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From Judge to Justice: Social Background Theory and the Supreme Court

Tracey E. George

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FROM JUDGE TO JUSTICE: SOCIAL BACKGROUND THEORY AND THE SUPREME COURT

TRACEY E. GEORGE*

The Roberts Court Justices already have revealed many differences from one another, but they also share a (possibly) significant commonality: Presidents promoted all of them to the U.S. Supreme Court from the U.S. Courts of Appeals. This means, of course, that they initially learned how to be judges while serving on a circuit court. How might the Justices' common route to the Court affect their actions on it? Social background theory hypothesizes that prior experience influences subsequent behavior such as voting, opinion writing, and coalition formation. This Article empirically analyzes promotion to the Supreme Court and examines the implications of promotion in light of the social background theory.

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INTRODUCTION

The Roberts Court after its first full Term appears to be deeply divided and ideologically polarized.¹ Prominent Supreme Court

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reporters were unanimous in declaring that the nine Justices were as conflicted as any Court in history. For example, a *Washington Post* headline declared, “A Rightward Turn and Dissension Define [the] Court.”² The first full Term was “marked by deep ideological divisions and heated rhetoric.”³ “[W]arring factions”⁴ on the Court battled over some of the most hotly contested issues in American society, including abortion,⁵ capital punishment,⁶ race,⁷ and free speech.⁸ Even Justices who agreed on outcomes sharply disagreed in

1. See, e.g., Joan Biskupic, *Roberts Steers Court Right Back to Reagan*, USA TODAY, June 28, 2007, at 8A (describing the Roberts Court first full Term as “remarkable” because a “narrow majority of Justices changed the law” on highly political issues); Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1 (offering a detailed examination of the major cases decided in the October 2006 Term and concluding “the picture was clear. This was a more conservative court” that decided one-third of its cases by a vote of five to four and nearly all of those were “along ideological lines.”).

2. Robert Barnes, *A Rightward Turn and Dissension Define Court This Term*, WASH. POST, July 1, 2007, at A7 (reviewing several highly visible and closely decided cases of the October 2006 Term to consider how the Court has turned to the right under Roberts).

3. Joan Biskupic, *School Diversity Programs in Doubt*, USA TODAY, June 29, 2007, at A1 (detailing the Court’s five-to-four decision rejecting school district’s consideration of race when making assignments to special programs).

4. David Von Drehle, *Inside the Incredibly Shrinking Role of the Supreme Court*, TIME, Oct. 22, 2007, at 40, 43.

5. See *Gonzales v. Carhart*, 550 U.S. ___, 127 S. Ct. 1610 (2007). The Carhart majority—Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito—voted to uphold the Partial-Birth Abortion Act, 18 U.S.C. § 1531 (Supp. III 2003), despite a 2000 decision striking a similar law as unconstitutional. Scalia and Thomas would have gone further and overruled *Roe v. Wade*, 410 U.S. 113 (1973). See *Gonzales*, 550 U.S. at ___, 127 S. Ct. at 1639 (Thomas, J., concurring). Justice Ginsburg, writing for the dissenters, argued that “a decision so at odds with our jurisprudence should not have staying power.” *Id.* at ___, 127 S. Ct. at 1653 (Ginsburg, J., dissenting).

6. See *Panetti v. Quarterman*, 551 U.S. ___, 127 S. Ct. 2842 (2007). Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer held that a prisoner was incompetent and thus could not be executed where he lacked a “rational understanding” of the “meaning and purpose” of his death sentence. *Id.* at ___, 127 S. Ct. at 2862.

7. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. ___, 127 S. Ct. 2738 (2007). Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito struck the challenged school district integration plans as unconstitutional. See *id.* at ___, 127 S. Ct. at 2767–68. Four majority Justices—Roberts, Scalia, Thomas, and Alito—also would have limited sharply the power of school districts to consider race when assigning students to schools. See *id.* at ___, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in judgment). Justice Breyer, in a long and passionate dissent joined by Stevens, Souter, and Ginsburg, warned that “[t]his is a decision that the Court and the Nation will come to regret.” See *id.* at ___, 127 S. Ct. at 2837 (Breyer, J., dissenting).

8. See, e.g., *Morse v. Frederick*, 551 U.S. ___, 127 S. Ct. 2618 (2007). Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito granted schools greater authority to censor student speech in a case known by the words on the offending banner: “BONG HiTS 4 JESUS.”

some instances over the methods for achieving those outcomes, as reflected in concurring opinions filed in several close cases.⁹

The Roberts Court Justices may have salient differences, but they also have a potentially significant commonality: they are all in their current position in part because they were sitting on the U.S. Courts of Appeals at the time of an opening on the Supreme Court.¹⁰ Presidents promoted them directly from the circuit courts, making this the first time that all Justices have prior federal judicial experience.¹¹ Perhaps more significantly, they all gained that experience on the courts immediately below the Supreme Court.

What are the implications of a Court composed of Justices who learned how to be judges while serving on the intermediate appellate courts? Prior judicial experience could affect the Justices in numerous ways. For example, every Roberts Court Justice has experience serving on a multi-member court where cooperation and compromise are necessary to reach decisions. Does this mean that the Justices on this Court, in contrast to their predecessors, are relatively more inclined toward agreement and therefore produce more moderate and measured decisions?

Or consider another example: every Roberts Court Justice came to the Court after having had the experience of reversing judicial decisions reached by lower court judges. Does this prior experience

9. *Greenhouse*, *supra* note 1; *see, e.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. ___, ___, 127 S. Ct. 2652, 2683 n.7 (2007) (Scalia, J., concurring in part and concurring in the judgment) (decrying the Roberts's plurality opinion as "faux judicial restraint" that amounts to "judicial obfuscation"); *Hein v. Freedom from Religion Found., Inc.*, 557 U.S. ___, ___, 127 S. Ct. 2553, 2573–74 (2007) (Justice Alito's opinion for the Court was joined by Chief Justice Roberts and Justice Kennedy, who wrote a separate concurrence. Justices Scalia and Thomas agreed with the plurality's conclusion that the taxpayers lacked standing to challenge the White House's faith-based initiatives, but they would have gone further and overturned *Flast v. Cohen*, 392 U.S. 83 (1968), which granted limited standing rights to taxpayers.); *Parents Involved*, 551 U.S. at ___, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in judgment) (criticizing Chief Justice Roberts's plurality opinion's "all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account"); *see also* Tom Levinson, *Scalia Courts Conflict: 'Fundamentalist' Justice Goads Roberts To Be Bold—from His Own Safe Spot*, CHI. TRIB., Oct. 14, 2007, § 2, at 3 (describing how Justice Scalia has disagreed with Chief Justice Roberts's logic despite agreeing in the outcome).

10. The Justices, in order of seniority, and their respective judicial appointments are John Roberts (D.C. Circuit), John Paul Stevens (Seventh Circuit), Antonin Scalia (D.C. Circuit), Anthony Kennedy (Ninth Circuit), David Souter (Superior Court of New Hampshire, Supreme Court of New Hampshire, and First Circuit), Clarence Thomas (D.C. Circuit), Ruth Bader Ginsburg (D.C. Circuit), Stephen Breyer (First Circuit), and Samuel Alito (Third Circuit). *See infra* Appendix.

11. *See* sources cited *infra* note 15; *see also infra* text accompanying Figure 1 (setting forth data on prior judicial experience of Supreme Court Justices); *infra* Appendix.

mean that these Justices, in comparison to their predecessors, are more likely to: (1) grant certiorari to cases they are likely to reverse, and (2) reverse at a higher rate?

Finally, and most significantly in light of this Symposium on Precedent and the Roberts Court, lower court judges are accustomed to deferring to Supreme Court precedent. Does this deeply engrained attitude survive when they are elevated to the Supreme Court? Or is respect for precedent conditioned on position in the judicial hierarchy such that former circuit judges no longer feel constrained by prior Court rulings once they are on the Court? Are they, in fact, emboldened by the power to overturn the decisions that once restricted their options?

This Article examines the history and implications of the elevation of lower federal court judges to the Supreme Court. Part I offers an empirical analysis of the practice of elevating appellate judges to the Supreme Court, including a discussion of the frequency of the practice, its evolution, and the factors that motivate its use. Part II considers the possible effects of this change in Court composition. Social background theory provides a means of considering how prior experience may influence current behavior.¹² This theory contends that the actions of judges can best be understood as a product of their demographic characteristics and personal and professional experiences such that a shared attribute, including prior work as a circuit judge, would affect subsequent behavior in predictable ways.¹³ This Part draws on social background

12. Social background theory is sometimes referred to as personal attribute theory. Regardless of the label, these studies hypothesize that judicial characteristics influence judicial decisions. That is, non-legal, individual-level variables explain, in part, the behavior of judges. In this Article and other work, I use the term “social background” to refer to personal and professional experiences (i.e., line items on a resume) and the term “personal attributes” to refer to largely immutable characteristics (i.e., race, sex, socio-economic status, and religion). Theories about the influence of these two types of variables can be distinguished on the ground that social background variables both influence behavior and reflect behavior, whereas personal attributes can only influence behavior. See Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. RES. Q. 625, 630–35 (2000) (examining social background theory as part of a consideration of the evolution in the political scientific study of courts). See generally Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 15–37 (2001) (offering a more recent overview of the social background literature); Joel B. Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551 (1966) (providing a contemporaneous review of watershed research on the relationship between a judge’s background and his decisions).

13. See, e.g., Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491 (1975) (testing the relationships between judicial characteristics—including personal attribute, social background, and ideological

scholarship and related work on role conception to develop hypotheses about the relationship between prior appellate court service and subsequent Supreme Court actions. Although it is too soon to analyze systematically the behavior of the current Court whose nine Justices all became judges on the U.S. Courts of Appeals, this Article draws on social background theory and concludes by forecasting the behavior we will observe on this new Court.

I. THE HISTORY OF PROMOTION TO THE SUPREME COURT

Promotion from Article III inferior courts to the Supreme Court is not a new phenomenon. Lower federal courts have been around as long as the Supreme Court itself.¹⁴ John Quincy Adams, in 1826, was the first President to elevate a sitting federal judge—Kentucky District Judge Robert Trimble—to the Supreme Court.¹⁵ But

variables—and decisions on the U.S. Courts of Appeals); C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916–88*, 35 AM. J. POL. SCI. 460 (1991) (developing a social background model of Justices' decisions and testing it empirically); S. Sidney Ulmer, *Dissent Behavior and the Social Background of Supreme Court Justices*, 32 J. POL. 580 (1970) (building a social background theory of the decision to dissent).

