at precedents raised only by the respondents, the effect

of the number of firms is significant but negatively related to citation by the court.[21] Party capability theory continues to be supported, however. Briefs submitted by individual-person respondents were less likely to identify and discuss precedents that were later cited by the court in its opinion when compared to those submitted by institutional respondents.

The characteristics of the precedent also affected the likelihood of the court referencing that decision. For appellants, a Supreme Court case discussed in the brief was twice as likely to be cited by the court than cases from any other court, all else equal. Appellants using a decision from the Seventh Circuit increased the probability of citation from .16 for non-Seventh Circuit cases to .24. Supreme Court precedents used by respondents were also more likely to be picked up by the court; however, respondents' use of Seventh Circuit cases did not affect the likelihood of court citation to a statistically significant degree. Although precedent age did not affect the likelihood of citation for appellants' precedents, the results from one respondent model (Table 1, Model 2) show a weak, though not curvilinear effect that favors newer cases.

As evidenced by the variable representing the effect associated with the total number of precedents cited in a brief, the "scattershot" approach to identifying as many precedents as possible does not affect the likelihood of court citation; however, precedents discussed by opponents were more likely to be cited by the court. In the appellants' model, if respondents also discussed the precedent, it increased probability of court citation from .16 to .41, holding all else equal. For respondents' precedents, the probability increased from .20 to .57 when appellants also discussed the case.

Taken together, these results underscore the distinct positions of appellants and respondents in the appeals process, where the sequential process of filing briefs places more of the burden of transforming a case from the trial posture on the appellant's attorneys. Expertise

matters for appellant attorneys; those that have not previously appeared before the court are statistically less likely to have their strong-cited precedents identified by the court, but firms specializing in appellate practice fair better than non-specialists. As appellants are confronted with the burden of persuading the appeals court to overturn the district court decision, it makes sense that more experienced and expert attorneys representing appellants play a larger role in informing the court of noteworthy precedents than those that have never appeared before the court or do not specialize in appellate advocacy. However, we also find support for "team" theories of litigation, where advocates on both sides play a role in providing information for the court. When both sides identify the same precedent, the court appears to take notice and will also use that precedent in the majority opinion. Yet all precedents are not created equal, as the Seventh Circuit is more likely to address a precedent when it is a decision from the U.S. Supreme Court or a case from its own circuits (at least for appellants).

Appellate Advocacy and Success. In this part of our analysis, we turn our attention to evaluating factors that affect the likelihood of a court agreeing with the brief writer's use of precedent. While "winning" and "losing" with respect to the outcome of a case clearly influences future cases, the breadth and actual language within the majority opinion establishes the relevant policies, scope, and legal principles that may be binding for decades into the future. Therefore, it is important to determine how the court uses the precedents raised by the party briefs, even outside of the particular outcome of who wins or loses.

Data and Measures for Success Models. As before, our data are drawn from a random selection of civil cases between 2005 and 2007. However, for this analysis, rather than examining mere recognition of the parties' strong-cited precedents, we focus on precedents identified by only one party (but not both) and examine whether the majority opinion used the

precedent in the same fashion as the parties. To do this, we analyzed the majority opinions, recording the court's acknowledgment of the parties' strong-cited precedents. If the court acknowledged a party's strong-cited precedent, we then coded the precedent as one of the following categories based on the court's use: positive, neutral, negative, or cited in a string.[22] We excluded observations where both briefs cited the same precedent, as well as observations in which the court ignored a brief writer's precedent altogether, which leaves us with 69 observations for appellants and 62 observations for respondents.

For the "Success Models," the dependent variables are coded in terms of whether or not the court's citation to a litigant-identified precedent was at odds with how it was used by the brief writer (see Appendix B). We coded a "win" for a litigant in terms of whether the court's treatment of a precedent was congruent with the use of the precedent by the brief writer. For example, if the brief writer uses the case positively (suggesting that a precedent is applicable and controlling in the present case) and the majority opinion also cites that precedent in a clearly positive way or relies on it in a string citation, then the dependent variable is coded as a 1 ("win"). Similarly, if the brief writer distinguished a case and the court also distinguished that case, this was coded as a "win." In contrast, a brief writer would consider it a "loss" if the court used the precedent in a way that was clearly different than the use in the brief. In these instances, such as where a party uses a case positively in a strong citation and the court then used the precedent negatively (distinguished the case, overruled the case, or otherwise said it is not controlling), then the dependent variable is coded as a "loss," or 0.

