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FOLLOW-UP CITATIONS IN THE U.S. SUPREME COURT

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THE QUESTION addressed in this article is straightforward — Why does the Supreme Court cite and follow some of its previous decisions while ignoring or distinguishing others? This question is important for the emerging literature on citation behavior among courts which views the citation of past cases as important indicators of communication (Caldeira 1985; Harris 1979), legitimacy (Friedman et al. 1981), status of the law (Landes and Posner 1977; Merryman 1977), or changes in the law over time (Merryman 1977; Johnson 1981). For these scholars, citations to previous decisions are important because they inform us about the institutional side of law — that is, law as a system of rules which may constitute a “language” and a constraining force on extra-legal factors affecting judicial decisions (Brigham 1978).

A major assumption of past citation research is that citations are more than casual references in judicial opinions and that, in fact, they represent an attempt to legitimize decisions by linking past decisions to contemporary ones. As Lawrence Friedman et al. note, judges are expected to decide “according to law,” which means that “they are not free to decide cases as they please, [but instead] are expected to invoke appropriate legal authority for their decisions” (1981: 793). To the degree that citations are systematic, and the assumption is false that they are casual or random, then researchers may, indeed, use them as reasonable indicators of such phenomena as communications among courts.

The research reported here tests two competing explanations for references to Supreme Court decisions by the Court itself. One explanation emphasizes personal or political factors, thus viewing such references as products of the ego or ideology of the citing judge. The other explanation views references as a function of such legal concerns as clarifying past policy or applying precedent when appropriate. These two explanations are elaborated below, and are followed by presentation of research findings on follow-up citations by the Court.

EXPLAINING FOLLOW-UP CITATIONS

Ego and Ideology

Citations could be a function of personal idiosyncrasies or ideological concerns of the opinion author. Research on the personal style of opinion

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writers on the Court is scarce. Landes and Posner, in one of the few such studies, argue that the number and average age of citations does not vary systematically from justice to justice (1977); but see Johnson (1985). Bernstein (1968: 77-78), on the other hand, finds that some justices differ with regard to references to secondary source material. No one, however, has examined whether justices have “favorite” citations to which they return regularly in opinions on the Court.

A basis for expecting personal citation styles is found in Lawlor’s (1968) theory of personal *stare decisis*, which suggests that justices are likely to develop a consistent set of policy preferences over time. Such a development contributes to the cognitive consistency of the justice and may also give a certain efficiency to his or her work. If consistency and efficiency are concerns of a justice, then self-citations are likely to be a reasonable expectation. Self-citations also serve ideological and personal agenda motivations in much the same way as self-assignments of majority opinions (see Rohde and Spaeth 1976). Thus, an obvious hypothesis is that justices will often refer to opinions they have authored — that is, self-citations will be frequent.

Self-citations may be constrained because majority opinions are partly group products. Although usually most majority coalitions have a common ideological base, Murphy (1964) and Howard (1968) demonstrate that opinion majorities are constructs that may involve considerable negotiation. References to previous decisions could be a part of those negotiations. Justices would be wise to include references to opinions written by members of the current majority or to decisions ideologically consistent with those in the majority. Thus, because opinion majorities share a common ideology and the continued membership of some members may depend on inclusion of certain legal arguments, a second hypothesis is that opinion authors will often refer to previous opinions written by ideologically similar justices.

Both of these hypotheses presume that citations are systematic, but are largely unrelated to concerns about developing a coherent body of law. Essentially they view citation behavior as an extension of ideologically based voting on the Supreme Court. Should the analysis support these hypotheses, then use of citations to indicate anything more than intra-court processes would be questionable.

Clarification and Stare Decisis

References to previous decisions may (also) represent attempts by the Court to clarify those decisions or, consistent with *stare decisis* norms, to underscore the Court’s support of them by following the decisions when circumstances warrant. Judicial policies are rarely made in a single decision and, in fact, some decisions may raise more questions than they answer. Cases such as *Brown v. Board* (1954, 1955) or *Baker v. Carr* (1962) are obvious examples of decisions the Court had to clarify in later opinions. Similarly, decisions such as *Harris v. New York* (1971) may indicate a change in policy by the Court which also requires further clarification. Finally, decisions may be ambiguous or require considerable clarification by the Court in order to give others an idea of what the policy requires.