14. The Judiciary Act of 1789, which organized the Supreme Court pursuant to Article III and provided for the appointment of one Chief Justice and five associate Justices, also established district courts and circuit courts. Judiciary Act of Sept. 24, 1789, ch. 20, §§ 1–4, 1 Stat. 73, 73–75 (codified as amended at 28 U.S.C. § 1 (2000)). The original Act provided for only one district judge for each of the thirteen districts and did not provide for any circuit judges. §§ 2–3, 1 Stat. at 73–74 (current version at 28 U.S.C. §§ 42–44 (2000)). Instead, two Justices and one district judge convened as the circuit court when it was in session. § 4, 1 Stat. at 74–75 (current version at 28 U.S.C. §§ 42–44). The original circuits were the Southern, Middle, and Eastern. § 4, 1 Stat. at 74 (current version at 28 U.S.C. § 44).

15. This claim and others regarding judicial experience are based on my review of the biographies of all Supreme Court Justices. I consulted various sources to ensure accuracies. Those sources include JOAN BISKUPIC & ELDER WITT, CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 845–962 (3d ed. 1997) (offering a discussion of the characteristics of the Justices along with short individual biographies); COMM'N ON THE BICENTENNIAL OF THE U.S. CONSTITUTION, THE SUPREME COURT OF THE UNITED STATES: ITS BEGINNINGS & ITS JUSTICES 1790–1991 (1992) (presenting very brief sketches of each Justice through Justice Thomas); LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 247–364 (3d ed. 2003) (presenting detailed background information on all Supreme Court Justices through Stephen Breyer); THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 1789–1995 (Clare Cushman ed., 2d ed. 1995) (providing detailed biographical information, including interesting trivia, and official and candid photos and drawings on all Justices through Justice Breyer); Federal Judicial Center, History of the Federal Judiciary, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Mar. 24, 2008) [hereinafter Federal Judicial Center] (containing biographical data compiled by the Federal Judicial Center, which is the research and education agency of the federal courts, from extensive governmental sources including those stored in the National Archives).

promotions were rare in the nineteenth century: only six of the fifty-seven Justices appointed before 1900 had served on the lower federal courts.¹⁶

The small number of promotions during this time can be attributed to a number of factors. First, the lower federal courts were relatively small during most of this period. At the close of the Civil War, there were still fewer than fifty district judges.¹⁷ Setting aside the failed experiment of the ill-fated Midnight Judges' Bill,¹⁸ Congress created circuit judgeships for the first time in 1869, but even then Congress authorized only nine.¹⁹ Before that time, district judges, with or without the allotted Justice from the U.S. Supreme Court, heard cases assigned to the U.S. Circuit Courts.²⁰ Thus, Presidents had a very small pool of available federal judges to consider for possible promotion. Consequently, Presidents were less likely to promote from within the federal judiciary than to look outside the courts, particularly for party faithful, to fill open seats on the High Court.

16. The present Article focuses only on prior experience as a judge on Article III courts (i.e., U.S. District Courts, U.S. Circuit Courts, and U.S. Courts of Appeals). The other nineteenth century Justices with prior federal judicial experience (and the year in which they were appointed to the Supreme Court, as well as the lower federal court(s) on which they served) are Philip Barbour (1836, U.S. District Court for the Eastern District of Virginia), Peter Daniel (1841, U.S. District Court for the Eastern District of Virginia), William Burnham Woods (1880, U.S. Circuit Court for the Fifth Circuit), Samuel Blatchford (1882, U.S. Circuit Court for the Second Circuit and U.S. District Court for the Southern District of New York), David Brewer (1889, U.S. Circuit Court for the Eighth Circuit), and Henry Billings Brown (1890, U.S. District Court for the Eastern District of Michigan). The U.S. Circuit Courts, which were created as part of the original Judiciary Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 73, 74–75, which established the federal judiciary, should not be confused with the U.S. Circuit Courts of Appeals created in The Evarts Act of 1891, ch. 517, § 2, 26 Stat. 826, 826 (current version at 28 U.S.C. §§ 42–44).

17. See U.S. COURTS, AUTHORIZED JUDGESHIPS 3, <http://www.uscourts.gov/history/judgeships/allauthorized.pdf> [hereinafter AUTHORIZED JUDGESHIPS].

18. The lame-duck Federalist President John Adams signed legislation creating sixteen circuit judgeships less than three weeks before the end of his term and the end of Federalist control of Congress. Judiciary Act of 1801, ch. 4, § 7, 2 Stat. 89, 90 (repealed 1802). He then nominated Federalist judges to fill the new positions. Newly elected President Thomas Jefferson and the Republican Congress swiftly repealed the Judiciary Act of 1801. 4 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, ORGANIZING THE FEDERAL JUDICIARY 284–360 (Maeva Marcus ed., 1992).

19. Judiciary Act of 1869, ch. 22, § 2, 16 Stat. 44, 44 (current version a 28 U.S.C. § 44).

20. For a discussion of circuit court practices, see ROSCOE POUND, ORGANIZATION OF COURTS 103–09, 194–240 (1940); and David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1714–26 (2007) (describing the history of Justices sitting on circuit courts).

A second significant factor in the low rate of promotion was the limited authority of district and circuit courts during their first 100 years. Before Reconstruction, disputes over federal law generally were resolved by state, not federal, courts.²¹ Congress only granted federal question jurisdiction to district and circuit courts in the late nineteenth century.²² Lower court judges mostly heard admiralty suits and diversity suits of limited import.²³ They rarely heard criminal cases.²⁴ Sitting lower court judges, then, could not claim to have resolved the wide range of questions considered by the Supreme Court. District and circuit judges also lacked meaningful appellate experience. Though granted limited power to review district court decisions in large civil suits, the circuit courts rarely exercised their appellate authority, primarily deciding cases within their original jurisdiction.²⁵ The weakness of the lower courts may explain why Presidents and Senators did not think of the federal courts as a rich source for Supreme Court nominees.

The lower federal courts changed dramatically at the turn of the twentieth century.²⁶ The federal judiciary grew to more than 100 district and circuit judges.²⁷ The Circuit Courts of Appeals Act of 1891,²⁸ popularly known as the Evarts Act,²⁹ created intermediate

21. See STANLEY I. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 143–60 (1968); see also William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 AM. J. LEGAL HIST. 333, 336 (1969) (discussing removal jurisdiction in the Reconstruction Era).

22. Jurisdiction and Removal Act of 1875, ch. 137, § 1, 18 Stat. 470, 470 (current version at 28 U.S.C. §§ 1291–92, 1295–96, 1330–68 (2000)).

23. The Judiciary Act of 1789 granted district and circuit courts concurrent jurisdiction over some suits—including those brought by the United States for more than \$100 and those by aliens asserting a claim under international law—and separate jurisdiction in others—including crimes on the high seas (exclusive in district courts) and diversity suits (concurrent between circuit courts and state courts). See Judiciary Act of Sept. 24, 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76–79 (current version at 28 U.S.C. §§ 1291–92, 1295–96, 1330–68). In subsequent statutes, Congress tweaked lower court jurisdiction. In their landmark empirical study of the work of the federal courts, Felix Frankfurter and James Landis examined the technical grant of authority as well as the actual, extremely limited exercise of this authority. See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 12–13 (1927) (describing the statutory grant of jurisdiction to lower courts and reviewing the records on their caseload).

24. FRANKFURTER & LANDIS, *supra* note 23, at 12.

25. See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 28–38 (5th ed. 2003).

26. For a history of the development of the lower federal courts, see FRANKFURTER & LANDIS, *supra* note 23, at 77–102.

27. See AUTHORIZED JUDGESHIP, *supra* note 17, at 4.

28. Circuit Courts of Appeals Act of 1891, ch. 517, § 2, 26 Stat. 826 (current version at 28 U.S.C. §§ 1291–92).

appellate courts.³⁰ In addition, Congress, which was adopting federal legislation at a rapid pace, granted federal question jurisdiction to federal trial courts.³¹ With this new size and authority, the lower federal judiciary thus became an important institution. Perhaps it is not surprising, then, that Presidents began looking to those courts more frequently for possible Supreme Court nominees. Since 1900, twenty-one Justices (thirty-nine percent) had a prior judicial appointment on an Article III court, and all but two of those served on the courts of appeals.³²

The most recent elevation of a circuit judge occurred on January 31, 2006, when George W. Bush appointed Third Circuit Judge Samuel Alito to the Supreme Court.³³ Justice Alito is the 110th Justice and the twenty-fifth to have served on the U.S. Courts of Appeals.³⁴ Justice Alito's appointment marked the beginning of a new Natural Court (i.e., a Court defined by unchanged membership), the "Roberts 2" Court.³⁵ Every member of the Roberts 2 Court came directly from a federal appeals court, making this the first time that every Justice shares that prior career experience. Justice Alito replaced Justice Sandra Day O'Connor, who had previously served on the Arizona State Court of Appeals, and Chief Justice Roberts

29. The Act's popular name was that of its sponsor, Senator William Evarts of New York. See FALLON ET AL., *supra* note 25, at 37.

30. See Circuit Courts of Appeals Act of 1891, § 2, 26 Stat. at 826–27 (establishing "circuit courts of appeals" that had appellate jurisdiction over district and circuit courts).

31. See Jurisdiction and Removal Act of 1875, ch. 137, § 1, 18 Stat. 470, 470 (current version at 28 U.S.C. § 1331 (2000)) (extending original jurisdiction to circuit courts over suits "where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars" and that are "arising under the Constitution or laws of the United States, or treaties"); see also Judicial Code of 1911, ch. 13, § 291, 36 Stat. 1087, 1167 (abolishing the circuit courts and transferring all circuit court authority, including jurisdiction, to district courts).

