TREATISE TACTICS

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ABSTRACT

A judge's choice of authority is generally governed only by the unwritten social norms of the judiciary, norms which do not exist in canonical textual form and thus are not always visible. Stare decisis norms, those that dictate which judicial opinions are binding on judges, are the subject of endless discussion while the norms that govern the use of non-binding (optional) authority receive little attention by comparison. The selection of optional authority is deemed relatively insignificant, guided by a vague set of tips that are not specifically grounded in theory or empirical data.

I conducted an original study of published opinions in the Tenth Circuit, focused on citation to optional sources of authority. Contrary to conventional wisdom, the data suggests that treatises carry a significant amount of weight as legal authority. Citation to optional sources of authority such as treatises are not random, unpredictable choices, based solely on whether a particular judge finds the content "persuasive." Treatises are more likely to be cited by men than women, more likely to be cited by Republicans than Democrats, and more likely to be cited in the majority when a dissent has also been written. I analyze these and other patterns in the data to begin developing a modern theory of treatises as a genre of legal authority.

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INTRODUCTION

What do judges count as law and why? This article uses an empirical approach to better understand how and why judges choose authority to support their published decisions. In particular, I seek to explain the circumstances under which judges invoke legal treatises[1] as a source of authority. I employ data collected from published cases in the Tenth Circuit over a three-year period. The data is consistent with the expectation that treatises have significant content-independent weight as legal authority, despite their "secondary" status.[2] Analysis of the data also reveals statistically significant patterns of use among judges on the Tenth Circuit: treatises are more likely to be cited in a majority opinion when a dissent has been filed; Republican-nominated judges are twice as likely to cite to a treatise than Democrat-nominated judges; and male judges are almost three times more likely than female judges to cite to a treatise.

If judicial norms accord weight to treatises, those treatises have the power to influence judicial decisions and articulation of the law moving forward.[3] That is not the same as proving treatises actually influence decisions, but it is an important starting point. Consider, for example, Justice Alito's recent extensive reliance on treatises in *Dobbs v. Jackson Women's Health Organization*.[4] Justice Alito uses treatises as "historical evidence" to establish that "a right to abortion is not deeply rooted in the Nation's history and traditions."[5] Describing the treatises he cites as "[t]he eminent common-law authorities," Justice Alito uses them to prove that abortion after quickening was a crime under the common law.[6] The distinction

1. I define treatises broadly as texts which articulate the law, offering more than just quotations and citations, consistent with the definition offered by Frederick Hicks in 1923. FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH 145 (1923) ("Considered as a class, treatises are those law books which, in connected literary form, attempt to restate and discuss the subject matter of the law.").

2. Treatises are "secondary sources" as opposed to primary sources of law. *Id.* at 275.

3. *See, e.g.*, Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE. L.J. 1750, 1855 (2010) ("[M]ethodology matters, . . . even if we cannot prove that it affects outcomes."); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 635 (1994) ("The lawyer or judge who gives a reason steps behind and beyond the case at hand to something more encompassing."); Allison Orr Larsen, *Factual Precedents*, 162 U. PENN. L. REV. 59, 98 ("There are consequences . . . and commitments that attach when a legal decisionmaker gives reasons for her decision.").

4. 142 S. Ct. 2228 (2022).

5. *Id.* at 2249–51, 2253–54, 2267 (citing to treatises by "common-law authorities like Bracton, Coke, Hale, and Blackstone . . . .").

6. *Id.* at 2249.

between using treatises as evidence of the law and treatises as the law itself is a fine one, and perhaps one without a practical difference.

Any source of authority that judges regularly rely on is worth our attention, even if the source is nonbinding. The data I collected shows that treatises are a multipurpose tool of opinion writing. They are cited for their expertise, as evidence of what other courts are doing, and as a source of historical or factual information in specialized areas. They are regularly cited and quoted as the source of a rule that the court relies on without comment. The data revealed patterns of citation, which provide insight into factors that may affect the way that judges choose authority to support their published decisions. In other words, the data sheds light on the craft of judicial opinion writing.

I. BACKGROUND AND THEORETICAL EXPECTATIONS

Judicial decision-making is the subject of a vast array of scholarship across numerous fields including law, economics, political science, and psychology. Its widespread relevance reflects the complexity of the subject matter; there is no simple way to explain judicial choices. The prevailing view is that judicial decision-making "is best characterized as a complicated mix of motivations,"[7] including not just ideological and legal motives,[8] but self-interested economic motives like job satisfaction, preservation of leisure time, salary, and the possibility of promotion.[9] Scholars have also begun to analyze judicial personality traits,[10] finding support for the theory that the conscientiousness of judges influences their opinion writing.[11] Judges are human, and their behavior cannot be explained by either a purely "attitudinal" or "legal" model.[12] In this Article, I seek a better understanding of the choices judges make in the process of judicial decision-making rather than focusing solely on outcomes. In particular, I address judges' choices of authority to support the reasoning in their written opinions.

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7. Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11, 24 (2013).

8. *Id.* at 25.

9. LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 12 (2006); LEE EPSTEIN, WILLIAM M. LANDES, & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES 168–69 (2013).

10. RYAN C. BLACK, RYAN J. OWENS, JUSTIN WEDEKING, & PATRICK C. WOHLFARTH, THE CONSCIENTIOUS JUSTICE: HOW SUPREME COURT JUSTICES' PERSONALITIES INFLUENCE THE LAW, THE HIGH COURT, AND THE CONSTITUTION 17–18, 23 (2020) (citing Jannica Heinström, *Five Personality Dimensions and Their Influence on Information Behaviour*, 9 INFO. RSCH. (2003) (arguing that conscientious individuals tend to look for more information than others).

11. *See* BLACK ET AL., *supra* note 10, at 237–243 (arguing more conscientious justices write opinions with more cognitive complexity, more extensive legal breadth, and more words).

12. *See, e.g.*, BAUM, *supra* note 9; LEE EPSTEIN & KEREN WEINSHALL, THE STRATEGIC ANALYSIS OF JUDICIAL BEHAVIOR 31 (2021) ("To the extent that judges are influenced by their emotions, intuitions, and biases it complicates their ability to make strategically rational decisions. And thus it complicates our efforts to explain their behavior. There is no getting around the fact that these very human features can distort purely strategic decision making.").

A judge's choice of authority is generally governed only by the unwritten social norms of the judiciary.[13] Those norms determine which materials are acceptable sources and how much weight those sources have. The cornerstone norm of authority is stare decisis, which, like almost all other norms governing the use of authority, has no textual origin and remains "unwritten."[14] It evolved organically, with the concept of "binding" precedent only starting to take hold in the early nineteenth century.[15] It is far from the only norm governing the use of authority in legal opinions—a wide array of norms either dictate or at least strongly influence the choices judges make in crafting their opinions. Yet almost all attention is focused on binding authority and the corresponding norm of stare decisis. In contrast, norms governing the use of optional authority (any authority that is nonbinding)[16] are infrequently discussed and not well understood. Instead, judicial selection of nonbinding authority, if addressed at all, is explained by the persuasiveness of the authority's content, with a few tips about what makes the content more or less persuasive.[17] Those tips typically reference content-independent factors (like the reputation of the author), though they are framed in terms of persuasiveness. If judges really do only cite to nonbinding authority whenever they find its substantive content persuasive, the judicial choice of optional authority seems largely idiosyncratic and not worth studying.

Yet, citation to optional authority is a routine and integral part of judicial decision-making—not only acceptable but a widely practiced aspect of opinion writing. In a one-year study of published Tenth Circuit opinions, I found that in 88% of those opinions, the authoring judge cited to at least one piece of optional authority.[18] The reason is not a mystery—judges are socialized to rely on the law,[19] and binding law does not resolve all legal issues. When binding law runs out, judges still have to make a decision and justify it. Both institutional and individual legitimacy matters, and

13. Amy J. Griffin, *Problems with Authority*, 97 ST. JOHN'S L. REV. (forthcoming 2023) (manuscript at 3) (on file with author).

14. By unwritten, I mean not enacted or codified in any formal way.

15. THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 308 (1929) (stating that stare decisis developed slowly, almost imperceptibly over several hundred years, assuming its modern form only in the late eighteenth and early nineteenth centuries. "[I]t is only in the nineteenth century that the present system of case law with its hierarchy of authorities was established.").

16. Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1946–47 (2008) (proposing term "optional authority").

17. *See infra* Section I.A.

18. Amy J. Griffin, Treatise Data Compilation (last visited Nov. 28, 2022) (unpublished data set) (on file with author) [hereinafter Griffin Data Compilation].

19. J. Mitchell Pickerill & Christopher Brough, *Law and Politics in Judicial and Supreme Court Decision Making*, *in* ROUTLEDGE HANDBOOK OF JUDICIAL BEHAVIOR 42 (1st ed. 2017) ("[L]aw as a constraint comes from the socialization judges received through their legal education."); Frank B. Cross, James F. Spriggs II, Timothy R. Johnson, & Paul J. Wahlbeck, *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 497 (2010); Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 L. & SOC'Y REV. 135, 137 (2006); Jack Knight, *Are Empiricists Asking the Right Questions About Judicial Decisionmaking*?, 58 DUKE L.J. 1531, 1532 (2009) ("Their strategic decisions are defended and justified by an array of normative and legal sources, and are proffered within a complex institutional context.").

citation to authority—whether binding or optional—is one of the central ways judges legitimize their decisions, protecting both individual and institutional judicial reputations.[20] When a judge includes citations to sources accepted as legitimate by the legal community (as determined by social norms), those citations support an ideal rule-of-law version of decision-making in which judges make neutral decisions resting on legal grounds rather than personal ones. In this respect, sources cited in an opinion need not dictate the outcome of the case to be important.[21] The reasons, arguments, and justifications offered in an opinion are significant because they are used to legitimize the decision. Moreover, what an appellate judge includes in a published opinion becomes part of the law moving forward, regardless of its source.[22]

A. Perceptions of the Treatise in the U.S. Legal System

Treatises are often described as positivist,[23] as they collect, organize, synthesize, and summarize legal principles in written form.[24] In short, one of their primary tasks is textualizing unwritten law. They are widely viewed as having arisen in response to the increasing number of binding cases—so many that it became difficult for practitioners to keep track of them all.[25] A thorough history of the treatise is beyond the scope of this Article, and others have taken up that task, but I provide a brief description here.[26] Treatises have been a relevant part of the U.S. legal system since

20. Knight, *supra* note 19, at 1533 ("The task of crafting persuasive opinions plays a central role in two aspects of the decisionmaking process: the justification of the legitimacy of the decision and the establishment of new law.").

21. Cross et al., *supra* note 19, at 491 ("A more refined theory suggests that citations are not wholly determinative of outcomes but operate as an important influence and constraint on Court decisions."); Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 45, 52, 56 (2009) ("[J]udicial decisionmaking is not just about outcomes; it is also about the *process* of decisionmaking." "[C]ase outcomes are not, to my mind, the appropriate measure of how diversity affects judicial decisionmaking. It is the process even more than the outcome that may be most important to measure.").

22. Knight, *supra* note 19, at 1544 ("[T]he reasons, arguments, and justifications judges offer in their opinions . . . determine both the substantive content of the law and the normative legitimacy of their decisions.").

23. Richard A. Matasar, *Treatise Writing and Federal Jurisdiction Scholarship: Does Doctrine Matter When Law Is Politics?*, 89 MICH. L. REV. 1499, 1508 n.29 (1991) (describing the construction of law in treatises as "beholden to positivism.").

24. *Id.* ("Treatises . . . implicitly assume that traditional legal materials and analyses matter. Therefore they collect, synthesize, and analyze doctrine flowing from cases, precedents, statutes, constitutional provision, legislative histories, and other written legal materials. These represent the data from which one can construct "law." Such law construction is beholden to positivism. It sees law as a science . . . ."); Steven Wilf, *Legal Treatise*, *in* THE OXFORD HANDBOOK OF LAW AND HUMANITIES 686, 698 (Simon Stern ed., 2019) (The treatise was "designed to present an objective summation of binding law.").

