

# COURT FIXING

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Whatever the legacy of Bill Clinton's presidency, he made a lasting mark on the federal judiciary. Clinton appointed 377 judges, representing nearly half of the Article III judiciary.<sup>1</sup> He nominated an additional forty judges<sup>2</sup> and thus came

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1. Clinton named 2 Supreme Court justices, 65 courts of appeals judges, 305 district court judges, and 5 Court of International Trade judges to lifetime appointments, or nearly 45% of the 843 Article III judges. The Clinton appointment figures are derived from the following sources: Alliance for Justice, *Judicial Selection Project Annual Report 1999* (visited Feb. 27, 2001) <<http://www.afj.org/jsp/tables.html#t1>>; Federal Judicial Center, *Judges of the United States Courts* (visited Feb. 27, 2001) <[http://air.fjc.gov/history/judges\\_frm.html](http://air.fjc.gov/history/judges_frm.html)>; U.S. Senate Committee on the Judiciary, *106th Congress Nominations Statistics, November 9, 2000* (visited Feb. 27, 2001) <<http://www.senate.gov/~judiciary/106stats.htm>>. These figures only include life-time judicial appointments confirmed by the Senate, and thus do not reflect Clinton's recess appointment of Roger Gregory to the Fourth Circuit on December 27, 2000. See Dan Eggen, *Clinton Names Black Judge to Appeals Court* (visited Dec. 27, 2000) <<http://washingtonpost.com/wp-dyn/nation/courts/supremecourt/20002001/A57051-2000D ec27.html>>. If Congress formally confirms Gregory at the end of his one-year temporary appointment, he will become a permanent member of the Fourth Circuit, and Clinton will tie Reagan's 378-judge record.

2. See U.S. Senate Committee on the Judiciary, *106th Congress Nominations Statistics, November 9, 2000*, (visited Feb. 27, 2001) <<http://www.senate.gov/~judiciary/106stats.htm>> (listing 16 courts of appeals and 24 district court nominations as pending for 66 vacancies); see also Administrative Office of the U.S. Courts, *Judiciary Now: The Latest News and Features: Judicial Vacancy Summary, Updated February 5, 2001* (visited Feb. 27, 2001) <<http://www.uscourts.gov/vacancies/summary.htm>> (noting that as of February 5, 2001, there were 29 court of appeals and 63 district court vacancies).

very close to surpassing Ronald Reagan's record 378 appointments.<sup>3</sup> He did not achieve that goal, however, as the Republican-controlled Senate slowed the confirmation process to a near standstill during the 2000 election year.<sup>4</sup> Given that nearly a quarter of the active federal judiciary was appointed by Reagan (who last nominated a judge more than twelve years ago), Clinton should have left the Oval Office confident that his judicial appointees will be making decisions for years to come.<sup>5</sup>

Clinton used his appointments to name liberal to moderate judges who appeared to vote consistently with his "New Democrat" agenda.<sup>6</sup> Conservatives have criticized Clinton for appointing liberal activist judges, while liberals have questioned whether Clinton's judicial appointments have been as liberal as prior Democratic appointees.<sup>7</sup> The first systematic study of circuit and district court

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3. See Alliance for Justice, *Judicial Selection Project Annual Report 1999* (visited Feb. 27, 2001) <<http://www.afj.org/jsp/tables.html#t1>>.

4. See Alliance for Justice, *2000 Judicial Selection Project Update, October 30, 2000* (visited Feb. 27, 2001) <<http://www.afj.org/jsp/notes.html>> (reporting a statement of Democratic Senator and Judiciary Committee Member Patrick Leahy that the Committee held no confirmation hearings in August or September although 36 nominees were awaiting hearings); Alliance for Justice, *Judicial Selection Project Annual Report 1999* (visited Feb. 27, 2001) <<http://www.afj.org/jsp99.html#II-a>> (reporting that, in light of the delays in Senate confirmation of Clinton nominees (170 days) and threats made by Republican Senators to shut down the confirmation process, pending nominees face an uphill battle for confirmation); *Editorial: Held Hostage in the Senate*, WASH. POST, May 7, 2000, at B6 (observing that the Senate has moved slowly on nominations in 2000 and arguing that the Senate should follow the practice of previous Senate majorities that have confirmed an opposing president's nominees in election years); Eric Pianin & Charles Babington, *Long in Limbo, Judge Finally Will Get a Ruling*, WASH. POST, Mar. 6, 2000, at A1 (describing the decreasing numbers of nominees that have been confirmed by the Senate and observing that "Republicans appear increasingly reluctant to approve more of Clinton's nominations before the November election, hoping that Texas Gov. George W. Bush takes the White House and begins making more conservative nominations").

5. According to Patrick McGuigan, Director of the Judicial Reform Project of the Institute for Government and Politics, "The Reagan legacy is probably going to be found in his court appointments...far beyond any legislative initiatives." HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* 3 (1988) (quoting McGuigan).

6. In the 1996 presidential election, Republican challenger Bob Dole tried to make Clinton's judicial appointments to the lower courts a key issue in his campaign. See, e.g., Harvey Berkman & Claudia MacLachlan, *Don't Judge a Book...Clinton's Picks—Not So Liberal: More Judges are Minorities, Women, But Ike'd Like Them*, NAT'L L.J., Oct. 21, 1996, at A1. He shouted to Republican Convention delegates in August 1996, "'For those who say that I should not make President Clinton's liberal judicial appointments an issue of this campaign, I have a simple response: I have heard your argument. The motion is denied!'" Naftali Bendavid, *GOP Measure Chips Away at Judicial Power, Discretion*, *LEGAL TIMES*, May 26, 1997, at 1 (quoting Dole's speech but concluding that "the issue never really caught fire during the campaign").

7. See, e.g., David Byrd, *Clinton's Untilting Federal Bench*, NAT'L J., Feb. 19, 2000, at 555 (describing conservative interest groups' claims as well as liberal groups'

decisions by Clinton judges found that they indeed were not as liberal overall as Carter judges, primarily because they were more likely to vote for the government in criminal prosecutions.<sup>8</sup> Clinton's circuit court appointees, however, were as liberal as Carter's in civil rights and liberties cases, and Clinton's circuit and district court appointees were more liberal than Republican appointees in all issue areas.<sup>9</sup> These appointments reflect the President's own centrist perspectives on many issues, his commitment to civil rights, and his tough-on-crime rhetoric.<sup>10</sup> Political scientist Sheldon Goldman, an expert on judicial selection, concludes, "From Clinton's perspective, he already has a legacy, and it's a pretty damn good one."<sup>11</sup>

George W. Bush also has the potential to leave a judicial legacy, particularly as the Senate is (barely) controlled by his party and therefore should

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laments about Clinton judges); Jeffrey Toobin, *Clinton's Left-Hand Man*, THE NEW YORKER, July 21, 1997, at 28, 29-30. Toobin argues that:

[T]he Clinton judges are an ideologically bland group. "The Clinton appointments are philosophically moderate," says Nan Aron, the president of the liberal Alliance for Justice, which monitors judicial appointments. "Studies show that they have the same ideological underpinnings as Gerald Ford's appointments. They're less liberal than Jimmy Carter's." [Deputy Attorney General] Jamie Gorelick says, "On choices of judicial candidates, the President has often been more comfortable with the more middle-of-the-road, less doctrinaire candidates."

*Id.*

8. Ronald Stidham et al., *The Voting Behavior of President Clinton's Judicial Appointees*, 80 JUDICATURE 16, 19, 20 (1996) (reporting that Carter's district court appointees were more liberal than Clinton's in criminal justice cases (38% versus 34%), but Clinton's appointees were more liberal than Nixon's (30%), Ford's (32%), Reagan's (23%), or Bush's (29%), and that Carter's circuit appointees were much more liberal than Clinton's in criminal justice cases (40% vs. 31%) though Clinton circuit judges were still more liberal than Nixon (26%), Ford (20%), Reagan (26%), or Bush (22%) judges in the criminal justice issue area).

9. See *id.* (reporting that Clinton district judges were liberal in 48% of all cases compared to Nixon (39%), Ford (44%), Reagan (36%), and Bush (37%) district judges and finding that Carter and Clinton circuit judges were comparably liberal in civil rights and liberties cases (42% versus 41%), an issue area in which the most liberal Republican appointees in these cases, Ford appointees, took a liberal position 35% of the time and the most conservative, Nixon appointees, took a liberal position 29% of the time); Byrd, *supra* note 7, at 555 (describing political science professor Robert Carp's study of 60,000 federal district court opinions that produced findings strikingly parallel to those found for circuit court judges).

10. See Carrie Johnson, *Final Judgment: The President Has Been Criticized by Left and Right. Maybe He Got the Bench He Wanted—And Deserved*, LEGAL TIMES, Mar. 6, 2000, at 10 (quoting Victoria Radd Rollins, associate counsel to President Clinton from 1994 to late 1995, who stated she "'believe[s] the president has been doing exactly what he intended and wanted to accomplish in all these years. He nominated centrist judges who in large part reflect his views on issues, with a deep commitment to representing women and minorities on the bench.'").

11. *Id.* (quoting Goldman).

be more receptive to his nominations.<sup>12</sup> As many as three Supreme Court justices, including the Chief Justice, may retire in the next four years.<sup>13</sup> Almost immediately, President Bush will be able to nominate judges for twenty-six vacancies on the courts of appeals (nearly fifteen percent of the seats) and fifty-four openings on the district courts (more than eight percent).<sup>14</sup> Congress could add to that number by creating the sixty-nine judgeships requested by the U.S. Judicial Conference,<sup>15</sup> a much more likely occurrence now that both houses are controlled by the president's party.<sup>16</sup> Political parties and interest groups viewed

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12. See Christopher P. Banks, *The Politics of Court Reform in the U.S. Courts of Appeals*, 5-11 (Sept. 1999) (unpublished paper presented at the Annual Meeting of the American Political Science Association, on file with Author) (describing in detail the Republican-controlled Senate's "war" on Clinton's judicial nominees); *see generally* Geoffrey Peterson & David Hogberg, *Nobody Expects the Spanish Inquisition: Judicial Confirmation Hearings and Divided Government* (Sept. 1999) (unpublished paper presented at the Annual Meeting of the American Political Science Association, on file with Author) (concluding, based on a finding that divided government significantly increases the length of time a nominee languishes in the Senate Judiciary Committee, that a president's judicial nominations face greater scrutiny when the Senate is dominated by a different party); Task Force on Federal Judicial Selection, *Justice Held Hostage: Politics and Selecting Federal Judges*, in *UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS* 1, 36, 60 tbl.11, 61 fig.11 (Citizens for Independent Courts, An Initiative of The Constitution Project ed., 1999) ("During times when one party had control of the Senate and the other party of the White House, the average number of days between nomination and final action was significantly higher. This difference existed for both successful and unsuccessful nominees, but the average time for unsuccessful nominees was much longer.").

13. Three justices are at least 70 years old: Chief Justice William Rehnquist is 76 (10/1/1924), Justice John Paul Stevens is 80 (4/20/1920), and Justice Sandra Day O'Connor is 71 (3/26/1930). See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 234-35 (1996). The next oldest justice is Ruth Bader Ginsburg at 68 (3/15/1933). See *id.* at 230.

14. See Administrative Office of the U.S. Courts, *Judiciary Now: The Latest News and Features: Judicial Vacancy Summary*, Updated January 4, 2001, (visited Feb. 27, 2001) <<http://www.uscourts.gov/vacancies/summary.htm>>. By comparison, the U.S. Senate Judiciary Committee reported that 66 seats were vacant as of November 9, 2000. See U.S. Senate Committee on the Judiciary, *106th Congress Nominations Statistics, November 9, 2000*, (visited Feb. 27, 2001) <<http://www.senate.gov/~judiciary/106stats.htm>>.

15. Administrative Office of the U.S. Courts, *Judicial Conference Seeks New Judgeships*, Press Release, Mar. 16, 1999 (visited June 1, 2000) <[http://www.uscourts.gov/Press\\_Releases/jcc99.html](http://www.uscourts.gov/Press_Releases/jcc99.html)>. The article reports:

At its biannual meeting today, the Conference also agreed to transmit to Congress a request for an additional seven permanent and four temporary judgeships in the courts of appeals and 33 permanent and 25 temporary district judgeships. The Conference also will ask Congress to convert 10 existing temporary judgeships to permanent positions in the district courts. New judgeships were last created in 1990. Since then, appeals filings have climbed by more than 30 percent and the number of cases filed in the district courts has increased by more than 20 percent.

16. John M. de Figueiredo et al., *Congress and the Political Expansion of the U.S. District Courts*, 2 AM. L. & ECON. REV. 107, 122 (2000) (finding that "there is a 39

the incoming president's potential impact on the judiciary as significant enough to use it as a rallying point during the 2000 presidential campaign.<sup>17</sup>

George W. Bush, like his predecessors, will seek to name judges who will carry his policy views to the courts; that is, the president will want to "fix" the courts.<sup>18</sup> He will want to avoid Dwight Eisenhower's error: when asked if he had made any mistakes while in office, Eisenhower reportedly responded, "Two—and they both sit on the Supreme Court."<sup>19</sup> The new president and his advisors should look to the empirical work of social scientists if they want to make the "right" decision in picking judges who match the president's perspective. A great deal of social science research has been conducted on the factors influencing judges' decisions, producing robust, informative findings. Current studies reveal the

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percentage point higher probability of an expansion in the district court during times of unified government than during times of divided government"); John M. DeFigueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435, 444-45, 452 (1996) (testing the theory that the House majority would support the creation of new courts of appeals judgeships when the new appointments would be nominated by a president from the same party and confirmed by a Senate majority from the same party and finding that a unified federal government is 59 percent more likely to add circuit judges than a divided government).

17. See, e.g., Christian Coalition, *A Message from the President: Letter Regarding the Countdown to Victory* (visited June 20, 2000) <<http://www.cc.org/countdown/letter.html>> ("alerting concerned Christians" that the 2000 election will impact the appointment of three Supreme Court justices and 180 federal judges); Letter from Kate Michelman, NARAL President, to NARAL Supporters (2000) (on file with Author) (warning supporters that an anti-choice president could use judicial appointment to limit abortion rights); NARAL Web Page, *The Powers of the President: Reproductive Freedom and Choice* (visited on June 16, 2000) <<http://www.naral.org/mediaresources/publications/president/index.html>> (cautioning that a new president will have the power to nominate judges to federal appellate courts); Barbara Olson, *Will the Supreme Court Remain Supreme?*, RISING TIDE, Winter 2000, at 10 (warning readers of this Republican National Committee publication that a liberal president could fill the courts with left-wing jurists who would radically alter national policies). Cf. *High-Court Nominee Issue May Sway Voters, Poll Finds*, DALLAS MORNING NEWS, July 2, 2000, at A24 (describing results of Princeton Survey Research Associates poll of registered voters: nearly three-quarters indicated that a candidate's probable Supreme Court appointments would be important to their vote with 36% stating appointments would be very important and 37% stating they would be somewhat important (with a 4 percentage point margin of error)).

18. Cf. Montgomery N. Kosma, *Measuring the Influence of Supreme Court Justices*, 27 J. LEGAL STUD. 333, 336 (1998) (drawing an analogy between "a financial manager selecting a capital investment" and "a president choosing a Supreme Court nominee" and developing "an economic model of the nominee as an investment").

19. Eisenhower was reportedly referring to Chief Justice Earl Warren and Justice William Brennan. See HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 266 (3d ed. 1992). Though repeated in many places, there is no direct evidence that Eisenhower actually uttered those words. Yet, this probably apocryphal tale seems consistent with Eisenhower's views on Warren's and Brennan's liberal Court decisions.

significance of a judge's political preferences and the insignificance of personal attributes such as gender, race, age, and religion. In addition, career experience appears to be weakly correlated with judicial decisions on certain subjects.

This Article critically examines the existing social science evidence on the relative importance of various individual factors on judicial behavior and adds to that evidence by considering the influence of prior academic experience on judges. Researchers have not focused much attention on the importance of a judge's background as a full-time law professor and legal scholar, although more than thirteen percent of courts of appeals appointees were former law professors.<sup>20</sup> Franklin Roosevelt and Ronald Reagan both viewed the federal judiciary (particularly the Supreme Court and the Courts of Appeals) as integral to their policy agendas, and both further believed that the individuals best able to fulfill their policy goals were law faculty who had demonstrated intellectual support for the president's perspective.<sup>21</sup> This Article will demonstrate FDR's and Reagan's appointments of academics substantially contributed to their ultimate success in fixing the courts to adopt their respective—and sharply contrasting—perspectives on law. By selecting legal scholars, the presidents were certain as to the ideological positions or "preferences" of their nominees. Moreover, former law professors selected by such means are more likely than other judges to pursue single-mindedly their views and to seek to influence other judges and courts to adopt these perspectives.

This Article pays particular attention to judges on U.S. Courts of Appeals of general jurisdiction. Franklin Roosevelt was the first president to recognize the potential importance of the circuit courts to his programs and to take an active role in the selection of lower court judges.<sup>22</sup> Today, a president will, and should, focus a great deal of attention on the individuals appointed to the courts of appeals. These courts are of critical importance, because they make and interpret the law for their respective regions with little review by the Supreme Court.<sup>23</sup> The

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20. *See generally* Tracey E. George, *From the Classroom to the Courtroom: Academics on the Appeals Courts* (2000) (unpublished manuscript, on file with Author) (detailing the history of the appointment of legal scholars to serve on federal courts of appeals)..

21. *See id.* at 3–7, 13–17.

22. *See* SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 30–38 (1997). Goldman explains that when FDR took office in 1933, the federal judiciary was not perceived as important to the construction of policies:

But beginning about one to two years after the start of Roosevelt's presidency, lower-court decisions (and then Supreme Court decisions) struck down various actions and programs of the New Deal. More than one-third of the lower-court federal judiciary during 1935 and 1936 issued a total of about sixteen hundred injunctions to prevent the enforcement of various New Deal measures.

*Id* at 30–31.