32. President Woodrow Wilson appointed John Clarke to the U.S. District Court for the Northern District of Ohio in 1914 and two years later promoted Clarke to the U.S. Supreme Court. In 1923, President Warren Harding promoted District Judge Edward Sanford from the U.S. District Courts for the Middle and Eastern Districts of Tennessee, where Sanford had held concurrent appointments since 1908. For a complete listing, see *infra* Appendix (listing, from 1900 to 2007, all Justices who were appointed to a federal district or appeals court, the name of the court, and length of their lower court service).

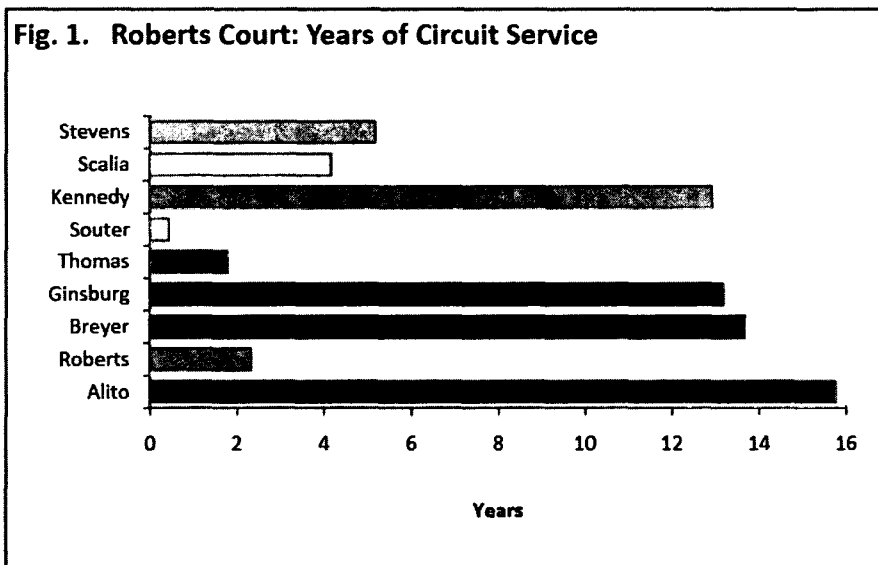
33. See David D. Kirkpatrick, *Alito Sworn In as Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 1, 2006, at A21 (describing the swearing-in ceremony for Justice Alito and the contested Senate confirmation process that preceded the appointment).

34. See Oyez U.S. Supreme Court Media, Samuel A. Alito, Jr., http://www.oyez.org/justices/samuel_a_alito_jr/ (last visited Apr. 8, 2008) (noting that Justice Alito is the 110th member of the Supreme Court). For a complete list of Justices who served on the U.S. Courts of Appeals, see *infra* Appendix.

35. The Roberts 1 Court included Justice Sandra Day O'Connor, whom Justice Alito replaced.

replaced Chief Justice William Rehnquist, who joined the Court from the Office of Legal Counsel in the Department of Justice.³⁶

Although the Roberts 2 Justices all arrived *directly* from the circuit courts, their lower court tenures vary greatly. Most notably, Justice Souter served for only five months on the First Circuit, the shortest court of appeals stint of any promoted Justice.³⁷ Justice Alito, in contrast, served almost sixteen years, the longest period of circuit service by a modern Justice since Justice Horace Lurton died in office in 1914. Figure 1 below compares the years of circuit service for the Roberts 2 Justices.³⁸



36. See *supra* note 15.

37. President George H.W. Bush appointed Justice Souter, who was serving as an Associate Justice on the New Hampshire Supreme Court, to the First Circuit on April 30, 1990 and to the Supreme Court on October 3, 1990 (I treat the date of commission as the first day of an appointment.). Federal Judicial Center, *supra* note 15.

38. Justice Stevens served for 5.18 years, Justice Scalia for 4.11, Justice Kennedy for 12.91, Justice Souter for .44, Justice Thomas for 1.62, Justice Ginsburg for 13.15, Justice Breyer for 13.65, Chief Justice Roberts for 2.33, and Justice Alito for 15.77. Justice Alito has the second longest period of service behind Justice Lurton, who spent nearly seventeen years on the Sixth Circuit at the turn of the *last* century. In the modern era (i.e., since the Judges Bill of 1925 granted the Court discretion over its caseload), Justice Alito has the longest service. Chief Justice Roberts's circuit service, by contrast, was relatively short. It would have been much longer if he had been confirmed when he was originally nominated to the D.C. Circuit by President George H.W. Bush in January 1992. The Senate did not hold a hearing on that election-year nomination. See Alberto R. Gonzales, Editorial, *Double Standard Filibuster*, WASH. POST, June 2, 2003, at A17.

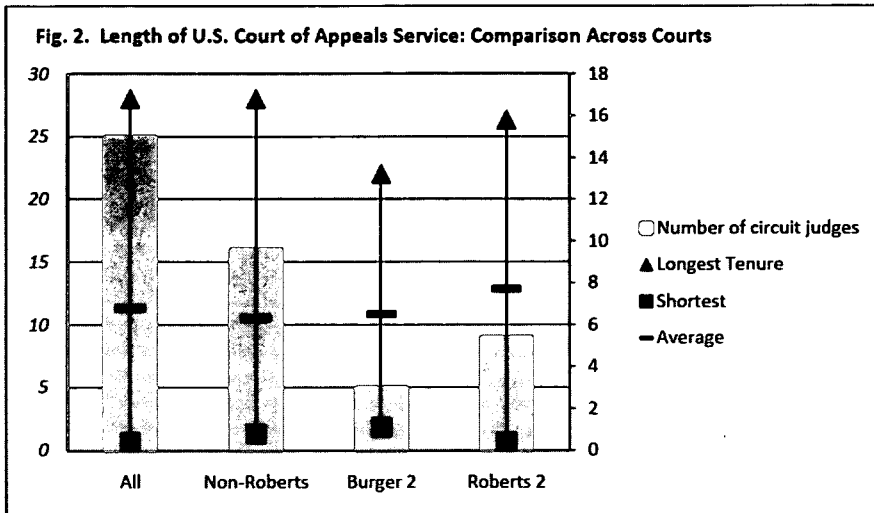
The circuit experience of Roberts 2 Justices differs from the circuit experience of other Justices in Supreme Court history. For example, the Roberts 2 Justices sat on the circuit bench twenty-three percent longer on average than non-Roberts Justices.³⁹ Figure 2 below compares the tenure of Roberts 2 Justices to the tenure of earlier Justices. The vertical line connects the longest and shortest circuit tenure for Justices in each cohort while the horizontal dash on each line marks the average tenure. Figure 2 includes a line for the five promoted Justices on the second Burger Natural Court (“Burger 2,” June 9, 1970–September 17, 1971) when former circuit judges held a majority of the Court for the first time.

The influence of prior judicial experience on Supreme Court Justices may be sensitive to any intervening experience the Justice had. That is, circuit court experience may have a greater effect on a Justice who was promoted directly from a circuit court than on a Justice who served in a non-judicial post between her circuit court service and her Supreme Court service. Thurgood Marshall, for example, had a break in his judicial tenure: he was Solicitor General for two years between his time on the Second Circuit and the Supreme Court.⁴⁰ Only two other Justices left the federal judiciary between the time of their appeals court and Supreme Court terms, and they too left for public service: Frederick Vinson was the Director of the Office of Economic Stabilization for just over two years between serving on the D.C. Circuit (1937–1943) and on the Supreme Court (1946–1953), and William Howard Taft was, among other things, President during a twenty-one year hiatus from judging on the Sixth Circuit (1892–1900) and then later the Supreme Court (1921–1930).⁴¹

39. Justices on the Roberts Court served, on average, 7.68 years on the courts of appeals. By comparison, earlier Justices served, on average, 6.24 years on the courts of appeals. These figures do not include service on district courts or the original circuit courts.

40. See JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 296–98, 313–18, 332–33 (1998) (describing President Johnson’s appointment of Marshall to be a Second Circuit judge, Solicitor General, and finally a Supreme Court Justice and considering the relationship between those appointments).

41. See *supra* note 15.



The identity of the circuit on which a Justice served may be as important as the length of time that a Justice served as a circuit judge. Circuits have distinct reputations, dockets, and norms.⁴² Not every circuit is represented in the hall of Justices.⁴³ Justice Alito is the first

42. See, e.g., DONALD R. SONGER, REGINALD S. SHEEHAN & SUSAN B. HAIRE, CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 119–30 (2000) (describing regional differences across circuits). See generally J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS (1981) (demonstrating, in this in-depth empirical study of the federal courts of appeals, the distinctive features of the various circuits).

43. I do not include here the Federal Circuit because it is such a unique court of appeals with limited subject matter jurisdiction and an unusual history. The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C.), created this Article III court by merging the U.S. Court of Customs and Patent Appeals and the U.S. Court of Claims. *Id.* Patent and trademark suits comprised thirty-seven percent of the court's merits decisions in fiscal year 2007 and money suits against the United States accounted for another seventeen percent. U.S. Court of Appeals for the Federal Circuit, Statistics, <http://www.cafc.uscourts.gov/statistics.html> (follow "Appeals Adjudicated by Merits Panels 2007" hyperlink) (last visited Mar. 24, 2008). Remaining cases involved various administrative law claims including veterans' claims, international trade disputes, and federal government personnel matters. See *id.* Moreover, the appointment process for federal circuit judges has been distinctive: most nominees have particular expertise in a relevant field and few nominees have been subjected to the kind of close Senate scrutiny visited on nominees for other courts. For a discussion of the court's current place, see generally S. Jay Plager, *The Price of Popularity: The Court of Appeals for the Federal Circuit 2007*, 56 AM. U. L. REV. 751, 753–54 (2007) (The Federal Circuit Chief Judge in this annual essay argues that the court is no longer "specialized" in that its influence has expanded far beyond the limited bounds that the term "specialized" implies.).