The independent variables used for the success models are the same as those used in the informational models, with one addition. We included a measure of ideological congruence to control for any attitudinal predisposition of a panel to side with a particular party. To create this

variable, we first created a dichotomous measure of panel preferences (0 = conservative, 1 = liberal) based on the ideological-median judge on the panel. Consistent with the coding of multiuser databases on judicial decision making (Songer, 1997), we examined the party matchups for each issue area and determined which party the panel would be most likely to favor, given their ideological preferences. (For example, in an employment-discrimination case that paired an individual against a business, we assume that a liberal panel is more likely to favor the individual than the business.) The variable is coded as -1 if the party citing the precedent is not ideologically aligned with the panel's preferences, 0 (if congruence could not be clearly ascertained), or 1 if the citing party was likely to be ideologically consistent with the panel's preferences.[23]

Our expectations for brief-writer success generally parallel those that emphasize the informational role played by parties and their counsel. In addition, we expect that ideological congruence between the party and the panel will be positively related to success for both appellants and respondents.

[Table 2 about here]

Success Model Results. Among appellants, judicial receptivity to the brief's use of precedent was affected only by the experience of counsel who submitted the brief. In contrast to the findings reported for the informational models estimated in Table 1, the number of previous appearances (before the Seventh Circuit) by counsel for appellants increased the likelihood of the court supporting their use of precedent in the majority opinion. For respondents, attorney-experience levels did not increase the likelihood of judicial receptivity to the brief's use of precedent.

While our predictions related to the other characteristics of counsel were not borne out by the analysis, the likelihood of a brief writer and the court using a precedent in the same manner was affected by characteristics of the precedent, but only for respondents. Binding precedents cited by respondents were more likely to be used in the same way by the court, as the variables for Supreme Court precedent and Seventh Circuit precedent indicate. However, this was not the case for appellants. This is expected given the different roles of the parties and burdens placed on appellants. Respondents often have positive cases on their side, while appellants may seek to be more creative in attempting to sway the court into overturning the prior decision.

Our expectations for ideological congruence were partially supported. While ideological congruence between an appellant and the court was not a significant influence on a brief writer's success, this variable was statistically significant for respondents. Holding all other variables at their means (or modal values for dichotomous measures), the probability of success for a brief writer increased from .47 to .74 as the court and party became ideologically congruent. This finding is significant because it suggests that the attorneys possess influence over not only case outcomes but also the substance of circuit opinions.

The Connections Between Case Disposition and Judicial Treatment of Precedents. The findings from the first and second parts of our analysis offer mixed support for the view that legal resources, including experience of counsel, contribute to litigant success in persuading its judicial audience. Although traditional perspectives on appellate advocacy emphasize the connection between arguments and success before the court, the disposition of the case may not adequately capture whether a litigant prevailed. In this set of observations, 42 percent of precedents favorably recognized by the court were associated with unfavorable case outcomes for litigants. These figures suggest that it is not infrequent for parties to "win over" the court in

terms of the contours of the opinion while losing the case outcome. To explore this puzzle further, we examine factors that affect the court's use of precedents among case winners and case losers.

As in Table 2, we again reconfigured the data so that we had one list of all unique precedents; that is, precedents that were cited by both parties were excluded from this analysis. From there, we separated the observation set by whether the party advancing the precedent ultimately won (n=68) or lost (n=55) in terms of the case disposition. Observations in which the case outcome did not indicate a clear win or loss and where the court ignored a precedent were omitted from the analysis. We use the dependent variable from the success models (coded as 1 if the brief and the court opinion used the precedent in the same way, 0 if in opposing ways). The independent variables, and our expectations for those variables, are the same as those used in the "success" models above, including controls for characteristics of the precedent, (age of precedent, identity of cited court) and the policy area (constitutional, civil rights). Attorney experience is included in this model, again measured as the logged number of previous appearances for the lead attorney. "Newcomers" were flagged, in addition to indicators of the total number of attorneys representing the loser, and whether the firm presented itself as specializing in appellate litigation. We also add a dummy variable indicating whether the party advancing the precedent was the appellant or the respondent. Finally, we include a variable that captures the ideological predisposition of the panel to support the policy outcome. Our expectation is that judges are more likely to agree with precedents advanced by a party when that party is seeking a policy consistent with the ideological preferences of the panel.