23. In the October 1999 term, the Supreme Court decided only 79 cases on the merits in 74 signed opinions. Fewer than four percent of the parties who sought a definitive ruling from the Court were able to obtain it (and relatively few even tried). *See* Supreme

sometimes controversial Ninth Circuit, for example, decides more than 9000 disputes each year with only a handful reconsidered by the Court, leaving in place the circuit's key rulings in such crucial areas as criminal law, intellectual property, and immigration rights.<sup>24</sup>

The Article proceeds as follows: Part I examines systematically the relative influence of personal attributes, social background, and ideological perspectives on judicial decision-making. Part II builds a theoretical model of how the academic experience could create an "individualistic" judge, one who is more active and independent than her colleagues. Part III tests empirically the hypotheses that are part of this model. The Article concludes by reflecting on the implications of the results.

## I. UNDERSTANDING JUDICIAL BEHAVIOR

In order to make wise selections, a president and his administration need to understand the factors influencing judicial behavior: what observable characteristics of an individual are likely to lead to (or at least be correlated with) the decisions the individual would make if appointed? Studies of judicial behavior over the last half century have revealed a great deal about the relative importance of various factors to judges' decisions. Researchers have considered the influence of judges' personal attributes, social background, and policy preferences on their decisional behavior as set forth in table 1.

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Court of the United States, *2000 Year-End Report on the Federal Judiciary* (visited Feb. 27, 2001) <<http://www.supremecourt.gov/publicinfo/year-end/2000year-endreport.html>>. During the previous term, the U.S. Courts of Appeals decided 26,727 cases on the merits. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1999 ANNUAL REPORT OF THE DIRECTORtbl.B-1 (1999), available at <<http://www.uscourts.gov/judbus1999/b01sep99.pdf>> (setting forth details of the circuit caseload for the 1998-99 term and reporting that courts of appeals terminated 24,710 additional cases without reaching the merits).

24. See Howard Mintz, *Judicial Choices Crucial for West*, SAN JOSE MERCURY NEWS, July 9, 2000, available at <<http://www.mercurycenter.com/premium/nation/docs/fedjudges09.htm>> (arguing that the next president would have a profound effect on the West through his appointments to the Ninth Circuit, because the Ninth Circuit has a greater impact on the region than does the Supreme Court).

Table 1. Individual Factors and Judicial Behavior: Existing Empirical Studies

<i>Personal Attributes</i>	Age Gender Race Religion
<i>Social Background</i>	Education Prior Judicial Experience Prior Prosecutorial Experience Prior Public/Elected Office
<i>Policy Preferences</i>	Legal Doctrine Appointing President Party Affiliation

#### *A. Personal Attributes*

The most obvious characteristics of potential nominees are their age, gender, race, and religion. As human behavior is often linked to these individual traits, judicial behavior may be as well. Studies of federal and state courts at every level have examined the relationship between judges' personal attributes and their voting behavior. Here, I bring together these disparate works and evaluate what they tell us about judicial decision-making.

##### *1. Age*

Judges of different ages offer complementary practical benefits to a president: the benefit of appointing younger judges is the prospect of longer tenure, whereas the benefit of appointing older judges is greater information about their legal views. Does judicial age also result in substantive differences? Scholars have hypothesized that individuals become more conservative over time, and hence older judges would be more conservative than younger judges.<sup>25</sup> Sheldon

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25. A small number of studies have also considered the effect of age at the time of appointment as opposed to the effect of age at the time of decision. A judge's age at appointment may measure the relative influence of the court's socialization processes on the judge, since a younger judge may be more open to its influences. See, e.g., S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947-1956 Terms*, 17 AM. J. POL. SCI. 622, 625 (1973) (finding, in a study

Goldman, in an early and influential study of courts of appeals decisions, found that older judges were more conservative than younger judges; however, his study did not control for party identification.<sup>26</sup> In contrast, an earlier Goldman study discovered no relationship between age and circuit judges' votes (except for votes on labor issues) when party affiliation was held constant.<sup>27</sup> Goldman questioned his earlier finding based on its reliance on a categorical rather than a continuous age variable; however, his later study is limited by its failure to control for political party identification.<sup>28</sup> Controlling for judges' party affiliation is important because age will be roughly correlated with party identification (i.e., judges of the same approximate age were likely appointed by the same president and hence will probably be from the same party) and party identification is a strong predictor of judicial votes. Therefore, any observed relationship between age and votes when party is not held constant may merely be the result of the influence of party on votes. In a Supreme Court study, Neal Tate found that age, measured in years (a continuous variable) and in cohorts (a categorical variable), was not a meaningful explanation of justices' votes when the influence of party affiliation and other judicial characteristics was controlled.<sup>29</sup> On balance, the studies suggest that age is of minimal value in predicting how judges will vote, particularly once other variables are considered.<sup>30</sup>

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of 14 Supreme Court justices, that age at appointment was highly correlated with the support of government parties).

26. Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 499 & tbl.6, 500–501, 501 tbl.7 (1975) (also finding no age difference in rate of dissent).

27. Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961–64*, 60 AM. POL. SCI. REV. 374 (1966); see also James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1715 tbl.II (1999) (reporting that age and union support were negatively related, but the influence of age appears minimal and the finding is only significant at the .10 level); Charles M. Lamb, *Exploring the Conservatism of Federal Appeals Court Judges*, 51 IND. L.J. 257, 267–70, 277 (1975) (finding that some District of Columbia circuit judges voted more conservatively over time while others became slightly more liberal).

28. See Goldman, *supra* note 26, at 498.

29. C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978*, 75 AM. POL. SCI. REV. 355, 359–63 (1981).

30. For examples of district court studies, see Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995) (concluding, based on a statistical analysis of 2258 district court cases, that a judge's age did not influence the probability of settlement); Beverly Blair Cook, *Sentencing Behavior of Federal Judges: Draft Cases—1972*, 42 U. CIN. L. REV. 597, 623–24 (1973) (discerning no relationship between a judge's age (over or under 65) and the severity of sentences given to draft offenders); Herbert M. Kritzer, *Political Correlates of the Behavior of Federal District Judges: A "Best Case" Analysis*, 40 J. POL. 25, 49–50 (1978) (finding a positive relationship between a judge's age and the harshness of the punishment imposed on draft law violators); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1459–60 (1998) (finding, after controlling for other variables, that a district judge's age was

In addition to marginal evidence of a relationship between a judge's age and her decisions, judicial age theories suffer from methodological shortcomings.<sup>31</sup> As James Gibson explains: "Age...is a particularly troublesome variable because it is so difficult to disentangle the variety of effects (including generational effects, effects of socialization to the judicial position, and period effects) with which it is associated."<sup>32</sup> In the end, a president should consider a judge's age if concerned about length of tenure or about having sufficient information on jurisprudential positions, but *not* as an indicator of probable rulings.

## 2. Gender and Race

Presidents have appointed lawyers of varying ages to the circuit courts, but of nearly unvarying gender and race: most appointees have been white men. Franklin Roosevelt appointed the first woman to the courts of appeals in 1934.<sup>33</sup> LBJ was the only other president to name a female circuit judge (and he named only one)<sup>34</sup> before Jimmy Carter appointed eleven women to the courts of appeals

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not a significant factor in her decision on the constitutionality of the Sentencing Guidelines or in the reasoning upon which she based her decision). *But see* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1189-90 tbl.4 (1991) (reporting that judicial age was statistically significantly related to rulings on intent claims in race discrimination suits).

31. One of the criticisms of judicial age research is that any observed differences in judicial behavior may be attributable to the judge's tenure on the court, since older judges have frequently also been on the court longer than younger judges. Thus, any attribution of voting variations to judicial age would be spurious. Interestingly, studies of the effects of length of tenure have not found it to be significantly related to judges' decisions. *See, e.g.*, Brudney et al., *supra* note 27, at 1730 tbl.VI (reporting an extremely weak, negative relationship—that approached but did not attain statistical significance—between year appointed and decisions in support of labor unions).

32. James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7, 24 (1983); *see also* David J. Danelski, *The Supreme Court of Japan: An Exploratory Study*, in COMPARATIVE JUDICIAL BEHAVIOR: STUDIES OF POLITICAL DECISION-MAKING IN THE EAST AND WEST 121, 149 (Glendon Schubert & David J. Danelski eds., 1969) (arguing that an individual's chronological age does not produce "liberalism, but...liberalism and conservatism are related to the climate of political opinion prevailing during the critical periods of the justices' political socialization"); Kritzer, *supra* note 30, at 50 (concluding, based on other correlations, that the positive relationship between age and sentence severity was a product of the effect of appointing president on behavior).

33. Florence Ellinwood Allen served on the Sixth Circuit from 1934 through 1959, presiding as chief judge in 1958 and 1959, and continued in senior status until her death in 1966. *See* Federal Judicial Center, *Judges of the United States Courts*, *supra* note 1. For biographical information, see generally JEANETTE E. TUVE, FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN (1984); Sarah Wilson, *Florence Ellinwood Allen*, in WOMEN IN LAW: A BIO-BIBLIOGRAPHICAL SOURCEBOOK 17 (Rebecca Mae Salokar & Mary L. Volcansek eds., 1996).

34. LBJ appointed Shirley Hufstedler to the Ninth Circuit in 1968. She resigned in 1979 to join the Carter cabinet as Secretary of Education. *See* Federal Judicial Center, *Judges of the United States Courts*, *supra* note 1.

(approximately twenty percent of his circuit appointments) beginning in 1977.<sup>35</sup> A chasm also spread between Harry Truman's recess appointment of the first African American to the courts of appeals<sup>36</sup> and the appointment of a measurable number of racial minorities: only four African Americans and one Asian American took circuit posts between 1950 and 1977, and no Hispanic or Native American did so.<sup>37</sup> Jimmy Carter's efforts to diversify the federal bench resulted in the appointment of two Hispanics, one Asian American, and nine African Americans to the courts of appeals (representing twenty-one percent of his circuit appointments).<sup>38</sup> Given the relative lack of variability in the gender and race of federal judges, meaningful empirical study of the influence of these attributes on judicial behavior was not possible until Carter's nominees had been in office long enough to issue a sufficient number of opinions for consideration. Moreover, robust analysis was stayed until Clinton's additional appointments increased the number of nontraditional judges (Reagan and Bush having appointed an almost entirely white-male circuit bench).<sup>39</sup>

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35. *See id.*

36. William Henry Hastie served on the Third Circuit from 1949 through 1971, presiding as chief judge from 1968 through 1971, and continued in senior status until his death in 1976. *See id.* He was the Dean of Howard University School of Law from 1939 until 1946 and was first appointed to federal judicial office by FDR, who named him to the district court in the Virgin Islands. *See id.* For biographical information, see PHILLIP McGuIRE, HE, TOO, SPOKE FOR DEMOCRACY: JUDGE HASTIE, WORLD WAR II, AND THE BLACK SOLDIER (1988); GILBERT WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE (1984).

37. See Federal Judicial Center, *Judges of the United States Courts*, *supra* note 1; see also Beverly Blair Cook, *Black Representation in the Third Branch*, 1 BLACK L.J. 260, 260–61, 264–65, 267 (1971) (observing the slow integration of American courts (one percent of all judges were black in 1970, the same percentage as in 1963, while by comparison, eleven percent of Americans were black in 1970), finding that black judges sat on federal courts in states with black state judges, and concluding that the low number of black lawyers did not account entirely for the scarcity of black judges); *The Black Judge in America: A Statistical Profile*, 57 JUDICATURE 18, 18 (1973) (reporting that in 1973 blacks constituted twelve percent of the American population, 1.2% of lawyers, 1.2% of state and city judges, and seven percent of full-time federal judges).

38. One of Carter's appointments was a minority woman: Second Circuit Judge Amalya Kearse, who is black. See Federal Judicial Center, *Judges of the United States Courts*, *supra* note 1.

39. Reagan named 4 women (5% of his appointments), 1 African American and 1 Latino to the courts of appeals of general jurisdiction. Bush named 7 women (19%), 1 African American and 2 Latinos to the courts of appeals. As of November 24, 2000, Clinton had named 20 women (31%), 10 African Americans, 9 Hispanics, 1 Asian American, and 1 Native American to the courts of appeals (32% of Clinton's appointments were ethnic minorities). *Id.*; Alliance for Justice, *Judicial Selection Project Annual Report 1999* (visited Feb. 27, 2001) <<http://www.afj.org/jsp/tables.html#t1>> (includes confirmed nominees who have not yet received their commissions); see also Carl Tobias, *Leaving a Legacy on the Federal Courts*, 53 U. MIAMI L. REV. 315, 318–20, 325–29 (1999) (reviewing Clinton's efforts to nominate women and minorities to the federal courts, recommending the appointment of more women and minorities, and contending that “[t]he selection of so few women and minorities by President Reagan and President Bush is troubling because they

Prior to much empirical study, scholars hypothesized that women jurists would adjudicate in a "different voice": female judges would be more sympathetic to claims of discrimination and exclusion and more likely to favor community concerns and family preservation.<sup>40</sup> If women judges approach judging from a distinct perspective, then we should observe differences in the judicial decisions of men and women. Empirical studies, however, have failed to find any broad, gender-based behavioral distinctions between jurists.<sup>41</sup> The one exception may be

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had bigger, more experienced pools of female and minority attorneys from whom to choose than did President Carter").

40. See, e.g., Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447 (1984) (asserting that women judges would integrate women's values—caring, connection, and community—into their constitutional decisions); Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Disposition*, SOC. SCI. J., April 1997, at 77 (anticipating that differences in "the socialization experiences of men and women" would lead to differences in the judicial decisions of men and women); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986) [hereinafter Sherry, *Civic Virtue*] (arguing, based in part on Carol Gilligan's "different voice" theory, that women judges would pursue a *feminine* jurisprudence favoring individual claims of exclusion from the community but valuing community interests over individual rights); Suzanna Sherry, *The Gender of Judges*, 4 LAW & INEQ. J. 159, 161 (1986) (predicting "that an influx of women into the judiciary will result in a corresponding decrease in gender-biased decision making"); Carl Tobias, *Closing the Gender Gap on the Federal Courts*, 61 U. CIN. L. REV. 1237, 1243 (1993) (arguing that "numerous female judges could beneficially affect substantive decision-making, especially in areas such as discrimination"); see generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

41. For an analysis of the relationship between state supreme court judges' gender and their decisions, see Donald R. Songer & Kelley A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750 (2000). But see David W. Allen & Diane E. Wall, *The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?* 12 JUST. SYS. J. 232 (1987) (examining the behavior of five female state supreme court judges and identifying four of the five as much more liberal than their male counterparts). For studies concluding that no meaningful gender differences existed in trial judges' sentencing and conviction decisions, see John Gruhl et al., *Women As Policymakers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308, 308 (1981) (concluding, based on an analysis of a northeastern city's criminal courts, that "women judges generally did not convict and sentence defendants differently than men judges did," except that women were more likely than men to sentence female defendants to prison time); Kritzer & Uhlman, *supra* note 40, at 82 (discovering that male and female judges treated criminal defendants similarly). For articles examining the content of women judges' opinions for a "different voice," see Jilda M. Aliotta, *Justice O'Connor and the Equal Protection Clause: A Feminine Voice?*, 78 JUDICATURE 232 (1995) (concluding, based on an empirical examination of O'Connor's opinions, that O'Connor's decisions could be explained by her political party affiliation rather than her gender); Sue Davis, *Do Women Judges Speak "In a Different Voice?"*: *Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit*, 8 WIS. WOMEN'S L.J. 143 (1992) (examining the content of Ninth Circuit Equal Protection opinions for differences based on gender and finding insufficient support for the "different voice" theory as applied to appellate judges). But see Sherry, *Civic Virtue*, *supra* note 40 (arguing that O'Connor's legal reasoning reflected a distinctly feminine perspective). See generally Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist*

sex discrimination cases, where female judges simply may be better able to identify with plaintiffs. Two courts of appeals studies have found that women circuit judges were slightly more receptive to employment-discrimination suits claiming gender bias than were their white male colleagues.<sup>42</sup> Federal district court studies have repeatedly failed to find a gender effect in any issue area, including sex discrimination.<sup>43</sup> Thus, while feminist and feminine theories of judging abound,<sup>44</sup> female judges do not appear to adopt significantly different approaches

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*Judging*, 70 IND. L.J. 891 (1995) (challenging the feminist theory of judging as espoused by Sherry).

42. See Nancy E. Crowe, *The Effects of Judges' Sex and Race on Judicial Decision Making on the United States Courts of Appeals, 1981-1996* (1999) (unpublished Ph.D. Dissertation, University of Chicago, on file with Author) (concluding, after a systematic consideration of courts of appeals decisions from 1981 through 1996, that female judges were more likely than male judges to vote in favor of plaintiffs in employment discrimination cases claiming gender bias but not in cases claiming race bias); Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129 (1993) (finding that (1) Democratic women appointed to the courts of appeals voted in favor of employees in employment discrimination cases more often than Democratic men, but that Republican women and men were indistinguishable, and (2) male and female judges did not vote statistically significantly different in obscenity cases although Republicans and Democrats did); Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 436 (1994) (finding that circuit judge gender had a statistically significant—though relatively weak—impact on job discrimination decisions); *see also* Bradney et al., *supra* note 27, at 1756-59 (discovering that Republican women circuit judges were more likely than Republican men to support the union's position in unfair labor practices suits, but that Democratic men and women were indistinguishable). *But see* Gerald S. Grysik et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143 (1986) (failing to find a significant relationship between a state high court judge's gender and decisions in sex discrimination suits).

43. See, e.g., Ashenfelter et al., *supra* note 30 (failing to find any relationship between a district judge's gender and the likelihood of case settlement); Jennifer Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137 (2000) (concluding, based on an examination of district court decisions, that women appointed by Clinton to the district courts were neither more responsive to claims of disadvantaged groups nor more liberal or activist than Clinton's white male appointees); Sisk et al., *supra* note 30, at 1453-54 (finding, after controlling for other variables, that a district judge's sex was not a significant factor in her decision on the constitutionality of the Sentencing Guidelines or in the reasoning upon which she based her decision); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 (1985) (analyzing male and female district judge's decisions across issue areas and discovering significant differences in only two areas—personal liberties and minority policy issues—and the direction of the difference was opposite of the one expected—male judges were more likely to support claimants than female judges).