Third Circuit judge to join the High Court. No judges have been elevated from the Fourth, Fifth, Tenth,⁴⁴ or Eleventh circuits.⁴⁵ The Eleventh, of course, has only been in existence since 1980.⁴⁶ The absence of the Fourth and Fifth Circuits is surprising because they have both long been prominent circuits. The Fifth Circuit's prominence owes in part to its historically large size. In much the way the Ninth Circuit dominates our current discussions of the courts of appeals, the Fifth Circuit was often the primary focus in judicial reform discussions in the recent past.⁴⁷ In addition, the civil rights disputes of the last century played out primarily in that court.⁴⁸ The Fourth Circuit, too, saw many of those highly contested cases, and it surrounds the nation's capitol.⁴⁹ Although Presidents did *try* to name judges from both the Fourth and Fifth Circuits to the Supreme Court, they simply did not succeed.⁵⁰

44. The 1929 division of the Eighth Circuit created the Tenth, Act of Feb. 28, 1929, ch. 363, § 1, 45 Stat. 1346, 1346-47 (current version at 28 U.S.C. § 41 (2000)) which has had thirty-eight judges in its nearly eighty years. Federal Judicial Center, U.S. Court of Appeals for the Tenth Circuit, Legislative History, <http://www.fjc.gov/public/home.nsf/hisc> (follow "U.S. Courts of Appeals" hyperlink; then follow "Tenth Circuit" hyperlink) (last visited Mar. 24, 2008).

45. See *supra* note 15.

46. See Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 1980 U.S.C.A.N. (94 Stat.) 4236 (codified as amended at 28 U.S.C. § 41) (dividing the Fifth Circuit into two circuits: the modified Fifth, which included the District of Canal Zone, Louisiana, Mississippi, and Texas; and the new Eleventh, which included Alabama, Florida, and Georgia).

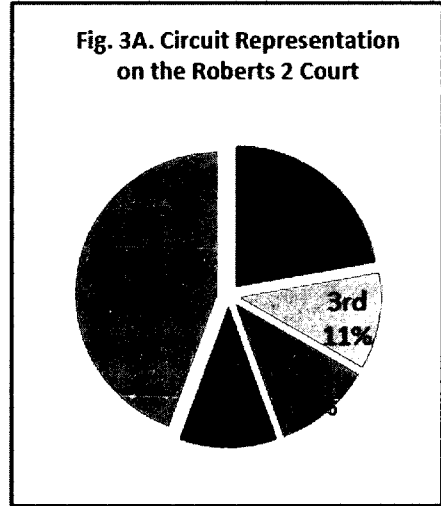
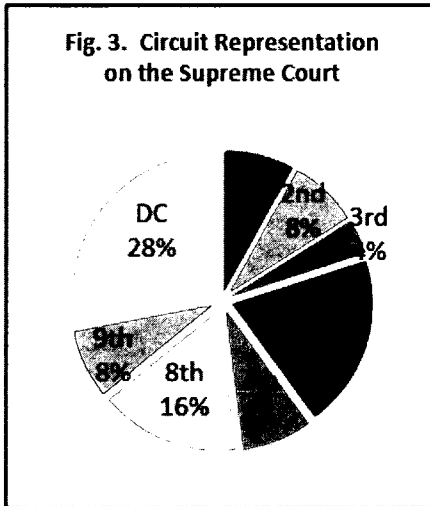
47. For a discussion of the history and division of the Fifth Circuit, see generally DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM* (1988).

48. See HOWARD, *supra* note 42, at 31-32 (noting that civil rights cases were "heavily litigated in the [Fifth Circuit]"). See generally J.W. PELTASON, *FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* 93-134 (1961) (analyzing federal courts' struggles with public school desegregation).

49. For a discussion of the Fourth Circuit, see Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1669-70 (1998) (discussing a combined attitudinal and strategic model of en banc court of appeals decisionmaking).

50. Several nominations to a single seat failed. On June 26, 1968, President Johnson nominated then-associate Justice Abe Fortas to replace Earl Warren as Chief Justice and also nominated Fifth Circuit Judge Homer Thornberry to the opening that would be created after the anticipated confirmation of Fortas as Chief. Judge Thornberry lost his opportunity when Justice Fortas was forced to withdraw on October 4, 1968, and ultimately resigned from the Court on May 14, 1969, mere months after President Nixon succeeded President Johnson. President Nixon initially had as little luck as President Johnson in filling the seat. President Nixon's first two nominees were rejected by the Senate: the Senate first rejected Fourth Circuit Judge Clement Haynsworth on November 21, 1969, by a vote of forty-five to fifty-five, and then rejected Fifth Circuit Judge G. Harrold Carswell on April 8, 1970, by a vote of forty-five to fifty-one. Almost exactly one year to the day following Justice Fortas's resignation, Eighth Circuit Judge Harry

The D.C. Circuit, with seven promoted judges, has become the most common circuit path to the Supreme Court. Four current Justices—Thomas, Ginsburg, Breyer, and Roberts—all came from that court. However, until 1993 the Sixth Circuit was a more frequent launching pad, with five members promoted to the High Court. The Eighth Circuit was right behind with four members. But, today, neither the Sixth nor the Eighth Circuit has a single spot on the Supreme Court.⁵¹ If circuit experience in general, rather than the experience on a specific circuit, influences Justices' behavior, then the change in circuits is historically interesting but irrelevant to forecasting. If, however, the effect of prior court of appeals experience is conditional on circuit, then the change in circuits may also mean a change in Supreme Court behavior.



While the Roberts 2 Court is the first Natural Court to be comprised entirely of circuit judges, it likely will not be the last. Presidents today regularly look to the judiciary when appointing not

Blackmun finally succeeded in obtaining Senate approval. See HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 10–14 (4th ed. 1999) (recounting President Nixon's efforts to fill the Fortas seat); United States Senate, Supreme Court Nominations, 1789–present, available at <http://www.senate.gov/pagelayout/reference/nominations/reverseNominations.htm> (last visited Apr. 24, 2008). See generally KENNETH W. GOINGS, THE NAACP COMES OF AGE: THE DEFEAT OF JUDGE JOHN J. PARKER (1990) (recounting the NAACP's successful challenge to President Hoover's nomination of Fourth Circuit Judge John J. Parker to the Supreme Court).

51. See *supra* note 15.

only Supreme Court Justices, but also circuit and district judges.⁵² Roughly half of circuit judges appointed since 1990 have had prior judicial experience.⁵³ And, numerous magistrate and bankruptcy judges—who are Article I judges—are promoted to the district courts.⁵⁴

Promotion from within the federal judiciary is appealing for several reasons. First, there is the perception that the Senate is more likely to confirm nominees who are already judges and that they will act relatively quickly in doing so. For example, during the collapse of the Harriet Miers nomination, several Senators, law professors, and commentators cited her lack of judicial experience as a serious weakness in her candidacy for the Supreme Court.⁵⁵ Second, sitting judges are likely—perhaps the most likely among all lawyers—to desire higher judicial office *and* to have the fortitude required to undergo the appointments process. The initial judicial appointment is a strong signal of an interest in serving as a judge as well as a willingness to forego benefits, including a higher salary, offered by most other legal occupations.⁵⁶ Federal judges also are better able to withstand the scrutiny and frustration associated with the nomination

52. For a detailed discussion of the lower court judicial selection process, including a consideration of the professionalization of the judiciary, see generally SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997).

53. See *id.* at 353, 356 n.b (finding that “[o]ver half of the [courts of appeals] appointees of each administration had had previous judicial experience” and “[t]he large majority of lower-court elevations were from the federal district bench”).

54. See Sheldon Goldman, Elliot Slotnick, Gerard Gryski & Sara Schiavoni, *Picking Judges in a Time of Turmoil: W. Bush's Judiciary During the 109th Congress*, 90 JUDICATURE 252, 264 (2007) (discussing the appointment of federal magistrate and bankruptcy judges, as well as state judges, to federal district judgeships); Federal Judicial Center, *supra* note 15 (based on a review of the Federal Judicial Center's data on federal judicial characteristics).

55. The Miers nomination produced thousands of news stories. For discussions of Senators' and others' concerns about her judicial inexperience, see, for example, Charles Babington & Thomas B. Edsall, *Conservative Republicans Divided Over Nominee*, WASH. POST, Oct. 4, 2005, at A11; Peter Baker & Dan Balz, *Miers To Face Tougher Time than Roberts in Hearings*, WASH. POST, Oct. 9, 2005, at A1; Elisabeth Bumiller & David D. Kirkpatrick, *Bush Fends Off Sharp Criticism of Court Choice*, N.Y. TIMES, Oct. 5, 2005, at A1; Lynette Clemetson & Jonathan D. Glater, *Quiet Force for Change in a Male-Dominated Era*, N.Y. TIMES, Oct. 6, 2005, at A30; and Shailagh Murray & Charles Babington, *Miers Makes Rounds on Hill*, WASH. POST, Oct. 7, 2005, at A6.

56. Chief Justice William Rehnquist, in fact, complained about the growing professionalization of the federal judiciary in one of his annual reports on the state of the federal courts. He attributed the professionalization to several factors including relatively low and stagnant salaries. See WILLIAM H. REHNQUIST, 2001 YEAR-END REPORT ON THE FEDERAL JUDICIARY, <http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html>.

process because the Department of Justice and Federal Bureau of Investigation have already vetted them.⁵⁷ They have survived meetings with Senators, a committee hearing, and a full Senate vote. They also have been subject to intense scrutiny by interest groups which scrutinize circuit and even district court nominees with increasing frequency.⁵⁸ Finally, sitting judges can keep their current position without financial hardship due to loss of clients or other business or other difficulties during a possibly long—and perhaps unsuccessful—nomination process. Chief Justice Rehnquist warned Congress in 2001: “The combination of inadequate pay and a drawn-out and uncertain confirmation process . . . restricts the universe of lawyers in private practice who are willing to be nominated for a federal judgeship.”⁵⁹

Nevertheless, the single most important factor in judicial promotion from within the federal judiciary is information: Presidents can more readily ascertain the policy positions and voting behavior of sitting judges. As Lee Epstein and Jeff Segal explain in their study of judicial appointment politics, Presidents seek to avoid the mistakes of their predecessors through “extensive screening. . . . This may explain why over half of [President George W. Bush’s] (and his immediate predecessors’) appointments have gone to individuals who have served or were serving as judges, an occupation that requires its members to write.”⁶⁰

The White House will view the judicial record as possibly the most reliable source of information on a candidate’s views.⁶¹ A

57. See GOLDMAN, *supra* note 52, at 9–13 (describing briefly the mechanics of judicial selection from beginning to end).