[Table 3 about here]

The results in Table 3 paint a mixed picture about the ability of traits of counsel to affect opinion content. Among those who ultimately won their case, newcomer attorneys still fared poorly in having the court adopt their framing of precedent. This suggests that even when first-time attorneys win their cases, those victories may be due to factors outside of the attorneys' skills in identifying and presenting persuasive precedents. In contrast, as Model 2 displays, experienced attorneys representing losing parties were somewhat more likely to have their characterization of the precedent adopted by the court. Thus, even when losing, more experienced attorneys may be able to shape the court's opinion by the use of precedent.

Interestingly, the size of the legal team and our appellate-specialization variables were negatively related to agreement on a precedent when the party lost the case and produced no statistically significant influence when the party won the case. One possible reason for this finding may be that more difficult cases may draw larger and more specialized attorney teams. Perhaps another explanation could be that larger and more specialized litigation teams are more aggressive in framing cases that may not apply, at least in the court's view.

The source of the precedent provides some, but limited, explanations when examining winners and losers and the use of precedent. Case winners have more success when citing precedent from the Supreme Court, though there was no effect for Seventh Circuit precedent. This was not true for those that lost the case, as the precedent's source exhibited little influence. Ideological congruence is weakly significant and in the expected direction for case winners, suggesting that not only did they win the case, but also were more successful in shaping the opinion when they faced an ideologically friendly panel. However, we find no evidence that the ideological preferences of the panel have any effect on the characterization of precedent for "losers." For case losers, citations in civil-rights cases were more likely to be contradicted by the

court's opinion, potentially pointing to more aggressive behavior of the attorneys in these types of cases.

DISCUSSION

Our findings underscore the important informational role played by appellate advocates in their ability to shape the contours of the court's opinion through the identification of relevant precedents. As noted by Seventh Circuit judge Richard Posner: "We call lawyers 'officers of the court.' And in truth lawyers assist judges in a variety of ways. Judges rely on the lawyers in a case to develop the facts on which the court will base its decision, to identify legal issues for decision, and to do at least the basic legal research. . . . Yet at the same time that they rely heavily on lawyers, judges do not trust lawyers completely, or even very much" (Posner, 1996:241).

As this quote indicates, judges rely on counsel to establish the issue agenda and identify relevant case law; however, our results suggest that the informational value provided by appellants' counsel varied with the expertise of the legal team. Appellants represented by firms with a specialization in appellate practice were more likely to find that precedents discussed in their briefs were later cited. Appellants represented by litigation teams with no experience in this forum fared poorly when attempting to call court attention to precedent. Whereas increasing levels of experience were negatively associated with judicial attention to precedents, this same variable increased the likelihood of the court's opinion treating the precedent in a manner consistent with the appellant's use. We speculated that highly experienced attorneys may be more aggressive in their identification of precedents, resulting in the low-information effect for cases identified by these lawyers. This raises more potential questions and perhaps an interesting topic for further research.

Among those precedents that are ultimately acknowledged by the court in the opinion, that acknowledgment is more likely to be a "win" when the precedent was advanced by experienced counsel for appellants. This result may stem as a function of the sequential nature of the process and the burdens placed on the appellants. As the default is to rule for the respondents, attorneys with less experience and skill representing respondents may nevertheless be successful. However, for appellants who face difficult legal hurdles in winning their cases, more experience may lead to more influence through an ability to persuade the court concerning relevant precedents.

Our analysis also revealed that certain factors influence whether the court treats a precedent the same way as the party regardless of whether litigants win or lose the case. An attorney with no experience before the circuit court is less likely to persuade a court when framing precedents, even when the attorney's client ends up winning the case. Meanwhile, more experienced attorneys are able to succeed in getting the court to adopt their use of precedent when their clients lose. Our results provide some support for the role of attorney experience and build upon this strong line of prior research.