44. See, e.g., SANDRA BURNS, *TO SPEAK AS A JUDGE: DIFFERENCE, VOICE, AND POWER* (1999); Judith Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988); Sherry, *Civic Virtue*, *supra* note 40.

to judging from those taken by their male colleagues,<sup>45</sup> a result consistent with analyses of other political elites.<sup>46</sup>

Scholars have also hypothesized that ethnic minorities, particularly African Americans, would vote distinctively on the bench, privileging the rights of the accused and disadvantaged groups.<sup>47</sup> The expectation that black judges are more liberal than white judges appears to be held by politicians as reflected in the difficulties faced by black lawyers aspiring to judicial posts.<sup>48</sup> Nominees of color

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45. See generally Beverly Blair Cook, *Will Women Judges Make a Difference in Women's Legal Rights? A Prediction From Attitudes and Simulated Behavior*, in WOMEN, POWER, AND POLITICAL SYSTEMS 216 (Margherita Rendel ed., 1981) (reporting few gender differences in jurists' attitudes and thus predicting little to distinguish female from male judicial behavior). But see Elaine Martin, *Men and Women on the Bench: Vive La Difference?*, 73 JUDICATURE 204 (1990) (analyzing mail survey responses showing that women judges had different perspectives and experiences than their male colleagues and arguing that women judges would therefore adjudicate differently).

46. See, e.g., Frieda Gehlen, *Women Members of Congress: A Distinctive Role*, in A PORTRAIT OF MARGINALITY: THE POLITICAL BEHAVIOUR OF THE AMERICAN WOMAN (Marianne Githens & Jewel Prestage eds., 1977) (finding female Congressional representatives deviated little from the behavior of male representatives); Edmund Costantini & Kenneth Craik, *Women as Politicians: The Social Background, Personality, and Political Careers of Female Party Leaders*, 28 J. SOC. ISSUES 217 (1972) (reporting no significant gender differences among political party elites). But see Shelah G. Leader, *The Policy Impact of Elected Women Officials*, in THE IMPACT OF THE ELECTORAL PROCESS (Joseph Cooper & Louis Maisels eds., 1977) (concluding based on interest group ratings that female members of Congress were more likely to cast liberal votes than men, particularly on social welfare and defense spending matters); Sue Thomas, *The Impact of Women on State Legislative Policies*, 53 J. POL. 958 (1991) (reporting that women legislators in state legislatures with a high percentage female membership propose and support more bills benefitting women, children, and families than men generally or women in low-percentage female legislatures); Susan Welch, *Are Women More Liberal Than Men in the U. S. Congress?*, 10 LEGIS. STUD. Q. 125 (1985) (finding that, according to interest group ratings, women were more liberal than men, though the difference has decreased over time); see generally WOMEN AND ELECTIVE OFFICE: PAST, PRESENT, AND FUTURE (Sue Thomas & Clyde Wilcox eds., 1998).

47. See MICHAEL DAVID SMITH, RACE VERSUS THE ROBE: THE DILEMMA OF BLACK JUDGES 256 (1983) (contending that black judges are more sympathetic to criminal defendants); George W. Crockett, Jr., *The Role of the Black Judge*, 20 J. PUB. L. 391 (1970) (arguing that black judges can reduce racist decision-making in the courts); Sheldon Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488, 494 (1979) (arguing that minority judges will inevitably bring "a certain sensitivity—indeed, certain qualities of the heart and mind—that may be particularly helpful in dealing with [issues of racial and sexual discrimination]").

48. See Cook, *supra* note 37, at 270 (concluding based, on her study of black judicial appointments, that "[t]he white monopoly in the Fourth and Fifth Circuits is probably due to the linking of ethnic and policy consequences to black appointments"). North Carolina Senator Jesse Helms, a senior Republican, has been in the unprecedented position of arguing that his state should not have a judge on the circuit court, despite the fact that two Fourth Circuit judgeships were vacated by North Carolinians in the 1990s. See James Rosen, *Helms Raises Ire with Court Bill*, RALEIGH NEWS & OBSERVER, Mar. 28, 1999, at A1. Helms effectively blocked the two North Carolina nominees that Clinton had

are twice as likely as whites not to be confirmed.<sup>49</sup> The most recent, high-profile example is the Senate rejection of Ronnie White, the first African American judge on Missouri's highest court, who was nominated by Clinton for the Eastern District of Missouri court. Senators expressed concern that White was too soft on capital crimes, or as Missouri Senator John Ashcroft put it, Judge White has "a tremendous bent toward criminal activity."<sup>50</sup> White was the first nominee to be rejected by the full Senate since the Bork nomination.<sup>51</sup> Some observers concluded that the Senators acted on the belief that black jurists vote differently from white judges, or specifically that blacks on the bench would identify with and be lenient on criminal defendants, rather than on White's voting record.<sup>52</sup> In fact, White voted to affirm seventy-one percent of the death penalty appeals he heard, and in all but one of the remaining cases, he agreed with judges appointed by Ashcroft when he was Missouri Governor.<sup>53</sup> White voted consistently with his white supreme court colleagues in these cases.<sup>54</sup>

Empirical research has not consistently revealed meaningful and systematic differences in the voting of black federal judges as compared to their

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proposed for these seats: both were African Americans. Debra Baker, *Waiting and Wondering*, 85 A.B.A. J. 52 (1999). Helms justified his position on the grounds that the Fourth Circuit does not need the vacancies filled; however, he voted to confirm the appointment of two other, white Clinton nominees to the Fourth during this period. Alliance for Justice, *Judicial Selection Project Annual Report* (visited Feb. 27, 2001) <<http://www.afj.org/jsp/jsp99.html#III-a3>>. The Fourth Circuit has the largest population of African Americans but had never had an African American judge. Bill Rankin, *President's Speech: Clinton Blasts Gridlock on Judge Nominees*, ATLANTA CONST., Aug. 10, 1999, at A10 (recounting Clinton's keynote address at the 1999 American Bar Association's Annual meeting). During the last congressional recess, Clinton appointed Roger Gregory, a black Virginian, to a one-year seat on the Fourth Circuit, which will become permanent if Gregory is confirmed by the Senate. See Eggen, *supra* note 1.

49. See Task Force on Federal Judicial Selection *supra* note 12, at 18 tbl.15, 69 fig.15 (including among failed nominations those for which the Senate failed to take action and those that were withdrawn); cf. Baker, *supra* note 48, at 53 (reporting that 63.4% of black lawyers, as compared to 11.5% of white lawyers, believe race is the major reason the Senate Judiciary Committee has not acted on minority nominees).

50. *The Ronnie White Vote*, WASH. POST, Oct. 8, 1999, at A28.

51. See Donna Britt, *Judging a Nominee by the Color of His Skin?*, WASH. POST, Oct. 8, 1999, at B1.

52. See, e.g., *id.*; Steve Kraske & Kevin Murphy, *White House Rips Rejection of Nominee*, KAN. CITY STAR, Oct. 7, 1999, at A1 (reporting that Clinton administration as well as leading civil rights groups accused Senate of racism in rejection); Ben White, *Deepening Rift over Judge Vote, Minorities Confirmed at a Lower Rate*, WASH. POST, Oct. 7, 1999, at A3 (discussing claims of racism in Senate confirmation process). But see Benjamin Soskis, *On the Hill: White Out*, NEW REPUBLIC, Nov. 1, 1999, at 14 (arguing that "White's rejection wasn't the result of racism but of another potent force: the grimy imperatives of state-level electoral politics").

53. See Britt, *supra* note 51.

54. See *id.* Cf. Bruce M. Wright, *A Black Brood on Black Judges*, 57 JUDICATURE 22, 22-23 (1973) (arguing, from his perspective as a black state judge, that black jurists conform to fit the conservative, white judicial model in order to avoid controversy and censure and to maintain status).

white counterparts, though the evidence provides more support for the presence of racial distinctions than of gender distinctions in judging.<sup>55</sup> One appeals court study discovered that, after controlling for party identification in a multivariate analysis, African American circuit judges were much more receptive than were white judges to employment discrimination claims.<sup>56</sup> An earlier appeals court study, based on relative frequencies in a smaller sample, detected no racial differences in employment discrimination decisions, though it did uncover strong differences in criminal and prisoner's rights cases.<sup>57</sup> Federal district court studies of Carter as well as Clinton judges failed to find demonstrable differences between white and black jurists in any issue area.<sup>58</sup> Studying racial effects on judicial decision-making remains challenging due to the small number of minority federal judges. Further confounding study, most minority judges share characteristics found to influence judicial behavior, such as party affiliation and the party of their appointing president (most are Democrats and/or appointed by Democrats),

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55. State court studies are also conflicting. Compare Susan Welch et al., *Do Black Judges Make a Difference?*, 32 AM. J. POL. SCI. 126 (1988) (concluding, based on an analysis of a northeastern city's criminal court, that "[w]hile the impact of black judges is...somewhat mixed, in the crucial decision to incarcerate, having more black judges increases equality of treatment") with THOMAS UHLMAN, *RACIAL JUSTICE: BLACK JUDGES AND DEFENDANTS IN AN URBAN TRIAL COURT* (1979) (concluding, based on an analysis of an urban criminal court, that black and white judges were both more severe on black defendants as compared to white ones) and Thomas Uhlman, *Black Elite Decision Making: The Case of Trial Judges*, 22 AM. J. POL. SCI. 884 (1978) (reaching same conclusion).

56. See Crowe, *supra* note 42, at 84.

57. See Jon Gottshall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 172-73 (1983) (analyzing Carter's black male and white male judges' votes in a sample of 301 non-unanimous criminal and prisoner's rights cases, 169 sex discrimination cases, and 295 race discrimination cases from 1979-1981 and finding blacks voted for accused and prisoners 79% of the time compared to 53% for whites, blacks voted for plaintiffs in sex discrimination suits 65% of the time compared to 57% for whites, and blacks voted for plaintiffs in race discrimination suits 57% compared to 59% for whites); see also Brudney et al., *supra* note 27, at 1715 tbl.II (reporting no relationship between African American characteristic and votes in support of labor unions in a study of 5463 unfair labor practice appeals); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 1, 109-10 tbl.X (2001) (finding no relationship between black racial identity and votes in unpublished, unfair labor practices circuit court decisions).

58. See Walker & Barrow, *supra* note 43, at 596 (utilizing a matched-pair statistical strategy to compare female and black federal judges appointed by the Carter administration to white, male judges also appointed by Carter); Segal, *supra* note 43, at 144-47 (examining votes of Clinton-appointed district court judges and discerning no relationship between race and voting); see also Sisk et al., *supra* note 30, at 1457-58 (finding that black district judges were no more likely than white judges to rule that the Sentencing Guidelines were unconstitutional, though black judges who found the Guidelines unconstitutional were more likely to do so on Due Process grounds).

making it difficult to disentangle the effect of race from the effect of party affiliation.<sup>59</sup>

Given the minimal evidence that judicial voting differences are attributable to race and gender, a president cannot rely on these attributes as a means of determining a judge's probable votes in the wide range of cases she will hear. While these characteristics meaningfully influence a person's life experiences, these attributes alone do not reveal much about the probable behavior of an individual making judicial decisions. As Theodore Shaw, Associate Director and Counsel to the NAACP Legal Defense and Education Fund, put it, "If there's anything we know, it's that to add more judges to the bench based on their race or ethnicity and regardless of their judicial philosophy, that's a useless game."<sup>60</sup>

### 3. Religion

Religious identification can be viewed as a personal attribute and as a social background characteristic. A person may identify with (or be identified with) a particular religion because she was born to a family that held those beliefs, and hence religious identification is akin to an immutable personal attribute. An individual speaks of being of Greek Orthodox or Jewish heritage, for example. A person, though, may choose to change religious affiliation, joining or leaving a synagogue, church, or mosque. Hence, religious identification is also akin to social background variables that reflect voluntary experiences. In studies examining the influence of religion on judges, scholars have based their hypotheses on both the group identification (i.e., personal attribute) and the socialization (i.e., social background) effects of religion.

Scholars have hypothesized that judges who are members of minority religious groups will favor underdogs because minority religion judges will empathize with the underdog's difficult circumstances. Specifically, studies have examined whether Catholics and Jews were more receptive than Protestants to claims of the economically and politically disadvantaged. Catholic courts of appeals judges in the 1960s were somewhat more likely to favor the "have-nots"

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59. See, e.g., Ashenfelter et al., *supra* note 30, at 275 (cautioning that their failure to find any relationship between a judge's ethnicity and case settlement should be viewed circumspectly, because their "sample contains so few minority and female judges that findings with respect to these variables should only be viewed as guides to the behavior of judges in the sample rather than to any larger class of minority and female judges"); Gottschall, *supra* note 57, at 172 tbl.6 (relying on only 63 votes by black appeals court judges in criminal cases and 70 votes in discrimination suits to support his conclusions); Merritt & Brudney, *supra* note 57, at 109 & n.119, 110 tbl.X (finding a statistically significant and negative relationship between Latino or Asian racial identity and votes favoring unions in unpublished, unfair labor practices circuit court decisions, but warning that "[t]he significance of our coefficient for Asian and Latino judges should be interpreted with caution, because very few of those judges appeared in our database").

60. Carrie Johnson, *Final Judgment: The President Has Been Criticized by Left and Right. Maybe He Got the Bench He Wanted—And Deserved*, *LEGAL TIMES*, Mar. 6, 2000, at 10 (quoting an interview with Shaw).

over the "haves".<sup>61</sup> Yet, later published scholarship has repeatedly failed to find a significant relationship between a judge's religion and her decisions.<sup>62</sup>

There are several inherent difficulties with constructing a sound model of the effect of religious identification on judicial behavior. First, the strength of religious identification varies substantially among individuals such that a simple binary classification (e.g., Catholic or not) cannot capture the intensity of the identification and the resulting influence. Second, the perspectives of religious groups vary over time, such that Catholics in the Fifties and Sixties were more likely to favor liberal, Democratic positions whereas Catholics today may be more likely to vote for conservative, Republican causes. So, any hypothesized relationship between religion and political behavior may be necessarily time-bound. Third, and relatedly, the relationship between socioeconomic status and religion is dynamic. In studies of 1950s state supreme courts and 1960s courts of appeals rulings, the researchers classified judges who were Methodists as being from lower-income backgrounds and holding lower-class perspectives on legal disputes. This premise would no longer be accurate; hence, findings from earlier eras may not be relevant today. In the end, religion is not a meaningful explanation for judicial behavior, and cannot be utilized by the president and his staff as a substitute for an individual's view on legal issues.

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61. Goldman, *supra* note 27, at 381–82 (finding, in a study of 2066 circuit decisions, that "Catholics were more prone than Protestants and perhaps Jews to oppose the position of the government in fiscal cases," even after controlling for party identification. However, Catholics did not behave distinctively in any other issue areas, and "[n]o differences in voting behavior were found between lower-status Protestants (such as Baptists, Lutherans, and Methodists) and higher-status Protestants (including Congregationalists, Episcopalians, Presbyterians, and Unitarians)"); Goldman, *supra* note 26, at 498 (hypothesizing that Catholics, as minority religious group members, "may have been socialized to favor the underdog" and finding, after controlling for party identification, that Democratic Catholic judges voted "more liberally for the economic underdog" than Democratic Protestant judges, but no relationship existed between religious identity and Republican judges' votes); *see also* Stuart S. Nagel, *Multiple Correlation of Judicial Backgrounds and Decisions*, 2 FL. ST. U.L. REV. 258, 267 tbl.1, 268–69 (1974) (finding Catholic state supreme court judges in 1955 were more likely than Protestants to favor criminal defendants and economic underdogs).

62. *See, e.g.*, Brudney et al., *supra* note 27, at 1715 tbl.II (discerning no religion-based distinctions between circuit judges' labor law rulings after controlling for other judicial characteristics); Michael W. Giles & Thomas G. Walker, *Judicial Policy-Making and Southern School Segregation*, 37 J. POL. 917, 929–31 (1975) (finding social background characteristics such as birthplace, education, party identification, religion, and prior political office had only a minimal impact on southern federal district judges' decisions in school desegregation cases); Merritt & Brudney, *supra* note 57, at 110 tbl.X (failing to find a statistically significant relationship between circuit judges' religious identification and their votes in unfair labor practices suits); Tate, *supra* note 29, at 362–63 (concluding that religious affiliation did not influence Supreme Court justices' decisions when other explanatory variables were considered); C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Model of Supreme Court Voting Behavior, 1916–88*, 35 AM. J. POL. SCI. 460, 473, 474 tbl.1 (1991) (concluding that religion was not related to Supreme Court justices' decisions for the period 1916 through 1988).

### *B. Social Background*

Judges are people. Their current approaches to their positions as well as their views on subjects governed by law will be influenced by their pre-judicial experiences.<sup>63</sup> It can be difficult to predict or measure the effects of the varied socialization processes or to contend that a certain experience will affect all individuals in the same way. Most studies of social background effects hypothesize that a particular characteristic will influence the ideological direction of judges' decisions. For example, studies have considered whether specific careers are highly correlated with liberal or conservative votes.

What distinguishes, on a large scale, the backgrounds of judges? Judges as well as potential judges share meaningful, transformative educational experiences, namely college and law school matriculation, and consequently they will be more alike than different when compared to a random cross-section of Americans. As among lawyers, their alma maters as well as their post-law school and pre-judgeship employment may serve to distinguish their experiences and hence their behavior. Researchers have considered, to varying degrees, the impact of elite education and career socialization on judges.

#### *1. Elite Education*

Judges who attended non-elite or low-tuition schools are more likely than their elite school colleagues to be from a lower socioeconomic class; thus, we might expect them to be better able to identify with the underdog, the relatively disadvantaged party. However, the handful of studies documenting some relationship (typically a weak one) between the relative rank of higher educational institution attended and judicial votes discloses the opposite. Prestige of college and law school is weakly but *positively* correlated with economic liberalism and receptivity to civil rights and liberties claims in the decisions of judges on the U.S. Supreme Court and state supreme courts. Social scientists explain this initially surprising finding by observing that judges from humble backgrounds may be affected by the "rags-to-riches phenomenon."<sup>64</sup> the "conservatism of the self-made man who lacked the initial advantage of a high-prestige education."<sup>65</sup>

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63. See, e.g., Hon. Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE L. REV. 489, 492-94 (1984). In the article, she related her answers to questions about her likely behavior as a judge:

What does my being a woman specially bring to the bench? It brings me and my special background. All my life experiences—including being a woman—affect me and influence me....My point is that nobody is just a woman or a man. Each of us is a person with diverse experiences. Each of us brings to the bench experiences that affect our view of law and life and decision-making.