25. Matasar, *supra* note 23, at 1508 n.29.

26. *See, e.g.*, LAW BOOKS IN ACTION: ESSAYS ON THE ANGLO-AMERICAN LEGAL TREATISE (Angela Fernandez & Markus D. Dubber eds., 2012); Morton J. Horwitz, *Part III—Treatise Literature*, 69 L. LIBR. J. 460 (1976); John Cannan, Prologue's Past: What the History of the Treatise Tells Us About Legal Information's Future (Apr. 6, 2022) (unpublished article), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4077303; A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 633 (1981); Wilf, *supra* note 24, at 691–93.

its inception, never universally acclaimed nor unanimously disdained, though their influence has waxed and waned over time.[27]

In one well-known 1981 article on treatise use, A.W.B. Simpson argued that the treatise had declined from its earlier preeminence.[28] He attributed the decline of the treatise to the existence of many different state jurisdictions and the quantity of reported cases available.[29] According to Simpson, the realist movement, with its "scepticism and even [] cynicism about the significance of legal doctrine in the determination of cases,"[30] had the greatest impact on the failing reputation of the treatise. In Simpson's view (and he was not the only one),[31] "treatise writing flourished in association with a certain type of legal theory, and when that theory fell out of favor the practice diminished in importance."[32] In the 1990s, one prominent judge lamented the "[academic turn] away from treatise writing,"[33] describing a need for high-quality treatises, those that "create an interpretive framework; categorize the mass of legal authorities in terms of this framework; interpret closely the various authoritative texts within each category; and thereby demonstrate for judges or practitioners what 'the law' requires."[34] However, treatises do not appear to have ever fallen out of use entirely, as judges have continued to cite to them.[35]

There has long been a tension inherent in the concept of a treatise—the form, which arguably freezes the law in place,[36] versus the purpose (of

27. W. M. Lile, *The Exaltation of Secondary Authority*, 14 BENCH & BAR 53, 55 (1919) ("The large majority of these volumes [of secondary authority] are but inaccurate and inexhaustive digests."); HICKS, *supra* note 1, at 156 ("We must, I think, accept it as a fact that treatises of the better class are of great use and value both to lawyer and judge; and it is possible, without withdrawing from our position that treatises are not authority, as we have defined it, to justify the cautious use of them."). Treatises are generally said to have been well regarded in the 1800s, with the digest system provided by West Company in 1887 perhaps decreasing the importance of treatises as finding tools. Cannan, *supra* note 26, at 23; *see also* Richard A. Danner, *Influences of the Digest Classification System: What Can We Know?*, 33 LEGAL REFERENCE SERV. Q. 117, 120–22 (2014). Some scholars have asserted that treatises reached another high point in the mid-twentieth century. *See, e.g.*, JOHN B. NANN & MORRIS L. COHEN, THE YALE LAW SCHOOL GUIDE TO RESEARCH IN AMERICAN LEGAL HISTORY 189 (2018) ("The mid-twentieth century was the heyday of the modern treatise.").

28. Simpson, *supra* note 26, at 676.

29. *Id.*

30. *Id.* at 677.

31. *Id.* at 633; *see also* Morton, *supra* note 26, at 460 ("The decline of the treatise is one of the important consequences of the assault on the systemization of legal doctrine that is associated with the rise of a legal realism during the 1920's and 1930's.").

32. Simpson, *supra* note 26*,* at 633.

33. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 49 n.44 (1992).

34. *Id.* at 43.

35. HICKS, *supra* note 1, at 155 ("Proof that judges do frequently cite and quote treatises may be found by an examination of any series of law reports."); Cannan, *supra* note 26, at 48 ("Criticism against citing treatises in this country, especially treatises of dubious quality, has, historically, been just as ineffective at eradicating that practice . . . .").

36. Simpson, *supra* note 26, at 675 ("Good treatises will indeed tend to have a conservative effect on the law to the extent that they are successful; thus much of the conceptional structure of modern contract law was fixed by the early nineteenth-century treatise literature. In this way, treatises contain the seeds of their own destruction.").

at least some treatises) as an agent of change.[37] In a recent chapter on the legal treatise, Steven Wilf described it as "a fraught, unstable genre[,]"[38] "crammed with so many contradictions."[39] On one hand, treatises are often seen as a tool of convenience; a useful summary of the status quo. For example, in 1977, John Henry Merryman wrote that citations to treatises "are often 'convenience' or 'baseline' citations,"[40] describing a baseline citation as a "reference to a reliable, documented statement of a relatively settled point of law that is not easily, accurately, or completely supplied by citing a leading case."[41] On the other hand, treatises are not necessarily neutral summaries. "Legal treatises are supposed to describe the law and report it in something like a neutral or objective way; but they do an awful lot of advocacy with respect to shaping what that law is."[42] In some fields, such as antitrust and copyright, a particular treatise has become highly influential.[43]

As for practical advice about using treatises, despite their routine citation, treatises are viewed as carrying little weight, if any, in the traditional hierarchy of authority.[44] Introductory legal research and writing texts typically explain that a treatise is a secondary source rather than a primary one, useful for a better understanding of the law or as a finding tool.[45] An author's 1923 admonition that "[n]o treatise may be safely used as a substitute for available authoritative source material"[46] is not much different from advice offered today. One modern text explains:

> [S]econdary authorities can be of great assistance to lawyers in interpreting the law in areas where the law is unclear or ambiguous, and this kind of commentary can be very persuasive to lawyers, legislators, and judges. But secondary authorities cannot create law. At most, they can provide guidelines for courts or legislatures to act in areas that are

37. Wilf, *supra* note 24, at 688; Matasar, *supra* note 23, at 1517 ("That treatises are being used to persuade suggests power in the positions being taken by authors.").

38. Wilf, *supra* note 24, at 701.

39. *Id.*

40. John Henry Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381, 413 (1978).

41. *Id.* at 414.

42. FERNANDEZ & DUBBER, *supra* note 26, at 4.

43. Ann Bartow, *The Hegemony of the Copyright Treatise*, 73 U. CIN. L. REV. 581, 583 (2004) (showing the powerful impact of a particular treatise as illustrative); Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 IOWA L. REV. 2039, 2045–50 (2015) (showing the influence and market power of the treatise in federal court opinions).

44. Chad W. Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 58 (2009) ("There is, in fact, a hierarchy of persuasive authority. As a purely descriptive matter, decisions from other *courts* outside the jurisdiction of the deciding court are treated as having more weight than other authorities—such as law review articles or treatises."); Wendy G. Couture, *Professor Alan R. Bromberg and the Scholarly Role of the Treatise*, 68 SMU L. REV. 703, 704–05 (2015) ("Although litigators and courts rely on treatises when performing legal research and analysis, they shy away from citing treatises in briefs or opinions because they do not constitute primary authority.").

45. *See* HICKS, *supra* note 1, at 134.

46. *Id.*

> not yet defined by a primary authority or where a change in the law is needed.[47]

Other texts also explicitly note that treatises can be persuasive to a court based on the reputation of the treatise or its author.[48] One well-known research text explains:

> Some treatises are widely respected and considered definitive sources in their subject areas. . . . If you use a definitive treatise in your research, you might cite it in a brief or memorandum. Ordinarily, however, you will use treatises for research purposes and will not cite them in your written analysis.[49]

Another suggests that "you may want to cite a secondary source as persuasive authority to convince the court that your position is the more reasonable or widely accepted position,"[50] though knowing how to use secondary sources "can be a little nuanced" as "not all secondary sources have equal weight for this purpose."[51] Introductory research and writing texts do not expand much on this advice.

The treatise remains a genre of interest to many scholars; in the words of one, "[t]reatises are a rhetorically important part of our legal discourse."[52] Legal scholars characterize treatises as both "neglected" and "really important."[53] Another author asked about the usefulness of treatises today: "Is not the lawyer's need for context and structure more urgent now . . . ?"[54] Treatises remain an established part of the legal universe.

B. Using Data to Better Understand Modern Treatise Use

Treatises are a regular component of modern judicial opinions; they have not become obsolete as some earlier scholars predicted. But advice and scholarship on their use as a genre of authority remains underdeveloped. I hope to put to rest the unhelpful refrain that treatises (as a category

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47. MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, LEGAL WRITING, AND ANALYSIS 7 (3d ed. 2021); *see also* KRISTEN KONRAD TISCIONE, LEGAL WRITING: FROM ADVICE TO ADVOCACY: A CONTEMPORARY APPROACH 140 (2021) ("[S]econdary authority can be persuasive, particularly where the court has no law 'on point' in its own jurisdiction.").

48. *See, e.g.*, RICHARD K. NEUMANN, JR., ELLIE MARGOLIS, & KATHRYN M. STANCHI, LEGAL REASONING AND LEGAL WRITING 72 (8th ed. 2017) ("The authoritativeness of a treatise depends on the reputation of its author and on whether the treatise has been kept up-to-date. Some of the outstanding treatises have been written by Wigmore (evidence), Corbin (contracts), Williston (contracts), and Prosser and Keeton (torts).").

49. AMY E. SLOAN, BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES 56 (8th ed. 2021).

50. MARK K. OSBECK, IMPECCABLE RESEARCH: A CONCISE GUIDE TO MASTERING LEGAL RESEARCH SKILLS 30, 31 (3d ed. 2022) (noting that a "well-respected treatise" like Wright & Miller's *Federal Practice and Procedure* provides "guidance to the court as to the interpretation other courts have given [a Federal Rule of Civil Procedure], and as to the policy rationale for that interpretation." The text explains that "it is not uncommon for the courts themselves to cite these types of secondary sources in their opinions, either as evidence of a majority rule, or in support of an argument that a certain position is more reasonable.").

51. *Id.* at 31.

52. Matasar, *supra* note 23, at 1516.

53. FERNANDEZ & DUBBER, *supra* note 26, at 1.

54. Richard A. Danner, *Oh, the Treatise!*, 111 MICH. L. REV. 821, 834 (2013).

of optional authority) are cited when a judge finds them persuasive and instead seek to determine when and why judges cite them as authority. Treatises have content-independent weight, as many scholars and practitioners have already acknowledged, and content-independent reasons for their use can be identified. If treatises have content-independent weight as a legal source, we should expect to see evidence of that systematic usage—patterns beyond the habits of an individual judge.

I analyzed judicial citations to treatises in the Tenth Circuit in three specific ways, looking for differences in treatise use based on (1) the difficulty of the case, (2) the political party of the president who nominated the authoring judge, and (3) the gender of the authoring judge. First, I sought to specifically test the hypothesis that treatises *do* have significant content-independent weight. The regular use of treatises might be consistent with low authoritative weight. Perhaps judges consistently use treatises in low stakes situations—to confirm an undisputed rule, for example. Treatise citations may simply satisfy the norm that judges must always cite to something. If that were true, we might expect to observe treatises cited as a source of authority more frequently in easier, less controversial cases.

On the other hand, given the frequency with which they are cited, treatises may carry more authoritative weight than conventionally thought, in which case we might expect judges to use treatises more frequently in so-called hard cases.[55] I looked to two factors that might indicate the difficulty of the case: (1) whether the published opinion reversed the court below, and (2) whether the published majority opinion was accompanied by a dissenting opinion. As others have hypothesized, reversals may be likely to involve difficult issues.[56] Reversing (or vacating) the lower court decision obviously shows disagreement between the appellate and trial court judges, which might indicate that the case is not an easy one. Thus, if treatises have significant weight as a source of authority, we might expect to see them cited more frequently in opinions reversing the court below.

The existence of a dissenting opinion is arguably an even better proxy for a difficult case, as it is a disagreement among peers and colleagues on the same court. Not only might concerns for collegiality impact a judge's decision to dissent, but writing a dissent requires additional effort[57] that is entirely a matter of choice. Written dissents (including dissents in part) occurred in just 12% of the Tenth Circuit's published cases over a three-year period.[58] If treatises have significant weight, we might anticipate heightened use of treatises when judges disagree to the extent that one of the judges publishes a dissenting opinion. Treatises might be used as a means of quelling dissent. Empirical evidence can determine whether this

55. *See, e.g.*, Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 415 (1985).
56. EPSTEIN ET AL., *supra* note 9, at 286.
57. *Id.* at 283 (noting that a dissent imposes an effort cost).
58. Griffin Data Compilation, *supra* note 18.

theory is plausible by identifying the difference in treatise use by unanimous panels versus split panels.