In part, obscenity decisions fall into this last category (e.g., *Miller v. California*, 1973). The Court is, of course, always free to ignore unclear decisions. However, the Court is expected to return to such cases or to those in new areas of the law to clarify or amplify its policy, since clarification is probably necessary for the policy to have its desired impact.

The most straightforward explanation for citation of previous decisions is that cases will be tied to previous decisions with similar facts. If the art of judicial reasoning is, as Levi (1949) so describes it, the process of reasoning by analogy, then similarities between precedent-setting cases and a later case should be very important in explaining whether a precedent is followed. Although legal scholarship evidences considerable debate about whether legal rules guide or ought to guide decisions (e.g., Dworkin 1977), the basic premise of most legal research and training is that differences and similarities among past and present cases are an overriding concern. Thus, even if opinions and citations are *post hoc* rationalizations for the Court's decisions, case similarities should be highly correlated with citation use.

The hypotheses discussed in the two previous paragraphs also suggest that citations are systematic, but in each instance citation behavior is tied to some aspect of formal legal decision making. Should the analysis lend support to these hypotheses, then we could have a bit more confidence in research which uses citations as indicators of communication or legal development.

RESEARCH DESIGN

Sample and Data

Data for this research include all signed majority opinions which cite at least one of a random sample of 27 Supreme Court decisions issued between 1947 and 1974. Obviously these 27 decisions (hereafter referred to as the original decisions) could not be considered a statistical sample of high court decisions; however, they provide a sufficiently varied set of original decisions for our purpose of considering later references to them by the Court. A universe of later cases citing these decisions (hereafter referred to as later decisions) were identified by using *Shepard's Citations* as well as LEXIS and WESTLAW. The later Supreme Court decisions, which are the units of analysis, are all decisions citing the original cases in signed majority opinions ($n = 141$).

The original and later Supreme Court decisions were read and briefed by panels of law students. Using previously agreed upon summaries of the original decisions, panels of three students read and briefed later cases evaluating factual similarities (generally similar or generally dissimilar) and whether the issues were related. The treatment of the original decision was classified as either being followed; limited; expanded or extended; not used, but could have used; or not used, but not applicable. The first three treatment categories involved explicit discussion and treatment of the original decisions in the majority opinions. The last two categories involve instances where the case is only mentioned in the later decision, but there is no specific discussion of how the original decision relates to the later one.

Agreement among at least two of the three coders was used to classify decisions. Coder reliability was relatively high with agreement on factual similarities at 94.7 percent, issue overlap at 93.5 percent, and treatments at 83.9 percent. The lower level of agreement for the latter category is partly the result of a five-category variable.

Operationalizations

Later Court Treatment of Original Decisions. Two measures of later Court treatments of the original decisions are used. The first indicates whether the original decision is substantively used in the later decision or whether it is merely mentioned without comment — usually in a string citation. Substantive use includes instances where the Court followed the holding of the original decision, extended the holding to new issues or facts, or limited the original decision by explicitly distinguishing it. Non-substantive use includes occasions when the Court only mentions the case and does not tie the decision to it in any way. (For this research we make no distinction between whether the panel thought the Court should or need not have used the case substantively.) A second indicator considers the direction of use for those instances where the case was used substantively. Positive uses are those where the Court followed or extended the original decision and negative uses are those where the Court distinguished it.

