Lower Court Influence on U.S. Supreme Court Opinion Content

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Despite the importance of Supreme Court opinions for the American polity, scholars have dedicated little systematic research to investigating the factors that contribute to the content of the justices' opinions. In this article, we examine the ability of lower federal courts to shape the content of Supreme Court opinions. We argue that lower court opinions will influence the content of the Court's opinions to the extent that the justices perceive that integrating language from lower court opinions will aid them in making efficacious law and policy. Utilizing plagiarism detection software to compare lower federal court opinions with the majority opinions of the Supreme Court during the 2002–2004 terms, we uncover evidence that the Court systematically incorporates language from the lower federal courts into its majority opinions.

When the United States Supreme Court renders a decision, the Court's opinion becomes binding precedent, constraining the decision making of future Supreme Courts, lower court judges, and executive branch agencies charged with adjudicating disputes related to the case. In addition, attorneys marshal the language of judicial opinions in an attempt to secure their clients favorable outcomes, and these opinions provide the justification for the Court's decisions, allowing the justices to engage in a dialogue with the citizenry (e.g., Bennett 2001). Moreover, Supreme Court opinions serve as the primary basis for the case study method that dominates American legal education (e.g., Patterson 1951). Given the significance of Supreme Court opinions for lower courts, bureaucratic agencies, future Supreme Courts, litigators, and the public, in order to comprehend the law, and the political system more generally, one must have an understanding of how Supreme Court opinions are crafted. However, scholars have dedicated little systematic research to investigating the factors that contribute to the content of the justices' opinions. In this article, we examine the extent to which lower federal court opinions influence the content of the U.S. Supreme Court's majority opinions. Specifically, we compare federal district court and courts of appeals opinions with the majority opinions of the Supreme Court using plagiarism detection software, which provides substantial insight into the ability of lower courts to shape the content of the justices' opinions.[1]

The importance of understanding the content of Supreme Court opinions cannot be overstated. Legal scholars, practitioners, lower court judges, bureaucrats, and the public closely analyze judicial opinions, dissecting their content in an endeavor to understand the doctrinal development of the law. Through the close analysis of the content of the justices' opinions, the meaning and consistency of various rulings within particular areas of law becomes apparent. Such is the case because it is through its opinions that the Supreme Court promulgates rules and tests that act as precedent, constraining the decisions of lower courts (Corley 2008, 469). Despite this, political scientists in the quantitative tradition have virtually ignored the content of the justices' opinions, focusing instead on case outcomes and the justices' voting behavior in those cases. While we do not deny the significance of studying case outcomes, it is clear that a case is more than its outcome. As Shapiro notes, "the

[1]An online appendix with supplementary material is available at http://journals.cambridge.org/JOP. Data and supporting materials necessary to reproduce the numerical results are available at http://www.psci.unt.edu/~pmcollins/.

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opinions themselves, not who won or lost, are the crucial form of political behavior by the appellate courts, since it is the opinions which provide the constraining directions to the public and private decision makers who determine the 99 percent of conduct that never reaches the courts" (1968, 39).

In order to comprehend the content of the justices' opinions, one must recognize that the Court does not operate in a vacuum. Rather, the legal rules articulated in the Court's opinions are very much shaped by the actors involved in the litigation environment (Wahlbeck 1997). When a case reaches the Supreme Court, the justices rely primarily on four sources of information to render their decisions (e.g., Stern et al. 2002). First, the plenary conflict in any given case involves the parties to litigation, which attempt to persuade the Court to render a favorable decision through their legal briefs. Second, interest groups provide the Court with their own subjective interpretations of the correct application of the law by filing amicus curiae ("friend of the court") briefs. Third, the justices obtain information regarding the litigants' desired applications of law at oral arguments, in which each litigant is typically granted 30 minutes to persuade the justices to endorse its position. Finally, the justices obtain information to assist them in adjudicating the controversy based on the opinions of the lower courts that initially disposed of the case.[2]

While political scientists have generally failed to address how these informational sources influence the justices' opinions, a small body of research reveals that the Court's opinions are shaped by the party's briefs on the merits (e.g., Corley 2008), amicus curiae briefs (e.g., Epstein and Kobylka 1992; Spriggs and Wahlbeck 1997), and oral arguments (e.g., Johnson 2004). Specifically, Corley (2008) compares the litigants' briefs with the majority opinions of the Court utilizing plagiarism detection software and finds that the percentage of the Court's majority opinions coming from each party's brief is driven by the quality of the brief, the ideological compatibility of the brief's argument with the Court, and the political salience of the case. With regard to amicus briefs, Epstein and Kobylka (1992) and Spriggs and Wahlbeck (1997) uncover evidence that the Supreme Court's majority opinions adopt language and legal rules forwarded by interest groups. Relating to oral arguments, Johnson's (2004) analysis indicates that the Court focuses a major portion of its opinions on issues that are discussed during oral arguments. Despite the significant progress that has been made toward understanding the justice's opinions, scholars have not yet systematically addressed the extent to which lower courts influence the content of the Court's opinions.

The fact that this lacuna in our understanding of Supreme Court opinion content exists is troubling. To remedy this state of affairs, we embark on the task of examining the influence of lower court opinions on the Supreme Court's majority opinions. Exploring this relationship is significant for a number of reasons. First, this research provides a more complete picture of the factors that shape the content of the justices' opinions than currently exists. Indeed, Justice Thomas is especially clear in articulating the significance of lower court opinions at the Supreme Court. Thomas explains the process by which the justices deliberate cases on the merits as follows: "We work through the case, as I read the briefs, I read what they've written, I read all of the cases underlying, the court of appeals, the district court. There might be something from the magistrate judge or the bankruptcy judge. You read the record" (quoted in Greenburg 2007). As Thomas makes evident, the justices do not start from scratch in their deliberation of cases. Rather, they digest the lower court opinions, litigant briefs, and amicus curiae briefs, all of which have the potential to shape the doctrinal content of the justices' opinions.

Second, this research is important in that it sheds fresh light on how the Supreme Court interacts with lower courts. While there is a voluminous literature on this topic, it overwhelmingly focuses on lower court interpretation of, and compliance with, Supreme Court precedent (e.g., Klein 2002), ignoring how lower courts shape Supreme Court precedents. As such, the current article holds the promise of illustrating the ability of lower courts to shape the doctrinal course of federal law as it is articulated in Supreme Court opinions.