While we have no reason to believe that the Seventh Circuit represents a unique court with respect to appellate advocacy, we fully recognize the limitations of an analysis that focuses on a single circuit, as additional research is needed to evaluate whether these findings may be generalizable to other circuits over time. Moreover, our reliance on an observation strategy that consists only of decisions with published opinions is another potential limitation, as judges may selectively use precedents as part of their effort to convince their "audience" that this decision is legally accurate and well reasoned. Although some have suggested that non-published opinions may include important public policy concerns (Songer, 1990), others, going back many decades,

have suggested that published decisions represent the major policy decisions of a court (e.g., Dolbeare, 1969). The court's own publication guidelines suggest that only unique legal or factual situations are worthy of publication. Therefore, while not perfect, examining published opinions may serve as an acceptable practice for both theoretical and practical reasons.

Our findings regarding the informational role played by litigants support the notion that judges rely on appellate briefs to identify relevant precedents for the court. Consistent with team theories of litigation, precedents that were more widely used by appellants and respondents garnered more attention from the court. Additional research will also be needed to explore the informational roles played by other actors, including law clerks, staff attorneys, and the trial court. While very few cases in the circuit courts involve amicus curiae participation, interest group involvement may become a larger factor in the future as their participation in lower-court cases continues to increase. Our findings regarding characteristics of precedents suggest that the effectiveness of appellate advocacy may vary with the precedential framework employed. Recent work at the Supreme Court level suggests that a party's success in influencing court decisions also stems from whether a party uses existing interpretations and framing of cases and issues, or whether the party contextualizes the issue in a new or alternative framework (Wedeking, 2010). Moreover, the particular ideology of the opinion writer or the panel majority may influence which precedents judges select (Braman and Nelson, 2007), a conclusion that is at least partially supported by our findings. Future research examining these issues could also be instructive on the connections between litigant "inputs" and judicial "outputs" in high workload courts, like the lower federal courts or state courts.

Despite the limitations discussed above, this project significantly adds to our understanding of advocacy and the development of case law in federal appellate courts. The

availability of more extensive resources, such as the Seventh Circuit briefs used in this project, will undoubtedly assist scholars in using new methods to understand these complex situations. This project represents another step in that direction as future research will continue to unravel the multifaceted influences on judicial decisions. **jsj**

Appendix A

Table of Independent Variables

Variable	Coding Scheme
Newcomer	1=no attorney on legal team has previous appearances before the 7th Circuit 0=at least one attorney has previous appearances before the 7th Circuit
Attorney Experience	Natural log of number of previous appearances by the lead attorney
Appellate Specialist	1 = Firm lists appellate specialty on Martindale Hubbard, 0 = otherwise
Number of Attorneys	Number of attorneys listed on the brief
Number of Firms	Number of firms listed on the brief
Individual Litigant	1 = individual litigant 0 = all others
Prisoner Appeal	1 = appeal by prisoner 0 = all others
Constitutional Case	1 = Appeal raises constitutional claim 0 = all others
Civil-Rights Case	1= Appeal identified as a civil rights case (excluding prisoner appeals) 0 = all others
Supreme Court	1 = precedent is from the U.S. Supreme Court 0 = precedent stems from another source
Seventh Circuit	1= the precedent is from the Seventh Circuit Court of Appeals 0 = precedent stems from another source
Precedent Age	Year the precedent was decided
Precedent Age Squared	Values from Precedent Age squared

Opponent also Used Precedent	1 = if "strong cited" in brief submitting by opposing litigant 0 = not strong cited in brief submitting by opposing litigant
Total Precedents Used	Number of total precedents listed in Table of Authorities of the party's brief
Ideological Congruence	-1 = Party raising precedent and median panel preferences not ideologically aligned 0 = Ideological congruence could not be determined 1 = Party raising precedent and median panel preferences ideologically aligned

Appendix B
Coding of Dependent Variable in "Success Models"

Attorney's Use of Precedent	Court's Use of Precedent	Dependent Variable Coding
Positive (applies/follows)	Positive	
Positive (applies/follows)	String Cite	**Win (1)**
Negative (distinguish/overrule)	Negative	
Positive (applies/follows)	Negative	
Negative (distinguish/overrule)	Positive	**Loss (0)**
Negative (distinguish/overrule)	String Cite	