64. Nagel, *supra* note 61, at 270 (finding that state supreme court judges who attended low-tuition law schools were more pro-prosecution than judges who attended high-tuition schools).

65. Tate, *supra* note 29, at 363 (finding that the prestige of college—though not law school—was positively related to U.S. Supreme Court justices' economic liberalism).

Federal court of appeals and district court research, by and large, has revealed that judges who attended prestigious schools were neither more liberal nor more conservative than their colleagues,<sup>66</sup> but such research may not be looking in the right place for differences. Differences in educational background may manifest themselves in the *content* rather than the direction of judicial decisions. Elite law schools place greater emphasis on theoretical, as opposed to practical, analysis and on cutting edge jurisprudential ideas, so elite graduates may be more inclined to adopt novel legal arguments. An extensive study of circuit judges concluded based on interviews and surveys that judges who attended elite law schools more frequently described themselves as innovative decision-makers.<sup>67</sup> No empirical review of judges' decisions, though, has borne out these self-reports.<sup>68</sup>

## 2. Careers

Researchers have considered the influence of career socialization processes on judicial behavior, focusing particularly on experience as a judge on another court, as a prosecutor, or as a public/elected official. The research questions are typically phrased as follows: How does the occupation of interest differ from prior jobs held by other judges? How do those differences translate into different views on legal disputes? Of course, career experience may be the cause of certain perspectives or may instead be the *result* of those perspectives (or perhaps the perspectives and the experience are reinforcing). For example, fighting for convictions may lead a prosecutor to hold conservative, law-and-order views. Or these views may prompt a lawyer to become a prosecutor. Thus, the finding that judges who were prosecutors are more conservative in criminal cases does not tell us whether the job experience is the cause. For the purposes of the social scientist, the causality conundrum is a frustrating one, as any observed relationship may be spurious. This difficulty is not the concern of the president or his staff, however, as the results still indicate that they can expect a former

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66. See, e.g., Bradney et al., *supra* note 27, at 1715 tbl.II (reporting that elite law school attendance was not statistically significantly related to votes in union cases when other variables were considered); Giles & Walker, *supra* note 62, at 930–31 (finding that educational background had a de minimis effect on district judges' decisions in school desegregation cases); Goldman, *supra* note 27, at 382 (discerning no differences between circuit judges based on the status of undergraduate college or law school attended); Sisk et al., *supra* note 30, at 1463–65 (reporting no relationship between elite education and district court Sentencing Guideline rulings). *But see* Bradney et al., *supra* note 27, at 1715 tbl.II (discovering a statistically significant, negative relationship between a judge's college selectivity and votes in support of unions, though the magnitude of the effect of college status on votes appears to be small).

67. See J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 167–69, 168 tbl.6.5 (1981).

68. See, e.g., Sisk et al., *supra* note 30, at 1464–65 (discovering that district judges who attended prestigious schools were more likely to adopt practical reasoning to support their Sentencing Guidelines decisions, but questioning the significance of this result in light of coding difficulties).

prosecutor to adopt a tough-on-crime perspective on the bench, for whatever reason. Therefore, the president should focus instead on the strength of the evidence in support of the hypothesized relationships between career background and voting.

Lawyers who served as judges, particularly on the trial bench, acted to protect the interests of the underprivileged more frequently than did lawyers who represented private clients. Hence, prior judicial experience may result in greater receptivity to claims of discrimination, bias, and the like.<sup>69</sup> On the other hand, judges bear responsibility for upholding the law; therefore, judicial experience may make a person more conservative. While a Supreme Court study has been published lending support to each of these contradictory propositions,<sup>70</sup> most research backs the conclusion that judicial experience and voting are unrelated.<sup>71</sup> Courts of appeals and district court studies have repeatedly failed to find a significant relationship between a judge's experience on another court and her subsequent rulings.<sup>72</sup>

Prosecutors act to enforce statutes and to maintain the status quo. In prosecuting criminal cases, a lawyer argues to restrict individual rights and liberties by defending searches and seizures as well as interrogations against defense lawyers' attacks, and by advocating incarceration. A former-prosecutor judge will likely be more receptive than other judges to government claims in criminal cases. The former prosecutor's pro-government perspective may extend to civil rights and liberties cases as well. For example, a former prosecutor who tried political protestors is less likely to oppose limitations on public demonstrations, and a former prosecutor who ordered wiretapping is unlikely to

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69. See Tate & Handberg, *supra* note 62, at 470 ("[J]udicial experience will make attorneys more liberal, since the judge, unlike the attorney, must always fairly weigh both sides of a dispute, even if one side is that of a socially less privileged litigant.").

70. Compare Tate, *supra* note 29, at 362 (finding, in a study of Supreme Court decisions from 1946 through 1977, that justices who had served on another court were more receptive to civil rights and liberties claims regardless of their party identification, other experiences, or personal attributes) with Richard E. Johnston, *Supreme Court Voting Behavior: A Comparison of the Warren and Burger Courts*, in *CASES IN AMERICAN POLITICS* 71 (Robert L. Peabody ed., 1976) (observing a correlation between a Justice's prior federal judicial experience and conservative civil liberties and economics rulings).

71. See Tate & Handberg, *supra* note 62, at 474-76 (concluding, in a study of Supreme Court decisions from 1916 through 1988, that prior judicial experience was not related to civil rights and liberties decisions and only very weakly related to economic rulings).

72. See, e.g., Ashenfelter et al., *supra* note 30, at 277-81 (concluding that district judges' votes appeared unrelated to their judicial background); Brudney et al., *supra* note 27, at 1715 tbl.II (failing to discern a relationship between prior judicial experience and votes in support of unions in circuit court rulings); Goldman, *supra* note 26, at 504 (determining that circuit judges with prior judicial experience were no more liberal or conservative than other judges); Goldman, *supra* note 27, at 381-82 (finding no relationship between prior judicial experience and judicial decisions generally or after controlling for party affiliation).

oppose electronic surveillance.<sup>73</sup> There is evidence that former prosecutors on supreme courts (federal and state) are more conservative than non-prosecutor judges in criminal and civil rights and liberties cases.<sup>74</sup> The observed effect was relatively weak, though. Moreover, the proposition has generally failed to find support in studies of lower federal courts.<sup>75</sup>

Those who seek—and attain—public office have been able to appeal to the mass electorate. Successful elected officials have worked effectively for the public and are more likely to be appointed to federal judgeships than unsuccessful officials. Thus, judges who previously served in public office may be more sensitive to the claims of common people in economic disputes than colleagues who spent most of their careers in service to elite, wealthy clients. Studies have found empirical support for the argument that federal judges with experience as elected officials behave distinctively, but an equal number have failed to find any relationship.<sup>76</sup> In the end, then, an individual's prior work as a judge, prosecutor,

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73. Neal Tate has argued that former prosecutors should also be more economically conservative than other judges: “[P]rosecutors spend most of their time defending the position of the ‘haves’ against the criminal attacks of the ‘have nots.’ Such experience would logically engender sympathetic attitudes toward economic ‘top dogs.’” Tate, *supra* note 29, at 363; *see also* Tate & Handberg, *supra* note 62, at 471 (explaining that “[s]ince prosecutors defend the public’s interest against the miscreants of business and labor...we expect prosecutorial experience to be conservatizing in that issue area also”). Tate, and later Tate and Handberg, found a statistically significant but extremely weak relationship between prosecutorial experience and conservative economic Supreme Court decisions. Nagel found a slight difference between state supreme court judges with and without prosecutorial experience in economic cases. Nagel, *supra* note 61, at 266–67 tbl.1.

74. *See, e.g.*, Johnston, *supra* note 70, at 108–09 (finding that Justices with prosecutorial experience were more conservative in criminal procedure cases as well as economic cases); Nagel, *supra* note 61, at 266–67 tbl.1 (demonstrating that former-prosecutor judges had an above average prosecution propensity for their respective state supreme courts, although prosecutorial experience accounted for a small amount (three percent) of the difference between prosecutors’ and non-prosecutors’ votes); Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L. & CRIMINOLOGY 333, 336 (1962) (reporting similar results); Tate, *supra* note 29, at 362–63 (showing, after controlling for various individual attributes, that justices without prosecutorial experience are more favorable to civil liberties claims than those with prosecutorial experience, though judicial experience between time as a prosecutor and appointment to the Supreme Court moderates the prosecutor effect). *But see* Ulmer, *supra* note 25, at 628.

75. For court of appeals studies, *see, e.g.*, Goldman, *supra* note 26, at 500 (finding, in a study of 2115 circuit cases, that prior prosecutorial experience was not a significant explanation of judicial decisions in any area, including criminal cases). For district court studies, *see, e.g.*, Ashenfelter et al., *supra* note 30; Mark A. Cohen, *Explaining Judicial Behavior, or What’s “Unconstitutional” About the Sentencing Guidelines?*, 7 J.L. ECON. & ORG. 183 (1991); Sisk et al., *supra* note 30, at 1473–74; but see Eisenberg & Johnson, *supra* note 30, at 1189–90 tbl.4 (discerning a significant, though weak, relationship between prior prosecutorial experience and receptivity to intent arguments in race discrimination suits).

76. *See, e.g.*, Brudney et al., *supra* note 27, at 1715 tbl.II (reporting that former elected officials on the circuit bench were more likely than their colleagues to support labor union claims, though the statistical confidence in this result is only 91%); Goldman, *supra*

or public official offers limited insight to the individual's probable actions in the broad range of cases heard by a federal judge.

### *C. Policy Preferences*

Judicial decision-makers are at core *human* decision-makers; thus, rational choice theory tells us that judges, like human beings generally, will seek to achieve their goals or preferences.<sup>77</sup> Judicial preferences likely include a desire to issue opinions that are well thought of by peers, affirmed by higher courts, and followed by other courts. Hence, judges would seek to issue decisions that are consistent with widely accepted legal doctrine and *stare decisis*. Of course, the law often grants judges a fair degree of discretion to reach more than one conclusion.<sup>78</sup> And in exercising that discretion, judges will want to issue a decision consistent with their personal normative conceptions of public policy and rights. Judicial studies have considered whether judges act to maximize their legal doctrinal goals ("legal theory") and/or their public policy preferences ("attitudinal theory") in making decisions.

#### *1. Legal Doctrine*

The traditional conception of judicial decision-making is best captured by legal theory.<sup>79</sup> Legal theory is derived from the idea that judges are neutral and

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note 26, at 504 (finding that judges with prior political experience were somewhat less likely to favor the government in fiscal cases); Tate, *supra* note 29, at 363 (discovering that justices who previously held elective office were more liberal on economic questions). *But see* Giles & Walker, *supra* note 62, at 930 (finding prior political office had only a minimal impact on southern federal district judges' decisions in school desegregation cases); Goldman, *supra* note 27, at 381–82 (finding no relationship between prior public/elective office or prior judicial experience and judicial decisions generally or after controlling for party affiliation).

77. See generally LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); Sheldon Goldman, *Backgrounds, Attitudes and the Voting Behavior of Judges: A Comment on Joel Grossman's Social Backgrounds and Judicial Decisions*, 31 J. POL. 214 (1969); Richard Posner, *What Do Judges Seek to Maximize? (The Same Things As Everyone Else)*, 1 SUP. CT. ECON. REV. 1 (1986). No single right theory or unambiguous standard exists for assigning the rational choice theoretic label. The assumptions generally shared by rationality theorists are preference or utility maximization, structuring of preferences, decision-making under conditions of uncertainty, and the centrality of individuals in explaining collective outcomes. See generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

78. See Task Force on Federal Judicial Selection, *supra* note 12, at 15 ("In our postrealist age, we know that legal materials may well be somewhat indeterminate or conflicting, and that judges often invoke background normative notions in deciding how to rule.").

79. See Tracey E. George, *Developing a Positive Theory of Decision-Making on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1642–43 (1998) (describing the sources and development of legal theory).

reasoned arbiters who defer to rules to guide their decisions.<sup>80</sup> In fact, most judges believe they are neutral arbiters and go to great lengths to explain their decisions by reference to existing law. The legal model, which presumes that "the reasons presented for decisions...perform an authentically disciplining function that constrains judges' decision-making," explains judicial decisions by reference to the legal rules governing the case.<sup>81</sup> Scholars have successfully crafted "legal" or "fact-pattern" models of judicial decision-making in several issue areas, including death penalty,<sup>82</sup> obscenity,<sup>83</sup> Fourth Amendment searches,<sup>84</sup> and sex discrimination<sup>85</sup> cases. To the extent that judges' decisions are motivated by neutral legal principles, presidents cannot influence outcomes through judicial appointments.

Judges with greater decision-making discretion are less constrained by legal doctrine. The lower the court in the judicial hierarchy and the fewer the limits on its caseload, the less discretion the court will have. District courts are the lowest tier of the federal judicial system and hear the largest number of cases. Not surprisingly, then, district court studies have found that legal factors account for most district court rulings, although a small group of close cases are sensitive to extralegal factors.<sup>86</sup> Since a greater percentage of courts of appeals decisions, and nearly all Supreme Court cases, allow decision-making leeway, studies demonstrate that the law provides only a partial account of appellate rulings. Therefore, presidents can expect to have greater influence on the law through their appointments to the appellate courts.

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80. See Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 324, 326 (1992) (explaining the classical legal paradigm and proposing a decision-making model based on its premises).

81. Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 255-64, 262 (1997) (delineating traditional legal model of judicial decision-making and subsequent innovations in legal theory as found in law schools).

82. See George & Epstein, *supra* note 80, at 327-30.

83. See, e.g., Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963 (1992).

84. See, e.g., Jeffrey A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981*, 78 AM. POL. SCI. REV. 891 (1984).

85. See Jeffrey A. Segal & Cheryl D. Reedy, *The Supreme Court and Sex Discrimination: The Role of the Solicitor General*, 41 W. POL. Q. 553 (1988).

86. See ROBERT A. CARP & C.K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* 165 (1983) (arguing, based on extensive empirical research, that for close cases or those presenting new issues, non-legal factors explain district court outcomes); Ashenfelter et al., *supra* note 30, at 281 (concluding that in most *district* court cases, "[T]he law—not the judge—dominates the outcomes. Judges may treat most cases as ones in which political interests are irrelevant or cannot change the outcome. In the select few cases that are appealed or lead to published opinions, individual judges have a greater role in shaping outcomes."); Sisk et al., *supra* note 30, at 1465-70.

## 2. Public Policy: Appointing President and Party Affiliation

The dominant political science theory of judicial decision-making is the “attitudinal” model, which posits that judges seek to maximize their sincere public policy preferences, termed “attitudes.”<sup>87</sup> Because most judges, in contrast to elected policymakers, have not publicly disclosed their policy preferences, a proxy for attitudes is necessary. Attitudinal studies have demonstrated that the ideological direction (“liberal” or “conservative”) of the party of a judge’s appointing president is a strong predictor of the case votes of justices on the Supreme Court<sup>88</sup> and judges on courts of appeal.<sup>89</sup> Unfortunately for the president seeking to appoint like-minded judges, however, these studies provide no help.<sup>90</sup>

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87. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993) (presenting the best statement and defense of attitudinal theory); see generally Cross, *supra* note 81, at 265–311 (describing and critiquing the attitudinal model); George, *supra* note 79, 1646–55 (discussing the historical development and current articulation of the attitudinal model); Gibson, *supra* note 32, at 9–13 (considering in detail the evolution of an attitudinal model of judicial decision-making).

88. See, e.g., JOHN SPRAGUE, *VOTING PATTERNS OF THE UNITED STATES SUPREME COURT: CASES IN FEDERALISM 1889–1959* (1968) (examining voting blocs using algorithm pairing justices who vote together); George & Epstein, *supra* note 80, at 326, 329–30 (finding that “the addition of Republican appointees enhanced the Court’s propensity toward a law-and-order stance”); Stuart S. Nagel, *Political Party Affiliation and Judges’ Decisions*, 55 AM. POL. SCI. REV. 843 (1961); Tate, *supra* note 30 (demonstrating that the ideology of the appointing president had a strong influence on justices’ decisions in civil rights and liberties and economic cases).

89. See, e.g., Budney et al., *supra* note 27, at 1715 tbl.II (finding that Democratic circuit court appointees were much more likely than Republican appointees to favor unions); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2175–76 (1998); George, *supra* note 79, at 1678–86 (demonstrating that the majority of Fourth Circuit judges participating in en banc cases between 1962 through 1996 voted their sincere policy preferences as measured by the party of their appointing president); Jon Gottschall, *Reagan’s Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution* 70 JUDICATURE 48, 54 (1986) (finding that Reagan appointees to the circuit bench were more conservative than Democratic appointees and comparably conservative when compared to previous Republican appointees); Stidham et al., *supra* note 8, at 17, 20 (finding that Clinton appointees were more liberal than Republican appointees but less than Carter appointees); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997); cf. Susan Brodie Haire et al., *Attorney Expertise, Litigant Success, and Judicial Decision-making in the U.S. Courts of Appeals*, 33 L. & SOC’Y REV. 667, 679–80, 681 tbl.4 (1999) (utilizing an ideological classification scale where circuit judges “appointed by a conservative ideology-conscious president [were] coded -1...those appointed by a president who was not ideology conscious [were] coded 0...and those appointed by liberal ideology-conscious presidents [were] coded +1” and concluding that ideology was significantly related to products liability decisions).

90. Another successful measure of ideological values analyzes the content of editorials written about a Supreme Court candidate after presidential nomination and before Senate confirmation. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); see also Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*,

An individual's party identification would seem another effective proxy for her policy preferences, particularly when considering her views as contrasted to a member of a different party.<sup>91</sup> As Stuart Nagel explains, this hypothesis is based on the belief that "in some cases judges rely on their personal standards of value in reaching a decision, and these same personal standards also frequently account for their party affiliation."<sup>92</sup> So, Democratic judges would be more likely than Republican judges to cast a liberal vote in cases where they have some decision-making discretion.<sup>93</sup> For example, in the areas of civil rights and liberties, Democratic judges generally seek to extend those freedoms, Republicans to limit them. In the realm of economic regulation, Democratic jurists favor an enhanced governmental role in the economy and tend to uphold legislation that benefits working people or the economic underdog, while Republicans oppose an increase in government intervention and tend to favor business. In criminal cases, Democratic judges generally are more sympathetic to criminal defendants, while Republicans tend to favor prosecution and law enforcement. The categorizations are admittedly broad and cannot account for the complexity of relative ideological positions. Nevertheless, the concepts retain meaning and significance in the course of trying to understand political phenomena.