Third, this research is significant in that it views the judicial system as a web of interactions among different levels of the federal judiciary. Rather than studying a single court without regard to its relationship to other courts, we paint a much more realistic picture of the federal judiciary by examining how the Supreme Court incorporates the language of lower court opinions into its own opinions that set precedent for the entire American judiciary. Finally, this analysis is noteworthy in that it illustrates the benefits

[2]In addition to these information sources, on rare occasions the justices hear from intervenors to the case, which are allowed to file their own briefs and participate at oral arguments under statutory law or when they can demonstrate a direct stake in the outcome of the case (e.g., Stern et al. 2002). Moreover, the justices may conduct their own legal research or direct their clerks to do so (e.g., Ward and Weiden 2006).

of utilizing computerized text analysis to further our understanding of political behavior. Supreme Court scholars in the quantitative tradition are not alone in terms of their almost myopic focus on case outcomes and judicial votes: similar limitations plague the study of legislative and executive politics in terms of their foci on roll-call voting (e.g., Poole and Rosenthal 1997) and presidential position taking (e.g., Bond and Fleisher 1990). By illustrating the utility of using computerized text analysis to understand the content of the justices' opinions, we hope to motivate scholars studying other institutions to shift their focus away from, for example, simple roll-call votes or position taking, and instead explore influences on the content of legislation and presidential speeches.

The Meaning of Lower Court Influence

There are myriad methods by which lower court judges can influence the Supreme Court. A lower court opinion that demonstrates a strong grasp on the corpus of federal law might motivate the justices to deny a certiorari petition, shaping the Court's agenda-setting decisions. A well-crafted lower court opinion might induce the justices to affirm the lower court ruling, influencing the ultimate outcome of the case. Conversely, a rogue lower court that steps too far out of line with existing law may motivate the justices to reverse that court's decision, again influencing a case's disposition. Here, we focus on perhaps the most significant means of influence: the ability of lower court opinions to shape the content of Supreme Court majority opinions.

In order to avoid any unnecessary confusion, it is imperative that we are clear with respect to what we mean by influence in the current context. By "influence," we are referring to the ability of lower court opinions to shape the content of Supreme Court opinions and thus the behavior of Supreme Court justices. Specifically, we contend that when the Supreme Court's majority opinion utilizes the same language as the lower court opinion, the lower court has affected the nature and substance of the opinion, indicating that the lower court judges have influenced the doctrinal development of federal law. To be clear, this does not necessarily indicate that the lower court has influenced the decision of the Court (e.g., reverse or affirm), but it does provide evidence that the lower court has shaped the development of the law (e.g., Corley 2008).

The Supreme Court can incorporate the language of lower court opinions into its own opinions in a variety of different ways. The Supreme Court's majority might favorably adopt a rule applied in the lower court to dispose of the case at the high court. Alternatively, a justice might specifically criticize a rule adopted by the lower court and explain why it is poorly conceived or inapplicable to the case at hand. In either instance, the lower court has shaped the development of the Supreme Court's opinion. In addition, a justice on the Supreme Court might borrow language from the lower court opinion that specifically relates to the lower court's discussion of precedent or statutory law. That is, if the lower court opinion quotes from another source, such as Supreme Court precedent, and the justice uses that same quotation in his or her opinion, this provides for the opportunity that litigants, lower courts, and future Supreme Courts may use that phrase at a later date, again evincing the ability of lower court judges to shape federal law through their influence on Supreme Court opinions. In such a situation, the lower court opinion has not only influenced the content of the Supreme Court's opinion, but has also contributed to the vitality of the precedent (e.g., Hansford and Spriggs 2006). Moreover, the Supreme Court might adopt the lower court's recitation of the facts of a dispute, which can affect, not only the content of the Supreme Court's opinion, but also the Court's outcomes (e.g., Segal 1986). When the justices engage in the process of applying the facts of the case to the rule of law, the Court determines the operative facts of the litigation. In so doing, the justices may "rulify" a standard, in which the explicit application of a standard manifests itself as a rule for use in future litigation (Rosen 2005). If the Supreme Court's majority opinion recites the facts from the lower court opinion, this provides evidence that the lower court has successfully persuaded the Court to adopt its view of the facts (Corley 2008, 470).

As these examples make clear, there are a wide array of means by which Supreme Court justices might incorporate the language of lower court opinions into the Court's opinions. In some instances, the result is a favorable treatment of the lower court opinion. In others, the result is a negative treatment of the lower court opinion. Regardless of whether the justices' integration of the language of lower court opinions into the Court's opinions is positive or negative, when the justices utilize lower court opinions as the basis for the Court's opinions, this provides evidence of lower court influence on the Supreme Court. Because our purpose here is to

provide a generalizable and systematic examination into the ability of lower court opinions to influence Supreme Court majority opinions, we do not disentangle these various forms of influence. This allows us to move beyond the more common case studies that track the doctrinal development of particular legal rules or tests and, instead, provide quantitative insight into lower court influence on opinion content.

Lower Court Influence on Supreme Court Opinions

We posit that Supreme Court justices are motivated by the interconnected desires to produce good law and good policy (e.g., Baum 1994). In other words, the justices wish to produce legally sound decisions that further their personal policy preferences and promote the coherence and consistency of the law. As Klein found, "judges are committed to deciding cases in accordance with some notion of legal soundness . . . and judges also care about the consequences of their decisions" (2002, 24). The primary means available to the justices to pursue these goals is through the Court's majority opinions, which act as precedents, constraining the decision making of lower court judges and future Supreme Courts. Moreover, sound legal opinions enhance the extent to which Supreme Court opinions are implemented by lower courts and other actors (e.g., Baum 1980). Further, justices are motivated to author strong opinions in order to be cast in as favorable a light as possible, serving as a large part of a justice's jurisprudential legacy (e.g., Baum 2006).