Second, I sought to test whether a citation to a treatise is apolitical, or whether treatises have some sort of ideological valence. It is possible that treatises have no correlation with ideology at all—that their citation is primarily due to nonpolitical motivations like the leisure effect. Judges exhibit effort aversion,[59] and perhaps treatises are simply a neutral shortcut, in which case we would not expect to see any difference between judges based on their political affiliation.

In the fields of statutory and constitutional interpretation, certain methodologies are associated with political viewpoints. Conservative scholars, judges, and activists have promoted originalism [60] and textualism as methodologies of judicial restraint.[61] Both originalism and textualism appear to align with rule-of-law principles.[62] Methods of interpretation are not inherently liberal or conservative, however,[63] and recently scholars have argued that political association with a methodology is more about rhetoric than the likelihood that a methodology will lead to either a more conservative or liberal outcome.[64] Nevertheless, a political association persists for some methodological choices.[65] Does frequent citation to treatises reveal anything about a judge's philosophy of decision-making? Does it align with other politically associated brands?

As a genre of authority, treatises lack an obvious established link to judicial methodology, in contrast to the way that legislative history and dictionaries are linked to interpretive methodologies. Nor are treatises easily categorized politically the way that an individual judge can be. It is

59. EPSTEIN ET AL., *supra* note 9, at 361–62.

60. Jamal Greene, Nathaniel Persily, & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 398 (2011) (Originalism as "part of a Republican or conservative brand . . . .").

61. *See, e.g.*, Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J. L. & PUB. POL'Y 29, 29 n.1 (2011) (citing sources); Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 849 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)) ("[T]extualism is widely regarded as a politically conservative methodology . . . it reflects the notion that textualism narrows the scope of federal law in ways that are attractive to Republicans but not Democrats."); Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign Against Legislative History*, 105 CORNELL L. REV. 1023, 1025, 1033, 1044, 1054 (2020) ("[T]he advocacy for and embrace of textualism and against legislative history had an ideological element from the outset . . . . Simply stated, the movement against legislative history had a strong ideological skew . . . . A citation to legislative history in a given opinion suggests that the author has rejected Scalia's methodological position on legislative history.").

62. Greene et al., *supra* note 60, at 386 ("[O]riginalism accords with a certain conception of the rule of law.").

63. Lemos, *supra* note 61, at 849.

64. *Id.* at 891, 901 ("[T]extualism's conservatism has relatively little to do with the details of the interpretive theory, or the arguments its practitioners make and the opinions they write. It has to do with textualism's embrace by conservative activists eager to challenge the legal status quo, its pairing with originalism in constitutional theory, and the rhetoric of 'judicial restraint' that developed around both methodologies . . . . Just as originalism has become code for "conservative" and living constitutionalism code for "progressive," textualism has become a conservative brand and purposivism its primary competitor.").

65. *Id*. at 854.

difficult to generalize the entire treatise genre;[66] there are likely some treatises that represent a liberal view while others represent a conservative view. It is also likely that there is no fitting political label for many treatises. Some treatises are designed in pursuit of a normative agenda while others are not. It is of course quite possible that treatises—comprising a broad genre that incorporates a wide degree of variety—have no verifiable correlation with any judicial philosophy or methodology. There is no highly visible political rhetoric around treatises the way there is around textualism or originalism.

However, given that treatises textualize the common law, the use of treatises is arguably evidence of a formalist judicial methodology. Textualism prioritizes stability and certainty—rule-of-law values.[67] Others have argued that textualist judges "are prone to a 'correct answer' mindset,"[68] and perhaps the same is true of judges who rely on treatises. The positivist depiction of treatises suggests that judges who cite to treatises are formalist to some extent, preferring to rely on clear statements of legal rules. Canons of construction are thought to further rule-of-law norms as accessible "'off the rack, gap-filling' principles."[69] Again, perhaps this is true of treatises as well—they provide gap-filling rules that further rule-of-law norms. In that respect, citation to treatises seems more likely to reflect a "faithful agent[]" theory of judging than an activist one.[70]

Given the link between treatises and positivism and rule-of-law ideals, I test the hypothesis that Republican-nominated judges are more likely to cite to treatises. Studies have shown that judges nominated by Republican presidents are more likely to be ideologically conservative than judges nominated by Democratic presidents.[71] The extent to which judges' political ideology influences their decisions has been widely studied,[72] and scholars frequently use the political party of the nominating president as a proxy for the judge's politics.[73] Studies have shown that in some types of

66. Wilf, *supra* note 24, at 701 (noting that while some see treatises as a "vehicle for reforming law," treatises "resist change.").

67. Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 160 (2018).

68. *Id.* at 205.

69. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 9 (2005).

70. *See, e.g.*, William N. Eskridge, Jr., *Reading Law: The Interpretation of Legal Texts*, 113 COLUM. L. REV. 531, 532 (2013).

71. EPSTEIN ET AL., *supra* note 9, at 168 (describing the trend of Court of Appeals judges appointed by Republican presidents are more likely to vote for conservative, rather than liberal, outcomes).

72. *See, e.g.*, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. SOC. SCI. 203, 205 (2017).

73. Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A Window Into the Behavior of Judges?*, 37 J. LEGAL STUD. 87, 94 (2008) (citing Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1717–18 (1997)); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 220 (1999); Cass R. Sunstein, David Schkade, & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation* 1 (Univ Chi. L. Sch., Working Paper No. 03-9, 2003), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=442480.

cases, there are differences in the way that Republican and Democratic judicial appointees vote on case outcomes.[74] If ideology influences the decisions of federal appellate judges,[75] it might also affect judicial methodology—the way the judge crafts their opinions. The citation to treatises by Democrat versus Republican appointees is simple to measure. Thus, I looked to see whether there was any discernible difference in the treatise citation rates of Democratic-appointed versus Republican-appointed judges.

Finally, I test whether the rate of treatise citation is correlated with the gender of the judge. Scholars have long been interested in whether men and women judge differently,[76] not finding any significant differences in judicial outcomes in most areas of law.[77] However, as with other individual traits of judges, scholars have found significant differences by gender when the subject matter of the case is relevant to gender.[78] In other words, "[g]ender matters in cases in which gender itself is an issue . . . ."[79] For example, empirical studies suggest that the gender of judges makes a difference in the outcome of Title VII sex discrimination cases.[80]

Carol Gilligan's work in the early 1980s is often credited as an influential theory on differences between men and women—she argued that the psychological development of women is different than that of men, and that female experiences were not reflected in existing theories of human (male) development.[81] "[W]omen are believed to emphasize connection, consensus building, and contextual factors, whereas men tend to focus on competition, rules, and individuation."[82] Based in part on her ideas, others have sought to show that female judges reason differently than male

74. CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN, & ANDRES SAWICKI, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 8 (2006) (noticing differences in cases involving affirmative action, NEPA challenges, congressional abrogation of state sovereign immunity, sex discrimination, disability discrimination, sexual harassment, review of environmental regulations, campaign finance, piercing the corporate veil, racial discrimination, segregation, obscenity, Contracts Clause violations, restrictions on commercial advertising, and the NLRB).

75. EPSTEIN ET AL., *supra* note 9, at 385.

76. *See, e.g.*, Jeffrey Budziak, *Promotion, Social Identity, and Decision Making in the United States Courts of Appeals*, 4 J.L. & CTS. 267 (2016); Todd Collins & Laura Moyer, *Gender, Race, and Intersectionality on the Federal Appellate Bench*, 61 POL. RSCH. Q. 219, 220 (2008); SUSAN B. HAIRE & LAURA P. MOYER, DIVERSITY MATTERS: JUDICIAL POLICY MAKING IN THE U.S. COURTS OF APPEALS 34–35 (2015); Lydia Tiede, Robert Carp, & Kenneth L. Manning, *Judicial Attributes and Sentencing-Deviation Cases: Do Sex, Race, and Politics Matter?*, 31 JUST. SYS. J. 249, 253–54 (2010).

77. Christina L. Boyd, Lee Epstein, & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010) ("[T]he presence of women in the federal appellate judiciary *rarely* has an appreciable empirical effect on judicial outcomes."); HAIRE & MOYER, *supra* note 76, at 49 ("[W]omen judges' voting behavior is generally similar to that of their male colleagues.").

78. Boyd et al., *supra* note 77, at 400–02.

79. Rachlinski & Wistrich, *supra* note 72, at 207.

80. Susan L. Miller & Shana L. Maier, *Moving Beyond Numbers: What Female Judges Say About Different Judicial Voices*, 29 J. WOMEN POL. & POL'Y 527, 533, 549 (2008).

81. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT xi (2d ed. 1993) ("[I]t seems obvious to me, as a psychologist, that differences in the body, in family relationships, and in societal and cultural position would made a difference psychologically.").

82. HAIRE & MOYER, *supra* note 76, at 50.

judges.[83] "Law is supposed to be rational, objective, abstract and principled, like men; it is not supposed to be irrational, subjective, contextualized, or personalized like women."[84] Gilligan's work has been heavily critiqued,[85] and "strong evidence supporting the claim that women judges have a 'different voice' has proved elusive."[86] Nevertheless, while views on gender differences vary significantly,[87] it does not seem controversial to acknowledge that the "lifelong processes of socialization and allocation associated with gender roles . . . contribute to differences in attitudes and

83. Michael P. Fix & Gbemende E. Johnson, *Public Perceptions of Gender Bias in the Decisions of Female State Court Judges*, 70 VAND. L. REV. 1845, 1847 (2017) ("Building from Professor [Carol] Gilligan's work, scholars have argued that female jurists, given differences in socialization, background, and experience, 'will employ different legal reasoning, and will seek different results from the legal process.'") (quoting Elaine Martin & Barry Pyle, *State High Courts and Divorce: The Impact of Judicial Gender*, 36 UNIV. TOL. L. REV. 923, 926 (2005)).

84. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 45 (1985) ("The male-derived model of moral reasoning and psychological development described by Gilligan values hierarchical thinking based on the logic of reasoning from abstract, universal principles.") (quoting Frances Olsen, The Sex of Law (unpublished manuscript) (on file with author)).

85. *See, e.g.*, Boyd et al., *supra* note 77, at 390 n.4 ("*In a Different Voice* has faced its share of criticism on any number of grounds—sociological, biological, psychological, and methodological. And yet . . . despite the critiques, Gilligan's 'theory no doubt continues to be taught, discussed, and tested because something about it rings true, or at least true based on some stereotyped notion of the way in which women behave.'") (citing Theresa M. Beiner, *The Elusive (but Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597 (2002)).

86. ERIKA RACKLEY, WOMEN, JUDGING AND THE JUDICIARY: FROM DIFFERENCE TO DIVERSITY 145 (2013) ("No unique and common perspective, no 'different voice,' shared by all women judges has been, or is likely to be, found."); Patricia Yancey Martin, John R. Reynolds, & Shelley Keith, *Gender Bias and Feminist Consciousness Among Judges and Attorneys: A Standpoint Theory Analysis*, 27 SIGNS: J. WOMEN CULTURE & SOC. 665, 666 (2002) ("Research on gender and judicial reasoning provides little support for this thesis . . ." that women reason differently than men and will change the legal institution).