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57 J. POL. 812 (1995) (expanding the Segal and Cover scores to include Bush, Roosevelt, and Truman appointees). The editorial-content measure is clearly unavailable to presidents evaluating potential nominees.

91. *But see* Gibson, *supra* note 32, at 36 n.24 (delineating criticisms of the party proxy).

92. Nagel, *supra* note 88, at 847. The author explained the point further by observing: "[P]arty affiliation and decisional propensity for the liberal or conservative position correlate with each other because they are frequently effects of the same cause [and]...party affiliation may be responsible for some decisional propensity by...feedback reinforcement on his value system which in turn determines his decisional propensities."

93. For examples of studies utilizing these distinctions between liberal versus conservative judicial behavior, see DONALD R. SONGER, UNITED STATES COURT OF APPEALS DATABASE: DOCUMENTATION (ICPSR 1998); HAROLD J. SPAETH, UNITED STATES SUPREME COURT JUDICIAL DATABASE, 1953-1993 TERMS: DOCUMENTATION (6th ICPSR version 1995); Nagel, *supra* note 88, at 845.

Table 2. Political Party Affiliation of Judicial Appointees<sup>94</sup>

President	Democrats Appointed	Republicans Appointed	Other or Affiliation	No Appointees	Percentage from Own Party
FDR	186	5	1	192	97%
Truman	117	10	0	127	92%
Eisenhower	10	166	0	176	94%
JFK	113	11	1	125	90%
LBJ	160	9	0	178	95%
Nixon	15	213	0	238	93%
Ford	13	51	1	65	78%
Carter	229	13	16	258	89%
Reagan	14	344	13	361	93%
Bush	10	166	11	187	89%
Clinton <sup>95</sup>	264	15	19	298	89%

Empirical studies have shown that appellate judges' political party affiliation is consistently correlated with their votes in a way parallel to the relationship between party and voting in elections and legislatures, though the magnitude of the difference between judges is typically not as strong as it is between voters or congressional representatives.<sup>96</sup> Presidents, in fact, look almost

94. District Court and Court of Appeals appointments drawn from GOLDMAN, *supra* note 22, at 277 tbl.7.1; Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 264, 275 tbl.3, 278 tbl.4 (1999); Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282 (1993). Supreme Court appointments drawn from EPSTEIN ET AL., *supra* note 13, at 318–20.

95. Clinton's appointments are current through June 2000.

96. See, e.g., Goldman, *supra* note 27, at 380–83 (concluding, based on all nonunanimous and unanimous reversals by courts of appeals between 1961 and 1964, that a statistically significant relationship exists between party affiliation and voting behavior); Goldman, *supra* note 26, at 494–95 (concluding, based on intercorrelations of voting behavior on issues and ideological voting blocs, "that attitudes and values defined politically rather than legally may be of prime importance in understanding appeals court voting behavior"); Nagel, *supra* note 88, at 845 (demonstrating that party affiliation is statistically significantly related to the votes of U.S. Supreme Court justices and state supreme court judges in divided rulings); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. 219 (1999) (meta-analyzing 84 empirical studies of the relationship between judges' party identification and judicial behavior and concluding that party affiliation explains a substantial amount of the variance in the ideological direction of judicial decisions, particularly on federal courts (explaining 48% of the variance)).

entirely to their own party for appointments to the federal bench despite pleas from various quarters for bipartisan—or apolitical—appointment. As reflected in Table 2, FDR almost never looked outside the Democratic party for judicial appointments: only six of his 192 appointments were non-Democrats (or three percent). Gerald Ford's appointment rate of seventy-eight percent Republicans is the closest to bipartisanship, and Ford, of course, was acting in the shadow of Watergate. Both parties have demonstrated comparable party favoritism: 92.2% of Democratic appointees have been Democrats, and 91.5% of Republican appointees have been Republicans.

#### *D. The Bottom Line*

Policy preferences are strongly related to judges' decisions; personal attributes and social background are sometimes weakly related but frequently unrelated to judicial behavior.<sup>97</sup> Table 3 summarizes the empirical evidence with respect to the relationship between judicial characteristics and judges' votes. While party identification explains a great deal of the variance in judicial decisions, social background and personal-attribute factors remain relevant to the extent that they account for judges' choice of parties. Further, these other factors may be independently important to a president's agenda; for example, a president may wish to appoint an ethnically diverse bench or to select judges of varied and complementary professional backgrounds to serve together.

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97. As journals usually publish findings rather than non-findings, I expect that other unpublished research projects have also failed to find the anticipated relationship between a judge's attributes or experiences and her decisions. For criticism of social background models, see Sheldon Goldman & Austin Sarat, *Backgrounds and Decisions*, in AMERICAN COURT SYSTEMS 372, 374 (Sheldon Goldman & Austin Sarat eds., 1978) (explaining weaknesses inherent in social background models); S. Sidney Ulmer, *Are Social Background Models Time-Bound?*, 80 AM. POL. SCI. REV. 957 (1986).

Table 3. The Relationship Between Individual Factors and Judicial Behavior: Weighing the Explanatory Value

<i>Personal Attributes</i>	Age	<i>insignificant</i>
	Gender	<i>sex discrimination suits only</i>
	Race	<i>weak</i>
	Religion	<i>insignificant</i>
<i>Social Background</i>	Education	<i>limited</i>
	Prior Judicial Experience	<i>insignificant</i>
	Prior Prosecutorial Experience	<i>weak</i>
	Prior Public/Elected Office	<i>weak</i>
<i>Policy Preferences</i>	Legal Doctrine	<i>moderate</i>
	Appointing President	<i>strong</i>
	Party Affiliation	<i>strong</i>

The political party result, though a significant social scientific finding, provides limited guidance to presidents, because it divides potential candidates into only two—or perhaps three—large, undifferentiated groups of candidates. Moreover, the desire to pursue a particular ideological agenda typically involves a certain type of liberalism or conservatism as well as positions on specific legal issues such as abortion, civil rights, and criminal procedure. Therefore, presidents would prefer better evidence of the position of candidates on the types of issues presented to courts. For this reason, and others, presidents may turn to law faculties for potential nominees. What can presidents expect if they decide to appoint legal scholars? In the next section, I delineate possible distinctive characteristics of scholar-jurists.

## II. THE BEHAVIOR OF ACADEMICS ON THE APPEALS COURTS

Circuit judges coming from academia may behave in distinctive ways. The limited literature analyzing the possible effects of professorial experience looks for academic background to have a single ideological directional effect, hypothesizing, for example, that former law professors will be more likely to support union claims or to oppose the Sentencing Guidelines.<sup>98</sup> These studies

98. See Bradney et al., *supra* note 27, at 1715 tbl.II (defining legal academic to include judges with significant adjunct experience); Sisk et al., *supra* note 30, at 1479–80.

expect academic experience to influence judges' positions on the merits of cases in a unidimensional way. Yet such a supposition ignores the honest, intellectual debates at the heart of legal scholarship that reflect the conflicting views held by law professors on all issues, including substantive doctrine and procedural rules. More importantly, professors on the courts were selected by presidents looking for certain ideological perspectives. Thus, the fact that law professors as a group are liberal does not mean that scholar-jurists as a group are liberal. We would, instead, expect academic judges' ideological positions to be as varied as those of the past century's presidents. The effect of law professor experience, then, cannot be confined to a single liberal/conservative continuum.

I propose that the academic experience should be examined by analyzing how it influences judges' "role conceptions."<sup>99</sup> Role conception encompasses the judge's normative view of her position, including her beliefs about the authority of the individual judge in the legal system. Role conception dictates the action that a judge will deem appropriate to take. Role conception speaks to the range of behavior a judge may pursue rather than the ideological direction of that behavior.

Judicial studies occasionally assume—implicitly or explicitly—that judges share a sufficiently stable view of the judicial role, such that role conception remains relatively fixed across judges, and that meaningful variation in observed behavior can be explained primarily by considering the judges' preferences on the issues. While models based only on judges' preferences can account for a great deal of the variation in merits votes in Supreme Court cases and in certain classes of courts of appeals rulings, these models can be improved by considering the influence of role conception on the ultimate vote in a case as well as other judicial action.<sup>100</sup>

Judges vested with discretion base their decisions on their preferences in a particular case as well as their role conception. A judge's view of the appropriate resolution of the dispute, as measured by either the legal or attitudinal model (or a hybrid), has a stronger—much stronger—effect than a judge's role conception on a judge's decision on the merits of a case. A judge's decision in a case reflects her underlying view on the issues, and role conception says less about that (at least in any sort of consistent way). Yet, a judge's view of her function in resolving disputes and interpreting the law will serve as the screen through which the judge's preferences or legal determinations are filtered. The judge who perceives her role as primarily institutional will filter out viewpoints that are inconsistent with the institution's preferences, whether measured by other judges on the panel,

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99. Cf. James L. Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911 (1978). Gibson's "role orientation" thesis is slightly distinct from my "role conception" thesis. He describes judges' individual role orientations as dictating "the criteria upon which their decisions will be based." *Id.* at 918.

100. Cf. Donald R. Songer et al., Strategic Behavior on the United States Courts of Appeals (April 1999) (unpublished paper presented at the Annual Meeting of the Midwest Political Science Association, on file with Author) (showing that judges' perceptions of the positions of their co-panelists, circuit colleagues, and the Supreme Court will have an influence on their behavior, overriding legal and attitudinal effects).

the circuit bench's majority, or the Supreme Court. A judge with a more individualistic, and typically activist, perspective will be more likely to pursue her viewpoint unfiltered. Therefore, individualistic judges will more frequently decide cases according to their preferences as compared to institutionally oriented judges.

The judge's perspective on her role—on archetypal judicial behavior—will be more important than her preferences in explaining the method by which the judge carries out her view of the case. The *strength* of preferences clearly will affect a judge's desire to state the court's reasons for its decision or to air publicly disagreement with the majority. But, the judge's view of the judicial function—the purpose of those actions—will predominate. So, a judge who sees herself as part of a group undertaking—a “team”—is unlikely to work against the group by acting independently, by dissenting or concurring separately, even when her opinion on the legal issues is strong. By contrast, a judge who sees herself as an independent actor, responsible for honestly relaying her views on cases, will be likely to dissent even when her disagreement with the majority is modest (although the practical costs of dissent in terms of expended time and strained collegial relationships may require that the disagreement at least be meaningful). Therefore, individualistic judges will more frequently express their preferences publicly as compared to institutionally oriented judges.

A judge's perception of the proper judicial role—as reflected in and influenced by her prior experience as an academic—may account for the frequency with which a judge votes her policy preferences (that is, the magnitude of ideological adherence), the judge's inclination to write opinions, and the judge's willingness to defer to colleagues and to precedent. The hypotheses below are premised on this idea.

#### *A. Scholar-Jurists Will Have a Strong Commitment to Explicit Ideological Perspectives*

Past presidents have selected law professors for judicial posts because they were able to confidently discern the content of professors' legal philosophies and their commitment to those views from a published record. FDR, for example, concluded that the courts of appeals were significant in his battle to protect and enforce New Deal legislation, and that the individuals best able to do so were men who had demonstrated their intellectual support of, and belief in, his programs.<sup>101</sup> FDR and his advisors looked specifically for academics who could provide a judicial rationale for his policy agenda.<sup>102</sup> Reagan, like FDR, viewed the federal

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101. See George, *supra* note 20, at 3–7.

102. Consider, for example, FDR's selection of law professor Calvert Magruder for the First Circuit:

In Attorney General Frank Murphy's official letter recommending Calvert Magruder for the First Circuit, he described Magruder as “a scholar of liberal outlook.” Magruder's Justice Department file contains an analysis of an article published two years earlier in the *Harvard Law Review* sympathetic to collective bargaining. The analysis noted that the

judiciary as crucial to his policy proposals and also looked to law schools for academics sharing his judicial philosophy—which reinforced his policy agenda—for appointment to the appellate bench.<sup>103</sup> Assisted by his close advisor Edwin Meese, a former law professor himself,<sup>104</sup> Reagan searched for conservative legal scholars who would undo the New Deal liberal judicial doctrine enunciated by FDR-appointed scholar-jurists. Reagan's advisors on judicial appointments suggested possible nominees based, in part, on a “[r]eview of available philosophically compatible law school faculty members.”<sup>105</sup>

Future presidents may, like Roosevelt and Reagan, choose legal academics because a published record of their positions exists. An individual's views on the legal issues of the type presented to circuit courts can best be gleaned from her explicit statements on similar subjects and in a comparable style to appellate opinions. A benefit of selecting a legal academic is that her positions are more definitely formed and confidently ascertained because a published record exists. Of course, these views are expressed in a different role than the one of a judge. Yet, the robe will not transform a person's fundamental perspectives on the role of law and legal institutions and the working of basic legal principles.<sup>106</sup>

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article “shows not only a great knowledge of law but an understanding of and sympathy with social growth.”

GOLDMAN, *supra* note 22, at 36 n.j.

103. SCHWARTZ, *supra* note 5, at 5, 68–69 (describing the “model Reagan [appellate court] nominee” as “a young, intellectually strong academic with little trial or other legal experience, with strongly held ultraconservative views based on an economic model”); Sheldon Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 324, 324, 326, 333 (1987) (positing that the Reagan Administration nominated “scholars [who] had a track record of published works so that their judicial philosophy could be discerned by administration officials”).

104. Meese was a professor and Director of the Center for Criminal Justice Policy and Management at the University of San Diego School of Law from 1977 through 1981. See Hoover Institution, *Edwin Meese's Home Page* (visited on July 12, 2000) <<http://www-hoover.stanford.edu/BIOS/meese.html>>.

105. GOLDMAN, *supra* note 22, at 299 (quoting a memorandum from Jonathan C. Rose, Assistant Attorney General for Legal Policy and lead advisor on judicial appointments, which recommended Yale law professor Ralph Winter for the Second Circuit).

106. A federal trial judge's views on various issues can also be gleaned from a published record. Though this record will be more limited than the one produced by a professor, it has the advantage of being the product of judicial processes. The difficulties of relying on trial judge's writings are their infrequency and limited focus. But, many presidents have turned to the district courts to find suitable nominees for the courts of appeals: President Clinton, for example, has regularly selected his court of appeals' nominations from district courts. See, e.g., Goldman & Slotnick, *supra* note 94, at 278–79 and tbl.4; see also Daniel Klerman, *Nonpromotion and Judicial Independence*, 72 S. CAL. L. REV. 455, 460 (1999) (“Promotion of federal district court judges to court of appeals judgeships has been common for the last hundred years. During most of this period, between forty and sixty percent of those appointed to the courts of appeals had previously served as federal district court judges.”).

FDR and Ronald Reagan sought to appoint law professors to the circuit courts not only because they knew the professors' legal positions (as reflected in their writings) but also because they expected professors to pursue those views once on the bench. FDR and Reagan wanted to select legal academics who were fully behind their respective (and very different) policy agendas, that is, scholars who had a demonstrated commitment to one perspective. Thus, I hypothesize that legal academic experience will lead to more consistently ideological decision-making. This hypothesis is also supported by the law professor socialization process. Law professors gain tenure by writing articles that take a particular approach to a legal issue, arguing confidently for the penultimate interpretation. Scholar-jurists, then, should be relatively unwilling to concede that an issue is capable of more than one legitimate resolution. Moreover, unlike practitioners who are hired to represent a particular side, law professors choose their perspective and can become "true believers."

#### *B. Scholar-Jurists Will Write and Publish More Often Than Their Colleagues*

There are many reasons to expect that legal academics will write frequently when appointed to courts of appeals. First, legal academics are more likely to take an individualistic outlook on their role as judge because they come from a job that allows—and rewards—a high degree of autonomy and independence. They will be less willing to subordinate their personal positions to the institution's position. Moreover, they may view opinions as opportunities for intellectual sparring as well as for establishing a reputation as an individual judge.

Second, former legal academics are likely to be able to write more opinions with less effort than their colleagues as they come from jobs where opinion-type writing is a central task. In general, the transition from law professor to appellate judge is an easy one when compared to moving to the bench from practice or politics. As Justice Ruth Bader Ginsburg explained while still on the D.C. Circuit Court: "[Y]our daily routine [as a circuit judge] is very much the same as it was in the law school where I taught my class and then went back to my office and the door was closed and there was my desk and the paper facing me."<sup>107</sup> She noted that judges who come from "a busy commercial practic[e]" or Congress are "shock[ed] to come into the quiet atmosphere of the courthouse and that's a real adjustment."<sup>108</sup>

Third, law professors are teachers of law and legal principle and may view opinions as a forum for instructing others as to the meaning of law. J. Woodford Howard describes and quotes from speeches of former Columbia law professor and Second Circuit Judge Harold Medina given when he was a district judge: "The 'most fun' was writing opinions, new outlets for [Medina's] penchant to teach. 'You can write about anything you wish,' he quipped, 'and leave out any facts that don't quite fit into the picture.' The only trouble was that nobody read

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107. Roundtable, *On Becoming a Judge: Socialization to the Judicial Role*, 69 JUDICATURE 139, 144 (1985) (reprinting Judge Ginsburg's comments).

108. *Id.*

them except losers preparing appeals."<sup>109</sup> Medina's eagerness to write during his district judgeship, a role in which relatively few decisions are written, demonstrates the strength of the literary urge among some former academics.

Fourth, circuit opinions speak to an external audience; this readership may provide an additional incentive for legal academics to put pen to paper. Former legal scholars will continue to desire the accolades and individual recognition achieved through successful scholarship. The primary means for circuit judges to gain recognition outside their circuit is to write *and* publish opinions. Scholar-jurists may be more inclined to dissent in order to communicate to other judges on the appeals court the appropriateness of *en banc* review or to signal to the Supreme Court the value of granting certiorari. Or they may simply seek to speak to the future, as they so often did in their writings as law professors.

For the foregoing reasons, I hypothesize that circuit judges who were academics will seek to write more than a "fair" share of majority opinions and will write more dissents and concurrences. Their individualistic approach to judging should increase their inclination to write signed, published opinions.