To further these desires, the justices wish to write legally strong, persuasive opinions. Of course, the justices do not operate in a vacuum with respect to their interactions with lower courts. Indeed, one of the most basic functions of the Supreme Court is to review the opinions of lower court judges and there is evidence that, in certain circumstances, the justices might be willing to defer to lower court judges (e.g., Ku 2008). As the justices craft the Court's opinions, we believe they will look to particular aspects of lower court opinions in order to determine the extent to which lower court opinions can assist them in making good law and policy. In order to comprehend how lower court opinions might influence the content of Supreme Court opinions, it is important to understand how Supreme Court justices perceive lower court opinions. In particular, we argue that justices on the Supreme Court will evaluate the extent to which lower court opinions can aid them in making good law and policy based primarily on three factors. First, the justices will assess the quality and persuasiveness of the lower court opinion, as translated through the prestige of the opinion author. Second, the justices will consider the authority of the lower court opinion relating to an opinion's precedential force and the place of the lower court in the federal judiciary hierarchy. Finally, the justices will contemplate whether the lower court opinion meshes with their ideological preferences.

There is substantial evidence that source credibility and prestige is a major determinant as to how individuals evaluate the opinions of others (e.g., Galanter 1974; Hovland and Weiss 1951). This body of research reveals that highly prestigious individuals are better situated to convince others to more carefully consider the quality and credibility of their opinions than their less prestigious counterparts. Such is the case because prestigious and credible sources are perceived by others as being capable of more complex and reasoned deliberation, thus earning the close attention of individuals evaluating their opinions. The deference granted to prestigious information sources stems from the view that these communicators have advanced knowledge and are therefore trustworthy information sources (e.g., Perloff 2003). Simply put, even when holding the content of the message equal, communicators are more effective if they are perceived to be prestigious.

We believe the legal system is no different. To be sure, lower court judges are not created equal. Some judges enjoy favorable reputations for the quality of their judicial opinions, while others are looked upon negatively for sloppy or underdeveloped opinions. As Klein and Morrisroe highlight, the opinions of judges with prestigious reputations "display particular insight, logic, craftsmanship, or some other similar quality, and so are more persuasive than typical opinions" (1999, 373). Indeed, the import of judicial prestige was corroborated by a court of appeals judge who was queried as to the significance of judicial reputation:

> . . . It matters very much. I have ratings for judges just like you rate baseball or football players. One of the first things I look at is who wrote the opinion. . . . When I see an opinion written by [Judge A, Judge B, or Judge C, all from the judge's own circuit] I give it a good deal of thought before I disagree. The same with judges from other circuits: Campbell, Breyer; I could go down the list. It's a very big factor. Say there was a panel of [A, B, and C] not directly binding on me. It would be very difficult for me – knowing they're consistently fair, learned, researched – I'd be very loath to walk too far away. With other judges, I look and sort of sniff: "This guy's sort of a

> clown.'' I don't like to cite them, even if they come out the way I want to go. (quoted in Klein 2002, 95).

While this statement was made by a court of appeals judge discussing the reputations of other circuit court judges, we have no reason to believe Supreme Court justices view judicial reputation any differently. As such, we expect the justices will pay particular attention to the prestige of the lower court opinion author and will be more likely to incorporate the language of lower court opinions authored by distinguished jurists into their own opinions.

> *H1: Lower court opinions authored by prestigious judges are more likely to influence the content of the Supreme Court's opinions.*

Judges serving on the lower federal courts enjoy control over whether their opinions are published, at both the federal district court and courts of appeals levels (e.g., Swenson 2004; Wasby 2004). The formal guidelines for the publication of opinions, outlined in the 1973 Advisory Council on Appellate Justice Report, indicate that opinions should be published largely as a function of the breadth to which they affect federal law. That is, since only published opinions have precedential value, the guidelines advise judges to publish opinions that create, alter, or criticize legal rules, involve significant issues of public interest, or resolve conflict between two or more courts. While the extent to which these rather broad and subjective guidelines are followed varies, evidence nonetheless suggests that published opinions tend to have broad import beyond the parties directly involved in the dispute (e.g., Swenson 2004; Wasby 2004).

We hypothesize that lower federal court opinions that are published will be more likely to influence the content of Supreme Court opinions than unpublished opinions. First, because these opinions have significance beyond the parties to litigation and the specific facts of the case, we expect that Supreme Court justices will be especially interested in the development of the legal rules in the lower court opinions for use as a guide in the formation of the Court's own legal rules. Related, because published opinions tend to be longer and more complex than unpublished opinions, published opinions evince better developed legal doctrines than unpublished opinions (Wasby 2004, 81). In this sense, judges expend more time and energy deliberating over the content of published opinions, knowing that they will likely be cited in future litigation. In contrast, because unpublished opinions are targeted at the litigants, judges focus more on the rule of law enunciated in unpublished opinions as it relates to the parties, as opposed to the broad corpus of federal law. Third, because lower court judges, as opposed to their clerks, are inclined to author published opinions (Wasby 2004, 95), these opinions reflect the experience of seasoned jurists, as compared to relatively green clerks who are often charged with drafting unpublished opinions. As such, published opinions demonstrate more thorough deliberation over the jurisprudential content of the opinion.

> *H2: Lower court opinions that are published are more likely to influence the content of the Supreme Court's opinions than unpublished opinions.*

At the lower federal court level, judges have a variety of options with respect to the types of opinions they author or join. Opinions representing the court's decision and reasoning are majority opinions for courts of appeals and three-judge district court panels, while the opinions of single judges perform an analogous function at the district court level. In addition to majority opinions, judges serving on collegial courts (i.e., courts of appeals or three-judge district court panels), occasionally author separate opinions that concur, dissent, or concur in part and dissent in part from those courts' majority opinions. To be sure, these separate opinions perform a very different function than majority opinions. Majority opinions serve as authorities for later cases and, thus, act as precedent. Through majority opinions (or single-judge district court opinions), the court articulates the rule of law established in the case, which theoretically acts as a binding force for future litigation. Unlike majority opinions, separate opinions have no precedential force. Rather, separate opinions represent only the views of those judges who concur or dissent from the majority's decision. While separate opinions do play an important role in the American legal system (e.g., Hettinger, Lindquist, and Martinek 2006), in the eyes of courts and litigants, they are less significant than majority opinions since only majority opinions have precedential value.