87. *See, e.g.*, Barbara Palmer, *Women in the American Judiciary: Their Influence and Impact*, 23 WOMEN & POL. 91, 91 (2001) (asserting that "there is much less consensus over whether or not women employ different methods of reasoning" as compared to claim that women vote differently in sex-discrimination cases); Miller & Maier, *supra* note 80, at 530–31 ("The 'ethic of care' shows concern with communication, mediation, conflict diffusion, and the preservation of relationships, reflecting women's 'outsider' status that brings with it greater empathy and understanding of others' plights because of women's own memberships in a subordinated group . . . . This understanding lends less allegiance to a male legal model that stresses competition, winning, adversarial interactions, and objectivity. In contrast, the 'ethic of justice' places greater values on hierarchy, abstract rules, and individual autonomy . . . . The alternative perspective, the minimalist approach, asserts that there exist few gender differences between men and women, and decision-making is governed more by one's legal training than by his or her personal experiences . . . a more conservative approach also known as 'conventional wisdom'. . . . Moreover, it could be that through the process of being socialized into the legal profession, men's and women's differences diminish as they learn to conform to existing norms and institutional cultures . . . .") (internal citations omitted); Linda S. Maule, *A Different Voice: The Feminine Jurisprudence of the Minnesota State Supreme Court*, 9 BUFF. WOMEN'S L.J. 295, 313 (2000) (identifying differences in language used by men and women on the court when deciding family law cases. Opinions authored by men "tended to focus on rules, processes and regulations" while women "were concerned with the impact of the decision on the losing party.").

behavior."[88] It is possible to avoid the "trap of essentialism"[89] by theorizing gender "as a social process."[90]

There is some evidence that socialization related to gender may impact judicial opinion writing. In one study, scholars found evidence supporting their hypothesis that "opinions written by women are significantly more likely to be ones that sought the 'middle ground' in terms of policy and treatment of the litigants' claims."[91] That same study showed that opinions written by women were longer than those written by men.[92] Several scholars recently explored whether female and non-white ("outsider") judges "process the weighty responsibility of opinion writing differently than their white male counterparts."[93] They found that minority and female judges write "longer opinions with more sources, cites, and deep cites"[94](counting only citations to "precedent" as sources of authority):

> Consistent with our expectations, the evidence suggests that female and minority appellate judges are more likely to overprepare in achievement-related tasks like writing majority opinions, spending more effort than their male colleagues to justify to key audiences (litigants, other judges, and the Supreme Court) that their decision is legally correct. Majority opinions written by women and minorities include more citations to prior cases, and they are more likely to devote more attention to discussing specific precedents.[95]

Existing studies led me to hypothesize that men and women might cite to treatises differently—that gender differences would impact citations to optional authority like treatises, not just binding sources like cases. With respect to gender and treatises, one theory might be that treatises are an attractive source for female judges exerting more effort to establish that their decision is legally correct because treatises are a well-established, longstanding source of law. In contrast, if treatises are viewed as more of a shortcut, female judges might be less likely to cite to them, instead devoting more time to discussion of specific past cases.

* * *

An empirical study easily answers other more basic questions about treatises as authority, such as which judges regularly rely on treatises,

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88. HAIRE & MOYER, *supra* note 76, at 47.

89. Sally J. Kenney, *Thinking About Gender and Judging*, 15 INT'L J. LEGAL PRO. 87, 88 (2008).

90. *Id.* ("Gender differentiation thus does not flow inevitably from sex differences; rather it is the process by which we attach meaning to sex differences, most often to devalue whatever society associates with women.") (citing MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY (2nd ed. 2003)).

91. HAIRE & MOYER, *supra* note 76, at 52.

92. *Id.* at 52–53.

93. Laura P. Moyer, John Szmer, Susan Haire, & Robert K. Christensen, *'All Eyes Are on You': Gender, Race, and Opinion Writing on the US Courts of Appeals*, 55 LAW & SOC'Y REV. 452, 453 (2021).

94. *Id.* at 460.

95. *Id.* at 464.

which treatises are most frequently relied upon, and what kinds of cases treatises are cited in; I also present data which answers these straightforward questions below. I compared the citation habits of individual judges, looking for patterns based on age differences and senior status. I looked at the type of law the treatise cited provided (federal, state, general), and the grounds for jurisdiction (diversity jurisdiction or federal question).

I also examined the introductory language leading up to each treatise citation for evidence of any content-independent reason why a judge might have cited it. The advice about treatises described above reflects two specific reasons why treatises have content-independent weight. First, that the expertise of the author (often framed as reputation) provides weight, a traditional reason for giving content-independent weight to authority.[96] Second, that treatises have weight because they summarize existing judicial practice—they are evidence of what other courts have done. In this view, treatises have weight as a proxy for precedent. I looked for evidence to support each of these theories and present the results below. Together with information I presented in an earlier article,[97] this data provides a fairly thorough description of existing judicial social norms on treatise use in the Tenth Circuit.

Treatises, like other optional sources, are selected by judges as one of many materials they use to craft a published opinion. The creation of a written judicial opinion is not a mechanical process. We expect and accept that judges will make individual choices about how to write those decisions. There is no current theory that explains when or why judges cite to treatises, but that does not mean treatise citations are not worth studying. To the contrary, the lack of any theory to explain why judges regularly rely on a genre of legal authority is a reason to investigate further.

II. DATA

To test these questions, I hand-coded all published Tenth Circuit cases in 2017, 2018, and 2019, resulting in a data set of 633 cases with at least one published opinion, and 748 separate written published opinions including all dissenting and concurring opinions for those 633 cases. As described below, the data collection was, in the main, an objective rather than a subjective exercise, so there should not be any concerns about coding bias. I focused on relatively recent cases in order to ascertain current practices. I pooled the data across all three years for a larger data set with greater statistical leverage, as the judges remained largely constant over this period.[98]

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96. *See, e.g.*, FREDERICK SCHAUER, THINKING LIKE A LAWYER 71 (2009); Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1200–01 (2006).

97. Griffin, *supra* note 13.

98. In 2017, 20% of published majority opinions contained a citation to a treatise; in 2018, 14%; in 2019, 21%. Griffin Data Compilation, *supra* note 18.

Is the Tenth Circuit representative, such that the findings here can be generalized to other circuits? By available measures, it appears to be. The number of judges in each circuit (excluding those with senior status) ranges from six in the First Circuit to twenty-nine in the Ninth Circuit.[99] The Tenth Circuit has twelve judges, the median number of judges on all thirteen circuits (while the average number of judges is just under fourteen).[100] The Tenth Circuit's even split between Republican-nominated and Democratic-nominated judges during the period of the study is typical.[101] A few circuits are politically tilted (the Eighth Circuit has ten Republican- and one Democrat-nominated;[102] the First Circuit has five Democrat- and one Republican-nominated;[103] the Seventh Circuit has seven Republican- and three Democrat-nominated)[104] but the remainder are fairly evenly split. Overall, at the time of my study, there were currently ninety-three Republican appointees and eighty Democratic appointees.[105] According to one study, the percentage of sitting female judges at the time of my study varied by circuit from a low of 6% (Eighth Circuit) to a high of 40% (Eleventh Circuit), with a median of 28%; 23% of the Tenth Circuit's judges were female judges.[106]

I identified citations to treatises across all opinion types (majority, dissenting, concurring, or mixed), the author of each opinion, the age and gender of the author, whether the author had taken senior status, and the party of the President who nominated the judge. I tracked whether the decision was unanimous, whether the decision reversed the court below, and whether the panel was comprised of judges from a single political party. Over a three-year period, a total of twenty judges wrote a published opinion; ten Democratic-appointed judges and ten Republican-appointed; fifteen men and five women; six with senior status the entire three-year period, and one who took senior status at the end of the first year.[107]

The treatise indicator is binary—indicating whether the opinion cited to at least one treatise. For the three specific inquiries described above, I used only that binary indicator. If a judge cited to at least one treatise in an opinion, I deemed that sufficient to count as treatise use. I was most interested in whether judges cite to treatises at all rather than the number of times treatises are cited in any particular decision. It is worth noting that

99. *United States Court of Appeals*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals (last visited Dec. 2, 2022).
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. Democracy & Government Reform Team, *Examining the Demographic Compositions of U.S. Circuit and District Courts*, CTR. FOR AM. PROGRESS (Feb. 10, 2022) (data used in this Center for American Progress study was collected in 2019).
107. Griffin Data Compilation, *supra* note 18. Judge Paul Kelly took senior status at the end of 2017. *Kelly, Paul Joseph, Jr.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/kelly-paul-joseph-jr (last visited Dec. 2, 2022).

this measure of treatise use allows for less variation on my outcome variable, meaning that I am less, rather than more, likely to identify systematic patterns in their use. As described below, for the other analysis I used the more fine-grained count of each individual instance of a treatise citation in order to track the apparent purpose of each one.

To analyze the first specific question described above, whether treatises are a tool of convenience or more consequential, I compared the frequency with which a treatise is cited in unanimous decisions versus in divided decisions (i.e., a dissenting or concurring opinion had been written). I also compared the rate at which treatise citations occurred in cases reversing the lower court versus cases affirming the lower court. 80% of published opinions over the three-year period were unanimous; 36% vacated or reversed the district court decision in whole or in part.

To analyze the second question about the political nature of treatise citations, I compared the frequency of treatise citation by Republican- versus Democrat-nominated judges. Again, I used the binary treatise indicator, tracking cases in which at least one treatise was cited. For the sake of simplicity, and again to gain as much statistical leverage as possible, I did not account for the political composition of the U.S. Senate that confirmed each judge in these comparisons. We might expect that a divided government would select different types of judges as compared to unified government. This question is left for future investigation.

To analyze the third question, I compared the frequency of treatise citation by female versus male judges. I confirmed the gender of each judge using the Federal Judicial Center's Biographical Directory of Article III Federal Judges.[108] At the time of my study, of the twenty judges, five were female; four of them Democratic-appointed and one Republican-appointed.[109] One of the four Democratic-appointed judges had senior status during the three-year period of the study.[110]

For a more complete picture of treatise norms in the Tenth Circuit, I also tracked the number of times a treatise was cited in each opinion and coded each separate use of a treatise. If the same treatise was cited for a second, separate point, I counted it as a separate instance. This resulted in a set of 207 instances of treatise citations across 132 cases. I used these instances to analyze the reasons why judges cited to a treatise and how often they used treatises for different purposes. I determined whether the treatise was cited as a source of federal law, state law, or general law. I also made a subjective determination as to whether the treatise was cited for a point of procedural, substantive, or methodological law. Finally, I

108. *Biographical Directory of Article III Federal Judges, 1789–Present*, FED. JUD. CTR., www.fjc.gov/history/judges (last visited Dec. 2, 2022).

109. *Id.*

110. *Id.*

tracked whether the case was based on federal question or diversity jurisdiction.

III. ANALYSIS

Treatises are cited frequently enough to show that, as a genre, treatises are a well-accepted source of authority in the Tenth Circuit. They are regularly consulted by at least some judges—a third of the judges on the Tenth Circuit cited to at least one treatise in more than 25% of their opinions. The citations to treatises, reviewed collectively, may seem unremarkable. They serve as one of many stitches in the fabric of judicial analysis and are not the focal point of any decision. Yet they shed light on justifications for decisions as well as the craft of judicial opinion writing.