### *C. Scholar-Jurists Will Write Significant Opinions and/or Develop New Theories*

Law professors seek through their scholarship and teaching to influence the views of others on the law. Professors who accept appointment to the circuit courts may do so to gain broader influence through a more prestigious, and potentially influential, position. They also may crave the opportunity to carry out the views that they had advocated as an academic. Thus, they would be more likely to use cases as an opportunity to argue original positions or force the law in certain directions.

A lawyer who is a law professor is different from lawyers in practice or government. The differences are produced by the academic socialization process and also reflect the personality characteristics that lead an individual to pursue a professorship. Most lawyers, trained in law school and practice to respect precedent, would be likely to defer to legal rules and doctrines in making their decisions. Law practice also rewards lawyers who are able to chart published court rulings, and successful lawyers are more likely to be appointed to prestigious federal judgeships. These observations undergird the "legal" model of judicial behavior which contends that judges seek to be (or at least appear to be) neutral and reasoned decision-makers who defer to rules to guide their decisions. But, law professors would be less likely to defer to precedent because the very operation of law school teaching and legal academic publishing is to challenge existing doctrines. Law professors are rewarded for questioning court rulings and for thinking unconventionally.

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109. J. Woodford Howard, Jr., *Judge Harold R. Medina: The "Freshman" Years*, 69 JUDICATURE 126, 130 & n.24 (1985) (quoting from Medina's 1948 address to the Federation of Bar Associations of the 6th Judicial District in Elmira, New York, and Medina, *Some Reflections on the Judicial Function*, 38 A.B.A. J. 107 (1952)).

One of the arguments made to support a legal—or more appropriately neo-legal—model of judicial decision-making is that legal training teaches students a strong allegiance to precedent such that they are unlikely when judges to be willing to make a decision inconsistent with prior decisions. By the same reasoning, the professors, who teach *stare decisis* to students, would not feel as bound by precedent, because their teaching and scholarship requires a willingness to challenge prior approaches and to stake out new ones. Or perhaps former law professors are more likely to see the law as teeming with uncertainty because of the academic enterprise of focusing on areas of uncertainty or, some may say, of creating uncertainty for intellectual purposes where none need exist.<sup>110</sup> Former practitioners better appreciate, perhaps, the value of *stare decisis* for it guided their daily work life, advice to clients, litigation strategies, and the like: the regularity and stability of law is essential to effective and profitable practice.

FDR's and Reagan's selection of academics for appellate court posts can be seen as extremely savvy if scholar-jurists are more active on the bench. Both presidents wanted to revolutionize the federal government and the rights of individuals and corporations. Both needed judges who would be willing to reverse existing precedent as well as set new precedent. Herman Schwartz, a liberal critic of Reagan's judicial appointments and himself a law professor, argued that law professors are specially suited for this task because the function of academics who challenge mainstream thought (which aptly describes the ideologically contrasting nominees of FDR and Reagan) is to "criticize. This induces a readiness—indeed, an eagerness—to correct what the critic considers wrongheaded. There is little respect for precedent and not much for stability, regardless of the lip service to judicial restraint."<sup>111</sup>

### III. EMPIRICAL EXAMINATION OF ACADEMICS ON THE APPEALS COURTS

To test my scholar-jurist hypotheses, I examine the opinions and behavior of courts of appeals judges with academic experience. Drawing on judicial biographies published by the Federal Judicial Center<sup>112</sup> as well as the *Almanac of the Federal Judiciary*<sup>113</sup> and Sheldon Goldman's published scholarship on judicial

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110. Cf. Dorothy B. James, *Role Theory and the Supreme Court*, 30 J. POL. 160, 168 (1968) (quoting Justice William O. Douglas, Address to the American Bar Association, Section of Judicial Administration, Seattle, Washington at 4 (Sept. 9, 1948)) (quoting a speech of Justice Douglas, who was formerly a member of the Yale law faculty, in which Douglas maintained that "the law will always teem with uncertainty").

111. SCHWARTZ, *supra* note 5, at 69.

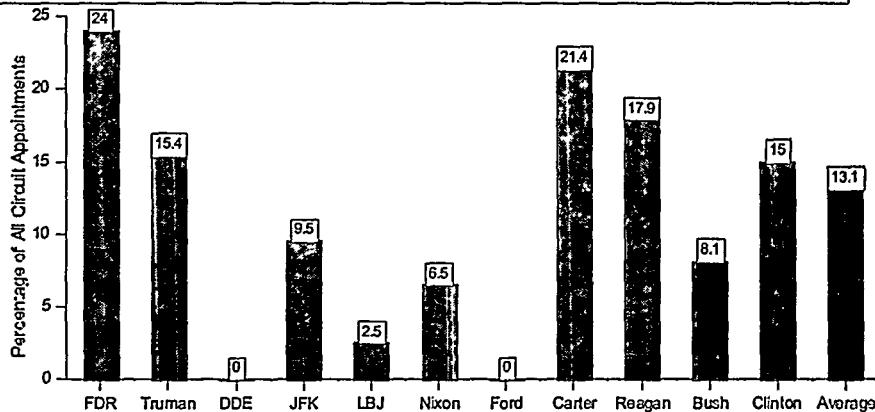
112. Federal Judicial Center, *Judges of the United States*, *supra* note 1.

113. 2 ALMANAC OF THE FEDERAL JUDICIARY (1999). I also reviewed law journal articles summarizing judicial biographies for different circuits. See *Judges of the United States Court of Appeals for the Ninth Circuit*, 29 GOLDEN GATE U. L. REV. xiii (1999); *Remembering the Fourth Circuit Judges: A History from 1941 to 1998*, 55 WASH. & LEE L. REV. 47 (1998). In addition, I searched for books and articles on the backgrounds of individual judges.

appointments,<sup>114</sup> I coded as an academic any judge who was a full-time, tenure-track/tenured law professor at the time of nomination or earlier in her career.<sup>115</sup> I only treat as former law professors those judges who worked full-time as a professor on a law school faculty. I did not code judges who served as adjunct or visiting professors or as lecturers as former law professors. In addition, the law professor category does not include judges who had previously held the title of "law professor" (without an "adjunct" or "visiting" modifier) but were working full-time in another post (typically, full-time law practice or government service). The reason for excluding these judges is that they were not primarily law professors and thus were not undergoing the same socialization process, such as seeking tenure, working independently, and participating in law school decision-making.

Using this methodology, I found that from FDR's first administration through June 1, 2000, presidents have successfully named sixty law professors and former law professors to the courts of appeals, more than thirteen percent of circuit appointments for that period. Presidents have varied significantly in the degree to which they turned to law faculties for courts of appeals judges as reflected in figure 1. FDR has had the highest rate of academic appointments: he appointed twelve law professors to the intermediate appellate courts out of fifty appointees, nearly one-quarter of his appointments. Neither Eisenhower nor Ford used any of their forty-five and eleven respective circuit appointments to name a legal scholar.

Fig. 1. Presidential Appointments of Professors to Courts of Appeals



The appointment rate also has varied by circuit, as reflected in Figure 2.<sup>116</sup> The D.C. Circuit could appropriately be dubbed the "Ivory Circuit" with

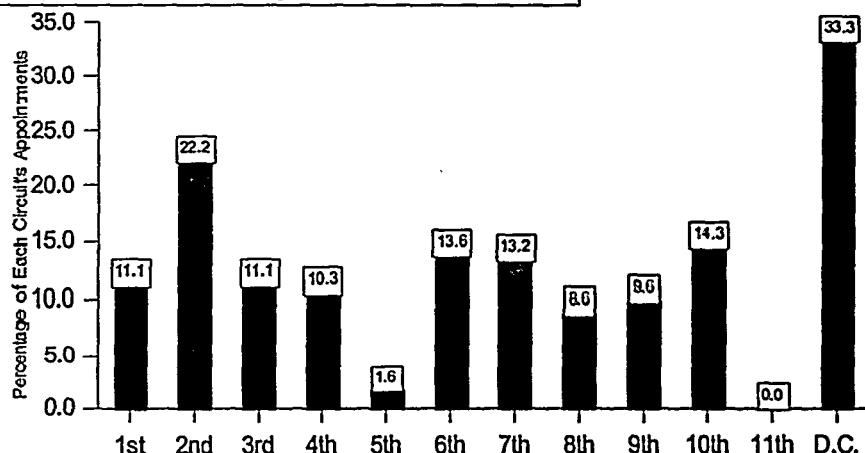
114. See GOLDMAN, *supra* note 22.

115. My numbers do not always agree with Professor Goldman's. In some instances, Professor Goldman is only including judges appointed directly from law school faculties.

116. In a study of circuit judges' backgrounds, the authors report the percentage of judges with substantial law professor experience, including adjunct appointments,

former academics comprising one-third of the judges who have served on the court (fourteen out of forty-two). In contrast, only one law professor has been appointed to the original Fifth Circuit and its progeny, the new Fifth and the Eleventh, despite the fact that seventy-three judges have been appointed during this period.

Figure 2. Academics by Circuit: FDR to Clinton



Scholar-jurists have not had a uniform academic experience prior to judicial appointment. Courts of appeals judges, from 1937 to present, taught full-time on fifty different law school faculties (some judges worked at several). Nineteen judges—or one-third—served as dean of their schools (four at two different schools). The average academic tenure was fourteen years with a median and mode of thirteen; the longest time as a professor prior to appointment was thirty-five years, the shortest was one year. Thirty-eight judges were appointed to the courts of appeals directly from law school faculties. The remaining twenty-two judges worked in various posts between their law school and circuit appointments: a number served on state courts or federal district courts, or worked for federal agencies. The average judge had left law school teaching nine years before receiving her circuit commission.

I wanted to test empirically the hypotheses that former academics behave distinctively as compared to their colleagues on the bench by voting more ideologically, writing more frequently, and seeking to develop new legal theories or approaches. To do so, I utilized two different methods of analysis: systematic, statistical examination of large numbers of cases to get an overall sense of academics on the courts, complemented by historic, descriptive evidence drawn from many sources, including biographies, contemporary accounts, and judicial opinions, in order to consider in greater detail the actions of scholar-jurists.

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appointed to each circuit from 1891–1992. See Susan Haire et al., *An Intercircuit Profile of Judges on the U.S. Courts of Appeals*, 78 JUDICATURE 101 (1994). For the entire period: 1st Circuit–20.8%; 2d–38%; 3d–22%; 4th–15.2%; 5th & 11th–12.2%; 6th–9.6%; 7th–22%; 8th–18.7%; 9th–18.3%; 10th–26.9%; D.C.–45.3%. See *id.* at 102.

*A. Ideological Behavior of Former Academics*

As explained previously, circuit judges may choose to pursue their public policy preferences in cases where the answer is not dictated by law. Not all circuit court cases grant judges sufficient leeway to allow for the consideration of personal preferences, because courts of appeals do not share the Supreme Court's prerogative to select cases for review. Many appeals courts decisions involve routine examinations of lower court outcomes, primarily using highly deferential standards of review, such as abuse of discretion or plain error. Where law and precedent provide weak guidelines rather than mandates, the judge's decision is more likely to be the product of attitudes and environment.<sup>117</sup>

One subset of circuit court decisions, *en banc* cases, allow for the consideration of the influence of policy preferences on individual judge's decisions. As the name implies, *en banc* cases are heard by the entire circuit bench: all active circuit judges as well as any senior circuit judge of that circuit who sat on the panel, if one was convened. Such decisions allow us to view circuit court behavior when acting in concert. Hence, *en banc* cases provide us with a more coherent body of jurists from which to extrapolate regarding the politics of deciding appeals at the circuit court level. In addition, *en banc* hearing procedures, like the certiorari process, limit the cases reviewed by the entire court to those selected by a majority of the court's members (a greater percentage than the Supreme Court's required four out of nine). This procedure creates the presumption that the cases are likely to involve difficult, complex, highly political, or at least significant questions. Thus, *en banc* decisions, as opposed to the majority of routine appeals taken right from lower federal courts or agencies, should test whether judges make decisions based on policy preferences.<sup>118</sup>

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117. See Cook, *supra* note 45, at 233.

118. Christopher Smith reasons further that *en banc* cases provide an effective means of examining intermediate courts because (1) the cases "frequently emanate from the existence of conflict among a circuits' judges" and (2) the expanded size of the deliberative body increases the likelihood of dissent. See Christopher Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Courts of Appeals*, 74 JUDICATURE 133, 134 (1990). Smith uses *en banc* cases decided between 1983 and 1988 to examine the theory that Reagan appointees to the courts of appeals are more conservative and polemic than other judges. The study documents the existence of Reagan-appointed voting blocs in appellate cases, but these polarized decisions have been concentrated in two circuits (the D.C. and Eighth Circuits) and are mirrored by a similar number of Carter-appointed voting blocs. See *id.*

I reviewed all Second, Fourth, and Eighth Circuit *en banc* cases decided prior to 1999 to test the hypothesis that scholar-jurists were more likely than their colleagues to vote ideologically. Six former law professors decided a sufficient number of *en banc* cases for consideration, two on each circuit:

Table 4. Testing the Ideology Hypothesis: Circuit Judges Considered

		Appointing President	Last Academic Position
2nd Circuit	Charles Clark	FDR	Yale Law Dean
	Paul Hays	JFK	Columbia Law Professor
4th Circuit	J. Dickson Phillips	Carter	North Carolina Law Dean
	J. Harvie Wilkinson	Reagan	Virginia Law Professor
8th Circuit	Pasco Bowman	Reagan	UMKC Law Dean
	Morris Arnold	Bush	Indiana Law Dean

Although nine academics have served on the Second Circuit, only two participated in a substantial number of *en banc* decisions, both serving as active judges prior to the 1980s.<sup>119</sup> FDR appointee Charles Clark was the most consistently liberal judge during his active service from 1939 to 1963, and he was the second most consistently ideological voter.<sup>120</sup> He took the liberal position in more than seventy-eight percent of the thirty-two *en banc* cases in which he participated; Clark's party affiliation was statistically significantly related to his decisions.<sup>121</sup> By contrast, JFK appointee Paul Hays was as likely to vote for the conservative position as the liberal one (nineteen liberal votes out of thirty-eight *en banc* decisions). In this regard, he behaved like his Second Circuit colleague

119. Academics serving on the Second Circuit in the 1980s and 90s did not have the opportunity to sit on many *en banc* panels because the Second Circuit has dramatically decreased its *en banc* hearings to less than one per year on average, making it the least likely circuit to grant *en banc* review. See Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 250 n.170 (1999).

120. Eisenhower appointee Moore was slightly more consistent in his ideological position, voting in favor of the conservative position in 80% of the *en banc* cases in which he participated.

121. A logistic regression found that the relationship between party affiliation and Clark's *en banc* votes was significant at the .001 level.

Irving Kaufman, another JFK appointee who served on the court for a long period (twenty-seven liberal votes out of fifty-two decisions). JFK's third appointment to the Second Circuit, Thurgood Marshall, was more likely to favor the liberal position than either Hays or Kaufman.

Both Fourth Circuit judges examined here came directly from law school posts (Phillips after eighteen years and Wilkinson after two separate stints for a total of six years), and both were relatively consistent in the ideological direction of their decisions. Wilkinson was nearly the most conservative judge during this period (out of fourteen Republican appointees), voting conservatively in eighty-nine percent of seventy-nine *en banc* cases.<sup>122</sup> He was the most conservative Reagan appointee. Phillips was the fifth most liberal judge during the entire period (out of twelve Democratic appointees), deciding two-thirds of ninety-five *en banc* cases in a liberal direction. Party affiliation was statistically significantly related to both judges' *en banc* votes.<sup>123</sup>

Pasco Bowman and Morris Arnold took somewhat different routes to the Eighth Circuit, and their subsequent behavior may reflect this fact.<sup>124</sup> Bowman came directly from the University of Missouri at Kansas City deanship, after nineteen years as an academic. Morris Arnold spent seven years on the federal district court (having spent eleven years on law faculties at Arkansas, Indiana, and Pennsylvania) before his appointment to the circuit court where his brother, who was appointed by Carter, already served. Ideology was statistically significantly related to Bowman's votes.<sup>125</sup> Moreover, Bowman was the second most conservative of all judges who served during the period (which included twenty Republican appointees), voting conservatively in eighty percent of the ninety *en banc* cases in which he participated. Morris Arnold, by contrast, did not vote in an ideological fashion: he was equally as likely to vote in a liberal direction as in a conservative one.

What accounts for the distinction between these two scholar-jurists, Republican appointees, and Eighth Circuit colleagues? Bowman was selected for the circuit court by a president seeking academics with the proper ideological-intellectual credentials, Arnold was not. Bowman joined the circuit court directly from a law school faculty, Arnold did not. Arnold frequently sits on panels with his older brother and former law partner, Richard Arnold, who is a Democrat; they have a high rate of agreement in their decisions. The confluence of these factors

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122. Bush appointee Luttig voted for the conservative position 90 percent of the time.

123. A logistic regression found that the relationship between party affiliation and each judge's *en banc* votes was significant at the .001 level for both judges.

124. A third academic, Harvey Johnsen, was appointed by FDR to the Eighth Circuit, but he is not included here because he participated in only nine *en banc* cases. In those cases, he was as liberal as other FDR appointees. Johnsen worked in various positions (private practice, corporate counsel, and state judge) for fourteen years after having spent four years on the Creighton law school faculty. See Federal Judicial Center, *Judges of the United States Courts* (visited Feb. 27, 2001) <[http://air.fjc.gov/history/judges\\_frm.html](http://air.fjc.gov/history/judges_frm.html)>.

125. A logistic regression found that the relationship between party affiliation and Bowman's *en banc* votes was significant at the .001 level.

explains Arnold's apparent non-ideological voting. Bush's appeals court appointees have proven to be substantially more liberal than Reagan's circuit judges.<sup>126</sup> And Arnold's seven years as a district court judge likely made him more moderate still. Lawyers appointed to a federal court after experience on a state bench or a lower federal court may be more circumspect about their authority than non-judge lawyers.<sup>127</sup> They may be more understanding—and forgiving—of the mistakes that can be made during a trial. They may also place greater value on collegiality and agreement with colleagues. Therefore, judicial experience may be associated with a tendency to defer to other judges.<sup>128</sup> This would certainly account for Arnold's middle-of-the-road approach; however, it is not wholly consistent with Arnold's high opinion-writing rates as discussed in the next section.