Given the differences in these types of opinions, we hypothesize that the Supreme Court will be more likely to incorporate the language of majority opinions (or single-judge district court opinions) than separate opinions. That is, like other actors in the judicial system, we expect the Supreme Court will more closely scrutinize majority opinions than separate opinions as a function of the precedential value of majority opinions. Inasmuch as the Court might give majority opinions special attention, we expect the justices will be more likely to borrow from majority opinions since they establish a rule of law that is potentially binding on the jurisdiction of the lower court from which the opinion emanated.

H3: Lower court majority opinions are more likely to influence the content of the Supreme Court's opinions than separate opinions.

The federal courts operate within a hierarchy of justice. The district courts sit at the bottom of this hierarchy and are charged with the initial resolution of disputes between litigants. The courts of appeals constitute the intermediate appellate courts in the federal judiciary. These courts perform the first—and typically final—review of appeals from the federal district courts. In so doing, the courts of appeals make policy by setting precedents that are binding on federal district courts and future courts of appeals panels within the circuit (e.g., Hettinger, Lindquist, and Martinek 2006).

We believe that a court's place in the federal judicial hierarchy will influence the Supreme Court's reliance on the language used in that court's opinion. More specifically, we hypothesize that the Supreme Court will borrow more language from courts of appeals opinions than district court opinions. First, this stems from the reality that courts of appeals decisions act as binding precedents for the entirety of their circuit. While district court decisions can be used as precedent (e.g., Rowland and Carp 1996, 3) their precedential significance positively pales in comparison to that of the courts of appeals since district court precedents do not formally bind the decisions of federal or state judges (Morriss, Heise, and Sisk 2005, 70). Second, the roles of these courts differ. The district courts operate at the front door of the federal judiciary and their chief responsibility is disposing of controversies relating primarily to the litigants to the suit, which typically involves fact finding. Conversely, the courts of appeals are appellate bodies, correcting errors in the lower court's application of the law, while engaging in broad policy making (e.g., Early 1977). This fact is not lost on Justice Scalia, who explains the differences between trial and appellate courts as follows: "They [trial courts] focus on achieving the proper result in one particular case, not on crafting a rule of law that will do justice in the generality of cases" (Scalia and Garner 2008, 7). In this sense, the courts of appeals and the Supreme Court share much in common in that they are both intimately concerned with the consistency of federal law and their opinions are binding on wider constituencies than district court opinions.

H4: Courts of appeals opinions are more likely to influence the content of the Supreme Court's opinions than district court opinions.

For more than a half century, students of the Supreme Court have recognized the paramount role of ideology in shaping the justices' choices (e.g., Pritchett 1948; Segal and Spaeth 2002). The effect of ideology is so ubiquitous that it influences the justices' decision making in a host of contexts, including the Court's agenda setting (e.g., Perry 1991), the justices' receptivity to oral arguments (e.g., Johnson, Wahlbeck, and Spriggs 2006), the treatment of litigant briefs (e.g., Corley 2008), decisions on the merits (e.g., Segal and Spaeth 2002), and the crafting of opinions (e.g., Maltzman, Spriggs, and Wahlbeck 2000). Moreover, past research demonstrates that a lower court's ideological compatibility with the Supreme Court plays a strong role in determining whether the Supreme Court will reverse or affirm the lower court (e.g., Scott 2006).

Following from this research, we expect that the Supreme Court will be less likely to incorporate the language of lower court opinions that are ideologically distant from the Supreme Court's decision. For example, when the Supreme Court's decision reflects a liberal majority, and the court of appeals opinion also represents the preferences of a liberal majority, we anticipate that the Supreme Court will be more likely to borrow from the court of appeals decision, as compared to an instance in which the court of appeals opinion reflects a conservative majority. First, in so doing, the Supreme Court is potentially rewarding the lower court for acting as a faithful agent. That is, by integrating the language of lower court opinions into its own opinions, the Supreme Court enhances the extent to which the lower court is able to contribute to the development of federal law via Supreme Court precedents. Second, by incorporating the language of an ideologically congruent lower court into its opinion, this provides a shortcut for the justices, reducing the resource costs of engaging in research beyond that which is presented by the litigants, amici, and lower courts. In other words, because the lower court opinion is consistent with the ideological preferences of the Supreme Court's majority, it is an efficient use of the justices' finite time and resources to borrow language from the lower court opinion.[3]

H5: Lower court opinions that are ideologically distant from the Supreme Court's decision are less likely to influence the content of the Supreme Court's opinions.

[3]Our empirical model does not distinguish as to whether the Supreme Court's opinion positively or negatively treats the lower court opinion. Regardless of a positive or negative treatment, we believe the justices will be more likely to borrow language from lower court opinions that are ideologically compatible with their attitudes since the justices are likely to be drawn to arguments, consciously or not, that mesh with their attitudes (e.g., Kunda 1990).

Data and Methods

To provide an empirical test of our hypotheses, we collected data on U.S. Supreme Court majority opinions and the opinions of the U.S. District Courts and the U.S. Courts of Appeals that previously heard the cases ultimately decided by the Supreme Court during its 2002–2004 terms.[4] We initially located the Supreme Court's cases in the Spaeth (2007) database. We then identified the relevant lower court opinions using Westlaw's direct history function, which tracks cases disposed of by the high Court through the legal system, linking each Supreme Court case to the lower court opinions that previously decided each case. The unit of analysis in our data is the Supreme Court opinion—lower court opinion dyad. There are 128 Supreme Court orally argued, signed, majority opinions in our data. Each Supreme Court majority opinion is tied to an average of 2.7 lower court opinions.[5]