Conventional wisdom tells us that secondary sources, such as treatises, lie at the bottom of the hierarchy of legal authority.[111] The data I collected undermines that account. In a one-year study, I found that in writing published opinions, Tenth Circuit judges included at least one citation to a treatise more frequently—in 20% of all 2017 published opinions—than any other source of authority that was not a judicial opinion.[112] Tenth Circuit judges frequently cite to published opinions in sister circuits (in 77% of published majority opinions); their own unpublished opinions (26% of published majority opinions); and federal district court decisions (26% of published majority opinions).[113] In contrast to these expected citations, the regular reliance on treatises was a bit surprising and prompted my next three-year study of treatise use.[114]

I found that over a three-year period (2017–2019), judges in the Tenth Circuit cited to at least one treatise in 19.4% of their published majority opinions.[115] Judicial citation to treatises directly (as opposed to cases cited by the treatise) suggests that in some instances treatises have more weight than any single nonbinding case. Given the supposed minimal weight of treatises, I found their regular citation by judges worth further investigation. Their regular usage reveals systematic patterns from which we can infer that as sources of authority, treatises do have "weight" beyond their substantive content.[116]

A. Testing Specific Hypotheses on the Modern Use of Treatises

An initial review of the data shows that in 20.8%[117] of all cases with a published opinion, a judge cited to a treatise at least once in either the majority, dissenting, or concurring opinion. Judges cited to treatises in 122

111. *See supra* text accompanying notes 41–46.
112. Griffin Data Compilation, *supra* note 18.
113. Griffin, *supra* note 13, at 28.
114. *See generally* Cannan, *supra* note 26 (describing the history of the treatise as authority through a Golden, Silver, and Bronze Age (1930s–present)). "Commentors have repeatedly pronounced the death of the treatise and yet it lives on." *Id.* at 48.
115. Griffin Data Compilation, *supra* note 18.
116. *See* Amy J. Griffin, *Dethroning the Hierarchy of Authority*, 97 OR. L. REV. 51, 61 (2018).
117. Griffin Data Compilation, *supra* note 18.

out of 629 majority opinions,[118] or 19.4% of the majority opinions. Judges cited to a treatise in 6 of 46 dissenting opinions (13%), 4 of 45 concurring opinions (8%), and 5 of 27 opinions dissenting in part and concurring in part (18.5%).[119]

Generally speaking, judicial norms permit citation to treatises as an authoritative source. The data suggests that as a genre, treatises have content-independent weight. But the data also reveals significant disparity in the frequency with which individual judges rely on treatises. The variety is not particularly surprising given that judges can choose among a wide variety of optional sources. There are not a lot of limitations on judicial citations to authority—it is much easier to describe the few things judges cannot cite to (horoscopes, results of coin flips, etc.) than the sources they can. I seek to identify patterns of practice across individual judges, even if those practices are not universal. The data I collected (particularly on treatise use by political affiliation and gender) suggests that there is a middle layer—between general judicial norms and entirely individual practices—patterns of citation across judges that reveal how judicial identity might affect judicial opinion writing.[120] Socialization—like personality traits[121]—appears to affect the ways in which judges implement legal authority.

1. Assessing the Weight of Treatises by Difficulty of the Case

As explained above, I first tested the hypothesis that treatises have significant content-independent weight by analyzing their use in difficult cases. I did this in two ways—first comparing citation to treatises in unanimous decisions to citation to treatises in decisions where a dissent was published. I also looked at treatise use in opinions that reversed at least some part of the lower court's opinion and compared that to opinions affirming the lower court. I hypothesized that if treatises have significant weight as legal authority, they would be more likely to be cited in difficult cases, using reversals and dissenting opinions as proxies for the difficulty of the case.

Treatises were more likely to be cited in cases where a dissenting opinion was filed than in cases with a unanimous panel signing on to a single opinion. In other words, in cases with evidence of some disagreement over resolution of the case, treatises were more likely to be cited. In majority decisions issued by unanimous panels, treatises were cited 17.9% of the time, while in cases where a dissenting (in whole or in part) opinion

118. *Id.* In four of the cases, there was a published concurrence or dissent but no published majority opinion. *Id.*

119. *Id.*

120. RYAN C. BLACK, RYAN J. OWENS, JUSTIN WEDEKING, & PATRICK C. WOHLFARTH, THE CONSCIENTIOUS JUSTICE 4 (2020) (using the concept of traits to help explain personality and focusing on conscientiousness as one of five major traits possessed by all humans).

121. *See id.* at 237–243 (noting increased conscientiousness led justices to be more likely to treat precedent positively—more likely to adhere to stare decisis).

was also issued, majority opinions cited to treatises 28.4% of the time, a statistically significant difference.[122] This evidence is consistent with a conclusion that treatises have significant weight and are not simply cited in low-stakes situations as a matter of form.

In contrast, judges were less likely to cite a treatise in a majority opinion vacating or reversing (in at least part) a lower court opinion than one affirming, and the difference was not statistically significant.[123]

These two findings arguably contradict one another. If treatises are used more frequently in decisions with a dissent, but no more frequently in reversals than affirmances, it is not clear that the difficulty of the case makes a difference. But perhaps a reversal is less likely to be a difficult decision on the theory that disagreement between different hierarchical levels of the court is not as significant as disagreement among the members of an appellate panel. Other scholars have posited that "judges writing majority opinions facing dissents will take extra care in crafting their opinions."[124] Writing a dissent takes significant extra effort, signaling that the issue is important.[125] It is plausible that judges writing a majority opinion in the face of a dissenting opinion might be more deliberate in choosing the authority to support that opinion.[126] Judges may attach more significance to the opinion of a direct peer judge than the opinion of a lower court judge. This might explain why there is no significant difference in treatise citation in opinions reversing lower court decisions—if the panel is unanimous, it may not be perceived as a "difficult" decision by the appellate judges.

2. Are Treatises Neutral Sources of Authority?

As described above, I sought to test whether a citation to a treatise is a neutral cite—apolitical—or whether treatises have some correlation with ideology. I found that in majority opinions, judges who were appointed by Republican presidents were twice as likely to cite to a treatise (in 28.3% of all opinions) than judges appointed by Democratic presidents (14%), a highly significant difference.[127]

This finding supports the inference that treatises are deployed to support a formalist methodology—they present the law in the form of a rule, which suits the opinion-writing style of formalist judges. Much like originalism and textualism, treatises suit the rhetoric of more conservative judges—a rule-of-law rhetoric signaling that the judge's decision is

122. Griffin Data Compilation, *supra* note 18; *see also* Amy Gallo, *A Refresher on Statistical Significance*, HARV. BUS. REV. (Feb. 16, 2016), https://hbr.org/2016/02/a-refresher-on-statistical-significance.

123. Griffin Data Compilation, *supra* note 18; *see also* Gallo, *supra* note 122.

124. Choi & Gulati, *supra* note 73, at 110.

125. *Id.*

126. *Id.*

127. Griffin Data Compilation, *supra* note 18.

constrained by neutral laws. For example, see this citation to two treatises for basic common law principles:

> It is essential that district courts comply with our mandates. "For appellate review to be meaningful, the decisions of the appellate court must bind the lower court on remand. Even if the appellate court may be incorrect, finality and the structure of the system require adherence to its decisions." *Law of Judicial Precedent* § 55 at 459; *see also* 18B Charles Alan Wright et al., *Federal Practice and Procedure* § 4478.3 at 733 (2d ed. 2002) ("[A]n inferior tribunal is bound to honor the mandate of a superior court within a single judicial system. There is nothing surprising about the basic principle, which inheres in the nature of judicial hierarchy . . . .").[128]

While most scholars would not consider the current legal era to be a formalist one,[129] judicial methodology is not necessarily aligned with modern legal theory. Scholars like Peter Tiersma have argued that the language of holdings in judicial opinions has been treated more and more like statutory text.[130] "[F]ormalism never really died, despite its rejection as a legal theory. It lives on as an operative methodology by which judges formulate decisions and as a legitimating discourse for those decisions."[131] Of course, based on citations alone, it is difficult to judge whether that formalism is sincere or performative—whether the citations to authority are used simply to demonstrate judicial neutrality. Just as is true of interpretive canons, the wide array of treatises cited might show that judges are able to find a "legitimate" source of justification for any position.[132]

Treatises sometimes stand for the status quo. However, the tension inherent to treatises, described above, leads to two opposing theories. On one hand, treatises can be seen as reinforcing the status-quo because they textualize parts of the law that are not expressed in canonical form (thereby "freezing" law in place). On the other hand, some treatises are designed as a means of influencing the law in a particular direction,[133] in which case a treatise citation might signal an effort to change the law. Is the use of treatises a sign of a judge who favors the status quo, or a judge who is sympathetic to a particular agenda for change? The data does not provide an answer to this question.

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128. Est. of Cummings *ex rel.* Montoya v. Cmty. Health Sys., Inc., 881 F.3d 793, 806 (10th Cir. 2018).

129. *See, e.g.*, Thomas B. Nachbar, *Twenty-First Century Formalism*, 75 U. MIA. L. REV. 113, 115–16 (2020) (describing many scholars' negative view of formalism).

130. Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1188 (2007); *see also* Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 222 (2010) (arguing that "overemphasis on words, phrases, and quotations to the exclusion of legal principles" is one of the reasons why dicta becomes holding).

131. Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1861 (1988).

132. Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation*: *An Empirical Analysis*, 70 TEX. L. REV. 1073, 1091 (1992) ("A wide or virtually limitless array of available sources makes it easier for a judge to justify any result by an accepted methodological approach.").

133. Wilf, *supra* note 24, at 14; FERNANDEZ & DUBBER, *supra* note 26, at 4.

In some respects, even if methodology is not the reason that Republican-nominated judges cite treatises more frequently than Democrat-nominated judges, the finding is still intriguing. As political parties have become more polarized,[134] it will be interesting to see if future studies find evidence of an impact on the process of judicial decision-making. Focusing on process as opposed to outcome is a lot less flashy—it is not terribly dramatic to point out that judges affiliated with one political party are more likely to cite to treatises than another. But over time, these differences in process change the content of the law that is developed in the judiciary—a citation quoting a rule from a treatise makes that quoted rule part of the law moving forward. The common law, as we know, is path dependent,[135] so that what is laid out in any published opinion has the potential to influence future law.

In an increasingly polarized world, we should not assume that sources cited by judges are neutral.[136] Greater transparency around the sources judges rely on may not solve all the issues related to third-party articulation of the law. But monitoring and reporting on sources—particularly those that are decidedly non-neutral—might help. As others studying judicial decision-making have pointed out, a study of umpires in Major League Baseball demonstrated "that home-plate umpires who know their calls are being recorded and scored by machine do not express racial preferences in calling balls and strikes (in contrast to unmonitored umpires)."[137] Monitoring can make a difference.

3. Gender Differences

Third, recall that I sought to test whether the rate of treatise citation is correlated with the gender of the judge. I found that male judges who write majority opinions are nearly three times as likely to cite to at least one treatise in their published opinions (23.3%) than female judges (8%).[138] Why might this be the case?

As judging (and the larger field of law) is a profession long dominated by males, it is quite likely that lawyers and judges who do not identify as male have experiences that are not shared with male lawyers and judges.[139] Women remain underrepresented on the federal bench, as they

134. *See, e.g.*, NOLAN MCCARTY, KEITH T. POOLE, & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 1–3 (2006).

135. *See* Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 603–04 (2001); Cross et al., *supra* note 19, at 492 ("*[R]esearch has suggested that the Justices' choice of precedents to cite can have a significant impact on the course of the law, as reflected by later decisions. This research confirms the value of studying citation practice*.") (emphasis added).

136. *E.g.*, Griffin, *supra* note 13, at 52.

137. Rachlinski & Wistrich, *supra* note 72, at 223.

138. Griffin Data Compilation, *supra* note 18.

139. Martin et al., *supra* note 86, at 667 ("We contend that . . . the gender composition of the legal institution is consequential because individuals' social location in the sex-gender system affects their experiences, interpretations, and, ultimately, consciousness within and beyond legal

constitute only 36% of all Article III judges,[140] and reached that figure only very recently. In 1977, there was still only one female judge on the federal Court of Appeals when President Carter was able to add eleven more.[141] As of 2006, women comprised only 17% of all federal Court of Appeals judges.[142] Women judges may face more hostility.[143] As one scholar describes it, "The exercise of judicial power is enmeshed in powerful cultural norms of masculinity."[144]

A recent study by the American Bar Association (ABA) on racial and gender bias in the legal profession found several patterns of both types.[145] The study found evidence that women often need to provide more evidence of competence to be seen as equally competent—women are held to higher standards; women are less likely to receive high-quality work assignments and are given more administrative tasks; women have less access to business development opportunities; women are paid less; women are expected to be "worker bees" who keep their heads down; and women leave the profession at much higher rates, to name just some of the evidence.[146] Though women make up half of all law students, they make up only 38% of those active in the legal profession.[147] Women are also "severely underrepresented at higher levels" of the legal profession.[148]

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contexts . . . . One does not leave gender "at the door" on entering a legal setting. Rather, the material, social, and cultural experiences associated with gender are raw material for the practice of law . . . .") (citations omitted).

140. *Diversity of the Federal Bench*, AM. CONST. SOC'Y, https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/ (last visited Dec. 2, 2022) (excluding judges who have taken senior status; including Supreme Court, circuit courts, district courts, and U.S. Court of International Trade).