58. During George W. Bush’s first term, Democrats in the Senate successfully filibustered ten circuit court nominees. See Annie Chiappetta, *Primer: Judicial Nominees and the Filibuster*, ABC NEWS, Apr. 25, 2005, <http://www.abcnews.go.com/politics/story?id=683438>; see also John Stanton, *Bush Offers New List of Judicial Nominees*, ROLL CALL, Jan. 10, 2007, at 1 (noting that the Senate filibustered four George W. Bush nominees for the courts of appeals during the first half of Bush’s second term). Civil rights groups can claim a great deal of credit for the very first filibustered nominee to a lower federal court, Miguel Estrada. See Neil A. Lewis, *Stymied by Democrats, Bush Court Pick Finally Gives Up*, N.Y. TIMES, Sept. 5, 2003, at A1. For an examination of the politicization of the lower court selection process, see generally NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENTS PROCESS (2005) (arguing the lower federal court appointment process is more politically relevant than Supreme Court nominations).

59. See REHNQUIST, *supra* note 56.

60. LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 63 (2005).

61. See, e.g., Elisha Carol Savchak, Thomas G. Hansford, Donald R. Songer, Kenneth L. Manning & Robert A. Carp, *Taking It to the Next Level: The Elevation of District Court Judges to the U.S. Courts of Appeals*, 50 AM. J. POL. SCI. 478, 479 (2006) (observing,

candidate may overstate in an interview her level of agreement with the President's ideological positions, but she is unlikely to do so in judicial votes and opinions where the costs of doing so are high (i.e., a vote against her true preferences) as compared to the potential benefits (i.e., the extremely low probability of elevation for any individual judge).⁶² Whereas a President can only hypothesize how a practicing lawyer might act once the lawyer dons robes, a President knows how a circuit judge behaves on the bench. Furthermore, Presidents expect sitting judges to adapt more quickly to a new judicial post. A smooth and rapid transition increases the speed with which a judge can influence the law. For all these reasons, Presidents must believe that prior judicial experience is related to future Supreme Court behavior. In the next Part, I consider whether the relationship likely is causal (i.e., circuit court service *influences* Supreme Court decisions) or spurious (i.e., any correlation between the two variables reflects the influence of a third factor).

II. SOCIAL BACKGROUND THEORY AND THE JUDICIAL ROLE

Justices arrive with attitudes and abilities developed over decades. Those experiences clearly will affect their behavior on the Court.⁶³ Their views on subjects governed by law will be influenced by salient events in their pasts. 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.

in a study of circuit appointments, that "the policy-relevant behavior of district judges is manifested under a set of constraints that are relatively similar to the constraints that will be faced by an appeals court judge" making district judges particularly appealing circuit nominees as compared to other "potential nominees" whose "record . . . may not provide as reliable an indicator of the policy choices they would make as a federal judge").

62. See CHRISTINE L. NEMACHECK, STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH 113–14 (2007) (hypothesizing that Presidents are more likely to select nominees who are sitting judges because they are unlikely to misrepresent their preferences in their judicial decisions because the likely gain from doing so—appointment to the Supreme Court—is so remote).

63. See, e.g., Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. 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.

Id. at 492–93.

However, various studies have had some success finding a causal relationship between specific characteristics and subsequent judicial actions.

In this Part, I begin by reviewing relevant social background literature, surveying briefly the treatment of common explanatory variables including career socialization. As explained below, most research focuses on how experiences influence votes on case outcomes. I argue instead that the effect of prior employment is more subtle and complex for judges elevated to the Supreme Court: prior judicial experience affects the way a judge conceives of her role as a judge, which is reflected in the *types* of actions she takes rather than the *ideological direction* of those actions.⁶⁴ I end by delineating a series of hypotheses about the effect of circuit experience on judicial role conception, arguing ultimately that circuit experience affects behavior on the Court.

A. *Social Background as a Predictor of Judicial Decisions*

Social scientific study of the judiciary has sought to explain judicial behavior by building on our understanding of human behavior generally. Political scientists in the Sixties developed a social background theory of judicial behavior that grew out of theories developed in social and cognitive psychology.⁶⁵ The theory provides a means to explain judicial behavior based on the lives judges lead prior to appointment.⁶⁶ Social background theory “holds

64. Types of actions are intended to capture the range of behaviors available to a judge in her formal role, including writing versus signing, willingness to dissent and/or concur, voting for en banc review, willingness to reverse lower courts, taking positions contrary to precedent, and overturning precedent.

65. See, e.g., STUART S. NAGEL, *THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE* (1969); GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946–1963* (1965) (developing a model of judicial decisionmaking based on social psychological studies of human behavior by Louis Thurstone, Clyde Coombs, and Louis Guttman); JOHN SPRAGUE, *VOTING PATTERNS OF THE UNITED STATES SUPREME COURT: CASES IN FEDERALISM 1889–1959* (1968); 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); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961–64*, 60 AM. POL. SCI. REV. 374 (1966) [hereinafter Goldman, *Voting Behavior*] (examining the relationship between various background variables and appellate judges’ behavior); Grossman, *supra* note 12; John R. Schmidhauser, *Stare Decisis, Dissent, and the Backgrounds of Justices of the Supreme Court of the United States*, 14 U. TORONTO L.J. 194 (1962); Kenneth N. Vines, *Federal District Judges and Race Relations Cases in the South*, 26 J. POL. 337 (1964).

66. See, e.g., Jilda M. Aliotta, *Social Backgrounds, Social Motive and Participation on the U.S. Supreme Court*, 10 POL. BEHAV. 267, 267–68 (1988); S. Sidney Ulmer, *Social*

that a range of political, socioeconomic, family, and professional background characteristics account for judicial behavior, or at the very least, help to explain the formation of particular attitudes.”⁶⁷

Social background theory has made meaningful contributions to our understanding of judicial behavior, highlighting the relationship between an array of characteristics and judicial decisions. While certain variables like age,⁶⁸ religion,⁶⁹ and education⁷⁰ are not

Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947–1956 Terms, 17 AM. J. POL. SCI. 622, 624–25 (1973).

67. Epstein & Knight, *supra* note 12, at 630.

68. Compare 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 and the severity of sentences given to draft offenders), and Goldman, *Voting Behavior*, *supra* note 65, at 382 (finding that older judges were not more conservative than younger judges), and Charles M. Lamb, *Exploring the Conservatism of Federal Appeals Court Judges*, 51 IND. L.J. 257, 267–70, 277 (1975) (finding that during the course of their tenure, some District of Columbia circuit judges voted more conservatively while others became slightly more liberal), and C. Neal Tate, *Personal Attribute Models of 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) (finding that age was not a meaningful explanation of Justices’ votes when the influence of party affiliation and other judicial characteristics were controlled), with 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 in race discrimination suits). One criticism of age as a variable is that any observed differences in judicial behavior may be attributable to missing variables, such as generational, socialization, and tenure effects. See James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7, 24 (1983). If this is true, any attribution of voting variations to judicial age would be spurious.

69. 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; thus, any hypothesized relationship is time-bound. Third, religious affiliation has a dynamic relationship with socioeconomic status. See, e.g., Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 110 tbl.X (2001) (failing to find a statistically significant relationship between circuit judges’ religious identification and their votes in unfair labor practices suits); Tate & Handberg, *supra* note 13, at 473, 474 tbl.1 (concluding that religion was not related to Supreme Court Justices’ decisions for the period 1916 through 1988).

70. The evidence on the relationship between educational background and judicial decisions is mixed. A few studies have found that prestige of college and of law school have a weak positive correlation with economic liberalism and receptivity to civil rights and liberties claims in judicial decisions. See, e.g., James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1715 tbl.II, 1716 tbl.III (1999) (finding a relationship between college selectivity and union support among lower federal court judges but failing to find a relationship between law school selectivity and union support); Micheal W. Giles & Thomas G. Walker, *Judicial Policy-Making and*

consistently correlated with judicial behavior, other social background variables have demonstrated explanatory power for at least some kinds of decisions.

Scholars, for example, have long hypothesized that women⁷¹ and minorities⁷² should behave differently from men and whites, respectively, in cases in which identity is salient and there is some

Southern School Segregation, 37 J. POL. 917, 930–31 (1975) (failing to find a relationship between education and the school desegregation decisions of federal district judges); Goldman, *Voting Behavior*, *supra* note 65, at 382 (finding no relationship between education and votes of federal circuit judges); Stuart S. Nagel, *Multiple Correlation of Judicial Backgrounds and Decisions*, 2 FLA. ST. U. L. REV. 258, 270–71 (1974) (finding that state supreme court judges who attended high-tuition law schools were more receptive to defendants' rights claims than were those who attended low-tuition law schools but finding little difference in economic cases); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1463–65 (1998) (failing to find a relationship between elite law school education and district judges' votes on the constitutionality of the federal sentencing guidelines); Tate, *supra* note 68, at 362–63 (finding a relationship between college prestige and Justices' economic liberalism but not between college prestige and civil rights and liberties liberalism).

71. See Nancy E. Crowe, *The Effects of Judges' Sex and Race on Judicial Decision Making on the United States Courts of Appeals, 1981–1996*, at 100–01, 159–60 (June 1999) (unpublished Ph.D. dissertation, available through The University of Chicago Dissertation Office at the Joseph Regenstein Library) (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, Susan Haire & Donald R. Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 132 tbl.3, 132–33 (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 Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging* app.A (unpublished manuscript, available at <http://ssrn.com/abstract=1001748>) (providing a summary of multivariate analyses of the effect of sex on judging). *But see* Gerard S. Gryski, Eleanor C. Main & William J. Dixon, *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143, 152–53 (1986) (failing to find a significant relationship between a state high court judge's gender and decisions in sex discrimination suits).

72. See 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]”); Crowe, *supra* note 71, at 84 (finding 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).

evidence of such a relationship.⁷³ But, most studies fail to find that sex or race have a consistent or substantial effect on judges' votes in cases in which we might expect sex or race to play a role.⁷⁴ This failure, however, may be due to methodological challenges rather than the absence of an effect. In a recent paper, Christina Boyd, Lee Epstein, and Andrew Martin overcame these challenges by taking a highly creative approach to disentangling the relationship between sex and votes in gender discrimination suits. They used a matching strategy whereby they matched judges who shared salient background characteristics except for sex and looked to see whether they voted in the same way. They found that male judges were much less likely than female judges to decide in favor of the party alleging discrimination.⁷⁵ The authors' matching strategy might also prove valuable for analyzing race and judging.