Having located the Supreme Court's majority opinions and the lower court opinions from which the Supreme Court's decisions originated, we converted the Court's majority opinions, and all of the lower court opinions, into a text format. We then utilized the plagiarism detection software, WCopyfind 2.6 (Bloomfield 2009), to compare each lower court opinion to the Supreme Court's majority opinion (see also Corley 2008). This program allows us to analyze two (or more) text documents to determine the extent to which they share common words in phrases.[6] Following Corley (2008, 471), we set the shortest phrase to match at six words. Thus, the program ignores matches of five words or less. Bloomfield (2009) recommends setting this parameter at six words, which is the default setting of the program. We set the program to ignore letter case, numbers, and outer punctuation, which enables the program to find matches despite minor editing. The program was also set to skip nonwords (i.e., "words" that contain characters other than letters, with the exception of internal hyphens and apostrophes). The significance of this is that the words in phrases reported by the program do not contain case citations. The program was set such that the shortest string it would consider was 100 characters, which is the default parameter. We programmed WCopyfind to allow up to two imperfections, authorizing the software to bridge its way across up to two nonmatching words as it connects pieces of perfectly matched phrasing. This enables the program to identify matches despite minor editing to the prose. Finally, we set the minimum percentage of matches that a phrase can contain at eighty, which is the recommended setting, in order to allow the program to identify matches notwithstanding minor editing. Thus, the parameters were largely set to the default standards of the program.[7]

After comparing the Supreme Court's majority opinions to each relevant lower court opinion, WCopyfind generates a report that indicates the percentage of the Supreme Court opinion that borrows directly from the lower court opinion. This percentage constitutes our dependent variable. To provide some perspective as to the makeup of our dependent variable, Figure 1 is a box plot of the percentage of the Supreme Court's majority opinions that directly incorporates language from lower court opinions, broken down by the Supreme Court justice who authored the majority opinion. For the purpose of comparison, Figure 1 also reports this information for all observations in the data (labeled SC). This lowest line in the box plot represents the minimum percentage, while the center line in the shaded area represents the median percentage of the majority opinion that borrows from the lower court opinions. The upper and lower quartiles of the dependent variable are indicated by the lines outside of the shaded area, while outliers are represented by the circles. Over all justices, the mean of our dependent variable is 4.32, with a standard deviation of 4.38.

As this figure makes clear, there is a good amount of variation with regard to the extent to which each justice incorporates language from lower court

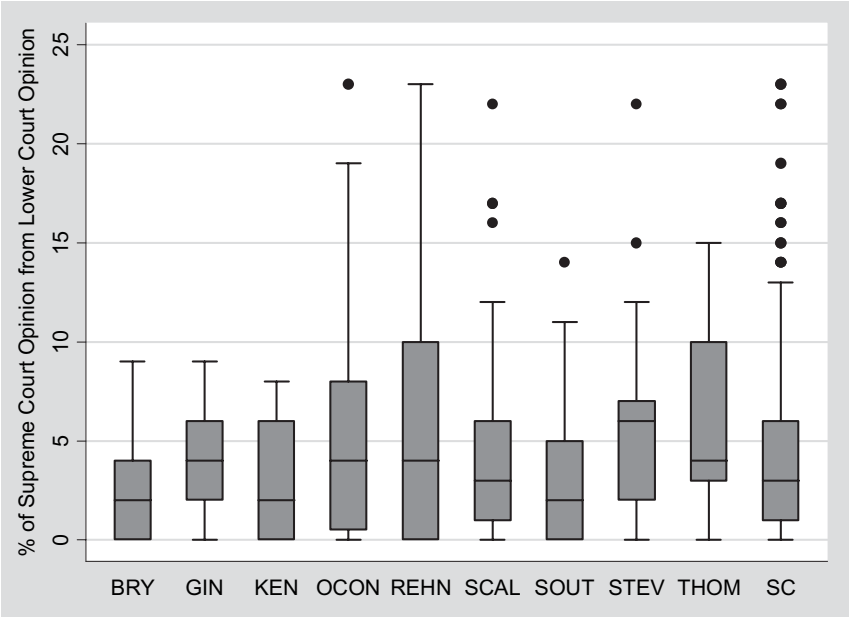
[4]We recognize that the Supreme Court can incorporate the language of the opinions of specialized federal courts (e.g., federal magistrate judges and other Article I courts) into its own opinions. However, because we lack measures of judicial prestige for the judges serving on these courts, we exclude them from consideration. While we acknowledge that the opinions of state court judges can also shape the content of the Supreme Court's opinions, because there are difficulties comparing state and federal judges, particularly relating to judicial prestige and the publication of opinions, we focus our attention on the federal courts.

[5]We excluded a small number of procedural opinions from the lower courts, such as the denial of a petition for an en banc hearing (provided there was no dissent from the denial), since these opinions are generally extremely short and do not address the substantive issues implicated in the litigation.

[6]Since WCopyfind provides a means to examine the extent to which two or more documents share common words in phrases, it does not differentiate between those situations in which attribution for a shared phrase is identified (that is, those instances in which a citation is provided) from those in which no attribution is given.

[7]To verify that our results are not unduly influenced by the settings for WCopyfind, we increased the shortest phrase to match to 10 words (from six), resulting in a more conservative approach to the detection of plagiarism. While the mean of the dependent variable decreases from 4.3 to 2.5, the substantive results of our statistical model remain unchanged.

FIGURE 1 Percentage of U.S. Supreme Court Majority Opinions from Lower Federal Court Opinions, by Justice (2002-2004 Terms)



Note: BRY = Justice Breyer; GIN = Justice Ginsburg; KEN = Justice Kennedy; OCON = Justice O'Connor; REHN = Chief Justice Rehnquist; SCAL = Justice Scalia; SOUT = Justice Souter; STEV = Justice Stevens; THOM = Justice Thomas; SC = Supreme Court

opinions into the Supreme Court's majority opinions. Majority opinions authored by Thomas have the highest average percentage (6.22), followed by majority opinions authored by Rehnquist (5.86) and Stevens (5.64). Breyer's opinions have the lowest mean percentage drawn from lower court opinions (2.57), followed by Souter (3.01) and Kennedy (3.20). Rehnquist evinces the highest amount of variability in his reliance on lower court opinions, as indicated by the size of the interquartile range: the extent to which Rehnquist directly incorporated language from lower court opinions ranges from 0 to 23%. This is followed by O'Connor and Thomas, while Kennedy, Ginsburg, and Breyer have the lowest interquartile dispersion.