Justice Characteristics. The authors of the original and later Court opinions are considered variables to test the self-citation hypothesis and are categorized by ideology to evaluate the ideology-based citation hypothesis. Justices were classified by ideology into four groups based on the percentage of support for civil and economic liberties claims as reported by Tate (1981)¹ Justices were first classified into the top, middle, and bottom third categories according to their support for civil liberties and economic liberties. Cross-tabulation of their rankings on these two scales produced four groups. The first is a liberal group which was in the liberal third for both civil and economic liberties — this group includes Warren, Douglas, Murphy, Rutledge, Brennan, Goldberg, Fortas, Marshall, and Black. The second group is a moderate group which fell into the middle third on both scales — this group includes Stewart, White, Powell, and Stevens. The third group is a moderate/conservative group which fell into the middle

¹Summary scales for liberalism of Supreme Court justices over multi-year time periods are offered by Tate (1981), Rohde and Spaeth (1976), and Schubert (1974). To a large extent, the rank order of justices on these scales is quite similar. Since the Tate data roughly correspond to the time period in this study, his scores are used here. The reader should note that a problem of using summary scores is that variance over time is ignored. In most instances, variation in percentages is of little consequence since the rank order of justices remain the same. Movement of justices from one category to another in this study is minimal, except for Justice Black, who appeared to become more conservative as time progressed. However, consistent with summary assessments by Tate and others, Justice Black is assigned to the liberal category for the entire time period since he behaved conservatively only during the last few terms of the Court, and then only in a limited range of cases. Moreover, dropping the seven cases referring to Justice Black's one original court opinion in this analysis has no substantial affect on the relationships reported later in the article.

third on one scale and the bottom third on the other — this group includes Jackson, Frankfurter, Whittaker, Blackmun, Vinson, Reed, Clark, and Minton. The fourth group is a conservative group which includes justices in the bottom third for both scales — this group includes Burger, Burton, Harlan, and Rehnquist. Justices of the same ideology are expected to cite opinions authored by justices in the same wing of the Court.

Law Characteristics. Measuring features such as clarity or state of the law is difficult, and will likely provoke debate regardless of the manner by which it is done. To further complicate the measurement problem, few researchers offer quantitative measures for such features. Moreover, clarity measures such as reading level (see Ulmer 1981) do not tap the clarity issues as they are usually thought of in this context, although they are reliable and easy to calculate and interpret.

Measures based on inter-subjective agreements on the law student panel are used to measure clarity of the original Supreme Court decisions in this study. Prior to reading the later Court decisions, the law students read, briefed, and coded all original decisions for this project. Part of that process included their evaluating the clarity of the decision as being “generally clear” or “not generally clear” for each part of their brief — the facts, issues, holding, reasoning, and rule. The result of this process is a series of dichotomous measures of clarity for each part of the brief. These measures are used to test the hypothesis that generally unclear decisions will be used more than generally clear ones in order to clarify or amplify the policy.

The state of the law is measured by an indicator used elsewhere to assess the development of the law — the average age of the citations in the original decisions. Landes and Posner (1977) and Merryman (1977) find that citations differ by age according to the level of development in the law. For example, decisions in well-developed areas of the law such as land condemnation or admiralty have much older citations than cases in criminal justice or constitutional law. Thus, the median age of the citations was determined for each original decision. This measure is used to test the hypothesis that decisions in areas of the law that are less well developed, as evidenced by newer citations, will be referred to more in later Supreme Court decisions.

The similarity of cases is the basis for *stare decisis* explanations of judicial decision making. The law student panel also assessed the degree of overlap between the facts of the original and later court decisions. Panel members evaluated whether the facts were “generally similar” if roughly half or more of the major facts were the same and “generally dissimilar” if less than half of the major facts were the same. A list of significant facts derived from the panel’s reading of the original cases was used in the evaluation of later Court decisions. The dichotomous measure of similarity/dissimilarity is used to test the hypothesis that the greater the factual similarities, the more likely the Court will refer to a previous case.

FINDINGS

My earlier research (Johnson 1981: 755-56) using *Shepard’s Citations* to assess Supreme Court citations of its own decisions found that less than

20 percent of the citations were “substantive.” This research roughly parallels this finding. Only 38 (27 percent) of the 141 cases used one of the original decisions in a way that could be considered substantive — that is, followed, expanded, or limited. Thus, a large number of citations were mere mentions in the majority opinions and had little or no direct relevance to the issues resolved in the later decision. This large number of non-substantive treatments should give pause to researchers who indiscriminately count citations without consideration of whether they carry any meaning.