The most success has been found in establishing a relationship between political preferences and judicial behavior. It is well established that political affiliation of a judge or appointing President is a strong predictor of how a judge will vote in a case.⁷⁶ A Democrat who served as a U.S. Attorney likely will be more liberal, even on

73. See Max M. Schanzenbach, *Racial and Gender Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUD. 57, 80 (2005) (finding that "the greater the proportion of female judges in a district, the lower the sex disparity" in prison sentences, which he attributes to "paternalistic bias" in male judges, but finding "mixed effects" for racial composition of a district and the length of sentences given to minority defendants).

74. See Merritt & Brudney, *supra* note 69, at 109–10 tbl.X (finding no relationship between black racial identity and votes in unpublished, unfair labor practices circuit court decisions); Jennifer Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 147–48 (2000) (concluding, based on an examination of district court decisions, that women and minorities 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).

75. See Boyd, Epstein & Martin, *supra* note 71, at 25. They also report that men on panels with at least one female judge are more sympathetic to rights claimants than men on all-male panels. *Id.* at 27.

76. See, e.g., 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); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219 (1999) (meta-analyzing eighty-four 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, where it explains thirty-eight percent of the variance); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997). Presidents rarely look outside their own party for judicial nominees: more than ninety percent of federal court judges since President Franklin D. Roosevelt have been members of the President's party. See EPSTEIN, SEGAL, SPAETH & WALKER, *supra* note 15, at 249.

criminal issues, than a Republican without prosecutorial experience. The theoretical basis for this relationship is less clear. A judge may have been influenced by his earlier involvement in a political party. For example, volunteering with a political campaign could lead a person to adopt views held by the candidate or at least strengthen a commitment to positions shared in common with the candidate. Or, the judge may have joined the party because it reflected his preexisting views. In the former case, political party membership is a cause, in part, of a judge's policy preferences. This generally would be the social background account. In the latter, political party membership is a product of a judge's policy preferences. Rational actor theory, which hypothesizes that individuals take actions likely to increase the probability of achieving a goal, explains party affiliation in this way—it is a proxy for policy goals.

Professional experience also poses this difficulty to a certain extent: a job may simultaneously *reflect* and *affect* the views of the person who holds it. I expect that both are relevant for Supreme Court Justices. Hence, any demonstrated relationship between professional experience and judicial decisions likely is attributable both to the experience and to the preexisting attitudes that lead the judge to seek out that professional experience. Researchers have considered the influence of career socialization processes on judicial behavior, focusing particularly on experience as a prosecutor,⁷⁷ a public or elected official,⁷⁸ an academic,⁷⁹ or a judge on another court.⁸⁰

Studies of prosecutorial experience, like most studies of social background, hypothesize that the experience will influence the ideological direction of judges' decisions. Researchers have hypothesized that prosecutors are more likely than other judges to

77. See *infra* text accompanying notes 81–82.

78. See, e.g., Brudney, Schiavoni & Merritt, *supra* note 70, at 1681 (reporting that former elected officials were more likely than their colleagues to support labor union claims); Goldman, *supra* note 13, at 501–03 (finding that judges with prior political experience were somewhat less likely to favor the government in fiscal cases); Donald Songer, Jeffrey Segal & Charles Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 679–80 (1994) (testing a multidimensional attitude variable based on a court of appeals judge's appointing President, region, prior prosecutorial or judicial experience, and religion); Tate, *supra* note 68, at 359–63 (discovering that Justices who previously held elective office were more liberal on economic questions).

79. See, e.g., George, *supra* note 12, at 14 (finding that academic experience was not a proxy for a particular policy preference but that it was associated with greater activism on the bench).

80. See *infra* text accompanying notes 83–86.

vote against criminal defendants because former prosecutors devoted some part of their lives to capturing and convicting wrongdoers.⁸¹ Judges with prosecutorial experience may be more likely to support the government's position in other cases as well. After all, prosecutors act to enforce statutes and to maintain the status quo.

Neal Tate has hypothesized that former prosecutors may be more conservative than other judges in a range of non-criminal cases including civil liberties and economic suits because "prosecutors 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.'"⁸² Some empirical evidence supports this hypothesis, yet the question of a missing variable lingers. That is, do these models fail to capture some element of an underlying "law-and-order" stance that motivates both judicial behavior and career choices? Fighting for convictions may lead a prosecutor to hold conservative, law-and-order views, or these views may be the reason that a lawyer becomes a prosecutor, or perhaps both.

Studies likewise have evaluated how judicial experience may influence attitudes about case outcomes. Scholars have hypothesized that 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.⁸³ On the other hand, judges bear

81. See, e.g., Richard E. Johnston, *Supreme Court Voting Behavior: A Comparison of the Warren and Burger Courts*, in *CASES IN AMERICAN POLITICS* 108-09 (Robert L. Peabody ed., 1976) (finding that Justices with prosecutorial experience were more conservative in criminal procedure cases as well as economic cases); Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 *J. CRIM. L. & CRIMINOLOGY* 333, 335-36 (1962) (finding that former prosecutors on state supreme courts were more likely than their colleagues to vote against criminal defendants); Stuart S. Nagel, *Multiple Correlation of Judicial Backgrounds and Decisions*, 2 *FLA. ST. U. L. REV.* 258, 266 tbl.1 (1974) (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).

82. Tate, *supra* note 68, at 359-63 (showing, after controlling for various individual attributes, that Justices without prosecutorial experience are more favorable to civil liberties claims and economic underdogs than those with prosecutorial experience, though judicial experience between time as a prosecutor and appointment to the Supreme Court moderates the prosecutor effect).

83. See Tate & Handberg, *supra* note 13, 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.").

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,⁸⁴ most research concludes that judicial experience and voting are unrelated.⁸⁵ Studies of courts of appeals and district courts have generally failed to find a significant relationship between a judge's experience on another court and her subsequent rulings.⁸⁶

The meaningful effects of career socialization may be seen not in the direction of a judge's vote, but rather in the judge's role conception. A Justice who learned how to be a judge on a lower court may fulfill his duties in a different manner than his colleagues from private practice or public service. In the next Section, I explain what I mean by "role conception" and how it may influence judicial behavior.

B. Role Conception as a Predictor of Judicial Actions

Role conception encompasses the judge's normative view of his position, including his beliefs about the authority of the individual judge in the legal system, the proper functioning of a judicial body, and the appropriate way to operate in a collegial setting.⁸⁷ As a general matter, those views tell us less about the ideological direction

84. Compare Tate, *supra* note 68, at 362 (finding, in a study of Supreme Court decisions from 1946 through 1978, 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).

85. See Tate & Handberg, *supra* note 13, 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).

86. See, e.g., Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 277–81 (1995) (concluding that district judges' votes appeared unrelated to their judicial background); Brudney, Schiavoni & Merritt, *supra* note 70, at 1715 tbl.II (failing to discern a relationship between prior judicial experience and votes in support of unions in circuit court rulings); Goldman, *Voting Behavior*, *supra* note 65, at 381–82 (finding no relationship between prior judicial experience and judicial decisions generally or after controlling for party affiliation); Goldman, *supra* note 13, at 504 (determining that circuit judges with prior judicial experience were no more liberal or conservative than other judges).

87. 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.

of a judge's behavior than about the range of behavior he is willing to take. A judge's role conception impacts the frequency with which he will pursue his preferences sincerely without consideration of other concerns. But, it also informs non-voting behavior such as opinion writing, coalition formation, oral argument questioning, public speaking, and so on.

Judicial studies occasionally assume—implicitly or explicitly—that judges share a stable view of the judicial role: role conception remains relatively fixed across judges and meaningful variation is primarily explained 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 votes on the merits of 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 in other judicial actions.

Judges vested with discretion, as Supreme Court Justices almost always are, 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), likely has a stronger—much stronger—effect than a judge's role conception on a judge's decision on the merits of a case.⁸⁸ A vote reflects the judge's underlying view on the issues, and role conception says less about that, at least in any sort of consistent way. Nevertheless, 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 the views of current colleagues or prior ones. A judge with a more individualistic, and typically activist, perspective will be more likely to pursue her viewpoint unfiltered and unconstrained. Therefore, individualistic judges will more frequently decide cases according to their preferences as compared to institutionally oriented judges.

88. The legal model treats judicial decisions as a product of "the law" while the attitudinal model treats judicial decisions as a product of judges' attitudes (or policy preferences). For an explanation of both models, see Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 324–28 (1992) (explaining the evolution and status of the legal and extralegal models and estimating a legal model and an extralegal model of Supreme Court decisions in death penalty cases).

The judge's perspective on his role, on archetypal judicial behavior, will be more important than his preferences in explaining the *method* by which the judge carries out his 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 his disagreement with the majority. However, the judge's view of the judicial function—the purpose of those actions—will predominate. Thus, a judge who sees himself 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 his 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, is more likely to dissent even when her disagreement with the majority is modest. This is the case even though the practical costs of dissent, such as an extended time commitment 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 conception of the proper judicial role may affect the frequency with which a judge votes his policy preferences—that is, the magnitude of ideological adherence and the judge's willingness to defer to colleagues and to precedent. The hypotheses below are premised on this idea. In my own research on academics who become appellate judges, I found that former professors take a more activist and less accommodating approach to judging.⁸⁹ They write more often, dissent more often, and reverse more often than other judges.⁹⁰ Scholar jurists are more likely to adopt new theories and/or write momentous opinions.⁹¹ They appear to view their new posts as an extension of their old ones: they propose innovative solutions to existing problems and act independently rather than collaboratively.⁹² The next Section examines whether prior judicial experience has a similar effect.

C. *Prior Judicial Experience as a Predictor of Decisions and Actions*

Based on the foregoing discussion on role conception and social background theory, we should expect that a Justice's perception of her role as a Justice will be heavily influenced by her prior judicial

89. George, *supra* note 12, at 37–50.

90. *Id.* at 50–54 & tbls.5, 6 & 7.

91. *Id.* at 54–59.