In order to test factors that shape the Supreme Court's reliance on the language from lower court opinions, we operationalize our independent variables as follows. To capture the prestige of the lower court judges who authored the opinions under comparison, we use the rating each judge received from the American Bar Association (ABA) at the time he or she was nominated to the federal bench (e.g., Hettinger, Lindquist, and Martinek 2006; Klein and Morrisroe 1999). The ABA rates judges according to their qualifications for office and general reputations in the legal community. Over the course of its ratings, the ABA employed four ratings: "not qualified," "qualified," "well qualified," and "exceptionally well qualified." In 1991, the ABA ceased using the "exceptionally well qualified" category. Given that our data contain judges appointed both before and after 1991, our measure of *Judicial Prestige* is coded such that 1 = "not qualified," 2 = "qualified," and 3 = "well qualified" or "exceptionally well qualified."[8] We expect this variable will be positively signed.[9]

To measure whether the lower court opinion was published or not, we reviewed each lower court opinion and created a *Published Opinion* variable, scored 1 for published lower court opinions and 0 for lower court opinions that were not published. The information

[8]For per curiam opinions, we use the mean ABA rating of the judges serving on the panel.

[9]While we recognize that the use of the ABA scores is an imperfect proxy for judicial prestige, in that there is evidence of an ideological bias in these scores (Vining, Steigerwalt, and Smelcer 2009), we believe they are preferable to using a citation based measure since citation counts also exhibit ideological bias (Choi and Gulati 2008), they capture factors unrelated to prestige (Landes, Lessig, and Solimine 1998), they do a poor job of capturing the prestige of relatively new jurists (Landes, Lessig, and Solimine 1998), and they do not put circuit judges on an equal footing with district court judges (in that courts of appeals judges are cited far more frequently than district court judges).

regarding the publication of lower court opinions is spelled out in Westlaw above the case citation. For courts of appeals decisions, the language corresponding to nonpublished opinions typically appears as follows: "This case was not selected for publication in the Federal Reporter." For district court opinions, nonpublished opinions are commonly identified with the following language: "Not Reported in F.Supp.2d." We expect this variable will be positively signed.

To test hypotheses three and four, we employ two variables. *Court of Appeals Majority Opinion* is scored 1 for court of appeals majority opinions (three-judge panel or en banc) and court of appeals per curiam opinions, and 0 otherwise. *District Court Opinion* is scored 1 for single-judge district court opinions, three-judge district court majority opinions, or three-judge district court per curiam opinions, and 0 otherwise. The reference category is separate opinions (concurring, dissenting, or concurring in part and dissenting in part) corresponding to three-judge courts of appeals panels, three-judge district court panels, or en banc courts of appeals panels. Consistent with hypothesis three, we expect these variables will be positively signed. Following from hypothesis four, we expect the coefficient corresponding to the *Court of Appeals Majority Opinion* variable will be larger than the coefficient of the *District Court Opinion* variable.

To capture the *Ideological Distance* between the lower court opinion and the Supreme Court's majority opinion, we calculated the absolute difference between the ideology score of the median judge in the lower court majority (or the district court judge) and the median justice in the Supreme Court's majority coalition. The ideology scores of the lower court judges are based on the Giles, Hettinger, and Peppers (2001) scores, while the ideology scores of the Supreme Court justices are based on the Judicial Common Space scores (Epstein, Martin, Segal, and Westerland 2007), which put Supreme Court justices in the same ideological space as the Giles, Hettinger, and Peppers (2001) scores. We expect this variable will be negatively signed.[10]

[10]We recognize that there is a debate in the literature as to whose preferences are most clearly reflected in Supreme Court majority opinions (e.g., Bonneau et al. 2007). Accordingly, we experimented with a variety of alternatives, including calculating the absolute ideological distance between: the lower court opinion author and the Supreme Court opinion author; the median judge in the lower court majority and the Supreme Court opinion author; and the median judge in the lower court majority and the median justice on the Supreme Court. In addition, we employed a dichotomous variable that captured whether the lower court opinion was ideologically congruent with the Supreme Court's majority opinion. The results of those alternative model specifications are consistent with the findings reported here.

The final variables in our model enable us to account for other factors that might shape the extent to which Supreme Court majority opinions incorporate language from lower court opinions. First, we employ an *Opinion Length* variable to capture the reality that the lower court opinions under analysis vary with respect to their length. This variable represents the number of words in each lower court opinion, divided by 1,000 to make the size of the coefficient more manageable. Because longer opinions provide the Supreme Court with more opportunity to borrow from the lower court opinion, we expect this variable will be positively signed.[11] Second, we control for the political salience of the case in order to account for the fact that, in salient cases, the justices might expend more time and energy shaping the content of the majority opinion than in relatively trivial disputes (Corley 2008; Maltzman, Spriggs, and Wahlbeck 2000). To capture the salience of a case, we adopt a measure based on the number of questions asked during oral argument (Black and Johnson 2008), which provides an *ex ante* proxy of a case's import to the justices. The *Political Salience* variable represents the term specific z-score of the number of questions asked during oral argument for each case in the data. We expect this variable will be negatively signed. Next, we consider the interplay between the justices' reliance on litigant briefs vis-à-vis lower court opinions. This allows us to evaluate whether the justices' dependence on one source of information (i.e., litigant briefs), relates to their use of a second source of information (i.e., lower court opinions). The *Percent from Petitioner Brief* and *Percent from Respondent Brief* variables represent the percentage of the Court's majority opinion adopted from each party's brief, using the WCopyfind settings discussed above. We do not expect the justices to view incorporating language from various information sources as a zero sum game. Rather, we believe these variables will be positively signed since we expect that, if a justice is likely to borrow from one source of information (i.e., litigant briefs), he or she also will be more likely to borrow from a second source of information (i.e., lower court opinions). Fifth, we account for temporal constraints that may influence the extent to which the justices make use of lower court opinions. In particular, we expect that the amount of time a justice can devote to writing an opinion is likely to affect that justice's reliance on the language from lower court opinions. As Wahlbeck, Spriggs, and Maltzman (1999)

[11]The correlation between the *Published Opinion* and *Opinion Length* variables is only 0.107, suggesting that multicollinearity is not a problem with regard to the inclusion of these variables.

note, workload constraints are especially significant as the Court approaches the end of its term. To capture this, we include an *End of Term* variable, which represents the number of days between the date of oral argument for each case and July 1, the traditional end of the Court's term (Wahlbeck, Spriggs, and Maltzman 1999). We expect this variable will be positively signed. Finally, we include dummy variables for each Supreme Court majority opinion writer, save Chief Justice Rehnquist (who acts as the reference category). As Figure 1 illustrates, there is a good amount of variation with respect to the frequency with which the justices incorporate the language of lower court opinions into their own majority opinions. The inclusion of these dummy variables allows the model to capture this fact (although we do not report the results of the justice-specific dummy variables in the statistical model that follows).