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Table 1
Informational Role and Appellate Advocacy
Logit Model—Likelihood of Judicial Citation to Precedents Identified in Briefs

	Model 1: Appellants Coefficient (RSE)	*Model 2: Respondents* Coefficient (RSE)	*Model 3: Precedents Cited Only by Respondents* Coefficient (RSE)
Newcomer	-.655*	.538	-.492
	(.375)	(.551)	(.804)
Lead Attorney Experience	-.548*	.083	.049
	(.115)	(.170)	(.166)
Number of Firms	-.075	-.171	-.609*
	(.180)	(.183)	(.314)
Number of Attorneys	.136	.158	.225***
	(.103)	(.097)	(.087)
Firm with Specialization in Appellate Practice	.652**	-.425	-.410
	(.253)	(.377)	(.358)
Individual Litigant	-.328	-.672**	-.999*
	(.262)	(.337)	(.585)
Prisoner case	-1.28***	-2.26***	-1.36***
	(.427)	(.437)	(.516)
Supreme Court	.825**	1.58***	1.73***
	(.339)	(.372)	(.578)
Seventh Circuit	.526*	.209	.329
	(.297)	(.312)	(.514)
Precedent Age	.007	-.041*	-.033
	(.016)	(.021)	(.035)
Precedent Age Squared	-.000	.000	.000
	(.000)	(.000)	(.000)
Total Precedents Used	-.007	.001	-.001
	(.008)	(.007)	(.011)
Opponent also Uses Precedent	1.34***	1.66***	-------
	(.267)	(.332)	
Constitutional Case	.536*	.191	-.178
	(.289)	(.483)	(.646)
Civil-Rights Case	.356	-.038	-.321
	(.291)	(.356)	(.463)
Constant	-.487	-1.27*	-.660
	(.492)	(.650)	(.790)
Log Pseudo-Likelihood	-217.75	-224.14	-141.73
Pseudo R-Square	.178	.157	.088
N	402	412	285

Notes: Coefficients reported with robust standard errors are clustered by case. +p<.10, *p <.05, **p <.01, *** p<.001(one tailed). Model 3 includes precedents discussed in respondents' briefs not previously identified by appellants.

Table 2
Logit Model of Appellate Advocacy and Success
Likelihood that Opinion Treatment of Precedent is Consistent with Brief Writer's Use

	Model 1: Appellants	*Model 2: Respondents*
Newcomer	-.266	---
	(1.060)	
Lead Attorney Experience	.599*	.280
	(.353)	(.379)
Number of Attorneys	.026	-.295
	(.301)	(.168)
Firm with Specialization in	-.990	1.422+
Appellate Practice	(1.357)	(.980)
Individual Litigant	.554	---
	(1.048)	
Supreme Court	.291	1.88*
	(1.470)	(.964)
Seventh Circuit	-.749	1.640*
	(1.105)	(.963)
Precedent Age	-.267	.132
	(.245)	(.116)
Precedent Age Squared	.005	-.003+
	(.005)	(.002)
Total Precedents Used	-.006	.023
	(.024)	(.021)
Civil-Rights Case	-2.900	1.376
	(2.297)	(1.886)
Ideological Congruence	-.516	1.184*
	(.581)	(.572)
Constant	5.149	-1.400
	(4.213)	(1.441)
Log Pseudo-Likelihood	-19.381	-23.028
Pseudo R-Square	.0275	.0277
N	69	62

Notes: Coefficients reported with robust standard errors clustered by case. +p < .10. *p <.05, **p <.01, *** p<.001(one tailed). Model 1 includes precedents discussed in appellants' briefs that were not also discussed in respondents' briefs; Model 2 includes precedents discussed in respondents' briefs that had not been previously identified by appellants. Collinearity prevented the inclusion of the variable "constitutional cases," "prisoner case" in both models, and the use of "newcomer" and "individual litigant" in Model 2 and "prisoner" in Model 3.