92. *Id.* at 37–59.

experience. The change in employment from circuit judge to Supreme Court Justice is in one sense minor: in both roles, judges review the decisions of lower courts, hear oral arguments, negotiate with colleagues to reach a collective decision, and issue written decisions. There are numerous salient common characteristics that grow out of the way the courts officially exercise their authority and practically operate.

The U.S. Supreme Court and U.S. Courts of Appeals, with very rare exceptions, make decisions as a group. Judges on both types of courts, then, must learn how to work in this setting. I expect that circuit judges elevated to the Supreme Court were particularly successful at working with others. This experience likely is manifested in several ways. First, courts of appeals judges, like Supreme Court Justices, act collectively rather than individually. Circuit judges, then, are accustomed to collegial decisionmaking, whereas Justices from other legal occupations may be accustomed to greater autonomy in their work. Second, because they can only decide cases with the agreement of their colleagues, Justices and circuit judges learn how to develop relationships with colleagues within and across cases. Thus, the formation and maintenance of coalitions is crucial to success as a federal appeals court judge. Finally, circuit judges, like Supreme Court Justices, appreciate the importance of accurately predicting their colleagues' positions on pending cases and their receptivity to specific arguments.⁹³

While Justices and circuit judges exercise judicial authority collectively, they otherwise operate in relative isolation. During the work day, they interact relatively infrequently with people beyond their very small office staff of three or four clerks and one or two secretaries. Lawyers in private practice, by contrast, often work in large law firms with extensive support staff, and they also interact regularly with clients, among others. Even district judges have more regular daily contact with a wide range of people because their work involves frequent interactions in their courtrooms or chambers with counsel as well as the parties. Of course, all judges are prevented by ethical rules from discussing pending matters with friends and family. Moreover, it is difficult for visitors to even reach judicial chambers because judges are hidden behind various layers of security. The

93. Rational actor theory has modeled the significance of these various internal strategies on the Supreme Court, *see, e.g.*, Paul J. Wahlbeck, James F. Spriggs & Forrest Maltzman, *Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court*, 42 AM. J. POL. SCI. 294, 298–301 (1998), and courts of appeals, *see, e.g.*, Cross & Tiller, *supra* note 76, at 2175–76.

formality that surrounds judges also may limit normal interaction. Elevated circuit judges likely have grown accustomed to the cloistered existence of the appellate judge and have learned how to work effectively in this environment.

I expect, then, that Justices who arrive from the circuit courts will adapt more quickly and fully to life on the Supreme Court. And, their work will reflect the ease and speed with which they settle into their new chambers: they will write more opinions, and more important ones, in their first year than Justices without such experience; they will be more likely to take strong ideological positions rather than the more moderate positions taken by new Justices without circuit experience; and they generally will seem comfortable where other new appointees seem bewildered or disoriented by their new environs. In sum, we should see less of a “freshman effect” in Justices promoted from the circuits.⁹⁴

While circuit judges and Justices may not regularly interact with elected officials, they have to anticipate the position and likely reaction of Congress and the President to their decisions, particularly in the area of statutory interpretation.⁹⁵ On the other hand, they need not fear termination as reprisal because they are protected by life tenure during good behavior.⁹⁶ Circuit judges, then, come to the Supreme Court with a sophisticated appreciation of the relevance of the elected branches of government to their decisions. We should expect that Justices with circuit court experience will make decisions that are as close as possible to their preferences without resulting in reprisal from the other branches. That is, promoted Justices will behave ideologically, but not beyond a point that prompts Congress to overturn a statutory ruling or attempt to restrict a constitutional one.

94. See, e.g., Timothy M. Hagle, “Freshman Effects” for Supreme Court Justices, 37 AM. J. POL. SCI. 1142, 1143–44 (1993) (explaining the “freshman effect” as the period of time required by newly appointed Justices to become acclimated to the Court). Hagle and other scholars who have tested the freshman effect have not distinguished federal courts of appeals experience from other judicial experience. And, as Hagle notes, the numbers of Justices in some studies with circuit experience is so small as to make a systematic empirical test infeasible. See *id.* at 1151.

95. See, e.g., Brian Sala & James F. Spriggs, II, *Designing Tests of the Supreme Court and the Separation of Powers*, 57 POL. RES. Q. 197, 204–06 (2004); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Political Theory of the Courts*, 91 AM. POL. SCI. REV. 845, 845 (1996).

96. U.S. CONST. art. III, § 1. The Senate has impeached twelve judges and one Justice. Seven judges were found guilty and removed from office. See United States Senate, Impeachment, http://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm (last visited Feb. 3, 2008).

Perhaps most importantly, circuit judges work on a daily basis in much the same way as Supreme Court Justices. They review briefs, hear oral arguments, exchange written communications internally and externally, and oversee judicial clerks. When deciding a case, their options are to reverse or affirm a lower court or agency, and to join a colleague's opinion or write separately. They consider precedent when making decisions and justify any action based on existing law. Moreover, a President's decision to nominate them and the Senate's confirmation of that nomination likely reflect that the judge has demonstrated real skill at justifying her decisions based on existing law while also signaling her true preferences.

Given the numerous and substantial common features of both positions, we might then expect that circuit judges experience little "freshman" effect upon their elevation to the Court because their work is similar to that in which they already have been engaged.⁹⁷ But, in other relevant respects, the jobs are distinct. First, courts of appeal operate primarily in rotating divisions of three judges that include both active and senior circuit judges and visiting judges from other courts.⁹⁸ Circuit judges expect the identity of co-panelists to vary across sessions. By contrast, Justices would sit with the same group of colleagues for every Supreme Court decision until someone left the Court. They may be more adept at coalition building and compromise when working with the same group.

Second, circuit courts of appeals do not share the Supreme Court's prerogative to select cases for review. Thus, most 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. Courts of appeals reverse only about twenty percent of the cases, compared to a reversal rate of sixty to sixty-five percent for the Supreme Court.⁹⁹ As Justices, they hear

97. See VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, *JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING* 38–39 (2006).

98. Federal circuit judges who have retired from regular active service may ask to serve on cases within their circuit. 28 U.S.C. § 294(b) (2000). The Judicial Code provides that the chief judge of a circuit may assign senior and active district judges from within the circuit to sit and decide cases brought before the circuit. *Id.* § 292(a). The code also provides that the Chief Justice, at the request of the chief judge or circuit justice of a circuit, may assign retired Supreme Court Justices with their consent, *id.* § 294(a), as well as circuit judges from other circuits, *id.* § 291(a), to sit temporarily on the circuit. These designated judges have the same authority as circuit judges in the cases in which they participate. §§ 291(a), 294(a).

99. See Tracey E. George & Chris Guthrie, *The Futility of Appeal: Disciplinary Insights Into the "Affirmance Effect" on U.S. Courts of Appeals*, 32 FLA. ST. U. L. REV.

more “hard” cases—those where there is a real dispute as to the proper resolution of the question before the court. In Supreme Court cases, law and precedent provide weak guidelines rather than mandates. Thus, promoted Justices may view precedent as generally irrelevant. By contrast, Justices appointed from the practicing bar, for example, will not be as attuned to this distinction.

Third, circuit judges lack the final word on the law even if Supreme Court review of their decisions is unlikely. They should view the Supreme Court’s power as substantial because they have toiled in its shadow. Thus, they may be eager to exercise their new authority as Supreme Court Justices. And, unlike practitioners who value stability and certainty of law, judges may feel less constrained since they have not most recently worked under it.

Fourth, circuit judges have a much heavier workload than do Justices. We should expect them to move more quickly and handle more cases. They also have more time to write separately once elevated to the Supreme Court than they had on the court of appeals. Moving away from courts in which a large and mandatory docket limits the desirability of dissent, promoted Justices should appreciate their newfound freedom to disagree and draft opinions giving reasons.

Fifth, Supreme Court Justices who were circuit judges are more likely to think courts of appeals decided cases correctly and thus to affirm lower courts more often and/or grant certiorari in fewer cases. Justices generally agree to hear cases with which they disagree¹⁰⁰: if they assume lower courts reached the right outcome, they have no reason to grant certiorari. In particular, they seem likely to believe that their own former circuit got it right and to cite and support their former court when possible. Jeffrey Berger and I found that Justices are more likely to cite opinions of judges from their old circuit.¹⁰¹ Of course, circuit courts do not always agree, resulting in circuit splits. Such inter-circuit conflicts likely appear more important as a general

357, 359–63 (2005) (presenting graphically data on circuit court and Supreme Court affirmance rates from 1946–2003 separately (Figures 1 and 2) and together (Figure 3) and describing the rates of affirmance based on the nature of the decision).

100. See Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824, 829–35 (1995).

101. See Jeffrey A. Berger & Tracey E. George, *Judicial Entrepreneurs on the U.S. Courts of Appeals: A Citation Analysis of Judicial Influence* 18 (Vand. U. Law Sch. Law and Econ., Working Paper No. 05-24, 2005), available at <http://ssrn.com/abstract=789544>.

matter to former circuit judges. Thus, they should be more likely to grant certiorari to circuit splits.¹⁰²

Finally, circuit judges' experiences are inevitably tied to their respective circuits. The D.C. Circuit now has a plurality of the Justices. That circuit is both combative and constrained in subject matter.¹⁰³ By contrast, the First Circuit is a small court that operates with a high level of harmony, as reflected in a very high level of consensus and infrequent en banc hearings.¹⁰⁴

The foregoing analysis supports specific predictions about the effects of prior federal judicial service on Supreme Court Justices. I offer the following hypotheses about the relationship between circuit court experience and Supreme Court behavior:

102. Supreme Court Rule 10 includes as a compelling reason to grant a petition that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or "that conflicts with a decision by a state court of last resort." SUP. CT. R. 10(a).