The direction of the substantive treatments in this sample is mostly positive (66 percent). This finding also parallels earlier findings that the Supreme Court rarely treats its own decisions negatively by limiting or overturning them (Johnson 1981: 754). Here, too, one wonders whether positive as well as negative substantive citations should be treated alike in studying such phenomena as communications among courts or development of the law.

Ego and Ideology

The data generally do not support the proposition that citations are products of either ego or ideology. There were few instances of self-citation among justices authoring later Court opinions who had previously authored one of the original opinions. As seen in Table 1, 19 out of 85 citations (22 percent) by these justices were self-citations. Of course, there is no benchmark to determine whether this aggregate figure represents a large or small rate since we have no information about opportunities for self-citation. Nevertheless, evaluations of individual justices suggest that self-citations are not frequent for most justices. An only slightly different picture emerges when considering citations to ideological blocks. Twenty-nine of the 141 citations (21 percent) are within one of the four previously specified ideological blocks. Here, too, we have no benchmarks for comparison, but clearly most citations are by justices with a different ideological makeup.

TABLE 1
FREQUENCIES OF SELF CITATIONS, CITATIONS BY SIMILAR IDEOLOGICAL BLOCS,
AND CITATIONS BY DISSIMILAR IDEOLOGICAL BLOCS

<i>Original Authors</i>	<i>Self Citations</i>	<i>Similar Ideo. Bloc</i>	<i>Dissimilar Ideo. Bloc</i>
Black	0	0	1
Douglas	2	15	21
Vinson	0	2	11
Clark	0	1	6
Minton	1	0	2
Harlan	3	0	5
Brennan	1	1	3
White	2	2	6
Fortas	*	3	9
Marshall	3	1	6
Powell	7	4	23
TOTALS	19	29	93

*No later opinions were written by Justice Fortas.

General statistics concerning citation within and between ideological groups are presented in Table 2. Here, too, only a weak relationship develops between ideology of the original justice and that of the citing justice. An obvious possibility is that the nature and direction of citations will differ for references within and between ideological blocs. Data relative to this hypothesis are reported in Table 3. While the percentages are in the predicted direction for both the substantive/non-substantive and direction tables, the correlations for each are low and not statistically significant.

TABLE 2
CITATIONS AMONG IDEOLOGICAL BLOCS

<i>Ideological Block of Later Authors</i>	<i>Ideological Block of Original Authors</i>			
	<i>Liberal</i>	<i>Moderate</i>	<i>Mod. Conservative</i>	<i>Conservative</i>
Liberal	39%	21%	48%	13%
Moderate	38%	34%	22%	38%
Mod. Con.	14%	14%	22%	13%
Conservative	9%	32%	9%	38%
N =	66	44	23	8

Tau b = .13 p < .04

TABLE 3
COMPARISONS OF SELF AND IDEOLOGICAL CITATIONS WHICH ARE SUBSTANTIVE AND POSITIVE

<i>Treatment</i>	<i>Source of Citations</i>			
	<i>Self</i>	<i>Other Justices</i>	<i>Same Ideology</i>	<i>Different Ideology</i>
% Substantive	31%	25%	35%	21%
N =	13	103	40	76
Phi =	.04 (ns)		.15 (ns)	
% Positive	75%	58%	71%	50%
N =	4	26	14	16
Phi =	.12 (ns)		.22 (ns)	

Law Characteristics

The Court often cites cases whose holdings are unclear. However, in contrast to citations to cases with unclear holdings (63 percent), the Court was less likely to refer to cases with unclear facts (14 percent), unclear issues (47 percent), unclear rules (22 percent) and unclear law (15 percent). One should note, of course, that the holding is the keystone of the decision and the finding that cases with unclear holdings are subject to greater citation rates may suggest that the Court does, indeed, return to clarify such decisions.