Table 3
Case Winners and Losers Logit Models - Likelihood of Congruence
Judicial treatment of precedent is consistent with party's use

Independent Variable	*Model 1: Case Winners*	*Model 2: Case Losers*
Respondent Party	-1.542	-3.377+
	(1.028)	(2.542)
Newcomer	-1.743*	---
	(.988)	
Lead Attorney Experience	.351	.845+
	(.448)	(.524)
Individual Litigant	---	-1.067
		(2.165)
Total Number of attorneys	-.162	-1.038*
	(.259)	(.625)
Firm with Appellate	.283	-2.664*
Specialization	(1.166)	(1.755)
Supreme Court	2.290*	.402
	(1.304)	(.964)
Seventh Circuit	1.081	1.134
	(.974)	(1.630)
Precedent Age	-.055	-.121
	(.099)	(.150)
Precedent Age Squared	-.000	.002
	(.001)	(.002)
Civil-Rights Case	-.091	-3.265**
	(1.660)	(1.098)
Ideological Congruence	1.313+	-.298
	(.874)	(.767)
Constant	4.746**	9.885*
	(1.950)	(5.556)
Log Pseudo-Likelihood	-18.551	-14.877
Pseudo-R^2	.0247	.0460
N	68	55

Notes: Coefficients reported with robust standard errors clustered by case. +p < .10. *p <.05, **p <.01, *** p<.001(one-tailed). Variables for "constitutional cases," "prisoner appeals," and "total number of firms" were dropped because of collinearity; "individual litigant" was dropped from Model 1 and "newcomer" was dropped from Model 2 due to collinearity,

[1] While each circuit has its own rules about the conditions under which oral argument is necessary, the Federal Rules of Appellate Procedure note that oral argument should not be granted if the appeal is frivolous, the dispositive issues have already been authoritatively decided, or if the facts and arguments in the brief and record provide a sufficient basis for the court to make a decision (F.R.A.P. 34(a)2.a-c).

[2] It should be noted that judges do not exclusively rely on the attorneys' briefs to convey the legal arguments, as law clerks often prepare "bench memos" that summarize the arguments on both sides and provide some evaluation of their relative strengths (Cohen, 2002). However, this practice is not uniform across circuits or judges, so it is difficult to generalize about the role that such memoranda play.

[3] It is possible for issues to be raised and precedents discussed in oral arguments that are not presented in the briefs. While this may occur at the Supreme Court level (Johnson, Wahlbeck, and Spriggs, 2006) it is a rare occurrence at the circuit-court level. Unlike the Supreme Court, oral arguments at the circuit level often deal as much with the factual issues in the case as the legal justifications. However, to explore the possibility that new precedents were raised in oral arguments, we listened to each oral argument from ten cases in our data (11 percent of our sample). After listening to these oral arguments, we found no instances in which new precedents not found in the briefs were raised, and minimal mentions of any precedents at all. The overwhelming majority of the discussions in these oral arguments dealt with the facts of the case or procedural issues, without reference to precedent. For this reason, we limit the focus of the present study to precedents identified in the briefs and leave the examination of oral arguments at the intermediate appellate level to future research.

[4] Responsible for ensuring uniformity in federal law, the Supreme Court recognizes the importance of resolving conflicts between courts (see Rule 10). Nevertheless, as McNollgast (1995) suggests, the high review costs associated with determining whether a lower court has followed the Court's preferences would contribute to a high level of tolerance for doctrinal deviance. One study found the average length of time that an intercircuit conflict persists prior to resolution before the Court was 8.2 years (Tiberi, 1993).

[5] To address the concern that our findings are affected by the absence of a control for the district court's efforts in identifying relevant precedents, we sampled one-fourth of the cases (n = 22) in our dataset to examine more closely the effect of the trial court disposition. Of the 22 cases in our sample, only 68 percent (15) had reasoned district court decisions, including four that were published in the federal supplement. Those district court decisions that did not have a reasoned opinion involved challenges to attorney fee awards (n = 2), district court procedural rulings in a jury trial (n=2), administrative decisions from BIA (n = 2), and a district court ruling that briefly affirmed the decision of a bankruptcy court (n = 1). Of the 15 "reasoned" decisions by district courts, the bulk of the discussion in each case was devoted to the court's fact finding. Seven of these 15 decisions discussed or included quotes from precedents with the other 8 decisions relying on string citations to support the trial court's arguments. If a reasoned decision had been filed, we listed all precedents cited by the district court (including string citations, which made up 75 percent of the total). Of the 119 precedents cited by district court judges, 78 percent were not acknowledged by the USCA in the panel's majority opinion; 17 percent (n = 21) were listed by the USCA in string citations; the appeals court discussed or quoted language from precedents identified by the trial court in 5 percent (n = 6). Appellate advocates used (strong cited) 25 of the