The empirical evidence suggests that when presidents select academics based on a desire to achieve certain policy aims, they are successful. Academics appointed by FDR and Reagan were more likely than other scholar-jurists to follow the ideological positions of their appointing president. Moreover, FDR and Reagan judges who were law professors were among the most consistently ideological of all judges.

Other empirical studies of Reagan's circuit court appointments lend support to this conclusion. The four most conservative judges in a *Columbia Law Review* study were scholar-jurists Robert Bork, Frank Easterbrook, Antonin Scalia, and Ralph Winter, who “[a]s a group...voted on the liberal side of the case only 12% of the time, far less than the 34% rate for the rest of the Reagan judges, and the 35% for other GOP appointees.”<sup>129</sup> A fifth scholar-jurist appointed by Reagan, Seventh Circuit Judge Richard Posner, also voted in a more consistently ideological manner than other Reagan judges—taking the conservative side of a case approximately seventy percent of the time—but was not as extreme as the other four.<sup>130</sup> Several articles examining the D.C. Circuit's voting record have reported that Reagan changed the court to a decidedly conservative one by appointing four conservative scholars (Bork, Douglas Ginsburg, Scalia, and

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126. Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298, 301 tbl.3 (1993) (reporting that Bush appeals court judges as compared to Reagan courts of appeals judges voted in favor of criminal defendants in 20% versus 15% of the cases, in favor of civil rights and liberties claimants in 34% versus 25% of the cases, and in favor of unions and the economically disadvantaged in 44% versus 35% of the cases).

127. Cf. HOWARD, *supra* note 67, at 168 tbl.6.4, 169 (reporting that none of the “former U.S. district judges [in his circuit court study] espoused a highly innovative view of his job”).

128. See Goldman, *supra* note 26, at 501–02 (observing a statistically significant relationship between prior judicial experience and rate of dissent: circuit judges with previous experience dissented much *less* frequently, and reporting that “prior judicial experience was the most important variable for the dissents category”).

129. Timothy B. Tomasi & Jess A. Velona, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766, 779 n.66 (1987).

130. See *id.*

Stephen Williams)<sup>131</sup> to the court, considered by many to be second only to the Supreme Court in its influence.<sup>132</sup>

### *B. Scholar-Jurists' Opinion-Writing Practices*

A wealth of descriptive accounts exists to support the hypothesis that academics on the bench seek to write more frequently than their colleagues. For example, FDR-appointed scholar-jurist Henry Edgerton was renowned for writing separately in an effort to convince fellow judges on his court as well as others to adopt his progressive views. According to the introductory biography to a published collection of Edgerton's D.C. Circuit opinions, "Judge Edgerton never forg[ot] that...he must convince both his orthodox colleagues and the members of the Supreme Court that his position [was] correct."<sup>133</sup> In one highly public instance, Edgerton made use of his skill at persuasive writing to set forth a dissent in "the *Joint Anti-Fascist Refugee Committee* case that induced a member of the Supreme Court to join with four of his brethren to overrule the [D.C.] Court of Appeals."<sup>134</sup> Likewise, Second Circuit Judge Charles E. Clark, another FDR appointee, was considered his circuit's leading dissenter.<sup>135</sup> He reported writing concurrences or dissents initially to try to persuade the other two panelists to change their views on the case.<sup>136</sup> If they did not, Clark would publish the separate opinions.

More recently, then-D.C. Circuit Judge Robert Bork, identified by most court watchers as the court's "conservative stalwart" during his tenure, was "instrumental in getting judges to vote to rehear a panel's decision *en banc*."<sup>137</sup> For instance, in a December 1986 case with two Carter appointees, Bork wrote a one-

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131. See, e.g., Kenneth Karpay, *The D.C. Circuit's New Face: Litigators Revamp Strategies to Suit "Reorganized" Bench*, *LEGAL TIMES*, May 4, 1987, at 1; Note, *The Politics of En Banc Review*, 102 HARV. L. REV. 864, 874 (1989) (examining the *en banc* decisions of the D.C. Circuit after Reagan appointees attained a majority and concluding, "The confluence of bloc voting by Reagan-appointed judges to reverse liberal panels on contentious issues in several instances suggests the emergence of a trend toward the use of *en banc* review to advance ideological and partisan goals"); Revesz, *supra* note 89, at 1762-63; Patricia M. Wald, "...*Doctor, Lawyer, Merchant, Chief*", 60 GEO. WASH. L. REV. 1127, 1150 (1992). The author observed that the D.C. Circuit in 1992 "is a sharply divided [court], and a new majority is making substantial changes in our jurisprudence...some of that new law is being made on the court's own initiative by overruling prior circuit precedent *en banc* or by distinguishing or weakening it in panel opinions." *Id.*

132. Former D.C. Circuit Judge Patricia Wald noted that more than 200 D.C. Circuit cases produced headlines in the *New York Times* and *Washington Post* during her five-year term as chief judge. Wald, *supra* note 131, at 1143.

133. *FREEDOM IN THE BALANCE: OPINIONS OF JUDGE HENRY W. EDGERTON RELATING TO CIVIL LIBERTIES* 14 (Eleanor Bontecou ed., 1960)

134. *Id.*

135. See MARVIN SCHICK, *LEARNED HAND'S COURT* 75 (1970).

136. *See id.*

137. Karpay, *supra* note 132, at 13; see also PUBLIC CITIZEN LITIGATION GROUP, *THE JUDICIAL RECORD OF JUDGE ROBERT H. BORK* (1987) (criticizing Bork for using judicial opinions for this purpose).

paragraph concurrence to a decision granting standing to environmental interest groups challenging the EPA's auto fuel standards. Bork explained that he did not agree with the panel's decision but felt bound by an existing circuit precedent until such time as the full court overruled it. He essentially invited the court to reverse its position, and the court accepted. Bork extended similar invitations in cases in which he was not on the panel.<sup>138</sup>

In addition to what is essentially anecdotal evidence, an empirical study of judicial influence found that Seventh Circuit judges and former University of Chicago law professors Posner (81.5) and Easterbrook (64.1) had the two highest average numbers of signed majority opinions per year among all judges sitting on the courts of appeals in 1995 (and who had served six or more years).<sup>139</sup> Only seven other judges published more than fifty signed opinions per year.<sup>140</sup>

To examine systematically the opinion-writing rate of scholar-jurists, I looked at five courts of appeals for the 1997 and 1998 calendar years. I searched WESTLAW for all panels in which a former-academic judge participated during this period.<sup>141</sup> I then examined each case to categorize the judge's participation, if any.<sup>142</sup>

As reflected in table 5, eight of the ten scholar-jurists who were active judges during the entire period published majority opinions at a higher rate than we would expect if they were authoring merely a fair share of such opinions (one-third of published and signed unanimous panel decisions and one-half of divided panel decisions). Judge Diane Wood, who was on the law faculty at Georgetown for one year and at University of Chicago for twelve years, wrote slightly fewer opinions (less than one-half of one percent) than expected. The only judge to write at a significantly lower rate than expected also had the shortest academic tenure: Jose Cabranes was a law professor for only two years at Rutgers University, at the rank of assistant professor (untenured) for the entire period. By contrast, the other

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138. See *id.*

139. See William M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 278, 278-79 n.20 (1998).

140. See *id.*

141. I searched the circuit's case database using the "PA" search term, which is overinclusive, capturing many cases in which the judge did not in fact participate in a merits resolution. For example, "PA" listed cases in which an en banc or other rehearing vote was taken, in which a judge initially sat on a panel but later recused herself, and in the case of the Eighth Circuit, decisions by the outgoing Chief Judge Richard Arnold to indicate that Bowman was the incoming Chief Judge.

142. I did not rely on the numbers produced by using WESTLAW search terms such as "JU" for majority opinions, "DIS" for dissents, and "CON" for concurrences, because it is not an accurate method of determining the number of dissents, concurrences, or majority opinions that a judge issued. These search terms capture all sorts of irrelevant cases. Several studies have tried to bypass the time-consuming data collection that is necessary to report opinion rates in the circuit courts by using the WESTLAW terms. These studies' numbers are not reliable, because the WESTLAW search terms produce inconsistent results.

nine former professors served at least six years as academics and all earned tenure and the rank of full professor.

Table 5. Majority Opinion Publication Rates for Academics on Five Appeals Courts: 1997 and 1998

Judge	Circuit	Majority Opinions	Expected Majority Opinion Rate <sup>143</sup>	Difference
Cabranes	2nd	32.0%	34.4%	-2.2%
Calabresi	2nd	43.3%	34.3%	11.0%
Winter, R.	2nd	37.4%	34.4%	3.0%
Sloviter	3rd	50.6%	34.2%	16.4%
Wilkinson	4th	58.7%	34.1%	24.6%
Easterbrook	7th	42.0%	34.3%	7.7%
Posner	7th	44.2%	34.2%	10.0%
Wood, D.	7th	32.2%	33.8%	-0.4%
Bowman	8th	38.1%	33.8%	4.3%
Arnold, M.	8th	38.1%	33.8%	4.3%

The evidence from 1997 and 1998 strongly supports the hypothesis that scholar-jurists will write signed and published majority opinions more frequently than expected, but evidence is nearly as strong on whether they also seek to write opinions when not assigned the majority opinion as reflected in table 6. The concurrence rate for each judges is the percentage of all published cases (excluding those in which the judge wrote the majority opinion) in which the judge concurred, and the dissent rate is the percentage in which the judge dissented. The circuit average is based on all published circuit decisions during this period. It assumes that a judge has an opportunity to dissent or concur in each case in which she does not write the majority opinion.

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143. The majority opinion authorship expected rate is based on the expectation that an average judge will write one-third of majority opinions for unanimous panel rulings and half of the majority opinions for two-judge majorities.

Table 6. Dissenting and Concurring Opinion Authorship Rates for Academics  
on Five Appeals Courts: 1997 and 1998

Judge	Circuit	Concur- rence rate	<i>Circuit Average</i> <sup>144</sup>	Dissent rate	<i>Circuit Average</i>
Cabranes	2nd	2.5%	1.1%	0.0%	2.2%
Calabresi	2nd	2.3%	1.1%	4.7%	2.2%
Winter, R.	2nd	1.1%	1.1%	4.4%	2.2%
Sloviter	3rd	8.7%	0.6%	4.4%	0.6%
Wilkinson	4th	4.7%	2.3%	7.0%	4.8%
Phillips (Sr.)	4th	3.3%	2.3%	6.6%	4.8%
Easterbrook	7th	1.5%	1.3%	0.5%	2.0%
Posner	7th	0.5%	1.3%	0.0%	.0%
Wood, D.	7th	3.2%	1.3%	1.8%	2.0%
Bowman	8th	0.0%	1.5%	0.0%	3.7%
Arnold, M.S.	8th	1.6%	1.5%	8.9%	3.7%

Scholar jurists did not concur or dissent with much frequency, but neither did their colleagues: separate opinions are extremely rare according to this sample. Judges Cabranes, Calabresi, Phillips, Wilkinson, Sloviter, and Arnold wrote concurrences and dissents at a higher rate (in some cases, a much higher rate) than their circuit colleagues, but the other judges did not.

Finally, former law professors are much more likely than their colleagues to use their majority opinion to reverse the lower court or agency's decision as shown in table 7. This relatively high reversal rate *may* reflect law professors' efforts to move the court away from prior approaches. The scholar-jurist was not acting alone as at least one other judge agreed with her opinions; however, the higher rate for majority opinions by former academics is consistent with the hypothesis that scholar-jurists use opinions to forward new ideas. Since district courts follow prior court rulings, circuit court decisions changing the law will necessarily reverse the lower court. The next section considers whether academics on the bench do in fact advocate new legal doctrines.

144. Circuit average is based on a random sample of published circuit cases from 1997 and 1998.

Table 7. Reversal Rates for Academics on Five Appeals Courts: 1997 and 1998

Judge	Circuit	Reversal rate	Circuit Reversal Rate <sup>145</sup>	Difference
Cabranes	2nd	42.5%	17.8%	24.7%
Calabresi	2nd	55.7%	17.8%	37.9%
Winter, R.	2nd	47.8%	17.8%	30.0%
Sloviter	3rd	36.6%	24.8%	11.8%
Wilkinson	4th	35.2%	17.1%	18.1%
Easterbrook	7th	33.3%	17.4%	15.9%
Posner	7th	29.0%	17.4%	11.6%
Wood, D.	7th	27.0%	17.4%	9.6%
Bowman	8th	29.0%	17.5%	11.5%
Arnold, M.S.	8th	29.5%	17.5%	12.0%

### *C. Scholar-Jurists As Innovative and Influential Decision-Makers*

Former law professors appointed to the circuit bench have frequently used cases as a means of moving the law in new directions. It is difficult to measure empirically the innovativeness of judges. I consider here examples of five scholar-jurists who forwarded new legal ideas through their judicial opinions. I also review studies of judicial influence demonstrating the significant reach of scholar-jurists' ideas.

#### *1. Judicial Opinions as a Vehicle for Cutting-Edge Legal Ideas*

FDR selected judges from law school faculties who had advocated progressive perspectives on the role of government and the rights of individuals. FDR and his advisors were probably influenced in their decision to appoint Edgerton to the D.C. Circuit by Edgerton's scholarship. Shortly before his

145. This is the reversal rate as drawn from the annual reports of the Administrative Office of the United States Courts. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1999 ANNUAL REPORT OF THE DIRECTOR Tbl. 5-1 (1999); ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1998 ANNUAL REPORT OF THE DIRECTOR Tbl. 5-1 (1999).

appointment, Edgerton published an article questioning judicial decisions striking acts of Congress, though he pointedly avoided consideration of Supreme Court New Deal cases.<sup>146</sup> Edgerton argued that judicial review of federal statutes frequently benefitted “the well-to-do minority” and did “harm to common men.”<sup>147</sup> In a 1935 essay, Professor Edgerton constructed his model of a liberal judge as one who has a “tolerance of change” and “an effective sympathy with the underdog.”<sup>148</sup> Judge Edgerton pursued that ideal on the bench and quickly established himself as a leader of the D.C. Circuit’s liberal wing, issuing progressive, sometimes dissenting, opinions in the areas of civil rights and liberties.<sup>149</sup>

FDR appointee Edgerton wrote many revolutionary opinions in the civil rights and liberties areas. Most of the opinions were dissents, but on repeated occasions, the Supreme Court eventually agreed with his position. For example, he was the first to deny the validity of racial covenants in housing contracts and to conclude that the segregation of D.C. public schools was unconstitutional—both in dissenting opinions.<sup>150</sup> He did not feel constrained by precedent that no longer was persuasive: “To let judges who lived and died in other times and other places make our decisions would be to abdicate as judges and serve as tellers.”<sup>151</sup>

Reagan-appointee Scalia also took the position that recent precedent should be ignored by circuit judges when it was inconsistent with earlier, more sound rulings.<sup>152</sup> For example, shortly after his D.C. Circuit appointment, Scalia

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146. See Henry White Edgerton, *The Incidence of Judicial Control over Congress*, 22 CORNELL L.Q. 299, 299 n.†, 348 (1937).

147. *Id.*

148. Henry White Edgerton, *A Liberal Judge—Cuthbert W. Pound*, 21 CORNELL L.Q. 7, 8 (1935).

149. Edgerton sought to be watchful of the rights of disadvantaged groups, protestors, and criminal defendants. See *FREEDOM IN THE BALANCE: OPINIONS OF JUDGE HENRY W. EDGERTON RELATING TO CIVIL LIBERTIES* 9–11 (Eleanor Bontecou ed., 1960). He fought restrictions on freedom of speech. See *id.* at 13. “He was the first to write an opinion—a dissent—denying the validity of restrictive covenants banning the sale or lease of real property to Negroes.” *Id.* at 13 (citing *Mays v. Burgess*); see also *Chaplin v. United States*, 157 F.2d 697, 699, 700 (2d Cir. 1946). The Supreme Court agreed with him in the second case, *Hurd v. Hodge*, 334 U.S. 24 (1948), in which he took this position. He was also the first to write (again in a dissent) that segregation of public schools of the District of Columbia was unconstitutional. See *FREEDOM IN THE BALANCE*, *supra* at 13 (citing *Carr v. Corning*). He consistently took the liberal position in non-unanimous cases. See *Sheldon Goldman, Conflict and Consensus in the United States Courts of Appeals*, 1968 WIS. L. REV. 461, 473 (1968).

150. *Mays v. Burgess*, 147 F.2d 869 (D.C. Cir. 1945) (Edgerton, J., dissenting) (racial covenants); *Carr v. Corning*, 182 F.2d 14 (D.C. Cir. 1958) (Edgerton, J., dissenting) (school segregation).

151. *Chaplin v. United States*, 157 F.2d 697, 699, 700 (2d Cir. 1946) (Edgerton, J., dissenting).

152. See Richard Nagareda, *Comment: The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. CHI. L. REV. 705, 738 (1987) (concluding based on a detailed consideration of Scalia’s D.C. Circuit opinions that his “jurisprudence in administrative and first amendment law calls for substantial change in existing legal doctrines”).

published an article advocating that courts only grant standing to plaintiffs who demonstrate a "concrete injury" produced by acts "directed" against them and further that "courts need to accord greater weight than they have in recent times to the traditional requirement that the plaintiff's alleged injury be a particularized one, which sets him apart from the citizenry at large."<sup>153</sup> Scalia conceded that his position was not entirely consistent with contemporary Supreme Court standing decisions but argued that his restrictive view of standing was required by earlier rulings. He expressed hope that the Court would "return" to the position he advocated.<sup>154</sup> In a seeming effort to encourage the Court's return, Scalia wrote two D.C. Circuit opinions adopting this stringent standing requirement and denying standing to plaintiffs.<sup>155</sup>

Reagan's selection of Scalia to the court that oversees administrative agencies is emblematic of what his administration hoped to achieve through the appointment of scholars to the bench. Scalia was an expert on administrative law who argued for a turning back of many policies adopted by Democratic administrations beginning with FDR and justified by Democratic appointees to the federal courts. On the D.C. Circuit, he was well-situated to correct the mistakes he perceived in agency law, and he did so by utilizing a textualist approach to statutory interpretation.<sup>156</sup> Scalia wrote 133 published opinions during his four years as a circuit judge including 114 majority, six concurring, five "concur and dissent", six concurring, and two statements on a denial of rehearing.<sup>157</sup> More than two-thirds of his opinions involved questions of administrative law, either whether plaintiffs had standing to challenge administrative agency decisions or whether agencies acted within their powers.<sup>158</sup> He used these cases as an opportunity to move administrative legal doctrine in a different direction.