Results

Given the makeup of our dependent variable, we utilize ordinary least-squares regression to test the factors that shape the Supreme Court's incorporation of lower court opinions into its own majority opinions. Because each Supreme Court majority opinion appears in the data more than once, in that each majority opinion is tied to an average of 2.7 lower court opinions, we use robust standard errors, clustered on docket number. This allows the model to account for the nonindependence of observations. The empirical results of our model are reported in Table 1. The model's R-squared value is a respectable 0.426 and the statistically significant F-test indicates that the variables included in this analysis systematically contribute to the extent to which the Supreme Court integrates language from lower court opinions.

Most importantly, the model provides support for four of our five hypotheses. First, we find that the Supreme Court is more likely to incorporate lower court opinions into its majority opinions when the lower court opinion was written by a prestigious judge. In substantive terms, 1.7% more of a Supreme Court's opinion comes from a lower court opinion if it was authored by a judge rated "well qualified" or "exceptionally well qualified" by the American Bar Association, as compared to a judge with an "unqualified" rating. This is indicative of the fact that, like courts of appeals judges (e.g., Klein 2002), the justices on the Supreme Court pay close attention to the prestige of the lower court opinion author.

TABLE 1 The Influence of Lower Federal Court Opinions on U.S. Supreme Court Majority Opinions, 2002-2004 Terms

Variable	Coefficient
Judicial Prestige [+]	0.841* (0.451)
Published Opinion [+]	2.24*** (0.552)
Court of Appeals Majority Opinion [+]	3.24*** (0.487)
District Court Opinion [+]	1.56** (0.569)
Ideological Distance [−]	−0.582 (0.715)
Opinion Length [+]	0.119*** (0.036)
Political Salience [−]	−0.602** (0.232)
Percent from Petitioner Brief [+]	0.108* (0.051)
Percent from Respondent Brief [+]	0.185*** (0.042)
End of Term [+]	0.007* (0.003)
Constant	−5.49** (1.93)
R^2	0.426
F-test	9.49***
N	345

The unit of analysis is the lower court opinion-Supreme Court opinion dyad. The dependent variable is the percentage of the Supreme Court opinion taken from the lower court opinion. Entries are OLS regression coefficients. Numbers in parentheses are robust standard errors, clustered on docket number. The expected direction of the coefficients of the independent variables appears in brackets. The model includes eight justice-specific dummy variables (results not shown). ***$p < .001$, **$p < .01$, *$p < .05$ (one-tailed tests).

We also find that the Supreme Court is more likely to incorporate lower court opinions that are published. All else equal, 2.2% more of the Court's opinion is incorporated from published lower court opinions, as compared to unpublished opinions. This corroborates extant research suggesting that lower court judges devote more time and attention to the doctrinal development of published opinions (e.g., Wasby 2004), and apparently the justices take notice, relying more on published lower federal court opinions in their majority opinions.

Consistent with our third and fourth hypotheses, the results illustrate that the Court relies more on majority opinions than separate opinions and is more likely to make use of courts of appeals opinions than district court opinions. First, compared to separate opinions, 3.2% more of the Supreme Court's majority opinion comes from courts of appeals majority opinions and 1.6% more comes from district court opinions. Since court of appeals majority opinions (or single judge district court opinions) have precedential value, it is apparent that the justices recognize this fact and pay close import to the doctrinal content

of these opinions. Second, Table 1 indicates that the Supreme Court is more reliant on courts of appeals opinions than district court opinions. This is evidenced by the fact that the coefficient for the *Courts of Appeals Majority Opinion* variable is statistically significantly larger than that of the *District Court Opinion* variable ($F = 12.52$, $p = 0.0006$). More substantively, 1.7% more of the Supreme Court's opinion is adopted from court of appeals majority opinions than district court opinions (the reference category are separate opinions for these variables). This indicates that the justices are especially dependent on court of appeals majority decisions as a function of the fact that court of appeals majority opinions have more significant precedential value than district court opinions.

Our results fail to provide evidence that the Supreme Court is less likely to borrow from lower court opinions that are ideologically distant from the Court's decision. This suggests that, though scholars have demonstrated the important role of ideology in shaping a variety of aspects of Supreme Court behavior (e.g., Johnson, Wahlbeck, and Spriggs 2006; Maltzman, Spriggs, and Wahlbeck 2000; Segal and Spaeth 2002), the justices are not necessarily motivated by the ideological compatibility of the lower court opinion with the Court's majority opinion when determining the extent to which they integrate the language from lower court opinions into the Court's precedents.

Turning now to the control variables, we find that, as the length of a lower court opinion increases, so too does the Supreme Court's incorporation of language from that opinion. For each additional 10,000 words in a lower court opinion, the Supreme Court borrows 1.2% more of the lower court opinion. We also find that the justices integrate fewer phrases from lower court opinions in salient cases: a one standard deviation increase in the number of questions asked during oral argument results in a 0.7% decrease in the percentage of the Supreme Court's majority opinion taken from lower court opinions. This is consistent with research indicating that the justices are especially interested in the doctrinal development of the majority opinion in salient cases and expend more time and effort crafting these landmark decisions (Maltzman, Spriggs, and Wahlbeck 2000). Table 1 also indicates that the more the justices borrow from the briefs of the litigants, the more they borrow from the lower court opinion. A one standard deviation increase in the percentage of the petitioner brief integrated into the Court's majority opinion results in a 0.6% increase in the percentage of the Court's opinion borrowed from the lower court opinion, while a one standard deviation increase in the percentage from the respondent brief corresponds to a 1.1% increase in the dependent variable. This reveals that, when the justices borrow from one source of information (i.e., litigant briefs), they are more likely to make use of a second source of information (i.e., lower court opinions). Finally, our results illustrate that workload pressures shape the justice's reliance on lower court opinions. A one standard deviation increase in the number of days to July 1, the traditional end of the Court's term, results in a 0.5% increase in the percentage of the lower court opinion assimilated into the Supreme Court's opinion.