27 district court-identified precedents that were ultimately acknowledged by the USCA. None of the six precedents included in the trial court decision and later discussed by the USCA had escaped the attention of an appellate advocate. Although further exploration of the role of the district court in shaping the appellate context merits further study, we believe that these observations suggest our assessment of judicial treatment of precedents identified by appellate advocates will not be affected by the failure to include precedents identified by trial courts.

[6] Likewise, arguing alternative strategies for one's clients may entail using numerous precedents that the reviewing court finds unnecessary. For example, attorneys will often argue that dismissal is needed based on a jurisdictional issue and, in the alternative, argue for their clients based on substantive matters, citing cases for both the jurisdictional and substantive issues. A reviewing court may adopt the jurisdictional arguments and cite those precedents discussed on this point in the brief, but ignore precedents used by counsel concerning the substantive issues. For this reason, our analysis below only focuses on precedents raised in issues that are addressed by the appellate panel.

[7] We note that all circuits may have unique factors that limit the generalizability of examining any single circuit. For example, the Seventh Circuit does not use "visiting judges," and during this period had a slightly higher reversal rate and published a higher percentage of its opinions than other circuits (Fitzpatrick, 2008). However, in other ways it is very similar to the remaining circuits. For instance, the civilian population of the Seventh Circuit is near the average for all circuits, and the time to complete each case is near the nationwide average. Fifty-five percent of appeals in the Seventh Circuit were criminal or prisoner appeals in 2007, as compared to the national average of 52 percent. The average number of Democratic judges on the circuit during

this period (27 percent) is slightly lower than the national average for all circuits (40 percent). While one could argue that the Seventh is dominated by Illinois-area judges and attorneys, evidence suggests that this may not be that different than other circuits, such as the Second (New York), Fifth (Texas), Ninth (California), and the Eleventh (Florida) that also include a mixture of one very large state and other less populous states (Emrey and Wasby, 2008).

[8] Our data do not include the relatively rare, but important, cases heard by the circuit en banc. Given our focus on the role of litigant briefs in the decision-making process, the inclusion of en banc cases would have required a separate analysis that takes into account several earlier steps where litigants provide written input, including briefs filed in conjunction with the original panel.

[9] A strong citation to precedent takes the following form: "A motorist who was shot by an off-duty deputy sheriff was allowed to pursue his claim in *Brown v. King*, 328 Ill.App.3d 717, 767 N.E.2d 357 (1st Dist. 2002)." In contrast, a "string citation" does not elaborate on the specifics of a holding and is often one of several citations listed at the end of a statement: "Post-arrest beatings are within the scope of a security guard's employment. *Argento v. Village of Melrose Park*, 838 F.2d 1483, 1487-89 (7th Cir. 1988); see also *Bryant v. Liuigni*, 250 Ill.App.3d 303, 619 N.E.2d 550 (1993); *Coleman v. Smith*, 814 F.2d 1142, 1149-50 (7th Cir. 1987)."

[10] For the court's use of party-identified precedents, we included instances when the court used the precedents as a string citation. We believe that judicial acknowledgment of a case in a footnote or string citation indicates that the case had some informational value to the decision-making process.

[11] The median number of appearances was 4, with the inter-quartile range of 1 to 10 for appellants. For respondents, the median number of appearances was 8.5, with the inter-quartile range of 3 to 15. The minimum and maximum values for appellants was 0 and 109, respectively, while for respondents these were 0 and 193.

[12] We recognize that there may be multiple means of measuring attorney experience, including using the most experienced litigator's number of appearances before a court (Flemming and Krutz, 2002) and the average number of prior appearances for all attorneys involved. Research on case outcomes frequently evaluates the effect of attorney capability by using a measure that compares experience levels of opposing counsel. Difference-based measures may be less useful, when focused on the informational role of counsel. Moreover, the sequential process of submitting briefs results in respondents reacting to the precedents that are initially discussed by appellants.