141. Sheldon Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 344, 351 (1981).

142. Miller & Maier, *supra* note 80, at 528 (citing ABA Commission on Women in the Profession (2006)).

143. Kenney, *supra* note 89, at 104 ("[W]omen judges experience what Rosabeth Moss Kanter called heightened attention: their qualifications are disputed, and their colleagues (on and off the bench) show open hostility to them. She notes that women judges' colleagues simply 'hold them in contempt for simply being women' . . . . The assumption is that men are the natural occupants of such positions, that women obtain them through political manoeuvring, not merit, and that enough women have been appointed. Moreover, evidence from Canada suggests that women judges are far more likely than men to have their objectivity challenged and gender-based conflicts of interest asserted . . . .") (internal citations omitted).

144. Sally J. Kenney, *Choosing Judges: A Bumpy Road to Women's Equality and a Long Way to Go*, 2012 MICH. STATE L. REV. 1499, 1499 (2012).

145. ABA COMMISSION ON WOMEN IN THE PROFESSION & MINORITY CORPORATE COUNSEL ASSOCIATION, YOU CAN'T CHANGE WHAT YOU CAN'T SEE: INTERRUPTING RACIAL AND GENDER BIAS IN THE LEGAL PROFESSION 8 (2018).

146. *Id.* at 7–9.

147. Linda Greenhouse, *Pipeline to the Bench: Women's Legal Careers*, 16 UNIV. ST. THOMAS L.J. 138, 141 (2020).

148. Joyce Smithey, *Women and the Legal Profession: Four Common Obstacles Faced by Female Lawyers*, MS. JD (Jan. 13, 2017), https://ms-jd.org/blog/article/women-and-the-legal-profession-four-common-obstacles-faced-by-female-lawyer.

In addition, the path to the judiciary for women appears to be different than the path for men.[149] Earlier studies showed that women on federal courts were far more likely than men to have prior state judicial experience.[150] A close study of the women President Carter nominated for the federal bench showed that they followed different career paths than the men he nominated.[151] According to one author, federal judges are selected by "a non-merit system that favors men."[152] Discrimination affects the experiences of female lawyers and thus the pool of female candidates for the judiciary. As a result, gender is one of many factors that might affect a judge's perspective and approach to opinion writing.[153] With respect to judges who do not identify as male, it seems entirely plausible that their status as outsiders to the judiciary changes their perception of the weight of certain kinds of authority. The less-frequent use of treatises by the four female judges in this study supports that hypothesis.

Differences in male and female experiences as legal professionals could easily lead to different citation patterns. To take just one example, many more women than men report having had an idea stolen in their professional lives (50% of women compared to 29% of men).[154] This might impact the way that women attribute ideas—in other words, their citation. More broadly, continuous additional pressure on female lawyers to prove their competence (deemed the "prove-it-again" phenomenon by the ABA report) could also plausibly affect a female judge's approach to providing support in her written opinions. In studies of politicians, scholars have found that female politicians need to work harder to win elections and stay in office.[155] This is consistent with the study described above, in which female judges wrote longer opinions with more sources cited than the opinions written by male judges.[156] And female judges might divide the

149. Barbara Palmer, *"To Do Justly": The Integration of Women into the American Judiciary*, 34 CAMBRIDGE UNIV. PRESS 235, 238 (2001) ("[T]he judicial pipeline for women tends to follow a different route than the pipeline for men.").

150. *Id.* at 238 (citing Sheldon Godlman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276 (1995); Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254 (1997)).

151. Elaine Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 306, 311 (1982).

152. *Choosing Judges*, *supra* note 144, at 1509.

153. RACKLEY, *supra* note 86, at 148 ("All one needs to establish is that gender is *a* factor which might, on occasions, shape a judge's views and preferences and in turn the way they judge. To suggest otherwise is to argue that of all the many factors and experiences that go to shaping a person's views, gender is *never* one of them. And, insofar as gender is *one* of the things, we should expect that at least sometimes the different lives and experiences of women and men, attributable to their differences in gender, will lead to differences in their attitudes, values and perspectives. And we should expect, in turn, that they will bring these experiences and these differences to their understanding and interpretation of law.").

154. ABA COMMISSION ON WOMEN IN THE PROFESSION & MINORITY CORPORATE COUNSEL ASSOCIATION, *supra* note 145, at 17.

155. *See, e.g.*, JEFFREY LAZARUS & AMY STEIGERWALT, GENDERED VULNERABILITY: HOW WOMEN WORK HARDER TO STAY IN OFFICE 6 (2019).

156. Moyer et. al., *supra* note 93, at 457.

workload with clerks differently than male judges, again leading to differences in citations.

That female judges were less likely to cite to treatises suggests that perhaps treatises are seen as shortcuts, and outsider judges are willing to put in more work to find sources that are not "secondary." This arguably contradicts the finding that a treatise is more likely to be cited in a case with a dissent—if a treatise has significant weight, why would it not be more likely to be cited by women with greater pressure to prove their competence? The findings raise questions about the different ways that men and women may value different sources of authority—not due to a reductive view of supposed innate gender differences but due to complex socialization factors.

4. Multivariate Analyses

These three factors affecting treatise adoption—whether a panel is nonunanimous, whether the author of the majority opinion was nominated by a Democratic or Republican president, and whether the authoring judge is female—are likely to be related in any particular case. For instance, the female judges on the Tenth Circuit were largely nominated by Democratic presidents (the only Republican-nominated judge, Alison Eid, authored very few opinions during the period of study).[157] Thus, the descriptive results above may overstate the effect of each of the factors after accounting for the others.

To investigate this possibility, a multivariate analysis was conducted. Because treatise use in majority decisions is a binary variable, a nonlinear (probit) model was estimated with panel non-unanimity (0 if the panel was unanimous, otherwise 1), the party affiliation of the authoring judge's nominating president (1=Democrat; 2=Republican), and the gender of the authoring judge (1=female; 2=male) as the key explanatory variables.

157. Griffin Data Compilation, *supra* note 18.

	Coefficient	Standard Error	z
Explanatory Variable:			
Nonunanimous Panel	.37**	.14	2.5
Republican Nominee	.38**	.13	2.9
Male	.34*	.17	2.0
Constant	-2.05**	.29	-7.0

N=622. *denotes p<.05; **p<.01.

TABLE 1. *Probit Model of Treatise Citation*

The results of the model (Table 1) indicate that the effects of panel non-unanimity, the party of the authoring judge's nominating president, and the authoring judge's gender are all robust when controlling for the other variables.[158] All three variables remain statistically significant at conventional levels ($p<.05$).[159] All three parameter estimates are positive, meaning that opinions of nonunanimous panels, opinions authored by judges nominated by Republican presidents, and opinions authored by male judges are all more likely to cite to a treatise.[160]

In terms of the substantive effects of these variables, we can examine the marginal effect of changing each of them on the predicted probability of a treatise being adopted in a majority opinion while holding the other variables fixed at their means. Doing so indicates that the majority opinion of a nonunanimous panel is much more likely to include a citation to a treatise (29% likelihood) than a unanimous panel (18% likelihood).[161] In addition, the model predicts that the probability that a Republican-nominated judge would cite to a treatise is 26%, as compared to the 16% probability that a Democrat-nominated judge would cite to a treatise.[162] Similarly, the model predicts that men are more likely (22% likelihood) than women (13%) to cite to a treatise.[163] In sum, we can be confident that all three relationships identified above are robust both statistically and substantively.

* * *

The data I present here suggests that we might be able to identify more of the ways in which socialization affects the way a particular judge crafts written opinions. One of the key purposes of a citation in an opinion is to assist in legitimating the judicial decision. The selection of sources is

158. *See supra* Table 1.
159. *Id.*
160. Accounting for whether a case was taken up based on diversity jurisdiction, discussed below, has little effect on these conclusions.
161. *See supra* Table 1.
162. *Id.*
163. *Id.*

a matter of choice, and it seems entirely plausible that social groups will have different approaches to those choices. Of course, individuals do not belong to just one social group—identities are complex. The point is not to suggest that all women or all Republicans reason in a particular way. Instead, the point is to recognize the variety among judges within the bounds of broad judicial norms, and to recognize that judges may have different perceptions of the weight of some sources of authority. By looking for patterns, we can improve our understanding of how those perceptions develop.

B. A Description of Treatise Norms in the Tenth Circuit

In addition to testing these three hypotheses, I compiled a broader set of data to provide a fuller picture of treatise use in the Tenth Circuit.[164] Practitioners in the Tenth Circuit have a clear interest in understanding the weight of treatises as perceived by judges in that circuit.[165] Treatise norms are not articulated, meaning that they are not highly visible. Identifying these sorts of unarticulated norms is the first step in understanding how and why they develop.

1. Who Cites to Treatises

In the three-year period covered by my study, twenty different judges wrote at least one published opinion.[166] Six of those judges had taken senior status before the study began; one judge took senior status after the first year of the study.[167] Five of the twenty were women, ten were appointed while a Republican was president, and ten while a Democrat was president.[168] For a general evaluation of treatise use, I included all opinions published (reported) during the three-year period regardless of who wrote the opinions. However, for the data by individual judge presented below, I excluded judges who authored fewer than ten opinions in the three-year period (Judges Gorsuch, Eid, Carson, and O'Brien), leaving sixteen judges (ten Democrats, six Republicans, and four women). Judges varied quite a bit in the frequency with which they cited to treatises, with two judges never citing to a treatise, and two judges citing to treatises in 40% or more of their published opinions.[169]

As shown in the chart below, younger judges were more likely to cite to a treatise than older judges.[170] The selection of sources in judicial opinion writing might be linked to the era of legal education in which the judge attended law school. However, the data certainly does not suggest that

164. *See* Griffin, *supra* note 13, at 38 (reviewing some aspects of these citations in an earlier work).
165. *Id.*
166. Griffin Data Compilation, *supra* note 18.
167. *Id.*
168. *Id.*
169. *Id.*
170. *See infra* Table 2 (outlining percentage of majority opinions citing to treatise by judge's year of birth).

treatises are the tool of an earlier generation discarded by younger judges—to the contrary. Judges born around 1940 would likely have attended law school in the 1960s, and perhaps that was a particularly low point for emphasis on staid sources like a treatise. The younger group of judges were born in the late 1950s or very early 1960s, and thus likely attended law school in the late 1970s and early 1980s. In addition, there was no significant difference in treatise citation when I compared judges with senior status authoring majority opinions to judges without senior status. Judges with senior status authoring majority opinions cited to treatises less frequently than those without senior status, but the difference was not statistically significant.[171]

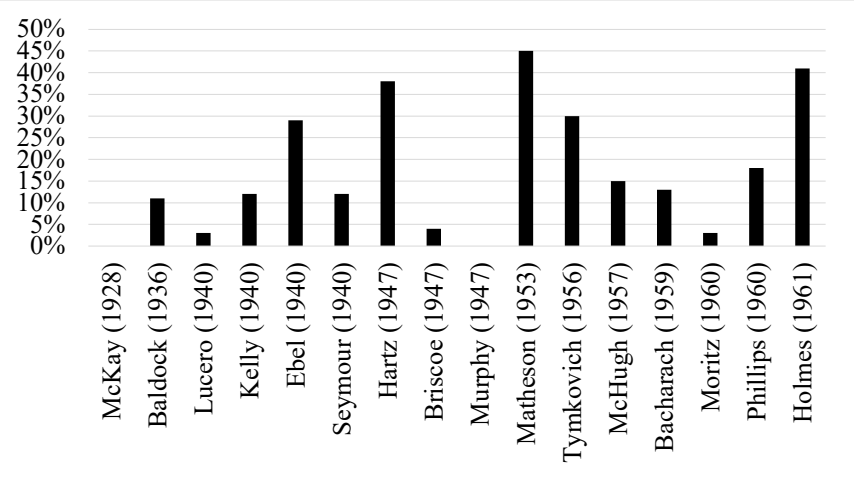

TABLE 2. *Percentage of Majority Opinions Citing to Treatise by Judge's Year of Birth*

In short, with this particular array of judges, born mostly in the 1940s, 1950s, and barely into the 1960s, there is scant evidence of a significant generational change in socialization with respect to treatise use. And with only sixteen judges regularly writing opinions during this three-year period, more data would be needed to reach any significant conclusions.