Although the differences in percentages for each individual variable may seem small, two hypothetical situations are illuminating in that they exemplify the cumulative effect of the variables in our model. First, we compute the baseline value of the percentage of the Court's opinion coming from the lower court's opinion when Rehnquist is the opinion writer, which is calculated by holding all continuous variables at their mean values while holding all discrete variables at their modal values. The baseline prediction is 6.73%. When the lower court opinion is an unpublished separate opinion, authored by a judge with a "not qualified" rating from the ABA, in a case that was orally argued in January with 128 questions asked during oral argument (the mean), Justice Steven's predicted use of the lower court opinion is a mere 0.01%. Conversely, when the lower court opinion is a published, court of appeals majority opinion written by a judge with the highest rating from the ABA, in a case orally argued in October with 57 questions asked during oral argument (the minimum), the predicted percentage of Justice Thomas's majority opinion borrowed from the lower court opinion is 9.4%. As this hypothetical indicates, under certain conditions, lower court opinions have a rather dramatic influence on the content of Supreme Court majority opinions, demonstrating the ability of the lower courts to shape the development of federal law.[12]

Conclusions

The Supreme Court's majority opinions play an enormous role in the American legal and political

[12]To ensure our results are not overly sensitive to the terms under analysis, we collected data on a random sample of 56 docket numbers from the 1985, 1987, and 1989 terms. Those results largely mimic the results reported in Table 1, although we failed to find support for hypothesis four in the random sample (and were unable to test hypothesis two due to a lack of variability). Given this, we conclude that our results are generally robust to alternative time frames.

systems. Within the legal system, these opinions act as precedents, constraining the behavior of lower court judges and future Supreme Courts. Moreover, majority opinions act as guides for litigants, shaping the arguments they make in their written briefs and during oral arguments. Within the broader political system, Supreme Court opinions influence the behavior of bureaucracies and further place limits on the content of legislation in congress and state legislatures. Despite the significance of Supreme Court opinions, few have systematically examined the factors that shape the content of the Court's majority opinions. The purpose of this research is to add to our understanding of the content of Supreme Court opinions by investigating the justices' reliance on lower court opinions in crafting the Court's majority opinions.

Our results indicate that the justices systematically incorporate language from lower court opinions into the Court's majority opinions based on their perceptions as to whether the lower court opinions will enhance their ability to make effective law and policy. We find that the justices are especially likely to borrow from lower court opinions that are written by prestigious judges. Moreover, the justices are particularly likely to assimilate published lower court opinions and integrate more language from lower court majority opinions than separate opinions, in addition to relying more on U.S. Courts of Appeals opinions than U.S. District Court opinions. Taken as a whole, this research provides substantial insight into the factors that contribute to the content of the Supreme Court's majority opinions.

Beyond this article's primary contribution to the greater understanding of the content of Supreme Court majority opinions, this research is significant in a number of other ways. First, it is indicative of the importance of understanding the judiciary as a web of interactions between different levels of the legal system. The Supreme Court formally sits at the apex of the judicial pyramid, with the lower courts typically viewed as subordinate, inferior entities charged with faithfully enacting the Supreme Court's policies. Indeed, many conceptualize the Supreme Court as a principal directing (or attempting to direct) its agents, the lower courts (e.g., Benesh 2002). Thus, previous literature analyzing the interaction between the Supreme Court and lower courts overwhelmingly focuses on lower court interpretation of, and compliance with, Supreme Court precedent (e.g., Klein 2002). In this article, we demonstrate that the lower courts are not merely the Supreme Court's inferiors, but that the lower courts have the ability to shape the doctrinal force of federal law. Though the justices have substantial, if not total, control over the content of their opinions, it is clear that the Court does not start with a blank slate. Rather, the language of the Court's majority opinions is derived from many different sources, and one such source is the opinions of the lower courts that initially disposed of the case.

Second, this research corroborates the value of using computerized text analysis to understand legal and political texts. While legal scholars have long investigated the content of the Supreme Court's opinions in order to understand the doctrinal development of federal law, they have overwhelmingly done so on an issue-by-issue or case-by-case basis, not fully taking advantage of more systematized research tools. As this article reveals, much can be learned about legal and political texts by employing computer based text analysis programs, such as the plagiarism detection software used here, as well as other automated methods (e.g., Laver, Benoit, and Garry 2003). For example, future research might use plagiarism detection software to evaluate the extent to which legislation authored by interest groups makes its way into finished legislation. Similarly, one could profitably exploit this software to evaluate how presidential speeches shape print media coverage of the president.

Like all research, this analysis has its limitations. For example, the content analysis software we employ does not disentangle the positive and negative treatment of the lower court opinions, nor does it ascertain the extent to which Supreme Court opinions borrow language from lower court judges' factual treatments of the controversy or from arguments relating to the substance of the legal questions facing the courts. Despite this, and consistent with our detailed explanation of the meaning of lower court influence, we are confident that our dependent variable is valid and reliable in that it systematically demonstrates that the Supreme Court assimilates lower court opinions into its own precedents. Indeed, the plagiarism detection software we employ is intended to do just that: determine the extent to which two documents share common words in phrases.[13] As such, we believe that future research

[13]While we believe that, for example, attempting to discern whether the Supreme Court has adopted the rule of law announced in the lower court's opinion, as compared to integrating dicta from the lower court judge, is a worthy endeavor, this necessarily leads to very subjective coding decisions that we were not compelled to make, potentially reducing the reliability and validity of the inferences one can draw. Such is the case because even lower court judges cannot agree as to exactly what constitutes a holding as compared to dicta (e.g., Leval 2006).

into the determinants of lower court opinion content, particularly with regard to the U.S. Courts of Appeals, will provide added insight into the doctrinal development of federal law. To be sure, the importance of understanding the content of judicial opinions cannot be overstated and we are certain that the addition of systematic research into this area will provide most welcome insight into the legal and political systems.

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