Reagan appointed Chicago law professors Richard Posner and Frank Easterbrook to the Seventh Circuit, to which they have brought a decidedly

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153. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 881-82, 895 (1983) (setting forth a revised version of a lecture given at Suffolk University Law School); *see also* Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 S.C.T. REV. 345 (1978).

154. *Id.* at 897-99.

155. *See Block v. Meese*, 793 F.2d 1303 (D.C. Cir. 1986); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984); *see also* *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322 (D.C. Cir. 1986) (Scalia, J., dissenting); *In re Center for Auto Safety*, 793 F.2d 1346 (D.C. Cir. 1986) (Scalia, J., dissenting) (dissenting from majority's grant of standing to consumer advocacy groups in two related cases challenging National Highway Traffic Safety Administration's reduction in fuel economy standards).

156. *See, e.g., Hirschey v. Federal Energy Regulatory Comm'n*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring); *see generally* William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. REV. 621, 650 n.114 (1990) (listing Scalia's textualist opinions).

157. RICHARD A. BRISBIN, JR., *JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL* 35-36 (1997).

158. *See id.* at 35.

“Chicago School” reputation. Admirers as well as critics of Chicago School law and economics have credited (or blamed) Posner and Easterbrook for bringing economic analysis to decisions in areas ranging from securities regulation<sup>159</sup> to constitutional law<sup>160</sup> to statutory interpretation.<sup>161</sup> The Chicago judges gained a particularly strong reputation for their judicial attack on antitrust laws, following through on a hostility reflected in work published prior to appointment.<sup>162</sup> Twenty-one state attorneys general filed an unsuccessful *amici curiae* brief asking the Supreme Court to review a Seventh Circuit antitrust decision, arguing that the circuit, in cases decided by Posner and Easterbrook, was ignoring Supreme Court precedent in order to find in favor of defendant businesses.<sup>163</sup> Posner and

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159. See, e.g., *Flamm v. Eberstadt*, 814 F.2d 1169 (7th Cir. 1987) (Easterbrook, J. authoring majority opinion) (citing numerous law and economics articles including his own, Frank H. Easterbrook & Gregg A. Jarrell, *Do Targets Gain from Defeating Tender Offers?*, 59 N.Y.U. L. REV. 277, 289–91, 294–99 (1984)). For a case in which Posner and Easterbrook utilized economic analysis to arrive at sharply conflicting opinions with Easterbrook citing Posner’s academic writings in support of his position, see *Jordan v. Duff & Phelps Inc.*, 815 F.2d 429 (7th Cir. 1987) (Easterbrook, J. authoring majority opinion and Posner, J., dissenting) (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986)). Seventh Circuit Judge Cudahy, the third member of that panel, wrote a two paragraph concurrence explaining that the case was a hard one and that “[b]oth the majority opinion and the dissent argue lucidly and cogently (and ingeniously) their respective points of view,” but that he ultimately was persuaded by Easterbrook. *Id.* at 443 (Cudahy, J., concurring).

160. See, e.g., *Menora v. Illinois High School Assoc.*, 683 F.2d 1030 (7th Cir. 1982) (Posner, J., majority opinion) (applying a cost-benefit analysis to uphold a high school regulation prohibiting headwear as applied to Jewish players wishing to wear yarmulkes); *American Civil Liberties Union of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (Posner, J., opinion for unanimous panel including Easterbrook) (utilizing a least-cost-avoider like approach to affirm injunction against a city’s display of a cross). See generally Martha Middleton, *Shaping a Circuit in the Chicago School Image*, NAT’L L.J., July 20, 1987, at 1.

161. Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983) (forwarding a “textualist” approach to statutory interpretation, which eschews legislative history in favor the objective meaning of the legislative text); see generally Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205 (discussing the influence of Easterbrook’s ideas on other Reagan-appointed judges, particularly then-Judge Scalia).

162. See, e.g., RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976); Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23 (1983); Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155 (1982); Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?* 60 TEX. L. REV. 705 (1982); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 22 CORP. PRAC. COMM. 583 (1981); Frank H. Easterbrook et al., *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331 (1980); William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Use Under the Antitrust Laws? An Economic Analysis of the Rules of Illinois Brick*, 46 U. CHI. L. REV. 602 (1979).

163. *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986).

Easterbrook, through their intellectual powers and penchant for producing powerful opinions, arguably have increased the prestige of the Seventh Circuit so that it rivals the Second and D.C. Circuits in terms of influence.<sup>164</sup>

A hot new jurisprudence today is the “new judicial activism” or “conservative judicial activism,” and former law professors are leading adherents and advocates of the perspective.<sup>165</sup> Fourth Circuit Chief Judge Harvie Wilkinson provided a detailed rationalization for this approach in his concurrence in *Brzonkala v. Virginia Polytechnic Institute*.<sup>166</sup> There he began by observing, “As this century draws to a close, it seems appropriate to examine the course of its jurisprudence and the place of this case within it. The decision before us is an especially difficult one because it pits the obligation to preserve the values of our federal system against the imperative of judicial restraint.”<sup>167</sup> He then details, in scholarly fashion, the three waves of judicial activism, including “contemporary” judicial activism that strikes federal legislation that “exceed[s] Congress’ authority at the expense of states.”<sup>168</sup> He explains how the new judicial activism can survive where the old failed, because it is free of the weaknesses characteristic of earlier activism.<sup>169</sup> The conclusion advocates activism in a writing style more common in law review articles than appellate opinions.

## 2. Scholar-Jurists and Judicial Influence

Two studies of judicial influence and prestige published recently in the *Journal of Legal Studies* provide modest support for the hypothesis that legal academics on the bench take actions that gain them greater individual recognition. William Landes, Lawrence Lessig, and Michael Solimine conducted a citation analysis of published opinions of circuit judges who had been on the court for six or more years at the end of 1995 (a total of 193 judges on the general jurisdiction circuits plus twelve Federal Circuit judges).<sup>170</sup> Approximately thirteen percent (25 out of 193) of the judges in their study were former law professors. They then ranked the judges using several different regression models. In the primary model,

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164. Cf. William M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998) (demonstrating the influence of Posner and Easterbrook on other circuits by way of citation analysis).

165. See generally Erwin Chemerinsky, *The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601, 602 (1998) (describing the federalism decisions as evincing a “conservative judicial activism”); Scott Fruehwald, *If Men Were Angels: The New Judicial Activism in Theory and Practice*, 83 MARQ. L. REV. 435 (1999) (examining the new judicial activism by looking at court decisions adopting the approach and giving special attention to Fourth Circuit Judge Wilkinson’s defense of this approach); Peter M. Shane, *Federalism’s “Old Deal”: What’s Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000) (critiquing the modern era of judicial activism).

166. 169 F.3d 820, 889 (4th Cir. 1999) (en banc) (Wilkinson, C.J., concurring).

167. *Id.* at 889–90.

168. *Id.* at 890–93.

169. See *id.* at 893–96.

170. See Landes et al., *supra* note 164, at 277.

they ranked all judges according to their total influence as reflected in outside-circuit citations.<sup>171</sup> Twenty percent of the top twenty (including the first and third) judges were former law professors, more than their percentage in the study.

David Klein and Darby Morrisroe calculated judicial prestige scores, based on weighted citations, for courts of appeals judges, ranking a sample of 139 circuit judges for the period 1989 through 1991.<sup>172</sup> Six of the top twenty-five, including the second, third, and fourth, judges were former academics (or twenty-four percent).<sup>173</sup>

The empirical evidence considered here reveals a number of things about scholar-jurists. When presidents utilize an ideological litmus test in selecting academics for the appellate bench, the scholar-jurists will behave consistently with their prior scholarly positions. Academic judges uniformly seek to express their judicial decisions in writing more often than non-academic judges. And, finally, a number of academics have succeeded in influencing the development of law through innovative judicial opinions.

#### IV. SEEKING INFLUENCE THROUGH JUDICIAL APPOINTMENTS

Presidents who seek to influence judicial decisions may look for several relevant characteristics in potential nominees. Individuals from the same party are much more likely to vote consistently with the president's ideological perspectives in close and significant cases. Lawyers who worked as prosecutors will be slightly more conservative, while those who were elected officials will be slightly more liberal. Finally, academics who have a published scholarly record of advocating ideas consistent with the president's will continue their advocacy from the bench.

Will the next President look to the nation's law schools for judges? Obviously, we can't know for sure. George W. Bush has said that Justice Scalia is his ideal judge.<sup>174</sup> If Bush idealizes Scalia for his writing ability and consistent conservatism, then Bush might nominate individuals who share Scalia's professional background as a full-time law professor and legal scholar.

Presidents who would be inclined to appoint academics must also consider the potential difficulties scholars may face in the confirmation process. A president may be hesitant to nominate a law professor with ideological positions that can be readily scrutinized by potential adversaries, such as members of the Senate Judiciary Committee or interest groups. Both FDR and Reagan appointed

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171. See *id.* at 288 tbl.2A.

172. David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEGAL STUD. 371 (1999).

173. *Id.* at 381 tbl.2.

174. See Alexandra Marks, *Abortion Edges Back Toward Center Stage in Election*, CHRISTIAN SCI. MONITOR, July 7, 2000, at 2 (reporting that Bush "praised Justice Antonin Scalia...as his model justice"); Judy Mann, *Taking the Low Road in South Carolina*, WASH. POST, Feb. 18, 2000, at C11 (observing, in an article following the Republican presidential campaign, that "Bush has gone on record as saying his two favorite Supreme Court justices are Antonin Scalia and Clarence Thomas").

like-minded academics when the Senate was controlled by their party and thus more receptive to their nominations. Reagan failed to appoint a law professor to the courts of appeals during the last two years of his presidency, when the Senate was controlled by the Democrats, despite three well-publicized attempts. In 1986, Reagan was forced to withdraw the nomination of University of Texas law professor Lino Graglia,<sup>175</sup> a well-published critic of the Supreme Court's school desegregation decisions and an ardent opponent of busing and affirmative action,<sup>176</sup> and another nominated professor, William Harvey, withdrew.<sup>177</sup> In 1987, San Diego law professor Bernard Siegan was rejected by the Senate Judiciary Committee.<sup>178</sup> Robert Bork's nomination to the Supreme Court was doomed, in part, because of his controversial scholarship.<sup>179</sup>

If a president faces a divided government, he might be forced to select more moderate—or seemingly moderate—judges to ensure judicial confirmation. In that scenario, academics may be less appealing candidates. Clinton, who taught briefly at the University of Arkansas Law School, largely stayed away from law schools in picking nominees to the circuit courts, opting for candidates with less visible records on legal issues. In one controversial instance, the *Washington Post* reported that Clinton decided not to nominate former Georgetown law professor "Peter Edelman, whom Clinton had personally promised a seat on the D.C. Circuit

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175. See Charlotte Low Allen, *Judgment Day for a Judging Panel*, INSIGHT ON THE NEWS, Mar. 20, 1989, at 46, 47 (reporting that Graglia charged the ABA with blocking his nomination because of his opposition to school busing and affirmative action); Lincoln Caplan, *Reagan's Judges Rewrite Legal History*, THE RECORD, Feb. 9, 1986, at 1 (arguing that Reagan advisors wanted to appoint Graglia "because he is as provocative an advocate for their views as any legal scholar in the country"); *UT Professor Dropped As Judge Choice*, DALLAS MORNING NEWS, Aug. 7, 1986, at 38A. (quoting Graglia's defense of his positions: "As a professor, I really try to provoke, to take opinions that need taking"); Sheldon Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 324, 327 n.15 (1987) (relating that the ABA Standing Committee informed the Reagan Administration that it would rate Graglia as unqualified if he were nominated and that Bell later agreed with the ABA's evaluation); Judy Wiessler, *Scrapping Plan for Texan's Judgeship Shows New Caution*, HOUSTON CHRON., Aug. 10, 1986 at 21 (examining Reagan Administration's decision to drop Graglia nomination after negative evaluations by the ABA and Bell).

176. See, e.g., LINO A. GRAGLIA, *DISASTER BY DECREE : THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* (1976); Lino A. Graglia, *From Prohibiting Segregation to Requiring Integration, in SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE* 69 (Walter G. Stephan & Joe R. Feagin eds., 1980); Lino A. Graglia, *Racially Discriminatory Admission to Public Institutions of Higher Education*, 9 SW. U. L. REV. 583 (1977); Lino A. Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351 (1970).

177. See SCHWARTZ, *supra* note 5, at 97.

178. See Goldman, *supra* note 22, at 317-18, 341.

179. Bork's legal scholarship, specifically his article *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971-72), was central to his confirmation hearings. See Lawrence C. Marshall, *Intellectual Feasts and Intellectual Responsibility*, 84 NW. U. L. REV. 832 (1990); ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 347 (1990).

court of appeals," after Senate Judiciary Committee Chair Orrin Hatch "complained that Clinton's friend would be a 'liberal activist' on the bench and chafed particularly at Edelman's writings about a possible constitutional right to a guaranteed minimum income."<sup>180</sup>

Even if the Senate is friendly, presidents should consider whether former academics will fail to lead their respective courts. Professors are more likely than other lawyers to come to the circuit bench with well-defined positions on legal issues and with less capacity to yield to the views of others in the interest of collegiality and coalition building. One possible drawback to academics: they may not be as well-equipped to build collegiality or influence colleagues. Their pride in intellectual independence may lead to an unwillingness to concede points. Two well-known Supreme Court justices—William Douglas and Felix Frankfurter—were brilliant academics and judges but failed to lead the Court or build support for their positions.<sup>181</sup> Justice Scalia has thus far suffered the same fate.

Even a former law dean may not be able to reach consensus with his court colleagues. Charles Clark's attempts to bargain with his Second Circuit colleagues reportedly failed miserably. In particular, Clark's disagreements with Jerome Frank, a perennial adjunct professor at Yale during Clark's deanship, would extend for months and often escalate in accusations.<sup>182</sup> One of Clark's notable dissents came in a case where he was unwilling to apply a controlling Second Circuit opinion because it had overruled a decision he reached when serving as a visiting trial judge in the district court.<sup>183</sup>

If history is any guide, future presidents will continue to nominate law professors to the courts of appeals at a rate disproportionate to their numbers. At present, twenty-four former law professors are active judges on the courts of appeals, accounting for approximately seventeen percent of occupied seats. An additional six are senior judges. To appreciate the significance of those numbers, you must know that law professors constitute a very small segment of the lawyer population. More than one million lawyers work in the United States<sup>184</sup> as

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180. Joan Biskupic, *Clinton Avoids Activists in Judicial Selections*, WASH. POST, Oct. 24, 1995, at A1.

181. See LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR I* (1997).

182. See SCHICK, *supra* note 135, at 75-76.

183. See Musher Foundation Inc. v. Alba Trading Co., 127 F.2d 9 (2d Cir. 1942) (Clark, J. dissenting); Pure Oil Co. v. Puritan Oil Co., 127 F.2d 6 (2d Cir. 1942) (reversing Clark's trial court decision).

184. Martindale-Hubbell's directory alone profiles more than 900,000 lawyers who work in private practice. See Martindale-Hubbell, *Martindale-Hubbell Law Directory in Print* (visited Jan. 18, 2001) <[http://www.martindale.com/products/law\\_dir\\_print.html](http://www.martindale.com/products/law_dir_print.html)>. More than 8900 lawyers are employed by the U.S. Department of Justice, "the world's largest legal employer." See Department of Justice, *Legal Recruitment Programs* (visited Jan. 18, 2001) <<http://www.usdoj.gov/oapm/lrp.html>>; *Index of Divisions*, (visited Jan. 18, 2001) <<http://www.usdoj.gov/oapm/larhtml/larbroch/larbroch/index.htm>>. State governments, interest groups, and corporations employ thousands more.

compared to less than 7000 full-time law professors.<sup>185</sup> The nation's five highest-grossing law firms in 1999 employed roughly the same number of lawyers as all of America's accredited law schools.<sup>186</sup> The total number of *state* judges serving in New York and Texas is about the same as the total number of law professors working in America's law schools.<sup>187</sup>

Given my position as a law professor, I won't argue whether the appointment of academics to the appeals courts is good or bad for the judicial system. But, scholar-jurists help make law and courts a fascinating subject of study.

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185. In 1999-2000, there were 6657 professors employed by the 184 ABA-approved law schools. See Association of American Law Schools, *Statistical Report on Law School Faculty and Candidates for Law Faculty Positions: 1999-2000* (visited January 18, 2001) <<http://www.aals.org/statistics/index.html#full>>, and tbl.1A, <<http://www.aals.org/statistics/T1A.htm>> (reporting 183 deans, 256 associate deans with professor title, 19 assistant deans with professor title, 4467 professors, 1147 associate professors, and 585 assistant professors). This number includes only those individuals who were considered as academics in my study; it excludes lecturers, instructors, visiting professors, professors emeritii, and administrative positions without professorial appointments. If these individuals are included in the total number, then ABA-approved law schools employ 8827 faculty.

186. In 1999, the top 5 revenue-earning law firms employed 6664 lawyers. The American Lawyer, *The Am Law 100 America's Highest-Grossing Law Firms in 1999* (visited Jan. 18, 2001) <[http://www.law.com/special/professionals/amlaw100/amlaw100\\_highgross.html](http://www.law.com/special/professionals/amlaw100/amlaw100_highgross.html)> (reporting the following numbers of attorneys were employed by the five highest-grossing firms in revenue order: Skadden, Arps: 1322; Baker & McKenzie: 2477; Jones, Day: 1213; Latham & Watkins: 900; Shearman & Sterling: 752).

187. In 1998, 3505 judges sat on state courts in New York, and 2909 judges sat on state courts in Texas. See Bureau of Justice Statistics, Department of Justice, *State Court Organization 1998*, June 2000 (visited Jan. 18, 2001) <<http://www.ojp.usdoj.gov/bjs/pub/pdf/sco98.pdf>>. These figures include all state courts, such as appellate, trial, family, probate, and claims courts.