2. Type of Law Treatises Are Cited For

In earlier work, I reported that treatises were most frequently cited to explain, describe, or summarize federal law (60% of all treatise citations); infrequently to explain, describe, or summarize state law (2% of all treatise citations); and regularly as a source of general law (34% of all treatise citations); with the remaining 4% as sources of historical or other factual information.[172] I described in some detail the judges' use of treatises as

171. Griffin Data Compilation, *supra* note 18 (finding senior judges cited to treatises in majority opinions they authored 13% of the time, compared to 22% for non-senior judges).

172. Griffin, *supra* note 13, at 31.

sources of federal or general law. For example, the *Federal Practice and Procedure* treatise by Wright and Miller is the single most-cited treatise in the Tenth Circuit, with most other treatises only cited once or twice.[173] Approximately a third of the time, treatises were cited for general law—legal rules not attached to any particular jurisdiction.[174]

I returned to that data, this time coding each treatise use as a source of substantive law, procedural law, methodological law, or historical information. As "methodology," I included citations supporting a method of statutory interpretation, or citations related to common law use (how to apply precedent or interpret a case). The line between substantive and procedural is a notoriously difficult one to draw. I limited my definition of procedural to the rules governing the litigation process so that, for example, citing a treatise on criminal procedure (search and seizure) counted as substantive, not procedural. Citations to treatises on evidence law, on the other hand, I counted as procedural. Treatises were cited for substantive law in just under 40% of cases, with a wide variety of subjects, including antitrust, torts, contracts, evidence, criminal law, insurance law, and federal Indian law.[175] However, when used as a source of federal law, treatises were much more likely to be cited for non-substantive (procedural or methodological) federal law (77% of the time) than substantive law (22% of the time).[176]

Using treatises commonly as a source of federal law is not surprising in that the federal system has thirteen different circuits with a superior court, the Supreme Court, that reviews only a tiny percentage of all federal cases.[177] That leaves a lot of synthesis to be done across jurisdictions, a role that treatises are well suited for. This is true for both procedural federal law and substantive federal law.

Approximately half of the citations I coded as procedural[178] were to some version of Wright and Miller's *Federal Practice and Procedure*.[179] The Federal Rules of Civil Procedure are well-suited to a treatise, as they are invoked so frequently across all circuits.[180] They are relevant in every case, regardless of subject matter, so the organized synthesis of their

173. *Id.*
174. *Id.* at 31–33.
175. Griffin Data Compilation, *supra* note 18.
176. *Id.*
177. For example, in a twelve-month period ending in June 2021, 45,790 cases were filed in the U.S. courts of appeals (not including cases filed in the Court of Appeals for the Federal Circuit). *Table B—U.S. Courts of Appeals Statistical Tables for the Federal Judiciary*, U.S. CTS. (June 30, 2022), https://www.uscourts.gov/statistics/table/b/statistical-tables-federal-judiciary/2022/06/30. In a twelve-month period ending in September 2021, the Supreme Court granted 140 petitions for certiorari from the U.S. courts of appeals. *Table B-2—U.S. Courts of Appeals Judicial Business*, U.S. CTS. (Sept. 30, 2021), https://www.uscourts.gov/statistics/table/b-2/judicial-business/2021/09/30.
178. Griffin Data Compilation, *supra* note 18 (noting fifty of ninety-seven were coded as procedural).
179. CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE (4th ed. 2009).
180. Griffin Data Compilation, *supra* note 18.

application across circuits is likely particularly useful. Procedural rules are a context where uniformity is valued by most, so the existence of a continuously updated comprehensive resource is unsurprisingly valuable. Wright & Miller's treatise has a long history of acceptance by federal judges.[181]

The methodology citations were almost all to Bryan Garner's two relatively new treatises, *Reading Law* (2011)[182] and *The Law of Judicial Precedent* (2016).[183] Did the treatises succeed because of the subject matter? Both present their subjects as general law, not specific to any particular jurisdiction. Both essentially codify complex unwritten legal subjects. As law that does not belong to any particular jurisdiction, general law is well suited to a treatise.

General law is also an area where treatises arguably hold the most power, as there is no court that can definitively state what general law is or change it. When used as a source of general law, treatises were more likely (62% of the time) to be cited for substantive law than non-substantive general law (36% of the time).[184] Some examples of general law citations include definitions of legal malpractice,[185] the common law crime of battery,[186] generic robbery,[187] a heat of passion defense for a federal criminal case,[188] and assault.[189]

Treatises are often a proxy for general law—this is not surprising given the nature of general law, but it is not often acknowledged.

3. Treatise Citation in Diversity Versus Federal Question Cases

Considering only majority opinions, treatises were twice as likely to be cited in cases based on diversity jurisdiction (38.5%) than those based on federal question jurisdiction (18.6%).[190] In diversity cases, treatises were only cited as a source of state law three times out of forty-seven instances.[191] Instead, treatise citations in diversity cases were cited for two

181. *See, e.g.*, Ruth Bader Ginsburg, *In Celebration of Charles Alan Wright*, 76 TEX. L. REV. 1581, 1583 (1998) ("Professor Wright's career is crowded with signal achievements, but Federal Practice and Procedure merits placement at the top of the list. That monumental work . . . is by far the most-cited treatise in the United States Reports; it has been called the procedural Bible for federal judges and those who practice in our federal courts.").

182. ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

183. BRYAN A. GARNER, CARLOS BEA, REBECCA WHITE BERCH, NEIL M. GORSUCH, HARRIS L. HARTZ, NATHAN L. HECHT, BRETT M. KAVANAUGH, ALEX KOZINSKI, SANDRA L. LYNCH, WILLIAM H. PRYOR JR., THOMAS M. REAVLEY, JEFFREY S. SUTTON, & DIANE P. WOOD, THE LAW OF JUDICIAL PRECEDENT (2016); *see* Griffin, *supra* note 13, at 34; Amy J. Griffin, *"If Rules They Can Be Called"*, 19 LEGAL COMM. & RHET. 155, 155, 157 (2022) (providing additional discussion of these treatises).

184. Griffin Data Compilation, *supra* note 18.

185. Sylvia v. Wisler, 875 F.3d 1307, 1321 (10th Cir. 2017).

186. United States v. Ontiveros, 875 F.3d 533, 538 (10th Cir. 2017).

187. United States v. O'Connor, 874 F.3d 1147, 1155 (10th Cir. 2017).

188. United States v. Currie, 911 F.3d 1047, 1054–55 (10th Cir. 2018).

189. United States v. Gonzales, 931 F.3d 1219, 1221–22 (10th Cir. 2019).

190. Griffin Data Compilation, *supra* note 18.

191. *Id.*

major purposes: general substantive law (39%) and federal procedural law (43%).[192]

In federal question cases, again, federal procedural questions were close to half of all treatise citations. Treatises were cited more frequently for substantive law in federal question cases, which could be simply due to federal judges' greater familiarity with federal law treatises because they work with federal law much more frequently than the law of any particular state.[193] And treatises as a source of substantive general law are more frequently cited in diversity cases than federal question cases.

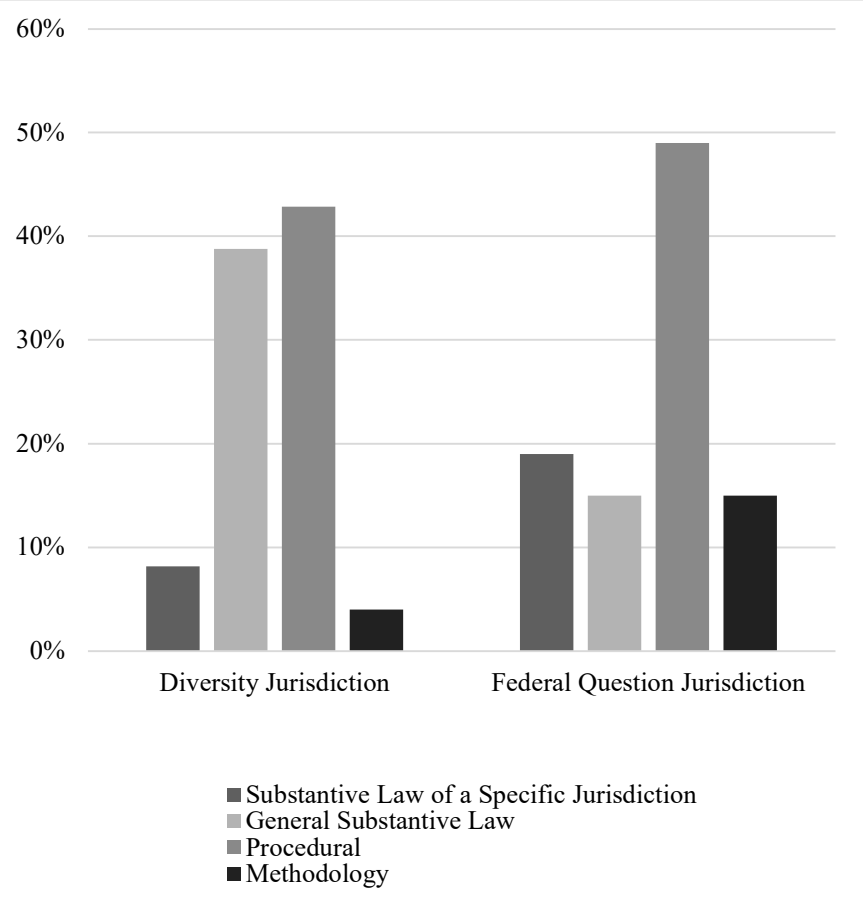

TABLE 3. *Treatise Citation by Type of Law*

4. Why Judges Cite to Treatises

All this data helps to piece together a fairly comprehensive picture of the way federal judges in the Tenth Circuit use treatises, on two important

192. *Id.*

193. *Id.* Diversity cases account for only about 10% of the published opinions in the period of my study (67 of 633 (10.6% of cases)), and of course even that set are not all from the same state. *See id.*

levels. First, the data illustrates broad judicial norms around treatise use—showing that treatises are an acceptable source of authority across many areas of law. The data above shows that treatises are cited as authority for procedural issues, for substantive issues across fields of law, and for methodological issues. The frequent citation to fairly new treatises in the methodological field (how to use precedent and how to interpret statutes) suggests that reliance on treatises as a genre is not limited to longstanding treatises such as Wright & Miller's. It also suggests that the genre is not a dying one.

Close review of all the citations to treatises supports the hypothesis that treatises have content-independent weight—value in the status of the source apart from its substantive content. One, treatises have weight as evidence of existing practices—not because the judge citing it is persuaded by the approach itself, but because the judge is persuaded by the fact that other courts are following it. If other courts have followed a particular rule, on some theories it is more likely to be right.[194] It also provides the judge with a neutral (nonpersonal) source for at least one piece of a decision. In some instances, the introductory language used by the court explicitly points out that the treatise is being used as evidence of how other courts have interpreted text or applied rules.

For example, in one instance, Judge Tymkovich cited to a treatise for the proposition that "courts view the right to frisk as being automatic . . . ."[195] Other examples include a citation to Wayne LaFave's *Search and Seizure* treatise for the proposition that "[c]ourts . . . have concluded . . . ,"[196] or the note that "many courts hold" with a citation to *Dobbs on the Law of Torts*.[197] Or the assertion that "lower federal courts are divided" on an issue, supported by a citation to Hertz and Liebman's *Federal Habeas Corpus* treatise.[198] Some of the typical practical advice about treatises described above reflects this theory of content-independent weight, noting that treatises might be cited as evidence of widespread practice.[199] In this view, treatises have weight as a proxy for precedent.

A second reason for deference to a treatise is the expertise of the author, a reason also reflected in practical advice on using treatises (often framed as the reputation of the author). Expertise is a traditional reason for giving content-independent weight to authority. Sometimes courts specifically use expertise language like "[a]s Professor Williston's treatise

194. Marquis de Condorcet outlined this theory in his 1785 book *Essay on the Application of Analysis to the Probability of Majority Decisions*. For more on this see *Jury Theorems: Condorcet's Jury Theorem*, STAN. ENCYCLOPEDIA PHIL. (Nov. 17, 2022), https://plato.stanford.edu/entries/jury-theorems/#CondJuryTheo.