103. Personal jurisdiction and venue essentially dictate the subject matter jurisdiction of the D.C. Circuit. On the one hand, nearly all administrative law suits may be brought in the D.C. District Court. Under the federal venue statute, civil suits against the U.S. government that challenge federal regulations may be brought in a federal district in which the government defendant resides (usually Washington, D.C.), "a substantial part of the events or omissions giving rise to the claim occurred" (again, usually Washington, D.C.), or where the plaintiff resides. 28 U.S.C. § 1391(e) (2000). On the other hand, the small geographic size of the District of Columbia means that relatively few organizations and individuals reside there, limiting the district court's personal jurisdiction as well as its venue. For a further discussion, see, for example, Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 564-605 (2002) (examining the workload of the federal courts in D.C. and concluding that its primary role is to monitor and check the power of the federal government); Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1201-02 (1992) (explaining that their location in the U.S. capital means that the district and circuit courts in the D.C. Circuit hear a disproportionate number of administrative law disputes even in instances where venue is not restricted to the District of Columbia); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1717, 1738-47, 1759-64 (1997) (explaining that "the D.C. Circuit has exclusive venue over challenges to a wide array of environmental regulations" and finding that, in environmental cases, D.C. Circuit judges behaved ideologically); and John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 376-77 (2006) (explaining how the circuit's small geographic size coupled with its location in the capital translates into a docket dominated by civil cases involving the federal government).

104. Over the last decade, the First Circuit averaged only two en banc decisions per year. See Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts, Annual Reports for 1997-2007* tbl.S-1, available at <http://www.uscourts.gov/judbususc/judbus.html>. For a consideration of the collegiality of the First Circuit, see, for example, FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 213-20 (1994) (arguing that collegiality is crucial to judicial decisionmaking and explaining how First Circuit judges work together to reach consensus); and Goldman, *supra* note 13, at 495 (finding that every circuit but the First Circuit had clear ideological voting blocs).

Hypothesis 1. Promoted Justices will experience little freshman effect.

Hypothesis 2. Promoted Justices will be more likely to find statutes unconstitutional.

Hypothesis 3. Promoted Justices will be more likely to overturn or at least to distinguish precedent.

Hypothesis 4. Promoted Justices will author more opinions generally and in particular as a product of a decision to concur and/or dissent.

Hypothesis 5. Promoted Justices will develop long-lasting coalitions.

Hypothesis 6. Promoted Justices will show greater support, through affirmation and citation, for their former circuit than for other circuits.

Hypothesis 7. Promoted Justices will bring the norms of their respective circuits to the High Court.

Most, though not all, of these forecasts are sensitive to time. That is, Justices who served for longer periods on a circuit court will be more likely to manifest this behavior (or to show a stronger version of it) than Justices who served for shorter periods. Intervening years and experiences likely dampen the effects of circuit court service. But, even those later events will be framed by the Justice's earlier work on the courts of appeals. Hence, the prior judicial experience will continue to influence, at least indirectly, a Justice's actions indefinitely.

CONCLUSION

The Roberts Court has been described as deeply divided and ideologically polarized.¹⁰⁵ This account is consistent with the judicial background hypotheses developed here. Promoted Justices are more likely to build coalitions (Hypothesis 5) and also to express publicly any disagreement that they have with other Justices (Hypothesis 6). Such behavior naturally will lead to divisions within the Court. With respect to these (and the other) hypotheses, I would anticipate that

105. See Barnes, *supra* note 2.

the homogeneity of the Justices would magnify the hypothesized effect.

The two most recent appointees, Chief Justice Roberts and Justice Alito, offer a prime example. Both have acclimated fairly quickly to the dynamics of the Court, as predicted by the first hypothesis. They already have influenced the outcome in several important and hotly contested cases. During the 2006 Term, they formed a powerful five-Justice majority with Justices Scalia, Kennedy, and Thomas in fourteen of the twenty-five cases decided five-to-four.¹⁰⁶ “It is not often in the law that so few have so quickly changed so much,” warned Justice Breyer.¹⁰⁷ This new coalition upheld a partial-birth abortion ban in a seeming about-face from a 2000 decision, struck down school racial integration plans, protected faith-based initiatives from taxpayer suits, and limited a 1969 case protecting student speech.¹⁰⁸

In its first Term, the Roberts 2 Court decided more than one-third of its cases by a one-vote margin.¹⁰⁹ Chief Justice Roberts and Justice Alito were in the majority in more than three-quarters of those five-to-four decisions.¹¹⁰ In cases where they disagreed with the majority, Chief Justice Roberts and Justice Alito both demonstrated a willingness to write separately.¹¹¹

These close cases also reveal that the Roberts 2 Court has not deferred to prior Courts (Hypothesis 3). In fewer than sixty cases in its first Term, the new Court undercut numerous Supreme Court decisions including several landmark opinions.¹¹² The Court rarely

106. *The Supreme Court—The Statistics*, 121 HARV. L. REV. 436, 442 tbl.I(E) (2007) (listing all majority coalitions in five-to-four decisions).

107. Justice Breyer issued this warning in his oral dissent in *Parents Involved in Community Schools v. Seattle School District No. 1*, 151 U.S. ___, 127 S. Ct. 2738 (2007).

108. See *supra* notes 5, 7–9 and accompanying text (presenting details on the cases).

109. See *The Supreme Court—The Statistics*, *supra* note 106, at 442 tbl.I(E).

110. *Id.* Only Justice Kennedy, who was in the majority in all of those cases and is widely recognized as the Court’s swing vote, was in the majority more often. See *id.* at 442 tbl.I(E) & n.s (observing this fact).

111. Both were nearly as likely to write a dissent as to join one when they were not in the majority. Roberts wrote a dissenting opinion in three of the eight cases in which he disagreed with the outcome, and Alito wrote a dissenting opinion in four of the nine cases in which he disagreed. See *id.* at 436 tbl.I(A). And, Alito wrote a concurrence in all four cases in which he concurred in the judgment but not the Court’s opinion. See *id.* at 436 tbl.I(A), 441 tbl.I(D).

112. See, e.g., *Morse v. Frederick*, 551 U.S. ___, 127 S. Ct. 2618, 2622 (2007) (creating an exception to the principle of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”); *Bell Atl. Corp. v. Twombly*, 550 U.S. ___, __ 127 S. Ct. 1955 (2007) (appearing to call into doubt notice pleading, a central feature of the

overturns (rather than distinguishes) its prior decisions because “the doctrine of stare decisis is of fundamental importance to the rule of law.”¹¹³ The new Court, however, quickly overturned three cases during a Term when it decided far fewer cases than average.¹¹⁴ This type of behavior is often described as activist because the Justices are setting aside the normal restriction on judicial decisionmaking while extending the authority of the current Court.

In the first Part of this Article, I predict that Presidents will continue to look to the circuit courts for Supreme Court nominees. With one Justice in his 80s and four Justices in their 70s,¹¹⁵ the next President is likely to name at least one member of the Court. We will have to wait to see whether his or her advisors will recommend continuing the trend.

Federal Rules of Civil Procedure that has been reaffirmed in numerous decisions including the landmark case of *Conley v. Gibson*, 355 U.S. 41 (1957), *abrogated by Twombly*, 550 U.S. at ___, 127 S. Ct. at 1969, and the more recent *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002)).

113. *Welch v. Tex. Dep't. of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987).

114. *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.* 551 U.S. ___, 127 S. Ct. 2705 (2007) (overruling, by a five-to-four vote, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which provided that resale price maintenance agreements were per se illegal under Section 1 of the Sherman Antitrust Act).

115. Justice Stevens celebrated his 88th birthday on April 20 of this year. *See* Oyez U.S. Supreme Court Media, John Paul Stevens, http://www.oyez.org/justices/john_paul_stevens/ (last visited Apr. 1, 2008). Justice Ginsburg, thirteen years his junior, is the next oldest Justice. *See id.*, Ruth Bader Ginsburg, http://www.oyez.org/justices/ruth_bader_ginsburg/ (last visited Apr. 1, 2008) (reporting Ginsburg's date of birth as March 15, 1933). Justices Scalia and Kennedy are both seventy-two this year. *See id.* at Antonin Scalia, http://www.oyez.org/justices/antonin_scalia/ (last visited Apr. 1, 2008) (reporting Scalia's birthday as March 11, 1936); *id.* at Anthony M. Kennedy, http://www.oyez.org/justices/anthony_kennedy/ (last visited Apr. 1, 2008) (reporting Kennedy's birthday as July 23, 1936).

APPENDIX

Table 1A. Justices with Prior Article III Judicial Experience, 1900 to 2007¹¹⁶

Justice	Lower Court	Lower Court Service (in years)	President (Year) of Supreme Court Appointment
Samuel Alito	Third Circuit	15.77	George W. Bush (2006)
Harry Blackmun	Eighth Circuit	10.72	Richard Nixon (1970)
Stephen Breyer	First Circuit	13.65	William Clinton (1994)
Warren Burger	D.C. Circuit	13.24	Richard Nixon (1969)
John Clarke	N.D. Ohio	2.01	Woodrow Wilson (1916)
William Day	Sixth Circuit	3.98	Theodore Roosevelt (1903)
Ruth Bader Ginsburg	D.C. Circuit	13.15	William Clinton (1993)
John Marshall Harlan	Second Circuit	1.12	Dwight Eisenhower (1955)
Anthony Kennedy	Ninth Circuit	12.91	Ronald Reagan (1988)
Horace Lurton	Sixth Circuit	16.73	William Taft (1909)
Thurgood Marshall	Second Circuit	2.94	Lyndon Johnson (1967)
Sherman Minton	Sixth Circuit	8.39	Harry Truman (1949)
John Roberts	D.C. Circuit	2.33	George W. Bush (2005)
Wiley Rutledge	D.C. Circuit	3.79	Franklin Roosevelt (1943)
Edward Sanford	M.D. & E.D. Tenn.	14.73	Warren Harding (1923)
Antonin Scalia	D.C. Circuit	4.11	Ronald Reagan (1986)
David Souter	First Circuit	0.44	George H.W. Bush (1990)
John Stevens	Seventh Circuit	5.18	Gerald Ford (1975)
Potter Stewart	Sixth Circuit	4.47	Dwight Eisenhower (1959)
William Taft	Sixth Circuit	8.00	Warren Harding (1921)
Clarence Thomas	D.C. Circuit	1.62	George H. W. Bush (1991)

116. For sources, see citations *supra* note 15.

Willis Van Devanter	Eighth Circuit	7.83	William Taft (1910)
Frederick Vinson	D.C. Circuit	5.45	Harry Truman (1946)
Charles Whittaker	W.D. Mo.	1.96	Dwight Eisenhower (1957)
	Eighth Circuit	0.76	