[13] Following other scholars' use of the experience measure (e.g., Johnson, Wahlbeck, and Spriggs, 2006), for the log of attorney experience when the attorney had no experience, we added a 1 to the natural log as the function is undefined at zero.

[14] We also modeled party capability as a series of dummy variables: individual, federal government, business, and other. However, in this operationalization, the only variable to achieve significance was the individual dummy variable, so the substantive results mirror the ones presented here.

[15] We also explored whether state court cases deserved special treatment. Few citations (13 percent) stemmed from state courts with the vast majority of these states geographically located

within the Seventh Circuit (i.e., Indiana, Illinois, and Wisconsin). Given the low relative number, we decided not to create a separate variable for state cases for the sake of parsimony.

[16] In alternative models (not shown), we included measures of case complexity in the "informational" analysis: the number of issues raised in the briefs, the page length of the briefs, and the presence of a consolidated case. Of these, only page length was significant and then only for respondents, indicating that longer briefs are negatively associated with citation of a given precedent. The estimates for the other variables in the model were not significantly affected.

[17] While examining why some particular advocates prevail before Supreme Court, other scholars have considered whether difference in resources between adversaries account for patterns of litigant success (e.g., McGuire, 1995). This makes theoretical sense in examining the Supreme Court as, with complete discretion in case selection, the roles of litigants are arguably less distinct. Respondents may take a more active role in attempting to frame the issues, particularly given the theory of "aggressive grants" (Perry, 1991). In the circuit courts, which have little discretionary control over the dockets, litigants' roles as appellants or respondents are much more clearly defined by a sequential process. Often, respondents merely react to the appellant's arguments. Given the arguably larger burdens on the appellants and heavier presumption that the respondent will be victorious at the circuit level, we chose to compare appellants to appellants and respondents to respondents in separate models. This allows us to examine more nuanced differences in advocacy, rather than highlighting the predominant influence of litigant role orientations in the sequential process of submitting appellate briefs. We do note that in the final part of our analysis, we pooled observations with litigant-identified precedents being the unit of analysis.

[18] We also modeled the citation of precedent as a function of whether the court addressed the issue associated with that precedent, using a Heckman selection model. However, because the *rho* fails to reach statistical significance, we can safely conclude that selection model and the prediction model are not positively correlated with each other, and selection bias is not producing incorrect coefficients. For these reasons, we present the results of a logit analysis.

[19] The variables Individual Party and Prisoner Appeal were only weakly correlated (r = .1).

[20] We also tried modeling the relationship between party and attorney experience as a conditional one by including a multiplicative term in the three models. The interaction was only statistically significant in the model with the subset of respondent precedents, but given the very small number of individuals in this set of observations (24 out of 296), the confidence intervals around the predicted probabilities are too large to make any meaningful comparisons between party types.

[21] This result cannot be attributed to collinearity, as the number of attorneys and number of firms is correlated only at r = .4 for these conditions.

[22] In coding the treatment of the precedent, we generally follow the framework used by Hansford and Spriggs (2006:44-45), who used *Shepard's Citations'* guidelines for coding positive and negative treatment. However, we include string cites used by the court, as these are generally supportive of the party's use of these prior cases. For example, in *Barricks v. Eli Lilly*, 481 F.3d 556 (2007), the respondent, Eli Lilly, discussed at length the applicability of *Radue v. Kimberly-Clark Co*., 291 F.3d 612 (2000) in the respondent's brief. However, the majority opinion simply noted, "We have frequently discussed the dangers of relying on raw data without further analysis or context in employment discrimination disputes," and string-cited the *Radue* case, along with

others, as supporting this principle (*Barricks*, 481 F.3d at 559). While the opinion does not expound on the precedent, string cites such as these show that the attorneys have been successful in drawing attention to a precedent supporting their position. In examining cases in our sample, we did not find an instance of a court string cite that was at odds with how the parties' brief used that cite, although we recognize that this is a possibility. Additionally, limiting our observations to only strong citations by the court would preclude us from estimating a meaningful multivariate model because of the small N.

[23] We also included this control in other iterations of the informational model (not shown), but it was not statistically significant and did not affect results for any of the other variables.