Although cases with unclear holdings have greater citation rates, they are not used more substantively. The analysis reported in Table 4 suggests that substantive citations are related to whether the original decisions were

factually clear and had generally clear issues. Such cases provide the clearest opportunities for drawing links between past and contemporary cases, so this relationship should not be surprising. Once the link is drawn, however, the direction of any substantive treatment is unrelated to any of the clarity measures.

TABLE 4
CORRELATIONS BETWEEN CHARACTERISTICS OF ORIGINAL DECISION
AND LATER CITATIONS

<i>Characteristics of Original Decisions</i>	<i>Substantive Treatments</i>		<i>Positive/Negative Treatments</i>	
	<i>Phi</i>	<i>p <</i>	<i>Phi</i>	<i>p <</i>
Clarity of				
Facts	.26	.002	.09	ns
Issues	.16	.06	.12	ns
Holding	.03	ns	.17	ns
Rule	.01	ns	.04	ns
Law	.11	ns	.17	ns
Median Age of Citations in Orig. Opinion	.19*	.02	-.29*	.04
Factual Similarity Between Original and Later Opinion	.33	.001	.13	ns

*Pearson's r since phi cannot be calculated for non-dichotomous variables

Contrary to expectations, substantive citations were most often to cases with older citations ($r = .19, p < .02$). However, the positive use of citations most often involved cases with relatively low median age case citations ($r = -.29, p < .04$).

Also contrary to our expectations, citations most often occurred when the facts of the later case were unlike those of the original decision. Only 18 percent of the citations occurred in cases with generally similar factual situations. However, the correlation between factual similarity and substantive treatments was positive and relatively strong ($\phi = .33, p < .0001$). Thus, 58 percent of those cases with generally similar facts received substantive treatment, but only 20 percent of those with generally dissimilar facts received such treatment. The relationship between case similarities and treatment does not, however, extend to the direction of the treatment ($\phi = .13, ns$). Thus, the Court is more likely to refer substantively to cases with similar backgrounds, but does not show an inclination to follow or extend the outcome of the original decision to the later one although factual backgrounds are similar.

CONCLUSIONS

The research reported above evaluates the assumption that citations in the Supreme Court are systematic, and are not casual references in ju-

dicial opinions. This assumption is critical to a growing body of literature relying on citations to measure various aspects of the judicial process. The results of this research suggest that some caution should be exercised in citation based research.

The most potentially troubling finding is that the overwhelming number of citations have no clear substantive treatment in the majority opinion. Less than one-third of all cited cases evidenced a positive or negative treatment, and a substantial number were part of "string" citations. This finding should give pause to researchers who count citations without regard to their treatment of or relevance to the majority opinion. In evaluating communications, for example, should a citation to a case that is being followed be counted the same as another which is part of a string citation? Furthermore, since we found roughly one-third of the substantive cases were limited, should those cases count the same as those which are followed? Quite possibly, if the nature of the citations is ignored, theoretical interpretations of "citation counts" may ultimately misrepresent such phenomena as communications among courts or the status of the law.

Although caution is suggested for research ignoring the treatment of citations, another problem for citation research was not uncovered in this research. Citations would not have much meaning if they were merely products of egos or ideological concerns. On the other hand, if citations were related to legally based considerations, some citations may be systematic enough to warrant investigation. This research found little support for self-citations by individuals or by ideological blocs. The legal model, however, produced some supportive correlations. The Court appeared to return to cases with unclear holdings, presumably for clarification. Substantive use also occurred most frequently if the original case facts were generally clear and similar to those of the later case. But even here, the legal model did not predict the direction of the treatment accorded the original decision.

The results of this research suggest that Supreme Court justices behave as Lawrence Friedman et al. hypothesize — namely, that they cite legal authority to support their decisions. However, one must wonder about how much attention we should pay to those citations when most are non-substantive and the direction of the substantive citations is not related to factual similarities as the legal model would predict.

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