195. United States v. Romero, 935 F.3d 1124, 1133 (10th Cir. 2019) (Tymkovich, C.J., concurring in part).

196. United States v. Russian, 848 F.3d 1239, 1247 (10th Cir. 2017).

197. Montoya v. Vigil, 898 F.3d 1056, 1067 n.9 (10th Cir. 2018).

198. Grant v. Royal, 886 F.3d 874, 912 (10th Cir. 2018).

199. *See supra* text accompanying note 50.

explains,"[200] or "[a]s stated by a leading treatise,"[201] or "[o]ur position finds support in leading authorities,"[202] or "a leading commentator notes,"[203] or "Professor LaFave notes that,"[204] or "[i]n the words of the preeminent antitrust treatise . . . ."[205] I identified a specific nod to the expertise of the treatise author in about 10% of the treatise citations. Which is not to say that those are the only times the judge uses the treatise for the expertise of its author—that is just the percentage of explicit acknowledgment.

As H.L.A. Hart has explained,

> [T]hough the statement of an authority on some subject is not regarded as creating an obligation to believe, the reason for belief constituted by a scientific authority's statement is in a sense peremptory since it is accepted as a reason for belief without independent investigation or assessment of the truth of what is stated. It is also content-independent since its status as a reason is not dependent on the meaning of what is asserted so long as it falls within the area of his special expertise.[206]

If the author of the treatise is an expert, reliance on a treatise makes sense in the very traditional sense of authority as a source of expertise.

These two theories (expertise and evidence of others' practices) are consistent with the reasons to give weight to *any* authority (as opposed to deciding each case anew). If multiple judges rely on it, it will increase the amount of consensus and uniformity. If a treatise is a proxy for multiple judicial decisions, its use is supported by all the same reasons that support stare decisis: consensus, uniformity, and efficiency. In these sorts of instances, treatises can easily be seen to have more weight than a primary source like a single case—because they stand for many cases. This use of a treatise is an extension of stare decisis, but it broadens the reach of cases outside of courts they technically "bind."

Relatedly, reliance on treatises may be motivated by the same sort of efficiency that supports stare decisis—evidence of decisions other courts made prevents a judge from needing to start from scratch with each decision. A treatise ideally provides an accurate synthesis of case law in rule form that would be time-consuming for an individual judge to reconstruct each time.[207] We might view treatises as shortcuts, consistent with an

200. Sylvia v. Wisler, 875 F.3d 1307, 1331 (10th Cir. 2017).
201. Ute Indian Tribe Uintah & Ouray Rsrv. v. Lawrence, 875 F.3d 539, 547 (10th Cir. 2017).
202. Chieftain Royalty Co. v. Enervest Energy Inst'l Fund XIII-A, L.P., 861 F.3d 1182, 1188 (10th Cir. 2017).
203. United States v. Williamson, 859 F.3d 843, 856 (10th Cir. 2017).
204. United States v. Faulkner, 950 F.3d 670, 676 (10th Cir. 2019).
205. Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221, 1234 (10th Cir. 2017).
206. H.L.A. Hart, *Commands and Authoritative Legal Reasons*, *in* ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL PHILOSOPHY 243, 261 (1982).
207. Paul J. Watford, Richard C. Chen, & Marco Basile, *Book Review: Crafting Precedent*, 131 HARV. L. REV. 543, 543–44 (2017) (reviewing BRYAN A. GARNER, THE LAW of JUDICIAL PRECEDENT (2016)).

economic theory of judicial choices—allowing judges to maximize their leisure time.

In most instances, the judge citing to the treatise does not provide any explicit indication of the reason for the citation—it is left to speak for itself. This is in contrast to Frederick Hicks' 1923 observation that "frequently the citation or quotation from the treatise is introduced by an expression which purports to show that the statement quoted has been tested by reference to the cases before deciding to use it."[208] Hicks points out language like "a fair summary of the principle under discussion is found in" or "the distinction is very early pointed out by."[209] The opinion citing a treatise in the cases I reviewed often provides a simple rule statement for a step in the analysis, without any introductory language explaining why a treatise is used as a source. For example:

> The relevance of these subsidiary standards is determined by the matters at issue in a summons-enforcement proceeding. *See* Harry T. Edwards & Linda A. Elliott, FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT AND AGENCY ACTIONS, Ch. V(A), Westlaw (database updated Feb. 2018) ("Although 'deference . . . is the hallmark of abuse of discretion review,' the variety of matters committed to the discretion of district judges means that the standard is necessarily variable. *It implies no single level of scrutiny by the appellate courts*." (emphasis added) (citation omitted) (quoting *Gen. Elec. v. Joiner*, 522 U.S. 136, 143, 118 S. Ct. 512, 139 L.Ed.2d 508 (1997))).[210]

It is difficult to characterize all the treatise citations in the study—there is too much variation. However, I categorize roughly half of the instances of treatise citations as direct citations to something in "rule" like form.[211] For example, with respect to methodology, the treatise on statutory interpretation by Justice Scalia and Bryan Garner, *Reading Law*, is often quoted.[212] The judge typically quotes the canon, citing to *Reading Law* as the source.[213] Garner's treatise on *The Law of Judicial Precedent* is cited in a similar fashion, with a judge often quoting a principle and citing the text as a source.[214] Judges have quoted *The Law of Judicial Precedent* for the definition of "dicta,"[215] for a rule on how to reconcile discordant decisions,[216] and cited it for the rule that the court can consider a

208. HICKS, *supra* note 1, at 158.
209. *Id.*
210. High Desert Relief, Inc. v. United States, 917 F.3d 1170, 1179 n.4 (10th Cir. 2019).
211. In the cases I studied, treatises were rarely cited for an application of law to facts. *But see* United States v. Gaines, 918 F.3d 793, 796 n.4 (10th Cir. 2019) (citing a treatise for the principle that flashing lights on a police car show that a reasonable person would not feel free to leave).
212. *See, e.g.*, Potts v. Ctr. for Excellence in Higher Educ., Inc., 908 F.3d 610, 614 (10th Cir. 2018); Navajo Nation v. Dalley, 896 F.3d 1196, 1208 (10th Cir. 2018); Nelson v. United States, 915 F.3d 1243, 1250 (10th Cir. 2019).
213. *See, e.g.*, *Potts*, 908 F.3d at 614; *Navajo Nation*, 896 F.3d at 1208; *Nelson*, 915 F.3d at 1250.
214. Watford et al., *supra* note 207, at 549–50.
215. Exby-Stolley v. Bd. Cnty. Comm'rs, Weld Cnty., 906 F.3d 900, 911 (10th Cir. 2018).
216. United States v. Hansen, 929 F.3d 1238, 1254 (10th Cir. 2019).

concurring opinion for its persuasive value.[217] In one case, Judge Bacharach quoted *The Law of Judicial Precedent* for the rule that "[t]he distinction between a holding and a dictum doesn't depend on whether the point was argued by counsel."[218] Similarly, many of the citations to Wright & Miller are quotations from the treatise in rule format.[219] For example, in one typical Wright & Miller citation, the court quoted the treatise for a legal principle related to the interpretation of intervention under Rule 24 of the Federal Rules of Civil Procedure.[220]

Other less frequent types of uses include citing to treatises for background of a particular area of law, such as the purpose of the 1924 Pueblo Land Act.[221] Occasionally, a judge cites to a treatise for policy-related points. For example, one judge quoted *Newberg on Class Actions*[222] for the statement that "the class action device is especially pertinent to vulnerable populations."[223] Another used a treatise as support for the reason the REAL ID Act was adopted: "But Thoung's interpretation misreads the REAL ID Act, which was adopted in 2005 to render the removal-challenge process consistent with *St. Cyr*. *See* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 41.1, at 2208–15 (6th ed. 2011)."[224]

As with any source cited by a judge in a written opinion, a citation to a treatise suggests that the case is being decided not on the whim of the judge but in accordance with neutral principles. Treatises are an effort to synthesize the law, to articulate and define the law in the form of rules. The data suggests to me that treatises have weight in large part because of their doctrinal form—their form as rules. Their frequent citation in rule form supports the idea discussed above that treatises have a link to formalist methodology.

CONCLUSION

Contrary to conventional wisdom, the data suggests that treatises carry a significant amount of weight as legal authority. Citation to optional sources of authority such as treatises are not random, unpredictable choices, and the more patterns we discern, the better understanding we will have of what judges count as law. Statistically significant differences in treatise citation among judges by gender and political party suggest that we have much more to learn about the factors that impact opinion writing. At a minimum, I hope this Article will help put to rest the unhelpful conventional wisdom that treatises are cited when judges are persuaded by

217. United States v. Garcia, 877 F.3d 944, 950 n.4 (10th Cir. 2017).
218. United States v. Turrieta, 875 F.3d 1340, 1345 (10th Cir. 2017).
219. *See, e.g.*, Brokers' Choice Am., Inc. v. NBC Universal, Inc., 861 F.3d 1081, 1102–03, 1105 (10th Cir. 2017).
220. New Mexico v. Dep't Interior, 854 F.3d 1207, 1231 (10th Cir. 2017).
221. United States v. Antonio, 936 F.3d 1117, 1121–23 (10th Cir. 2019).
222. Menocal v. GEO Grp., Inc., 882 F.3d 905, 915 (10th Cir. 2018).
223. *Id.*
224. Thoung v. United States, 913 F.3d 999, 1003 (10th Cir. 2019).

their content. Instead, we should view the weight of authority as neither binary nor unknowable. We should strive to understand, to the extent possible, the weight that judges accord different sources of authority, even if they are optional.

For one thing, in the context of any particular dispute, the litigants themselves ought to know which sources of optional authority have weight for the judges deciding their case. Numerous scholars have shown that the adversarial system does not necessarily provide parties with the opportunity to evaluate and counter the sources the judge relies on.[225] Scholars have pointed out the problems with judges citing to nonlegal sources that they themselves have unearthed.[226] Judges regularly cite to cases that the parties did not cite in their briefs. This practice is potentially even more problematic with respect to sources that are not case law, as they do not comprise a well-defined universe. Classifying all sources with any content-independent weight (and how that weight changes over time) might encourage consistency across courts. It would arguably be better for litigants—fairer—for all parties to have equal access to and knowledge of the sources that might impact the litigation.

Beyond fairness to the litigants, there are normative questions about which sources judges should give weight to, questions that transparency can help to answer. Are judges giving weight to ideological sources? There is so much variety within the treatise genre, and some treatises might be much more reliable than others. There ought to be a better system for evaluating sources, which is not to suggest that judges should be limited to particular sources. Judicial norms about the weight of authority evolve organically, just as all social norms do. Those who have historically been outsiders to the long-standing white male judiciary bring new perspectives, and when they become part of the judiciary, they can contribute to the evolution of those norms. As Steven Wilf wrote relatively recently,[227] "The legal treatise is part of a much broader genre ecology that is only beginning to be explored by scholars."[228] This Article illuminates the ecosystem of acceptable sources of authority by highlighting the strategic, political, and gendered reliance on treatises in one representative federal appellate court.

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225. *See, e.g.*, Kevin Bennardo & Alexa Z. Chew, *Citation Stickiness*, 20 J. APP. PRAC. & PROCESS 61, 64 (2019); Brian N. Larson, *Endogenous and Dangerous*, 22 NEV. L. REV. 739, 740–41 (2022); Chad M. Oldfather, Joseph P. Bockhorst, & Brian P. Dimmer, *Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal Scholarship*, 64 FLA. L. REV. 1189, 1238 (2012).

226. *See, e.g.*, Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1263, 1291 (2012); Larsen, *supra* note 3, at 63, 101.

227. *See generally* Wilf, *supra* note 24 (discussing legal treatise).

228. *Id.* at 688 ("[A] genre ecosystem is a complex network of interacting forms. These must be examined in comparison to other modes of embodying law . . . .").